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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICKEY LEE DILTS, et al.,
 Plaintiffs,
v.
PENSKE LOGISTICS, L.L.C., et al.,
 Defendants.

Case No. 08cv0318-JLS (BLM)
**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO COMPEL**
[ECF No. 91]

The instant discovery dispute arises from requests for production of documents and special interrogatories separately served on Penske Logistics, LLC and Penske Truck Leasing, Co., L.P. (collectively "Defendants") by Plaintiffs Mickey Lee Dilts and Ray Rios on or about February 11, 2011. ECF No. 91-1 ("Pls.' Mem.") at 1. On March 15, 2011, the day Defendants' discovery responses were due, Defendants' counsel emailed Plaintiffs' counsel and requested a one week extension. *Id.*, Ex. 7 at 51. Plaintiffs' counsel responded the next day and agreed to the extension. *Id.* at 50. The following week, on March 22, 2011, defense counsel emailed Plaintiffs' counsel and again requested additional time to comply with discovery requests. *Id.* Plaintiffs' counsel granted Defendants an additional week to respond, but noted that in the future, Plaintiffs would require specific details as to why any additional delay would be necessary. *Id.* at 49. Almost one month later, on April 18, 2011, Plaintiffs' counsel followed up with defense counsel seeking the current status of the Defendants' discovery responses because Plaintiffs still had not

1 received any formal responses. Id. On April 21, 2011, after no response from defense counsel,
2 Plaintiffs' counsel again emailed defense counsel about the overdue discovery responses. Id.

3 On June 9, 2011, counsel for both sides contacted this Court's clerk to discuss the instant
4 discovery dispute. Id. at 42. During the call, counsel for both parties agreed that Defendants
5 would serve their responses and documents by June 16, 2011. Id. The Court issued an order
6 authorizing Plaintiffs to file a motion to compel if Defendants did not comply with that agreement.
7 ECF No. 90. Defendants did not do so (ECF No. 98-2, Ex. C at 18) and, therefore, in accordance
8 with the order, Plaintiffs filed their motion to compel on June 17, 2011. ECF No. 91. Defendants
9 opposed the motion on June 24, 2011 (ECF No. 94), and Plaintiffs filed a reply brief on July 1,
10 2011 and a sur-reply brief on July 11, 2011. See ECF Nos. 98 & 100. The Court took the matter
11 under submission. See ECF No. 90.

12 LEGAL STANDARD

13 The Federal Rules generally allow for broad discovery, authorizing parties to obtain
14 discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense."
15 Fed. R. Civ. P. 26(b)(1). Also, "[f]or good cause, the court may order discovery of any matter
16 relevant to the subject matter involved in the action." Id. District courts have broad discretion
17 to determine relevancy for discovery purposes. See Hallett v. Morgan, 296 F.3d 732, 751 (9th
18 Cir. 2002).

19 A party may request the production of any document within the scope of Rule 26(b). Fed.
20 R. Civ. P. 34(a). "For each item or category, the response must either state that inspection and
21 related activities will be permitted as requested or state an objection to the request, including the
22 reasons." Id. at 34(b). The responding party is responsible for all items in "the responding
23 party's possession, custody, or control." Id. at 34(a)(1).

24 Similarly, an interrogatory may relate to any matter that may be inquired under Rule
25 26(b)." Fed. R. Civ. P. 33(a)(2). The responding party must answer each interrogatory by stating
26 the appropriate objection(s) with specificity or by "answer[ing] separately and fully in writing
27 under oath." Id. at 33(b). The responding party has the option in certain circumstances to
28 answer an interrogatory by specifying responsive records and making those records available to

1 the interrogating party. Id. at 33(d).

2 DISCUSSION

3 Documents

4 Plaintiffs request that the Court enter an order compelling Defendants to comply with their
5 document requests by producing all responsive documents. Pls.' Mem. at 4. Defendants do not
6 object to the substance of Plaintiffs' document requests and simply state that they have
7 "produced nearly all the remaining requested documents" and that the only additional documents
8 that need to be produced are: (1) payroll records; (2) the Xata records; and (3) the E Time cards
9 for some of the remaining drivers. ECF No. 94 ("Defs.' Resp.") at 2-3. In fact, in their response
10 to Plaintiffs' motion, Defendants only request that the Court provide them with a short extension
11 of time (until July 7, 2011) to respond to Plaintiffs' document requests. Id. Plaintiffs agreed to
12 the extension of time to respond; however, after Defendants failed to produce the additional
13 documents by July 7, 2011, Plaintiffs renewed their request. ECF No. 100 ("Pls.' Sur-Reply") at
14 2.

15 Because the parties agree that the requested documents are relevant to the subject matter
16 of the instant litigation, properly requested, and in the Defendants' possession, custody or control,
17 the Court **GRANTS** Plaintiffs' motion to compel Defendants to comply with the document
18 requests. See Fed. R. Civ. P. 34(a)(1). Defendants must provide ALL documents responsive to
19 Request for Production of Documents [Set Two] to Plaintiffs on or before **July 27, 2011**.

20 Interrogatories

21 Plaintiffs move to compel supplemental responses to Special Interrogatories 26-35 [Set
22 Two]. See Pls.' Mem., Pls.' Reply, & Pls.' Sur-Reply. Plaintiffs argue that Defendant Penske Truck
23 Leasing Co., L.P.'s responses to the interrogatories are insufficient because Defendant Penske
24 Truck Leasing's response to all but one interrogatory is that "Penske Truck Leasing did not employ
25 any class members during the relevant time period." Pls.' Mem, Ex. 8 at 66-67. Plaintiffs argue
26 that Defendant Penske Logistics, LLC's responses to the interrogatories are insufficient because
27 most of the responses direct Plaintiffs to "see response to Request no. 38 of Request for
28 Production of Documents propounded by Plaintiff, Mickey Lee Dilts, to Penske Logistics, LLC" or

1 to look at "Exhibit A" for the information requested. Pls.' Reply, Ex. B at 4-7. Plaintiffs find these
2 responses to be "inappropriate under the circumstances" and an attempt to improperly shift the
3 burden of responsibility from Defendants to Plaintiffs. Pls.' Reply at 3. Because Plaintiffs only
4 explained their specific objections to Defendants' interrogatory responses in their Reply,
5 Defendants did not address the sufficiency of their interrogatory responses except to say that they
6 "have provided the signed versions of the written discovery responses." Defs.' Resp. at 2.

7 **Penske Truck Leasing Company L.P.'s Responses to Interrogatories 26-35**

8 With the exception of interrogatory 29, Penske Truck Leasing Co., L.P. responded to
9 interrogatories 26-35 by stating that "Penske Truck Leasing did not employ any class members
10 during the relevant time period." Pls.' Mem, Ex. 8 at 66-67. Plaintiffs' objection to this response
11 is unclear. Plaintiffs state that "even though this Discovery was propounded from Plaintiff Dilts
12 to *PENSKE LOGISTICS, LLC*, Defendant PENSKE TRUCK LEASING objected to the Discovery, as
13 not being the actual employer and therefore did not respond." Pls.' Reply at 2. However, the
14 exhibit that Plaintiffs reference, Pls.' Mem, Ex. 8 at 66-67, shows that the interrogatories were
15 propounded by Plaintiff Dilts to Defendant Penske Truck Leasing and were answered by Penske
16 Truck Leasing. Because Penske Truck Leasing responded to interrogatories 26-35 [Set Two],
17 Plaintiffs' request that the Court Order Penske Truck Leasing Co., L.P. to specifically answer
18 interrogatories 26-35 is **DENIED**.

19 **Penske Logistics, LLC's Responses to Interrogatories 26-35**

20 Defendant Penske Logistics, LLC responded to interrogatories 26-28 and 30-32 by directing
21 Plaintiffs to "see response to Request no. 38 of Request for Production of Documents propounded
22 by Plaintiff, Mickey Lee Dilts, to Penske Logistics, LLC" and to interrogatories 33-35 by stating that
23 the answers are "set forth in the attached Exhibit A." Pls.' Reply, Ex. B at 4-7. Plaintiffs argue
24 that the production of documents is not an appropriate response and ask the Court to require
25 Defendant Penske Logistics, LLC to provide a "concrete number," a statement that Defendant
26 does not know the answer, or another "definitive and concrete" answer. Pls.' Reply at 4-5.¹

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28 ¹Plaintiffs also assert that Defendant Penske Logistics, LLC "FAILED TO RESPOND TO THE DISCOVERY on the erroneous grounds that the Discovery was propounded to PENSKE TRUCK LEASING, CO., L.P., when in fact it was not." Pls.' Reply at 2-3. Not only is this statement untrue, Plaintiffs have provided Defendant Penske Logistics, LLC's

1 The Federal Rules of Civil Procedure authorize a party to respond to interrogatories by
2 producing business records that contain the requested information. Fed. R. Civ. P. 33 (d). As
3 Rule 33 explains,

4 [i]f the answer to an interrogatory may be determined by examining, auditing,
5 compiling, abstracting, or summarizing a party's business records (including
6 electronically stored information), and if the burden of deriving or ascertaining the
7 answer will be substantially the same for either party, the responding party may
8 answer by: (1) specifying the records that must be reviewed, in sufficient detail to
enable the interrogating party to locate and identify them as readily as the
responding party could; and (2) giving the interrogating party a reasonable
opportunity to examine and audit the records and to make copies, compilations,
abstracts, or summaries.

9 Id. While Plaintiffs have attached some of the documents referenced by Penske Logistics, LLC
10 in the interrogatories as part of their motion², they have not discussed the type, quantity or
11 quality of documents at issue, nor explained why it would be unduly burdensome for them to do
12 the necessary compiling. This makes it impossible for the Court to determine if the documents
13 are business records³, how specific Defendants have been with their responses⁴, and how much
14 of a burden the Defendants are placing on Plaintiffs⁵. Plaintiffs also have not any alleged facts

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responses to the discovery. See Pls.' Reply, Ex. B.

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18 ²Plaintiffs included an "Exhibit A" at the end of Defendant Penske Logistics, LLC's Answers to Special
Interrogatories 33-35 [Set Two] which could be the same exhibit referenced by Defendant in its interrogatory
19 answers. Pls.' Reply, Ex. B at Ex. A 8-16. However, the exhibit provided to the Court does not appear to be complete
as it is only eight pages long and contains a seven page document that is missing pages 2, 3, 5 and 7. Id.

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21 ³See Wagner v. Fishing Co. Of Alaska, Inc., 2008 WL 2813333, *1 (W.D.Wash. July 18, 2008) (noting that
Fed. R. Civ. P. 33(d) has been narrowly interpreted by the courts and that in cases not involving "business records"
22 federal courts have generally refused to let parties respond to interrogatories by referring to outside materials) (citing
Illinois Nat'l Bank & Trust Co. V. Canton, 136 FRD 682, 687 (D. Kan. 1991)).

23
24 ⁴See Mancini v. Insurance Corp. of New York, 2009 WL 1765295 (S.D.Cal., June 18, 2009) (finding that
referring to a wide universe of documents does not specify the records in sufficient detail) (citing Dibbs v. The Franklin
Mint, 2007 WL 4327876 (W.D.Wash. Dec.10, 2007) (responding to interrogatory by referencing entire document
production does not specify records in sufficient detail.)).

25
26 ⁵See Fed. R. Civ. P. 33(d) (if the burden of deriving or ascertaining the answer will be substantially the same
for either party, the responding party may answer by specifying business records that contain the answer); see also
27 McKie v. Sears Protection Co., 2011 WL 1670910, *1 (D.Oregon, May 3, 2011) ("the rationale behind Rule 33(d) is
to shift the burden of compiling the information and, accordingly, ascertaining the answer, from the producing party
28 to the interrogating party. Thus, where one of the parties must undertake the task of compiling the information and
the records presented are not voluminous or indecipherable, the interrogating party should bear the responsibility
of compiling the information.") (quoting Sadofsky v. Fiesta Products, LLC, 252 F.R.D. 143, 148 (E.D.N.Y.2008)).

1 indicating that Defendants created an unequal burden for the Plaintiffs, for example, by choosing
2 to provide a mass of records as opposed to an already existing compilation or summary. See Fed.
3 R. Civ. P. 33(d), Adv. Comm. Notes (1980) (stating that “if the information sought exists in the
4 form of compilations, abstracts or summaries then available to the responding party, those should
5 be made available to the interrogating party”). Moreover, Plaintiffs have not alleged that the
6 referenced records do not contain the sought after information or that they cannot extract the
7 information from the records. See Dibs, 2007 WL 4327876 at *1 (finding that “a party claiming
8 that the opposing party inappropriately used Fed. R. Civ. P. 33(d) must make a prima facie case
9 showing that the use of this rule is somehow inadequate, either because the information is not
10 fully contained in the documents or because it is too difficult to extract”). Finally, because
11 Plaintiffs did not raise this issue in its moving papers, Defendants also did not address any of
12 these issues or considerations in their opposition.

13 Given the lack of information provided by Plaintiffs, as well as the fact that this dispute was
14 initially raised in Plaintiffs’ Reply so there is no response from Defendants, there is no basis for
15 the Court to find that the production of documents is an inadequate response to the special
16 interrogatories [Set Two] 26-35. Therefore, Plaintiffs’ request “that the Court enter an Order
17 specifically compelling Defendants to respond to the interrogatories at issue” is **DENIED**.

18 **IT IS SO ORDERED.**

19 DATED: July 21, 2011

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21 BARBARA L. MAJOR
22 United States Magistrate Judge
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