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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 MOHIT NARAYAN, HANNA RAHAWI,
and THOMAS HEATH, on behalf of
16 themselves, all others similarly situated, and
the general public,
17

18 Plaintiffs,
19

20 v.
21

EGL, INC., a Texas Corporation; EAGLE
22 FREIGHT SERVICES, INC.; and DOES 1-
10, inclusive,
23

24 Defendants.
25
26
27
28

Case No. C 05-04181 RMW

**DEFENDANT EGL, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
ON THE INDIVIDUAL CLAIMS OF
PLAINTIFF THOMAS HEATH**

Date: January 26, 2007
Time: 9:00 a.m.
Ctrm: 6

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1 **I. INTRODUCTION.**

2 Plaintiff Thomas Heath (“Heath”) admits that he was an independent contractor during the
3 entire time that he, through his trucking business, Tom’s Express, performed delivery services for
4 defendant EGL, Inc. (“Eagle”). Nevertheless, Heath joined this lawsuit and asserted a laundry list of
5 employment law claims against Eagle, all premised on the flawed theory that he was misclassified as
6 an independent contractor, rather than an employee. But Heath’s own admissions belie his claims, and
7 the undisputed facts demonstrate that Heath was, at all times during his relationship with Eagle, an
8 independent contractor, just as his contract states. Accordingly, Eagle is entitled to summary judgment
9 on all of Heath’s claims.

10 **II. STATEMENT OF FACTS.**

11 **A. The Parties.**

12 **1. Eagle Is A Global Logistics Company Providing Domestic Delivery Services.**

13 Eagle is a global transportation, supply chain management and information
14 services company, providing logistics solutions for customers worldwide. (Declaration of Martha
15 DeLeon-Schmidt (“Schmidt Dec.”) filed herewith, ¶ 2.) Eagle provides value-added services beyond
16 those customarily provided by traditional air freight forwarders, ocean freight forwarders and customs
17 brokers to help customers streamline their supply chain, reduce their inventories, improve their
18 logistics information and provide them with more efficient and effective domestic and international
19 distribution strategies in order to enhance their profitability. (*Id.*) Eagle’s services include air and
20 ocean freight forwarding, customs brokerage, local pick-up and delivery service, materials
21 management, warehousing, trade facilitation and procurement and integrated logistics and supply chain
22 management services. (*Id.*, ¶ 3.) These services are provided through Eagle’s extensive network of
23 approximately 400 facilities, agents and distribution centers located in over 100 countries on six
24 continents. (*Id.*)

25 One of the many areas of Eagle’s business is domestic delivery services. (Schmidt Dec., ¶¶ 3,
26 4.) Domestic delivery services may be provided either as part of Eagle’s freight-forwarding operations
27 or for customers requiring local pick-up and delivery services. (*Id.*, ¶ 4.) Eagle maintains a non-asset
28

1 based philosophy and structure across the board. (*Id.*, ¶ 5.) Accordingly, with some exceptions, Eagle
2 does not generally employ drivers or use Eagle-owned vehicles for pick-up and delivery services. (*Id.*)
3 Instead, Eagle contracts with trucking businesses, both large and small, to handle its pick-up and
4 delivery services. (*Id.*) These owner-operators (“Contractors”) own, operate and maintain the vehicles
5 used in their work for Eagle, and may perform the services themselves or employ qualified drivers of
6 their choice. (*Id.* ¶ 6; Deposition of Thomas Heath (“Heath Dep.”), 67:4-68:19, 119:2-18, 207:7-9.)¹

7 Eagle and the Contractors benefit from a mutual business relationship. (Schmidt Dec., ¶ 6.)
8 They each profit or lose by meeting the delivery demands of Eagle’s customers. (*Id.*) The Contractors
9 perform this service by obtaining delivery jobs from Eagle. (*Id.*, ¶ 6; Heath Dep., 106:25-107:2.)
10 Contractors make themselves available at their own discretion. (Schmidt Dec., ¶ 8; Heath Dep.,
11 194:22-25, 175:19-25, 183:16-18, 186:21-187:3, 189:25-190:9.) At certain times of the day, heavier
12 volumes dictate more profitable opportunities than at other times of the day. (Schmidt Dec., ¶ 8.)
13 Contractors receive a percentage of an applicable tariff for each load. (*Id.*, ¶ 7.)

14 Contractors arriving at the dispatch station and seeking business availability go to the dispatch
15 office. (Schmidt Dec., ¶ 9.) Dispatches are offered as a delivery packet that is normally grouped
16 geographically and sometimes includes customer time and delivery specific requirements. (*Id.*) Once
17 a Contractor obtains a packet, he will review the manifests to determine how to route the deliveries in
18 the packet. (*Id.*, ¶ 10; Heath Dep., 109:23-110:6.) Pursuant to customer demand, the Contractor will
19 attempt to deliver the priority orders first. (Schmidt Dec., ¶ 10.) The Contractor is completely on his
20 own to determine the manner and means by which he will perform the delivery orders, although
21 dispatch will occasionally contact drivers to relay customer demands. (Schmidt Dec., ¶ 10; Heath
22 Dep., 110:7-19.) After completing a priority delivery, Contractors generally inform the station that the
23 delivery is complete to enable Eagle to update customers regarding the status of priority deliveries.
24 (Schmidt Dec., ¶ 11; Heath Dep., 112:2-113:11.) Contractors also call the station periodically to find
25

26
27 ¹ Excerpts from Heath’s deposition are attached as Exhibit A to the Declaration of Jill Vizas
28 (“Vizas Dec.”) filed herewith. Exhibits to the Heath deposition are attached as Exhibit B to the Vizas
Declaration.

1 out if there are any pick-up orders in their current vicinity. (Schmidt Dec., ¶ 11; Heath Dep., 112:2-
2 113:11, 114:11-15.)

3 After completing the packet of deliveries, Contractors bring any pick-up orders back to the
4 station. (Schmidt Dec., ¶ 12.) Many Contractors also return to the station to submit their delivery
5 manifests because early receipt of manifests enables Eagle to ensure a quick payment to the
6 Contractors. (*Id.*) Based on the manifests, Eagle generates settlement reports, which the Contractors
7 review to ensure that the reports properly account for any special charges or specially-negotiated
8 delivery rates. (*Id.*)

9 2. Heath's Trucking Business, "Tom's Express."

10 Heath leased a truck and began his own trucking business in 1993. (Heath Dep.,
11 30:17-31:25, 35:3-8.) Heath named his trucking business "Tom's Express," specializing in "hot shots"
12 and other express deliveries because they were more profitable than standard freight. (*Id.*, 30:17-
13 31:25, 38:1-10, 40:13-18.) "Hot shots" are express deliveries where the driver picks up a load and
14 delivers it without picking up or dropping off other loads, providing the customer with "exclusive use
15 of the truck" for urgent freight. (*Id.*, 37:18-25.) Heath had business cards printed with the name of his
16 business, Tom's Express, and also had several gasoline credit cards in that name. (*Id.*, 40:19-21,
17 41:10-11.)

18 Shortly after Heath started his trucking business, he began to provide delivery services for
19 Roadway Global Air as an independent contractor. (Heath Dep., 30:17-31:6.) After Roadway Global
20 Air went out of business in late 1995, Heath continued his business by providing express delivery
21 services as an independent contractor to several other freight forwarding companies in the Sacramento
22 and San Francisco areas, including Eagle. (*Id.*, 30:12-25, 35:9-25.) Eagle became one of Heath's "best
23 customers." (*Id.*, 37:9-15.) But in late 1999, Eagle and another of Heath's best customers, Mad Dog
24 Express, told Heath they would no longer be using him as much for hot shots and express deliveries.
25 (*Id.*, 38:16-18, 46:11-19.) Hearing that Eagle was looking for trucking companies with vans, Heath
26 decided to sell his truck and purchase a van so that he could continue making money by providing
27 delivery services as an independent contractor for Eagle. (*Id.*, 32:4-9, 38:16-18, 46:11-19.)

1 **B. The Agreements Entered Into Between Heath And Eagle Establishing Heath's**
2 **Independent Contractor Relationship With Eagle.**

3 Heath and Eagle entered into two Agreements for Leased Equipment and Independent
4 Contractor Services, first on December 21, 1999 (the "Initial Agreement") and again on May 10, 2000
5 (the "Second Agreement") (collectively, the "Agreements"). (Heath Dep., 53:17-54:12, 70:13-71:25;
6 Exs. 253, 255.)² The Agreements did not guarantee Heath any amount of work, and Eagle reserved the
7 right to continue to contract with other companies. (*Id.*, 60:8-12, 62:1-8.) Under the Agreements,
8 Heath would receive 60 percent of the amount charged to a customer by Eagle for each shipment
9 picked up or delivered by Heath or his employees. (*Id.*, 76:12-16.) Hot shots would be paid at \$1.75
10 per mile. (*Id.*, 77:10-15.) Heath understood that because he was an independent contractor, he was
11 responsible for filing tax returns for his business and that Eagle would not withhold any taxes from the
12 delivery rates paid. (*Id.*, 69:18-70:1, 214:6-9.) Heath also understood that, other than these delivery
13 rates, neither he nor his employees would receive benefits or any other form of compensation from
14 Eagle. (*Id.*, 59:13-22, 214:6-9; Ex. 253, § 4.06; Ex. 255, § 4.08.)

15 The Agreements established an independent contractor relationship between Heath and Eagle
16 whereby Heath, as owner-operator of a trucking business, performed delivery services for Eagle.
17 (Heath Dep., 56:16-57:7, 72:11-20.) The Initial Agreement stated that Heath and Eagle intended "to
18 establish a relationship between Contractor and [Eagle] through which Contractor, as an independent
19 contractor, (i) leases a vehicle to [Eagle] and (ii) renders certain related pick-up and delivery
20 services...." (*Id.*, 56:16-23; Ex. 253, § I.) Similarly, the Second Agreement established Heath and
21 Eagle's intention to "create a vendor/vendee relationship between Contractor and [Eagle] through
22 which Contractor, as an independent business person, has the potential to realize a profit or loss by:
23 leasing a truck to [Eagle]; rendering certain pick-up and delivery related services...." (*Id.*, 73:15-74:4,
24 Ex. 255, § I.)

27 ² The Agreements are generally referred to together because they contain largely the same
28 language.

1 Under the Agreements neither Heath nor anyone who worked for him was to be considered an
2 employee of Eagle. (Heath Dep., 57:8-12, 74:5-18; Ex. 253, § 2.09; Ex. 255, § 2.09.) Heath also
3 agreed that “if at any time during the term of this agreement [Heath] is of the opinion that something
4 other than an independent contractor relationship exists between [Heath] and [Eagle], [Heath] shall
5 immediately notify [Eagle].” (*Id.*, 77:21-78:2, Ex. 255, p. 2.) Heath never did so. (*Id.*, 78:5-9.)
6 Indeed, Heath testified that at all times he believed he was an independent contractor. (*Id.*, 142:25-
7 144:8.)

8 As an independent contractor, Heath was responsible for supplying the van and other tools used
9 to provide services to Eagle, such as a hand truck and straps to secure his loads. (Heath Dep., 119:2-
10 18.) Heath was responsible for all of the costs and expenses of maintaining, repairing and operating
11 his van, including any damage or depreciation. (*Id.*, 67:14-21, 69:2-5.) Heath was also responsible for
12 obtaining insurance policies on the van and the freight he carried. (*Id.*, 68:20-69:1.)

13 Although Eagle retained the right to issue reasonable requirements regarding the results to be
14 accomplished under the Agreements (Heath Dep., 59:8-12; Exs. 253, 255, § I), the Agreements
15 required Heath to exercise independent discretion and judgment to determine the method, manner and
16 means of his performance of his obligations under the Agreements. (*Id.*, 58:2-59:7, 65:15-66:11.) The
17 Agreements expressly stated that “[C]ontractor shall exercise independent discretion and judgment to
18 determine the method, manner and means of performance of its contractual obligations under this
19 Agreement.” (Exs. 253, 255, § I.) Heath’s exercise of independent discretion and judgment included
20 whether or not to accept or reject dispatches, the days and times Heath would operate his vehicle, the
21 routes he would travel, where he would park, and the repair and maintenance of his vehicle. (*Id.*,
22 66:12-23.) Under Section 2.02 of the Agreements, Heath also controlled the operation of his vehicle.
23 (*Id.*, 65:17-23.)

24 **C. The Contractor-Customer Relationship Between Heath And Eagle.**

25 Heath continued to conduct his business as Tom’s Express after he entered into the
26 Agreements with Eagle, and considered himself an independent businessman who was trying to make
27 as much money as possible. (Heath Dep., 45:7-14, 151:5-20.) Both before and after he entered into
28

1 the Agreements with Eagle, Heath believed that he was an independent contractor and not an employee
2 of Eagle. (*Id.*, 140:16-23, 143:11-18.) Indeed, Heath identified himself as a small business concern
3 under his business name Tom's Express on the EEO compliance certificates he completed for Eagle.
4 (*Id.*, 149:14-150:5, 151:15-152:10, 152:11-24, Exs. 269, 270.) Even today, Heath still believes that he
5 was an independent contractor during the entire time of his contract with Eagle and that he was never
6 employed by Eagle. (*Id.*, 143:25-144:8.)

7 Consistent with this understanding, Heath conducted his business independently, exercising his
8 own independent judgment and discretion to make decisions regarding all aspects of his business.
9 Heath decided how and when he would conduct his deliveries for Eagle, choosing which days and
10 times to make his van available for deliveries. (Heath Dep., 175:19-25, 183:16-18, 186:21-187:3,
11 189:25-190:9, 194:22-25.) The number of days Heath made himself available each week varied
12 between three and six days per week. (*Id.*, 183:1-18, 186:21-187:3.) He never made himself available
13 seven days a week while he was performing services for Eagle. (*Id.*, 187:4-6.) He generally chose not
14 to take dispatches on Saturdays and Sundays, but occasionally he would choose to make deliveries on
15 the weekend. (*Id.*, 103:2-23.)

16 On the days Heath chose to make his van available to Eagle for deliveries, Heath chose what
17 time to arrive at the Sacramento station. (Heath Dep., 194:22-25.) Although Heath often arrived
18 between 6:30 and 7:00 a.m., some mornings he arrived much earlier to earn more money by handling
19 pick-ups at 5:30 a.m. when the airport opened. (*Id.*, 95:12-20, 194:22-25.) Pick-ups that required the
20 driver to pick up freight at the airport counter paid even more, and these higher paying counter pick-
21 ups accounted for about half of Heath's early morning airport pick-ups. (*Id.*, 95:23-96:13.) On other
22 days, Heath reported to the station for dispatches after 7:00 a.m., such as mornings after he had driven
23 between Sacramento and Los Angeles the night before. (*Id.*, 96:22-98:13, 104:5-20.) Heath chose
24 when to arrive at the station, and there was no penalty for choosing not to arrive between 6:30 and 7:00
25 a.m., or even for choosing not to come at all. (*Id.*, 98:14-16, 106:19-24.)

26 After arriving at the station, Heath was generally offered a dispatch. (Heath Dep., 106:25-
27 107:2.) Although Heath understood that he could decline dispatches that were offered to him, he
28

1 generally chose to accept the dispatches that were offered to him because he wanted to make more
2 money. (*Id.*, 45:7-21, 67:11-13, 108:9-13.) If no freight was available when Heath arrived at the
3 station, Heath usually chose to stay and wait for freight, again because he wanted to make more
4 money. (*Id.*, 45:7-21, 108:14-24.)

5 After accepting a dispatch, Heath determined how to load the freight onto his van. (Heath
6 Dep., 108:4-8.) Heath also chose the order of the deliveries and selected his route. (*Id.*, 109:23-110:6.)
7 After each delivery, Heath called dispatch to advise when the freight was delivered and who signed for
8 it so customers could track their freight. (*Id.*, 112:2-113:8.) Heath also called dispatch when his
9 deliveries were complete to let dispatch know he was available for more loads. (*Id.*, 114:24-115:3.)
10 Heath was not aware of any requirement to call in or continue working after deliveries; he chose to call
11 because he always wanted to work and make more money. (*Id.*, 45:7-21, 114:24-115:13.) On busy
12 days, Heath chose not to take breaks and to eat while driving so that he could deliver more freight and
13 make more money. (*Id.*, 208:11-209:4, 110:20-25.) Heath also chose when to end his day. (*Id.*,
14 111:21-23.)

15 As an independent contractor, Heath exercised independent judgment and discretion in other
16 aspects of his business as well. For example, Heath knew he could expand his business by hiring a
17 second driver and leasing a second truck to Eagle, but he chose not to. (Heath Dep., 207:24-208:7.) He
18 also knew that he could hire an employee to assist him, but again he chose not to expand his business
19 in this way. (*Id.*, 207:7-9, 67:22-68:1.) Heath understood that anyone hired to assist him would be his
20 employee and not Eagle's, and that he alone would control employee selection, hiring, firing and
21 compensation. (*Id.*, 67:22-68:19.)

22 Eventually, in July 2002, Heath chose to stop driving for Eagle because he did not think he was
23 making enough money. (Heath Dep., 39:5-10.) Three years later, Heath received a phone call from
24 plaintiff Mohit Narayan, asking Heath to join this lawsuit. (*Id.*, 12:25-13:21.) Despite the fact that
25 Heath always thought of himself as an independent contractor while performing services for Eagle,
26 Heath agreed. (*Id.*, 140:16-142:1.) Plaintiffs' First Amended Complaint alleges that Eagle
27 misclassified Heath and its other van drivers as independent contractors and asserts a laundry list of
28

1 employment-related claims, including allegedly failing to indemnify Heath for employment-related
2 expenses, taking unlawful deductions to cover employment-related expenses, requiring Heath to make
3 purchases from Eagle, failing to provide off-duty meal periods and overtime compensation, failing to
4 maintain payroll records and to accurately report the hours worked by Heath, and failing to pay Heath
5 properly when he terminated his contract with Eagle. (See FAC, ¶¶ 26, 27, 28, 31, 32, 33, 34 and 35.)³
6 But flatly contrary to his claims, Heath believes to this day that he was an independent contractor at all
7 times while performing services for Eagle. (Heath Dep., 143:11-144:8.)

8 III. APPLICABLE LAW.

9 This Court should apply Texas law in interpreting the Agreements and deciding this motion. As
10 noted above, all of Heath's claims are premised on the theory that the Agreements misclassified him as
11 an independent contractor. (FAC, ¶ 27.) The Agreements provide that they "shall be interpreted under
12 the laws of the state of Texas." (Heath Dep., Exs. 253, 255, § 7.03.)

13 Federal courts apply the choice of law rules of the forum state to determine the substantive law
14 that should be used. *Patton v. Cox*, 276 F.3d 493, 495 (1992) (citing *Klaxon Co. v. Stentor Elec. Mfg.*
15 *Co.*, 313 U.S. 487, 496 (1941)). California courts apply "the principles set forth in Restatement section
16 187, which reflect a strong public policy favoring enforcement of such provisions." *Nedlloyd Lines*
17 *B.V. v. Super. Ct.*, 3 Cal. 4th 459, 465-466 (1992). Under this approach, courts first examine whether
18 the chosen state has a substantial relationship to the parties or to the transaction, or whether there is
19 another reasonable basis for the parties' choice of law. *Id.* at 465. "A substantial relationship exists
20 where one of the parties is domiciled or incorporated in the chosen state." *ABF Capital Corp. v. Osley*,
21 414 F.3d 1061, 1065 (9th Cir. 2005) (citing *Nedlloyd*, 3 Cal.4th at 467). Eagle is domiciled in the state
22 of Texas. (Exs. 233, 255, § 7.09.) Thus, there is a reasonable basis for the parties' choice of Texas law.

23 California courts also consider whether the application of another state's law "is contrary to a
24 *fundamental* policy of California." *Nedlloyd*, 3 Cal.4th at 466 (emphasis in original). The threshold
25

26 ³ The first phase of this litigation deals solely with Plaintiff's individual claims. (See Case
27 Management Order, filed March 16, 2006.) Therefore this motion for summary judgment is made as to
28 Heath's individual claims against EGL and does not consider the claims alleged by Heath on behalf of
a putative class.

1 issue in the present case is whether Heath was properly classified as an independent contractor.
2 California does not have a fundamental public policy regarding the classification of contractors. *See*
3 *Mary Kay Inc. v. Woolf*, 146 S.W.3d 813, 817 (Tex. App. 2004) (applying Texas law to decide whether
4 a Mary Kay consultant who worked in California was an independent contractor or an employee,
5 where there was a Texas choice of law clause in the contract). Moreover, Texas law regarding the
6 classification of independent contractors is substantially similar to California law (*see* Section V. B. 3,
7 *infra*), and thus application of Texas law cannot be contrary to fundamental California policy. Texas
8 law applies.

9 **IV. SUMMARY OF THE ARGUMENT.**

10 The material facts are undisputed; Eagle is entitled to judgment as a matter of law and its
11 motion for summary judgment should be granted. Heath's claims are all premised on the theory that he
12 was misclassified as an independent contractor when he was really an employee of Eagle. Yet, Heath
13 admits that he was an independent contractor at all times while performing services for Eagle. The
14 Agreements, which specify that Texas law will govern the Agreements, also make clear that Heath was
15 an independent contractor.

16 Under Texas law, courts determine independent contractor status by looking to the agreement
17 between the parties. In some instances, courts will look outside of the parties' agreement to determine
18 whether the alleged employer had the right to control the progress of the work, rather than just the final
19 outcome. As noted above, the Agreements here clearly stated that Heath was an independent
20 contractor. Moreover, Heath retained the right to control the progress of his own work, and Eagle only
21 controlled the final outcome. Thus, Heath was properly classified as an independent contractor and his
22 employment claims fail as a matter of law.

23 **V. ARGUMENT.**

24 **A. Standard For Summary Judgment.**

25 Summary judgment is appropriate where "there is no genuine issue as to any material
26 fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby,*
27 *Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). The moving party is entitled to
28

1 judgment as a matter of law if the nonmoving party “fails to make a showing sufficient to establish the
2 existence of an element essential to that party’s case, and on which that party will bear the burden of
3 proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no genuine issue unless
4 “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”
5 *Anderson*, 477 U.S. at 249 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253,
6 288-89 (1968)). “When the material underlying facts are not in dispute and can give rise to only one
7 reasonable conclusion, whether a worker was an employee or an independent contractor is a question
8 of law.” *Texas A&M University v. Bishop*, 156 S.W.3d 580, 584 (Tex. App. 2005) (citing *Indus. Indem.*
9 *Exch. v. Southard*, 160 S.W.2d 905, 906 (Tex. 1942)).

10 As demonstrated below, Heath lacks the evidence necessary to prove any of his claims.
11 Accordingly, summary judgment should be granted for Eagle.

12 **B. Summary Judgment Is Mandated Because Heath Was An Independent Contractor.**

13 All of Heath’s claims are premised on the theory that he was misclassified as an
14 independent contractor, rather than as an employee. An independent contractor is one “who, in the
15 pursuit of an independent business, undertakes to do a specific piece of work for other persons, using
16 his own means and methods, without submitting himself to their control in respect to all its details.”
17 *Durbin v. Culbertson County*, 132 S.W.3d 650, 658 (Tex. App. 2004) (citations omitted.) Courts
18 generally look to the parties’ agreement to determine the relationship between the parties. *Id.* at 659.
19 Here, the Agreements clearly establish that Heath was an independent contractor. Heath agreed that he
20 was not an employee of Eagle; he was to provide his own vehicle; he was to control the means, manner
21 and method of making deliveries; he could use his own employees or subcontractors over whom he
22 would exercise exclusive control; he was to be paid by the job; and his Eagle-derived income was to be
23 reported on a Form 1099, with Heath solely responsible for the payment of income taxes, among other
24 things. (Ex. 253, § I, 2.01, 2.02, 2.09, 4.01, 4.07; Ex. 255, § I, 2.01, 2.02, 2.09, 4.01, 4.09.)

25 Even if this Court looks beyond the Agreements, there can be no doubt that Heath was correctly
26 classified as an independent contractor, as he himself has testified. When looking beyond the parties’
27 contractual agreement to determine whether an independent contractor is correctly classified, courts
28

1 will examine which party has the right to control the progress, details, and methods of the operations of
2 the work. *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990) (citing *Newspapers*
3 *Inc. v. Love*, 380 S.W. 2d 582, 585-90 (Tex. 1964)). To measure the right to control, the courts
4 consider the following five factors: (1) the independent nature of the contractor's business; (2) the
5 contractor's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the
6 contractor's right to control the progress of the work except about final results; (4) the time for which
7 the contractor has contracted; and (5) the method of payment, whether by unit of time or by the job.
8 *Limestone Prods. Distribution Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (citations omitted).
9 As will be shown below, an analysis of these five factors demonstrates that Eagle did not exert a "right
10 to control" over Heath and he was properly classified as an independent contractor.

11 **1. The Agreement Entered Into Between Heath And Eagle Establishes That**
12 **Heath Was An Independent Contractor.**

13 In determining whether a party is an independent contractor, courts will first
14 look to whether the party has described itself as an independent contractor under the applicable
15 agreement. "[G]enerally, an agreement providing that a person shall be an independent contractor and
16 providing for no right of control is controlling in determining the relationship between the parties."
17 *Durbin*, 132 S.W.3d at 659 (citations omitted) (agreement that "Independent Contractor stipulates and
18 agrees that he shall not be deemed an agent, servant or employee of the COUNTY" controlling). "A
19 written contract that expressly provides for an independent contractor relationship is determinative of
20 the parties' relationship in the absence of extrinsic evidence indicating that the contract was a
21 subterfuge that the hiring party exercised control in a manner inconsistent with the contract provisions,
22 or if the written contract has been modified by a subsequent agreement, either express or implied."
23 *Northwinds Abatement, Inc. v. Employers Insurance of Wausau*, 258 F.3d 345, 351 (5th Cir. 2001)
24 (citing *Weidner v. Sanchez*, 14 S.W.3d 353 (Tex. Ct. App. 2000) (applying Texas law in deciding that
25 contract stating that Wausau was an independent contractor and not an agent was controlling)).

26 As shown above, the Agreements established an independent contractor relationship between
27 Heath and Eagle whereby Heath, as owner-operator of a trucking business, performed delivery services
28

1 for Eagle, as Heath concedes. (Heath Dep., 56:16-57:7, 72:11-20.) The Initial Agreement stated that
2 Heath and Eagle intended “to establish a relationship between Contractor and [Eagle] through which
3 Contractor, as an independent contractor, (i) leases a vehicle to [Eagle] and (ii) renders certain related
4 pickup and delivery services....” (Ex. 253, § I; *see also* Heath Dep., 56:16-23.) Similarly, the Second
5 Agreement established Heath and Eagle’s intention to “create a vendor/vendee relationship between
6 Contractor and [Eagle] through which Contractor, as an independent business person, has the potential
7 to realize a profit or loss by: leasing a truck to [Eagle]; rendering certain pick-up and delivery related
8 services....” (Ex. 255, § I; *see also* Heath Dep., 73:15-74:4.) Moreover, the Agreements
9 unambiguously state that “neither contractor nor any of its employees or agents shall be considered to
10 be employees of EFS or of EFS customers at any time under any circumstances for any purpose
11 whatsoever.” (Ex. 253, § I; Ex. 255, § I; *id.*, 57:8-12.) And, the Agreements also expressed that Eagle
12 had no right of control over the method, manner and means by which Heath would perform under
13 them. (Ex. 253, pp. 1-2; Ex. 255, pp. 1-2.) Accordingly, under the clear holding of *Durbin*, Heath was
14 an independent contractor under the Agreements.

15 **2. There Is No Evidence Of Control Outside Of The Agreements Between**
16 **Heath And Eagle.**

17 Even if this Court looks outside the Agreements, there is no evidence that Eagle
18 controlled the progress of Heath’s work. Before Eagle may be considered Heath’s employer, Eagle’s
19 “exercise of control must be so persistent and the acquiescence therein so pronounced as to raise an
20 inference that, when the incident occurred, the parties by implied consent had agreed that the principal
21 had the right to control the details of the work.” *City of Paris v. Floyd*, 150 S.W.2d 224, 227 (Tex.
22 App. 2004). “An employer controls not merely the end sought to be accomplished, but also the means
23 and details of its accomplishment.” *Cook v. Nacogdoches Anesthesia Group*, 167 S.W.3d 476, 481
24 (Tex. App. 2005) (citing *Thompson*, 789 S.W.2d at 278 (finding that an anesthesiologist who had
25 discretion in how to conduct his job and was provided equipment by the hospital and not the group he
26 contracted with was an independent contractor, despite the fact that the group told him when to be at
27 the hospital for his anesthesia services)).

1 Addressing a similar situation, the Texas Supreme Court recently concluded that a contract
2 driver was an independent contractor as a matter of law. *See Limestone Prods. Distribution Inc.*, 71
3 S.W.3d at 308. In *Limestone*, the court utilized the five-factor test described above to determine
4 whether a truck driver was an employee or an independent contractor. *Id.* at 312. As here, the
5 contractor in that case owned his own truck, could drive any route he wished, was only required to
6 deliver the load on time, had his income reported on a Form 1099, and had to pay his own taxes and
7 expenses. *Id.* at 312-13. The *Limestone* court concluded that the truck driver was an independent
8 contractor:

9 Limestone supplied no tools or equipment to Mathis. Instead, Mathis
10 owned and used his own truck for deliveries, and he paid for his truck's
11 gasoline, repairs and insurance. Limestone paid Mathis by the load he
12 delivered, and he received no pay if there was no work. Limestone
13 reported Mathis's income on a 1099 form, not a W-2 form. Also,
14 Limestone did not pay Mathis for vacation, sick leave, or holidays. And
15 Mathis paid his own social security and federal income taxes.

16 [T]he summary-judgment evidence establishes that Limestone merely
17 controlled the end sought to be accomplished – determining where and
18 when to deliver the load – whereas Mathis controlled the means and
19 details of accomplishing the work.

20 *Id.*

21 Indeed, in a case against Eagle involving the same agreement as that at issue here, the U.S.
22 District Court for the Eastern District of Louisiana earlier this year applied *Limestone* to hold that an
23 owner-operator under contract with Eagle was properly classified as an independent contractor and was
24 not an employee. *See Davis v. EGL Eagle Global Logistics LP*, 2006 WL 2631966, *1 (E.D. La.
25 2006). The court explained:

26 He was not guaranteed a certain amount of work and was free to serve
27 other carriers. He could, as he saw fit, employ drivers and control the
28 aspects of their work. It was Davis' decision to accept or reject dispatches
offered by EGL. He had the right to control the progress of the work,
including that he could generally choose the day and time of day to make
deliveries. He could choose the routes traveled and the parking sites most
suitable to accomplish his task. He could arrange for repair of his vehicle,
which he leased to EGL. This control exercised by Davis was not
undermined by the Agreement's qualification of this right to control,

1 which provided merely that he “fully and efficiently perform his
2 obligation under the Agreement.”

3 *Id.* at *3-*4. Other factors on which the court relied in reaching this conclusion in *Davis* were that the
4 plaintiff was compensated per delivery rather than on an hourly or salaried basis, he was not entitled to
5 receive any benefits or compensation beyond the 60% of the tariff for each shipment picked up and
6 delivered, and Eagle did not withhold income tax or social security taxes; rather, he was responsible for
7 paying his own taxes. *Id.*

8 The facts here are the same as in *Limestone* and *Davis*, and the same analysis applies. Heath,
9 like the drivers in those cases, was required to furnish his own van – the major tool of his trade – as
10 well as his own hand truck and straps to keep objects from moving in the vehicle. (Heath Dep., 119:2-
11 18.) Heath was also responsible for the costs of operating and maintaining his vehicle, including
12 gasoline, repairs and insurance. (*Id.*, 67:14-21, 68:20-69:5.) Heath was not guaranteed any amount of
13 work from Eagle. (*Id.*, 60:8-12.) Heath was paid either by a rate of 60% of the tariff for the load he
14 was carrying or by mileage when he did a hot shot load, and he received no pay if there was no work.
15 (*Id.*, 76:12-20.) Heath received a Form 1099 from Eagle, not a W-2, and he paid his own taxes. (*Id.*,
16 69:18-70:1, 154:9-22, 154:23-155:9, 155:23-156:13, 156:21-157:11, Exs. 271, 272, 273, 274.)
17 Additionally, Heath operated as an independent business, Tom’s Express, and he was free to hire others
18 to assist him in his business. (*Id.*, 31:12-25, 67:22-68:19, 151:5-12.) Heath did not have to show up at
19 the station on a regular schedule; he could select his own route and was free to reject deliveries he
20 viewed as undesirable. (*Id.*, 67:11-13, 106:19-24, 109:23-110:6, 175:19-25.) Eagle merely controlled
21 the end sought to be accomplished – delivering freight in accordance with customer specifications –
22 whereas Heath controlled the means and details of accomplishing the work.⁴

23
24
25 ⁴ Although Heath contends that Eagle exercised control over him because the requirements that
26 he place an Eagle logo on his van precluded him from providing services for other freight carriers, he
27 admitted in his deposition that there were ways to cover the logo but that he never tried to cover it.
28 (Heath Dep., 60:17-24, 61:13-25.) Examining this same requirement in *Davis*, the court held that the
logo and similar requirements did not “create a factual dispute” and were “not at all inconsistent with
independent contractor status.” *Davis*, WL 2631966 at *3-*4.

1 In sum, all of the factors set forth in *Limestone* and applied in *Davis* compel the conclusion that
2 Heath was properly classified as an independent contractor and his claims against Eagle cannot stand.
3 Summary judgment is mandated.

4 **3. Heath Was An Independent Contractor Under California Law.**

5 Even if California law applied, Heath was properly classified as an independent
6 contractor. California law is substantially similar to Texas law regarding classification of independent
7 contractors; under both, a "right to control" test is used to determine whether an independent contractor
8 is properly classified. *Compare Limestone Prods. Distribution Inc.*, 71 S.W.3d at 312 (right to control
9 the progress, details, and methods of the operations of the work) *with Bates v. Industrial Accident*
10 *Comm'n*, 156 Cal. App. 2d 713, 718 (1958) (independent contractor relationship will not be considered
11 employment relationship unless the alleged employer has the right "to exercise complete and
12 authoritative control of the mode and manner in which the work is performed").

13 As discussed above, Texas courts analyze the "right to control" by considering: (1) the
14 independent nature of the contractor's business; (2) the contractor's obligation to furnish necessary
15 tools, supplies, and materials to perform the job; (3) the contractor's right to control the progress of the
16 work except about final results; (4) the time for which the contractor is employed; and (5) the method
17 of payment, whether by unit of time or by the job. *Limestone Prods. Distribution Inc.*, 71 S.W.3d at
18 312. California courts consider similar factors in determining the "right to control." For example, in
19 *Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 430-33 (1991), the court held that a package
20 delivery driver was an independent contractor, not an employee, based on the parties' written
21 agreement, which provided for an independent contractor relationship, as well as other factors, such as
22 the driver's obligation to provide his own vehicle, gas and liability insurance and to pay for vehicle
23 maintenance and repair costs. The court also noted that the driver was paid on a "per route" basis
24 (rather than by the hour), and retained the right to control the progress of his work. "Other than to say
25 'be careful' or to give him directions to a particular location, or possibly tell him to deliver the
26 packages in the order received, [the carrier] did not instruct [the driver] as to how to make the
27 deliveries or how to drive his car." *Id.* at 431.

1 The court considered similar factors in *Bates*, 156 Cal. App. 2d 713, holding that the driver of a
2 catering truck was an independent contractor, not an employee, because the driver controlled the day-
3 to-day operation of his route, was obligated to provide insurance and maintenance for his truck, and
4 did not receive an hourly wage. *Id.* at 718-719; *see also Mission Ins. Co. v. Workers Compensation*
5 *Appeals Board*, 123 Cal. App. 3d 211 (1981) (security alarm service provider an independent
6 contractor, not an employee, based on the parties' agreement, the independent nature of the contractor's
7 business, the contractor's obligation to furnish his own vehicle and pay his own expenses, and the
8 method of payment). Thus, even under California law, Heath was properly classified as an
9 independent contractor and his claims fail.

10 **C. All Of Heath's Claims Fail As A Matter Of Law Given That Heath Was An**
11 **Independent Contractor.**

12 All of the provisions of the California Labor Code and Wage Order on which Heath
13 bases his First through Eighth Causes of Action apply only to employees, not to independent
14 contractors. *See* Cal. Lab. Code §§ 201, 202, 203, 221, 223, 226, 226.3, 226.7, 400-410, 450, 510,
15 1174, 1174.5, 1194, 2802; IWC Wage Order No. 9; FAC ¶¶ 44, 45, 46, 47, 54, 57, 52, 65, 68, 69, 72,
16 75, 76, 77. As demonstrated above, Heath was an independent contractor, not an employee. Thus, the
17 Labor Code and Wage Order provisions on which he relies do not apply to him, and his First through
18 Eighth Causes of Action fail. And, because Heath's Ninth Cause of Action for violation of California's
19 Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, is wholly based on the violations
20 alleged in his First through Eighth Causes of Action, the Ninth Cause of Action fails with them.


1 **VI. CONCLUSION.**

2 Heath's own deposition testimony defeats any claim that he was not properly classified as an
3 independent contractor, and his claims against Eagle fail. No material facts are in dispute, and Eagle is
4 entitled to judgment as a matter of law. For all the foregoing reasons, Eagle's motion for summary
5 judgment should be granted.

6 Dated: December 8, 2006

Respectfully submitted,

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8
9 By  _____
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10
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EGL, INC.