Christopher Ho, SBC No. 129845
Donya Fernandez, SBC No. 190976
Julia Figueira-McDonough, SBC No. 200452
The EMPLOYMENT LAW CENTER,
A Project of the LEGAL AID
SOCIETY OF SAN FRANCISCO
1663 Mission Street, Suite 400
San Francisco, California 94103
Telephone: (415) 864-8848
Facsimile: (415) 864-8199

William J. Smith, SBC No. 056116
Melvin M. Richtel, SBC No. 056036
RICHTEL & SMITH
2350 West Shaw Avenue, Suite 154
Fresno, California 93711
Telephone: (559) 432-0986
Facsimile: (559) 432-4871

Alan L. Schlosser, SBC No. 49957
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA
1663 Mission Street, Suite 460
San Francisco, California 94103
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Plaintiffs

(Additional counsel on next page)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA RODRIGUEZ, MARIA RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE YANG, and XHUE YANG,

Plaintiffs,

v.

NIBCO, INC., an Indiana corporation, and R. M. WADE & CO., an Oregon corporation,

Defendants.

No. CIV F-99-6443 AWI SMS

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER RE CONDUCT OF DEFENDANTS' DEPOSITIONS OF PLAINTIFFS

[Fed.R.Civ.P. 30(d)(4), 26(c); Civ.L.R. 26-252(d)]

Date: June 8, 2001
Time: 10:30 a.m.
Ctrm: 4

[Hon. Sandra M. Snyder]

Marielena Hincapié, SBC No. 188199
NATIONAL IMMIGRATION LAW CENTER
1212 Broadway, Suite 1400
Oakland, California 94612
Telephone: (510) 663-8282
Facsimile: (510) 663-2028

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

I. INTRODUCTION

Out of the twenty pages comprising defendants' opposition brief, only *six* specifically address the motion now before the Court. The rest of defendants' arguments, and almost all of their voluminous concurrent filings and exhibits, amount to a "kitchen sink" hodgepodge of unrelated and irrelevant issues.[1] Of the few arguments that defendants actually direct to the present motion, none are persuasive.

Far more importantly and to the point, however, this Court should not lose sight of the fact that if defendants are permitted to undertake the unfettered and needless discovery they seek, plaintiffs may be forced into a choice between exercising their rights to be free from employment discrimination, on the one hand, and avoiding the threats of job loss or drastic immigration consequences, on the other. Because the requested protective order accommodates the legitimate discovery needs of defendants while protecting plaintiffs' ability to have their claims heard, plaintiffs respectfully request that the Court grant their motion.

II. GOOD CAUSE EXISTS FOR THE REQUESTED PROTECTIVE ORDER

As a threshold matter, it is often difficult to comprehend defendants' stated concerns with the proposed protective order. Indeed, a number of defendants' arguments may suggest either a lack of careful review of the order, or a mischaracterization of it.[2] What is more, defendants -- in a blatant

---

[1] Indeed, the belated interjection of those extraneous matters, including their improper request for sanctions -- none of which have merit, *see* section III, *infra* -- directly contravenes the Court's telephonic order of May 14, 2001 that any motions by either side be filed by no later than May 21, 2001. Defendants filed no such motion. Indeed, after meeting and conferring on those issues, defendants informed plaintiffs that they would *not* file such a motion. William Hahesy May 21, 2001 email to Christopher Ho (appended hereto as Exhibit A). Defendants' failure to abide by the scheduling instructions of the Court would appear to violate Civ. L.R. 11-110 (noncompliance with any order of the Court).

[2] At times, for example, it would appear defendants do not understand that the requested order does not seek to bar questioning in areas other than those bearing directly upon the plaintiffs' immigration status and work authorization. As one illustration of this, defendants appear to believe that plaintiffs' footnoted reference to the privilege against self-incrimination amounts to an actual assertion thereof as to all plaintiffs -- which, upon a review of that footnote (Pltfs.' Opening Brief at 7, fn 13), is plainly inaccurate. As another example, defendants devote an entire page defending their right to ask plaintiff Martha Rivera about her place of marriage. Defendants' Opposition Brief ("Defts.' Oppn. Brf.") at 11:1-22. However, as plaintiffs' counsel attempted to explain at Ms. Rivera's deposition, and as plaintiffs' moving papers and proposed order reiterate, this is simply a non-issue. Although plaintiffs strenuously dispute that such information has even a scintilla of germaneness to a Title VII employment discrimination case, plaintiffs do *not* seek to bar that question, nor most others under discussion herein, from being asked. Rather, defendants' "marriage" question would fall only within the limitations on disclosure appearing at section B of the proposed order.

about-face and without providing plaintiffs and the Court the benefit of any explanation -- now unreasoningly oppose the very nondisclosure provisions of the protective order *that they had agreed to during the Rivera deposition*.[3] Nevertheless, as best plaintiffs are able, they offer the following responses to the relevant portions of defendants' brief.

A. The Fact that Certain Questions May Be "Routine" Does Not Render Them Proper

Defendants would persuade the Court that if particular questions can be characterized as "commonplace," or because they may appear in form interrogatories promulgated by the Judicial Council of California,[4] they are *a fortiori* immune from limitations imposed by a valid protective order. Defts.' Oppn. Brf., 10:13-23. This is, of course, not so. Even the lone case cited by defendants for this bold proposition applied the established standard that a party seeking to limit discovery "must demonstrate to the court 'that the requested documents [information] either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.'" Gober v. City of Leesburg, 197 F.R.D. 519, 521 (M.D. Fla. 2001). Accordingly, the Gober court found against the plaintiff for the unremarkable reason that he did not meet his "burden of showing that the information sought is confidential, irrelevant, unduly burdensome to produce, or privileged." Any suggestion that Gober justifies an unthinking standard permitting all so-called "routine" questions, or that its ruling was premised on

---

Defendants' discussion as to the importance of the "marriage" question is therefore irrelevant for the above reasons. Nonetheless, plaintiffs note that defendants' contention that they want to assess Ms. Rivera's marital status for purposes of a potential deposition of her husband, Leobardo Servin, is somewhat curious for at least two additional reasons. First, if defendants truly wanted to find out whether Ms. Rivera is married to Mr. Servin, they should simply ask that question -- which they have, and which Ms. Rivera has answered in the affirmative (Rivera Depo., 18:11-16, Exhibit A to Pltfs.' Opening Brief) -- instead of demanding that she answer the quite different question of *where* they were married. Second, both sides have been limited by the Court to taking a total of 175 hours of depositions. Defendants have already indicated that they will be spending one full day for each named plaintiffs' deposition, thus presumably using up their time allotment. It is unclear where defendants would propose to obtain the additional time for Mr. Servin's deposition (if, hypothetically, he were for some unimaginable reason not covered by the spousal privilege), let alone for those of the non-spousal partners, if any, of each of the other 24 plaintiffs.

[3] Rivera Depo., 22:11-14, 18-20; 24:6-7; 28:16-19 (Exhibit A of Pltfs.' Opening Brief).

[4] In any event, as the Court is well aware, there is no counterpart to California "form" interrogatories in the Federal judicial system.

such an assumption, would be misleading.

In this case, by comparison, the above-described balancing test yields a very different result. As plaintiffs have noted in their opening brief, immigration status and work authorization, as well as "place of birth" questions, are either irrelevant to this case or have already been answered for all legitimate purposes[5] -- making their incremental relevance "marginal" indeed. The utility of deposition answers in those areas is therefore plainly outweighed by the potential harm they would occasion.[6] Gober, *supra;* Burke v. New York City Police Dept., 115 F.R.D. 220, 224 (S.D.N.Y. 1987) (same). Defendants' contentless invocation of "routineness" to counter plaintiffs' showing of good cause is hardly persuasive.

B. The Potential Injuries Feared by Plaintiffs Are Well-Established, If Not Self-Evident

Much as defendants may wish the Court to believe otherwise, the harms that would flow from defendants' proposed lines of questioning absent a protective order are hardly "stereotyped or conclusory," as defendants repeatedly contend.[7] Quite to the contrary, good cause for the order plaintiffs seek is demonstrated by the cases and other authorities plaintiffs have cited, as well as the

---

[5] Pltfs.' Opening Brief at 3-9.

[6] The individual and public policy harms of permitting unregulated discovery into these sensitive areas were described by plaintiffs in their Opening Brief at, e.g., 4-9. For the sake of brevity, plaintiffs will not repeat that discussion here, but respectfully refer the Court thereto.

[7] A review of the cases suggests that the disfavoring of the use of "stereotyped or conclusory statements" to support motions for protective orders is meant largely to address facially egregious failures to allege good cause. Indeed, the only Ninth Circuit decision that appears to have applied Rule 26(c) in this respect found an insufficient showing of good cause only where the sole reason defendant provided for not wishing to produce its publisher for deposition was that his testimony "would be repetitious with what plaintiff had learned from other sources." Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975). *See also, e.g.,* McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1484 (5th Cir. 1990) (protective order denied where only allegations in support were that the "request is overly-broad, not specific, and creates a hardship on the producing party."), Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990) ("Defendants [seeking discovery stay] have done no more than to argue in conclusory fashion that their motions to dismiss -- some of which are yet to be filed -- will succeed, and that plaintiff class will not be certified."); Rolscreen Co. v. Pella Products of St. Louis, Inc., 145 F.R.D. 92, 96 (S.D. Iowa 1992) (protective order barring deposition of corporate agent denied where sole allegations of good cause were that he was the company's president and did not remember much about a disputed event).

Defendants' suggestion that particular plaintiffs file declarations as to the fear of deportation they may experience as a consequence of the discovery sought, or as to the chilling effect of being required to answer sensitive questions, is difficult to take seriously. Unless such declarations were to be filed without identification of the specific declarant, their doing so would itself identify them as persons who might have reason to fear the consequences of the discovery at issue.

obvious deterrent impact of those potential criminal penalties that could accrue to those plaintiffs who may have immigration-related concerns.

Defendants' analysis of the decisions cited by plaintiffs amounts, at most, to the classic drawing of distinctions without any differences. Defendants entirely ignore the Fifth Circuit's recognition of the inhibiting effect of discovery into sensitive areas because of the "embarrassment and inquiry into [plaintiffs'] private lives" and the potential for "collateral consequences" that would result. In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom.* Griffin & Brand of McAllen v. Reyes, 487 U.S. 1235 (1988). Defendants' treatment of John Dory Boat Works, Inc., 229 N.L.R.B. 844 (1977), likewise attempts to escape the fact that the National Labor Relations Board expressly recognized the chilling and deterrent impact of immigration-related discovery on the willingness and ability of workers to come forward to vindicate their workplace rights (effect upon workers of immigration-related inquiries "ranged from unsettling to devastating and certainly affected their ability to testify"). Id.

More seriously, defendants' characterization of Montelongo v. Meese, 803 F.2d 1341 (5th Cir. 1986), as having "nothing to do with discovery into immigration status" (Defts.' Oppn. Brf., 16:19) is facially disingenuous. Id., 803 F.2d at 1352 n.17 (explicitly noting that the district court "barred *inquiry into the immigration status* of the people who responded" to notice to class of agricultural field workers). What is more, defendants make no attempt to respond to the concern of the U.S. Supreme Court in Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288 (1960), that "fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." Id., 361 U.S. at 292. Nor do they acknowledge any of the secondary authorities cited by plaintiffs.[8]

Even leaving these authorities aside, however, it could not be more self-evident that adverse testimony in the areas at issue could lead to serious legal and economic penalties. It needs no sophisticated factual demonstration to understand that the specter of such consequences would force plaintiffs to choose between continuing to pursue their federally protected rights, on the one hand,

[8] Pltfs.' Opening Brief at 6, fn.11.

and avoiding the possibility of deportation or loss of their jobs, on the other.[9] *See also* Hoffman Plastic Compounds, Inc, v NLRB., 237 F.3d 639, 648 (D.C. Cir. 2001) ("denying undocumented workers remedies for retaliation would chill participation in union activities 'regardless of whether the employer knew of the undocumented worker's immigration status'.").

Far from being "stereotyped" or "speculative," as defendants would have it, the chilling effect posed by defendants' proposed discovery is so plain as to be a proper subject of judicial notice. Good cause clearly exists for balancing the different interests at play here via the proposed protective order.

C. The Protective Order Is Entirely Consistent With the Need to Determine Plaintiffs' Remedies

Contrary to defendants' arguments, the proposed protective order is no obstacle to determining the remedies due each plaintiff. To begin with, it is not disputed that undocumented employees are entitled to monetary relief such as compensatory and punitive damages,[10] or other remedies such as attorneys' fees or prospective injunctive relief to prevent future discrimination,[11] on the same basis as all workers.[12] Secondly, defendants' stated concerns with respect to back pay, and reinstatement or front pay, are simply resolved for the reasons set out below.

1. IRCA Prohibits Employers From Improperly Attempting to "Reverify" Employees' Employment Eligibility

---

[9] Pltfs.' Opening Brief at 7.

[10] *See, e.g.*, Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053, 1059-60 (N.D. Cal. 1998) (finding, in Fair Labor Standards Act case, that undocumented employee was entitled to punitive damages, and noting the established practice of the courts to construe National Labor Relations Act, FLSA, and Title VII by reference to each other).

[11] *See, e.g.*, EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999 ("EEOC Enforcement Guidance on Remedies"). It is settled law that the EEOC's administrative interpretations of Title VII are "entitled to great deference." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). A true and correct copy of this Guidance is appended for the convenience of the Court at Exhibit B.

[12] *See also, e.g.*, the report of the House Education and Labor Committee on the Immigration Reform and Control Act of 1986 ("IRCA") ("[T]he Committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the [EEOC] to remedy unfair practices committed against undocumented employees"), Educ & Lab. Comm., H.R. Rep. No. 682 (II), 99th Cong., 2d Sess. 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5758, and that of the House Judiciary Committee, Jud. Comm., H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess. 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662 (employer sanctions provisions of IRCA should not "be used to undermine in any way" legal protections for undocumented employees).

Each plaintiff in this case, at the time of her or his hire by defendants, completed an INS Form I-9, which constitutes the means by which an individual's eligibility to work in the United States is established for immigration law purposes. The Immigration Reform and Control Act of 1986 ("IRCA") *inter alia* makes it an unfair immigration-related employment practice for an employer seeking to verify a person's employment eligibility to insist upon "more or different documents than are required [by the I-9 form] or refusing to honor documents tendered that on their face reasonably appear to be genuine." 8 U.S.C. § 1324b(a)(6). An employer's insistence on such additional documentation constitutes actionable document abuse. Id.

Thus, by completing the I-9 process, defendants themselves certified for IRCA purposes that each plaintiff was eligible to work in the United States. Importantly, once the I-9 process has been completed, an employer may *not* reverify an employee's I-9 information except under narrowly specified circumstances. Indeed, the regulations implementing IRCA set out a lengthy list of situations in which an employer is specifically not authorized to reverify an employee's work authorization -- including for purposes of determining remedies. 8 C.F.R. § 274a.2(b)(viii)(A)(4)-(5) (reverification *not* permitted under enumerated circumstances, including where the employee is "on strike or in a labor dispute . . . [or] *reinstated after* disciplinary suspension [or] *wrongful termination, found unjustified by any court* . . . or otherwise resolved through reinstatement or settlement") (emphasis supplied).[13]

What is more, an employer may review the adequacy of I-9 forms with respect to *facially inadequate* information (*e.g.*, required blanks left unfilled, missing signatures) if and only if its past practice has been to do so on a regular basis, and as to *all* of its employees. Otherwise, an employer which conducts such checks on an *ad hoc* or irregular basis, or only as to certain categories of employees (*e.g.*, persons of a particular national origin or citizenship status), is in violation of IRCA. *See* 8 U.S.C. § 1324b(g)(B)(iv)(V) (penalties of up to $1,000 for each violation of 8 U.S.C. §§

[13] *See also* Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001) (*en banc*) (citing to same); EEOC Enforcement Guidance on Remedies at n.21 and associated text (stating that except under narrow circumstances, "employers may not request or reexamine I-9 documents of workers returning from a discriminatory discharge," and citing to same).

1324b(a)(1)(A)-(B), 8 U.S.C. § 1324b(a)(6)). The purpose of these restrictions is clear: were employers permitted repeatedly to "recheck" an employee's work authorization whenever it chose to do so, it would provide them with a ready means with which to discriminate against employees whom it chose to single out for any reason. IRCA's regulations plainly seek to avoid such abuse of the employment eligibility verification process.

2. Defendants Need Not Inquire Into Plaintiffs' Immigration Status to Determine Remedies, and Should Not Be Permitted To Do So

The dangers of allowing selective inquiries into employees' work authorization are noted by the National Labor Relations Board in a recent opinion of its General Counsel:

> [Q]uestions concerning reinstatement are only appropriately raised in a compliance proceeding. Such evidence concerning a discriminatee's work authorization status is relevant at compliance proceedings *only* if the respondent has a reasonable basis independent of the compliance proceeding for knowing that the discriminatee cannot lawfully work in the country. In this regard, we would object to the compliance proceeding being used as a fishing expedition to try to determine whether someone is unlawfully working in the country.

Memorandum GC 98-15, "Reinstatement and Backpay Remedies for Discriminatees Who May be Undocumented Aliens in Light of Recent Board and Court Precedent," December 4, 1998 (emphasis supplied).[14] "We have often observed that the NLRA was the model for Title VII's remedial provisions, and have found cases interpreting the former persuasive in construing the latter." Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 909 (1989).[15]

The courts that have addressed this remedial issue have acted in keeping with the above reasoning. For instance, in NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997), the Second Circuit affirmed the NLRB's order providing that undocumented employees who

---

[14] "Courts must defer to the requirements imposed by the Board if they are "rational and consistent with the [National Labor Relations] Act." Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 394 (1998); *see also* Auciello Iron Works v. NLRB, 517 U.S. 781, 787 (1996) (NLRB due considerable judicial deference by virtue of its charge to develop national labor policy). A true and correct copy of the General Counsel's opinion is appended hereto for the convenience of the Court as Exhibit C.

[15] *See also* EEOC Enforcement Guidance on Remedies at n.3 and associated text (looking to decisions applying the NLRA for guidance in interpreting Title VII back pay provisions).

had been fired in violation of the NLRA were entitled to conditional reinstatement:

> The Board ordered the Company to offer reinstatement to Benavides and Guzman, "provided that they present within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the [Company] to meet its obligations under IRCA." The reinstatement order, accordingly, does not require the Company to violate IRCA. To the contrary, the Board's order quite clearly tailors the remedy for the violation of the NLRA to the restrictions of [IRCA]." . . . . We also note that the remedy felicitously keeps the Board out of the process of determining an employee's immigration status, leaving compliance with the IRCA to the private parties to whom the law applies.

Id., 134 F.3d at 57.[16] The court reached a similar practical solution with respect to the back pay award:

> The backpay order provides that Benavides and Guzman be paid from the date of their unlawful discharge until either their qualification for future employment or the expiration of the reasonable time allowed for them to comply with IRCA [i.e., presentation of I-9 and supporting documents]. . . . [P]recluding the [back pay] remedy would increase the incentives for employers to hire undocumented aliens. . . . Finally, the backpay order does not require the reestablishment of an employment relationship in contravention of IRCA. Instead, it merely compensates Benavides and Guzman for the economic injury they suffered as a result of the Company's unlawful discrimination against them.

Id., 134 F.3d at 58. *See also* Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001) (*en banc*) (following A.P.R.A, and noting that IRCA permits reinstatement after unlawful discharge without requiring reverification of the employee's work authorization status).[17] The EEOC has adopted the A.P.R.A. analysis for purposes of determining remedies under Title VII.[18] In other words, defendant Wade would not be required to violate IRCA were it to reinstate any of the

---

[16] Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998), is not inconsistent with A.P.R.A. as to reinstatement, since the A.P.R.A. court did not sanction employment relationships involving undocumented workers. Instead, it simply provided the employees at issue with a reasonable time within which to produce I-9 forms and supporting documents, thus "felicitously keep[ing] the Board out of the process of determining an employee's immigration status." Id., 134 F.3d at 57. Moreover, contrary to defendants' characterization, Egbuna only addressed the remedies issue of reinstating workers known to be undocumented; it does not reach the issue of statutory coverage. Indeed, had Egbuna not been covered by Title VII, his retaliation case would have been dismissed on that ground itself.

[17] Hoffman Plastic, like A.P.R.A., concerned the issues of the remedies available to undocumented workers who sought back pay. Among other things, the court stated that the employer "itself could have mitigated its backpay liability either by making [the employee] a bona fide reinstatement offer . . . or by complying promptly with the Board's reinstatement order before [the employee's] undocumented status became known."

[18] EEOC Enforcement Guidance on Remedies at n.3 and associated text (""The A.P.R.A. rationale . . . applies equally to the federal employment discrimination statutes.").

plaintiffs in compliance with A.P.R.A.'s reasoning.[19] *See also* Hoffman Plastic Compounds, Inc., *supra*, 237 F.3d at 650 ("[IRCA] makes it unlawful for employers to knowingly hire undocumented aliens . . . IRCA does not explicitly make it unlawful for undocumented aliens to work.").

The situation in A.P.R.A. differs from this case in that defendants herein have complied with the I-9 process, whereas the employer in A.P.R.A. hired the employees in question with full knowledge that they lacked employment authorization -- thus justifying the presentation of I-9 information there. Id., 134 F.3d at 52. Following the reasoning of the National Labor Relations Board in its General Counsel's opinion, therefore, the present case is not a situation where defendants (as in A.P.R.A.) have any "reasonable basis independent of the compliance proceeding for knowing that the discriminatee cannot lawfully work in the country." Such information is thus wholly irrelevant to the case at bar. It may not be inquired into by defendants, whether by "rechecking" the information provided by the I-9 or through any other discovery.[20] However, A.P.R.A. is still instructive, not the least for its harmonization of IRCA with the workplace rights of undocumented employees; even if the remedies at issue (such as reinstatement, back pay, and/or front pay) are dependent upon a plaintiff's legal "availability for work," neither the parties not the Court are obliged to conduct any inquiry beyond what IRCA itself requires.

To sum up, *defendants have already ascertained, via the established I-9 process under IRCA, the employment eligibility of each of the 25 plaintiffs.* As seen, all of the pertinent case law and regulatory authority clearly counsel against any further inquiries into immigration status. Permitting

---

[19] The proposed order's bar on immigration-related questions reflects A.P.R.A.'s holding that any determinations of an employee's employment authorization status are, for purposes of reinstatement and back pay, properly made through the normal I-9 process once such remedies, if any, are ultimately ordered. Id., 134 F.3d at 57-58. Such determinations are properly deferred, for remedies purposes, until "the expiration of the reasonable time allowed for them to comply with IRCA" via the I-9 process. Id. at 57. Defendants' invocation of the "after-acquired evidence" doctrine explained in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), does not affect this conclusion, since McKennon only addresses the remedies-limiting result of after-acquired evidence; it does not create an affirmative entitlement for a defendant to conduct a search for such evidence in the context of discovery. *See also* additional discussion of McKennon, *infra*.

[20] In a pre-IRCA case the Ninth Circuit, employing reasoning identical to that reflected in A.P.R.A. and in the Board's General Counsel opinion, similarly held that conditioning a back pay award upon a reverification of employees' employment authorization was inconsistent with both the NLRA and the immigration laws. Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro), 795 F.2d 705 (9th Cir. 1986) (relying in part on Sure-Tan v. NLRB, 467 U.S. 883 (1984).

defendants, contrary to those authorities, to revisit this issue under the present circumstances would allow them to undertake precisely the "fishing expedition" that would be so destructive of the ability of plaintiffs and others like them to assert their legally protected workplace rights. At least with respect to plaintiffs' immigration status and work authorization, defendants' determination of the extent of remedies need go no further than what they have already done in compliance with the law. The proposed protective order is fully consistent with this; it permits all remedies-related discovery to the extent that it does not inquire into plaintiffs' immigration and employment authorization status *per se*.[21] Proposed Protective Order (previously lodged with the Court), ¶ 3.

D. McKennon Does Not Require A Different Result

Defendants' reliance on the after-acquired evidence doctrine set out in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) is unpersuasive. Most importantly, as a threshold issue, this Court need not even reach the question of after-acquired evidence as to plaintiffs' immigration status and employment authorization, since the inquiries which might conceivably elicit any "after-acquired evidence" in that respect are properly barred for the reasons discussed above. Because defendants already have all the information needed to determine

---

[21] Defendants' extended discussion of Murillo v. Rite Stuff Foods, Inc., 65 Cal.App.4th 833 (1998) is unpersuasive. To begin with, defendants mischaracterize Murillo by suggesting that the "after-acquired evidence" doctrine permits a "complete defense" to a termination claim under the California Fair Employment and Housing Act. Defts.' Oppn. Brf. at 13. Instead, Murillo determined at most that the remedies available to the plaintiff in that case would be limited to redress for the employer's discriminatory acts while she was employed there. Id., 65 Cal.App.4th at 850. Moreover, to the extent that Murillo's treatment of remedies with respect to undocumented workers might be read to depart from the analyses of the federal authorities cited above, it is settled that state law having any impact upon the area of immigration may not conflict with federal law and policy. *See, e.g.*, League of Latin American Citizens v. Wilson, 1998 U.S. Dist. LEXIS 3418, 33, 37 (C.D.Cal. 1998) (court severed from Proposition 187 the definition of "an alien in the United States in violation of federal law," since that term, and the verification of status, *inter alia* "did not conform to federal law, and, in addition, were part of a scheme to regulate an area exclusively reserved to the federal government.); Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948) ("Because the federal government bears the exclusive responsibility for immigration matters, the states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.").

It is additionally noteworthy that Murillo emphatically pointed out that "[c]ourts must tread carefully in applying the after-acquired evidence doctrine to discrimination claims. . . . 'the prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued . . . [T]he likely consequence of the widespread application of after-acquired evidence will be underenforcement of [antidiscrimination statutes], and consequently underdeterrence of discriminatory employment practices." Id. at 849-50.

plaintiffs" "availability for work," there is simply no permissible reason for them to inquire any further. The protective order thus does not prejudice defendants in any manner.

Even leaving that aside, however, a defendant cannot be permitted to conduct an unfettered "fishing expedition" into sensitive matters where, as here, there are the "extraordinary equitable circumstances" of the exact sort recognized by the Supreme Court -- circumstances that strongly counsel in favor of plaintiffs' "legitimate interests" in having their legal claims decided without the inhibiting factor of fear being present. Id., 513 U.S. at 362.[22] The protective order reflects a measured and appropriate balancing of the equitable considerations at play in the present case.

E. Defendants Do Not Need to Learn Plaintiffs' Geographical Birthplaces To Determine Their National Origins

Here again, defendants' arguments are opaque at best. The very case defendants cite in support of their alleged need to know plaintiffs' physical places of birth states that national origin includes "the country from which his or her ancestors came." Espinoza v. Farah Mfg Co., Inc., 414 U.S. 86, 88 (1973). They provide *no* reason why plaintiffs' interrogatory answers identifying their countries of ancestry are inadequate to show their national origin. They provide the Court with *no* authority whatever for the proposition that national origin *must* be identified by geographical birthplace, or for the proposition that it *cannot* be identified either by reference to one's family's countries of origin or some other trait. Instead, defendants endeavor to convince the Court that they need geographical birthplace data "to determine if [the national origin information defendants supplied to the EEOC] is accurate." Defts.' Oppn. Brf., 9:14.

The cases make clear, however, that a plaintiff's national origin need not be defined in terms

[22] The Supreme Court's reference to "information acquired during the course of discovery," id., plainly does not include inquiries into extremely sensitive and prejudicial matters that are made despite the total absence of any showing of need or possible relevance. The EEOC has expressed concerns about application of the after-acquired evidence doctrine when there is no clearly permissible purpose for the discovery that leads to that evidence. *See, e.g.*, EEOC Enforcement Guidance on After Acquired Evidence and *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 65 EPD Par. 43, 368 (1995), No. 915.002, issued December 14, 1995 ("Launching a retaliatory investigation of a [charging party's] background in response to a charge or complaint of discrimination is one such equitable circumstance [of the type noted by McKennon as warranting flexible application of the doctrine]."). Id. at II.C.1. A true and correct copy of this Guidance is appended for the convenience of the Court at Exhibit D.

of her place of birth.[23] Indeed, the Title VII national origin cases commonly characterize plaintiffs by reference to the customary broader groupings, *e.g.*, simply as "Latino" or "Hispanic."[24] And even if defendants would try to persuade the Court that plaintiff Martha Rivera, who is of Mexican descent and speaks Spanish as her mother tongue, is not Latina, or that plaintiff Mao Her, who is of Hmong ancestry and a native Hmong speaker, is neither Hmong nor Asian, they could not do so for at least two reasons. If defendants are insisting on the formalism of a document styled as a "stipulation" in order to hold them to their agreement with plaintiffs as to their national origin, plaintiffs will be happy to oblige. Moreover, although defendants cavalierly call plaintiffs' suggestion that defendants should be bound by their own statements to the EEOC a "novel contention,[25]" plaintiffs note that defendants themselves incorporated their EEOC submissions into their discovery responses by reference.[26]

None of defendants' assertions have any merit. As was the case with the remedies issue, defendants already have all the information they need to establish plaintiffs' national origins.

---

[23] The Title VII cases are replete with situations in which the courts have refused to tie" national origin" exclusively to the country of a plaintiffs' birth, looking instead to broader ethnic, ancestral, and linguistic characteristics as well. *See, e.g.,* Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist., 154 F.3d 1117, 1119 (9th Cir. 1998) ("we have no trouble concluding that discrimination against Hopis constitutes national origin discrimination under Title VII."); Botello v. County of Alameda Social Services Agency, 1995 U.S. Dist. LEXIS 19532 (N.D. Cal. 1995) (rejecting employer's claim that plaintiff could not state a Title VII national origin discrimination claim because she was born in the United States); Roach v. Dresser Indus. Valve & Instrument Div., 494 F.Supp. 215, 218 (W.D. La. 1980) (person of Acadian or "Cajun" descent could maintain national origin discrimination claim); Gilbert v. Babbitt, 1993 U.S. Dist. LEXIS 15467, 8-10 (D. D.C. 1993) (upholding statutory coverage of Caucasian plaintiff who alleged discrimination because of her Hispanic national origin, court stated that it "resists the parties' invitation to rule on whether or not -- as a matter of law or as a matter of fact -- Ellie Gilbert is Hispanic. Such a ruling is not sensibly required by Title VII or the EEOC Guidelines, perhaps because Courts have no business deciding such matters. . . . Title VII must not be used to promote further racial and ethnic categorization," and citing Plessy v. Ferguson, 163 U.S. 537 (1896), as a negative example thereof).

[24] *See, e.g.,* Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 660 F.2d 1217, 1225 (7th Cir. 1981) (in case alleging national origin discrimination against "Latinos," court viewed terms "Latino" and "Hispanic" interchangeably); Morales v. Human Rights Div., 878 F. Supp. 653, 654 n.1 (S.D.N.Y. 1995) (in national origin case, "[t]he terms Hispanic and Latino shall be used interchangeably to denote persons whose ancestry originates from Spain, Portugal, or the nations of Latin America"); Pacheco v. IBM, 1991 U.S. Dist. LEXIS 6937, 1 (N.D.N.Y. 1991) (plaintiff of Latino national origin). *See also* Hernandez v. New York, 500 U.S. 352, 355 (1991) (using "Latino" and "Hispanic" interchangeably in equal protection context).

[25] Defts.' Oppn. Brf., 9:13.

[26] A true and correct copy of a representative such interrogatory answer is appended hereto as Exhibit E. Defense counsel additionally confirmed later that its reference to its EEOC submissions covered the entirety of those submissions. Ho letter to Kristi Culver Kapetan, June 5, 2000, at 3; Enos letter to Ho, July 24, 2000, at 4 (also appended hereto as Exhibit E).

Defendants' evasive and bad faith argumentation should be rejected.

F. The Proposed Protective Order Is Sufficiently Clear and Specific

Finally, defendants' complaint that the proposed order is "grossly ambiguous" is not well founded. As the Court is of course well aware, it is doubtful that any document, particularly in a litigation context, has ever been drafted that was invulnerable to the charge that it was "ambiguous" in some arguable respect. Notwithstanding that, plaintiffs' proposed order is plain and straightforward, certainly as much as could reasonably be expected of any such document regarding a vigorously disputed issue. Although defendants hyperbolically label as "mind-boggling" the manner in which plaintiffs define the areas where inquiry would be barred, they neglect to acknowledge that the proposed order incorporates numerous illustrative examples of the types of specific questioning that would be covered. Proposed Protective Order, ¶¶ 1-2.

For these reasons, the proposed order is amply clear and specific. Nevertheless, it goes without saying that plaintiffs would welcome any improving modifications that the Court may deem appropriate or, for that matter, any focused and non-conclusory suggestions from defendants, although none have been put forth thus far.[27]

III. DEFENDANTS' UNRELATED ARGUMENTS ARE IMPROPER AND MERITLESS

As noted above, defendants have contravened the Court's May 14, 2001 telephonic order by raising, in their papers opposing this motion, a host of unrelated complaints about the alleged misbehavior of plaintiffs' counsel at the deposition of Martha Rivera. Because the Court ordered that any motions arising from that deposition be filed by May 21, 2001 at the latest, those matters are not properly before the Court.

Nevertheless, two points deserve brief mention. First, defendants' extended discussion of

[27] Defendants' critique of the proposed order is somewhat disingenuous in this respect. They neglect to inform the Court that after the May 14, 2001 telephonic hearing, plaintiffs in fact attempted to meet and confer as to refining the protective order that was initially submitted to defendants for their consideration at the Rivera deposition. Among other things, plaintiffs asked defendants to provide more specific information than that contained in their May 16, 2001 letter (Exhibit B to Pltfs.' Opening Brief) regarding their areas of planned deposition questioning, so that a revised proposed protective order could be drafted in as clear and closely-tailored a manner as possible. Defendants declined to provide that additional information, even though many of defendants' stated areas of questioning appear to be exceedingly broad.

plaintiffs' counsel's instruction to Ms. Rivera not to answer selectively omits *any* discussion of Rule 30(d)(1)'s clear statement[28] that adjournment to seek a protective order to prevent a deponent from oppressive questioning is a proper basis for an instruction not to answer. [29] Second, in view of their present defiance of the Court's May 14 order, defendants' non-noticed "request for sanctions"[30] -- supposedly based on the instruction to Ms. Rivera as well as on plaintiffs' stipulated filing of the instant motion -- is audacious at best.

IV. CONCLUSION

Plaintiffs are anxious to proceed to litigate the substance of this case. Regrettably, because of defendants' insistence on discovery having no relevance to the issues -- compounded in many instances by disavowals of their prior representations on those matters -- too much delay has resulted. That insistence has not only tied up this litigation with ancillary disputes, but also threatens -- even if unintentionally -- to sow fear among the plaintiffs in such a manner as to frustrate the effective prosecution of their legitimate legal claims. The protective order that plaintiffs submit for the Court's approval resolves the parties' present discovery dispute by permitting all needed discovery to occur, while also ensuring that plaintiffs are protected from the "chilling" consequences of sensitive inquiries that are counter to well-established public policy.

For the foregoing reasons, therefore, plaintiffs respectfully request that the Court enter the proposed protective order.

Dated: June 4, 2001

Respectfully submitted,

Christopher Ho
Donya Fernandez
Julia Figueira-McDonough
The EMPLOYMENT LAW CENTER,
A Project of the LEGAL AID

---

[28] Rule 30(d)(1) provides in relevant part: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, *or to present a motion under Rule 30(d)(4*)." (emphasis supplied).

[29] This provision had previously been noted by plaintiffs. Pltfs.' Opening Brief at 1:18.

[30] Defts.' Oppn. Brf., 19:3-21:16, and Declaration of Howard A. Sagaser, 9:7-10.

SOCIETY OF SAN FRANCISCO

William J. Smith
Melvin M. Richtel
RICHTEL & SMITH

Alan L. Schlosser
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER

By: _____
CHRISTOPHER HO

Attorneys for Plaintiffs