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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION

Plaintiffs file this Supplemental Brief in Opposition to Defendants' Request for Reconsideration of a protective order issued by Magistrate Judge Sandra M. Snyder on June 18, 2001. This matter came before the Court on October 1, 2001, at which time the Court requested supplemental briefing. In finding good cause to issue an order limiting discovery into plaintiffs' immigration status and place of birth, Judge Snyder carefully examined the applicable law to reach a correct and equitable result.

For the reasons set forth in detail below, Judge Snyder's decision to issue the protective order was not in clear error or contrary to law:

(1) The discovery that defendants seek is barred by the Immigration Reform and Control Act of 1986, the regulations implementing that statute, and Equal Employment Opportunity Commission's Enforcement Guidance.

(2) Judge Snyder's order is supported by well-established case law.

(3) Plaintiffs' immigration status is not needed to determine remedies.

(4) The after-acquired evidence doctrine (which defendants rely upon almost exclusively) does not authorize this discovery.

II. THE STANDARD OF REVIEW

The sole question before this Court is whether Magistrate Judge Snyder's finding of good cause for granting the protective order was "clearly erroneous or contrary to law." Civ. L.R. 72-303; *see* Fed.R.Civ.P. 72(a). A central aspect of the protective order granted by Judge Snyder was that defendants should be barred from asking questions regarding plaintiffs' immigration status and place

of birth.[1] Allowing defendants, instead, to *pursue* discovery as to such matters would constitute a reversal of the Magistrate Judge's decision. As such, this Court is now required to determine whether her decision was clear error or contrary to law.

For the reasons that follow, plaintiffs submit that the result reached by Judge Snyder was mandated by the law, and was carefully tailored to achieve a manifestly just resolution in the context of the circumstances before the Court. It should therefore be affirmed.

III. DEFENDANTS' DISCOVERY AMOUNTS TO PROHIBITED REVERIFICATION UNDER IRCA, AND MUST BE DENIED FOR THAT REASON

Because the discovery defendants seek is barred by the Immigration Reform and Control Act of 1986 ("IRCA"), it cannot be undertaken. Permitting that discovery to go forward would be to contradict IRCA's carefully crafted statutory scheme – including that statute's painstaking and detailed balancing of the rights and responsibilities of employees and employers alike in the highly complex immigration law context. The protective order is required for this reason alone.

A. To Prevent Abuses, Congress Established Strict Limitations on the Employment Verification Process, Including Employer Attempts to "Reverify."

When it enacted IRCA, Congress sought to reduce illegal immigration but, at the same time, to prohibit abusive employer practices that would unlawfully discriminate against non-citizen immigrant workers and discourage immigrant workers from asserting their rights in the workplace. Because of substantial evidence[2] that those controls could be used by employers to selectively deny employment opportunities to minority group members[3] – particularly including Latinos and Asians –

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[1] It is plaintiffs' understanding from the Court's remarks at the October 1, 2001 hearing that the Court has no concerns with the substance of Section B of plaintiffs' [Proposed] Protective Order, lodged with the Court on May 21, 2001. That aspect of the Order is therefore not addressed in this brief.

[2] *See, e.g.*, H.R. Conf. Rep. No. 682, 99th Cong., 2d Sess., pt. I at 70, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5672 (testimony regarding impact of employer sanctions on minority groups).

[3] Id. (noting concerns that "employers, faced with the possibility of civil and criminal penalties, will be reluctant to hire persons because of their linguistic or physical characteristics.").

Congress added antidiscrimination provisions to complement IRCA's "employer sanctions."[4] Key among these provisions are prohibitions against "document abuse" or "document discrimination" – that is, employers' asking for "the production of any other document" [*i.e.*, other than those required by the I-9 employment verification process]." 8 U.S.C. § 1324a(b)(1)(A). *See also* 8 U.S.C. § 1324b(a)(6) (prohibition against requesting "more or different documents than are required under section 1324a(b) of this title").

These prohibitions make it an "unfair immigration-related employment practice" under IRCA for an employer *to require anything more than those documents the I-9 process requires.* Id. Unless the employee's initial work authorization has expired (*e.g.*, as in the case of a temporary work visa), or if the employer has actual knowledge that an employee is undocumented, the employer is categorically barred from requiring her to present those documents again (*i.e.*, "reverification").[5] 8 U.S.C. § 1324b(a)(6); 8 USC § 1324a(a)(2); 8 CFR § 274a.2(b)(1)(vii). Aside from those two narrowly-defined situations, IRCA's regulations make it unlawful for an employer to reverify in other circumstances, such as when an individual is not considered a "new hire" but rather "continuing in employment." An employee is deemed to be "continuing in his or her employment" *inter alia* when:

> *(4) An individual is on strike or in a labor dispute;* [or]
> *(5) An individual is reinstated after disciplinary suspension []or wrongful termination, found unjustified by any court . . . or otherwise resolved through reinstatement or settlement.*

8. C.F.R. § 274a.2(b)(viii)(A)(4), (5).

The document abuse and reverification provisions are plainly integral to effectuating the intent of Congress that undocumented workers would – even under IRCA – continue to be able to avail themselves of employment statutes such as Title VII.[6] Vigorous enforcement of those laws

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[4] Immigration Act of 1990, §§ 531-39, amending the Immigration and Naturalization Act ("INA"), § 274B, 8 U.S.C. § 1324b.

[5] *See* U.S. v. Padnos Iron & Metal Co., 3 OCAHO 414, 1992 WL 535554 (finding document abuse committed during reverification process, and rejecting respondent's defense of good faith compliance with statute).

[6] *See, 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

furthers the intent of IRCA by ensuring that employers gain no economic advantage by hiring undocumented workers.[7] Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro), 795 F.2d 705, 719-20 (9th Cir. 1986), *citing* Sure-Tan v. NLRB, 467 U.S. 883, 893 (1984).

B. IRCA's Prohibitions Against Reverification Apply With Equal Force in the Litigation Context.

The discovery defendants seek concerning plaintiffs' immigration status and closely related matters would, if permitted by the Court, plainly violate IRCA's carefully-designed employment verification process. Any argument that the civil litigation context magically renders these inquiries benign -- let alone totally immunizes them from IRCA's bar on "reverifying" inquiries -- is meritless because it would allow them to engage in the very practices proscribed by Congress. Were this Court to permit this discovery to proceed, it would be setting a very dangerous legal precedent: that immigrant workers who wish to assert their legal rights can be stripped of their IRCA protections once they step into the judicial system. Such a precedent would severely undermine the purposes of IRCA itself.[8]

Federal labor standards agencies such as the [EEOC] to remedy unfair practices committed against undocumented employees for exercising their rights . . . To do otherwise would be counterproductive of our intend to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment. "), 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).

[7] Judge Coyle noted in Tortilleria that enforcing the employment rights of undocumented workers furthers the purpose of IRCA by reducing the incentive for employers to hire undocumented workers. *See e.g.* Tortilleria, 758 F. Supp. at 593. As a result, retaliation against workers who file claims against their employers is illegal. *See e.g.* Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1059-60 (N.D. Cal. 1998) (finding allegedly undocumented plaintiff entitled to seek punitive damages under the Fair Labor Standards Act when employer retaliated against her for filing a wage claim).

However, by themselves the statutory coverage and retaliation provisions do not address the reluctance of undocumented workers to bring Title VII cases due to their "fear of deportation" that Judge Coyle referred to in Tortilleria, if workers suspect that they will have to reveal their documentation status in the process of litigation. *See e.g.* Tortilleria, 758 F. Supp. at 593.

[8] Not surprisingly, the issue reverification tends to arise in the employment or labor context where workers have attempted to avail themselves of their workplace rights. By identifying reinstatement after wrongful termination as a situation in which an employer may not reverify an individual's work authorization, the IRCA regulations explicitly contemplate and prohibit reverification in the context of litigation. It would be illogical for Congress to have prohibited reverification upon reinstatement after a wrongful termination case if employers could nonetheless reverify that same worker's status during the discovery process of the underlying employment case.

Moreover, since the majority of the plaintiffs have been rehired by defendant R.M. Wade & Co. after Wade acquired the plant from defendant NIBCO, Inc. in 1999, IRCA excludes them from reverification even in the absence of this litigation by virtue of being current employees. 8 U.S.C. § 1324b(a)(6); 8 USC § 1324a(a)(2); 8 CFR § 274a.2(b)(1)(vii); 8 C.F.R. § 274a.2(b)(viii)(A)(4), (5). Allowing defendants to nonetheless reverify their work eligibility would single them out due to their having filed a discrimination claim against defendants -- contravening the intent of IRCA that reverification not be used to discourage workers from asserting their rights.[9]

The importance of those protections to the integrity of workplace statutes, and indeed to the integrity of the federal courts themselves, is difficult to overstate. Were employers permitted to engage in IRCA-prohibited inquiries, it would – as this Court itself noted during the October 1 hearing on this matter – deter and intimidate employees who, through their claims, would advance the enforcement of important employment laws such as Title VII.

In sum, Magistrate Judge Snyder reached exactly the right result in issuing an order that takes those protections into account. By so doing, Judge Snyder clearly understood the need to craft a solution fully consonant with the IRCA statutory scheme that was established by Congress. Far from being "contrary to law," therefore, her decision is entirely consistent with the law and, indeed, dictated by it.

IV. THE IMPORTANCE OF ADHERING TO IRCA'S SAFEGUARDS FINDS EXTENSIVE SUPPORT IN THE LAW

As did Magistrate Judge Snyder, the federal agencies charged with administering federal workplace laws have recognized the important purposes of IRCA's protections. The U.S. Equal Employment Opportunity Commission, in an 1999 enforcement guidance on this subject, cites to IRCA and its implementing regulations to conclude that "employers may not request or reexamine I-9 documents of workers returning from a discriminatory discharge" unless the employer *knows* that the worker is unauthorized (emphasis supplied). EEOC Enforcement Guidance on Remedies

[9] See footnote 6, *supra*.

Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999 ("EEOC Guidance").[10] Likewise, in a recent opinion of its General Counsel, the National Labor Relations Board reiterated IRCA's prohibition on reverification in the context of a discrimination case against an employer:

> [Q]uestions concerning reinstatement are only appropriately raised in a [NLRB] 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.[11]

Likewise, Magistrate Judge Snyder's order prohibiting the use of discovery to probe into plaintiffs' immigration status is equally well supported by established federal case law. The Ninth Circuit, in reversing a National Labor Relations Board decision conditioning back pay on proof of work authorization, upheld the administrative law judge's decision to permit discriminatees to testify under assumed names and to refuse to answer questions relating to their immigration status. Felbro, 795 F.2d at 710. More recently, consistent with Felbro, a materially identical protective order was granted by another district court within this Circuit. In Acevedo-Valdovino v. Vander Houwen, No. CY-98-3074-RHW (W.D. Wash. 1999) (action under the Migrant and Seasonal Agricultural Worker

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[10] 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 A.

[11] 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). "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).

Since the NLRA was the model for Title VII's remedial provisions, cases interpreting the NLRA are persuasive in construing those provisions of Title VII. Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 909 (1989). *See also* EEOC Guidance at n.3 and associated text (looking to decisions applying the NLRA for guidance in interpreting Title VII back pay provisions). A true and correct copy of the General Counsel's opinion is appended hereto for the convenience of the Court as Exhibit B.

Act and citing to, *inter alia,* Felbro, 795 F.2d at 719; In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom*. McAllen v. Reyes, 487 U.S. 1235 (1988)), the court noted that "[i]f documented and undocumented workers are to be treated identically, their status as documented or undocumented becomes immaterial. Discovery on alienage issues cannot lead to admissible evidence because it cannot lead to relevant evidence." (citations omitted.)[12]

Like the Ninth Circuit, the Fifth Circuit has placed limitations on defendant-employers' ability to conduct invasive discovery regarding workers' immigration status and related issues. In In re Reyes, *supra*, the court reversed a district court's order permitting discovery into *inter alia* plaintiffs' citizenship status, places of birth, and immigration status. The Fifth Circuit noted that plaintiffs could be deterred from pursuing their rights if the discovery were permitted, due to the "embarrassment and inquiry into their private lives" and potential collateral consequences.[13] Id., 814 F.2d at 170. *See also* Montelongo v. Meese, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (district court barred inquiry into the immigration status of class members in an action under Farm Labor Contractor Registration Act).

In addition to being required by IRCA, therefore, Magistrate Judge Snyder's order finds wide support in the authoritative agencies interpreting that statute and in the courts that have addressed the question of discovery in the immigration context. Far from being "contrary to law," her result was the correct one.

V. DEFENDANTS' DISCOVERY IS NOT NEEDED TO DETERMINE REMEDIES

Because no discovery is required for the determination of plaintiffs' remedies if they prevail

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[12] The decision in Acevedo-Valdovino is appended as Exhibit C. Plaintiffs respectfully request that the Court take judicial notice thereof pursuant to Fed.R.Evid. 201.

[13] The In re Reyes court reasoned that such information:

> was completely irrelevant to the case before it and was information that could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case.

on the merits of their action, the proposed protective order is appropriate.

A. The Calculation of Plaintiffs' Monetary Damages Does Not Require A Determination of Their Immigration Status

Both the Ninth Circuit and the courts of the Eastern District have consistently found that the entitlement of plaintiffs to monetary relief for employment claims is unaffected by their immigration or employment authorization status. *See, e.g.,* Felbro, 795 F.2d 705 (granting NLRB petition for enforcement containing back pay award); Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986) (upholding arbitration awards granting back pay to undocumented employees); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) (following Felbro regarding back pay availability);[14] EEOC v. Tortilleria "La Mejor," 758 F.Supp. 585 (E.D. Cal. 1991) (scope of Title VII not diminished by passage of IRCA).

These courts are in accord with the EEOC's Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, which states "[E]mployers who discriminate against unauthorized workers are liable for monetary relief, including compensatory, punitive, or liquidated damages, to the same extent as for authorized workers." EEOC Guidance, III.B.3. *See also* Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1059-60 (N.D. Cal. 1998) (finding allegedly undocumented plaintiff entitled to seek punitive damages under the Fair Labor Standards Act, and noting "the Ninth Circuit's historically expansive view of remedies under federal labor laws").

In re Reyes, 814 F.2d at 170. Such a result cannot be foreclosed in the instant action.

[14] Although Felbro and Hacienda Hotel concerned claims filed prior to IRCA's enactment in 1986, their reasoning has been adopted in cases postdating IRCA, including in cases decided by the Eastern District. *See, e.g.,* EEOC v. Tortilleria "La Mejor," 758 F.Supp at 593-94 (*citing* Felbro, Apollo Tire, and Hacienda Hotel, regarding scope of Title VII's coverage of undocumented workers); Contreras v. Corinthian Vigor Insurance Brokerage, Inc,.25 F.Supp.2d at 1059 (*citing* Felbro, Hacienda Hotel, and Bevles on the issue of monetary damages). *See also* NLRB v. Kolkka, 170 F.3d 937 (9th Cir. 1999); EEOC Guidance at n.13 and 29 (citing to Felbro and Hacienda Hotel).

Only in situations where an employer has "actual" or "constructive" knowledge than an employee is undocumented is any reverification of employment authorization appropriate, and then only through the established I-9 process and at the time remedies were awarded. NLRB v. A.P.R.A. Fuel Oil Buyers Group, 134 F.3d 50 (2d Cir. 1997) (*citing* extensively to Felbro as basis for reinstatement conditioned on presentation of I-9 documents within reasonable period prior to time of rehire, and noting that"[C]ongress . . . [in enacting IRCA] expressly approved the view of the Supreme Court in Sure-Tan [v. NLRB, 467 U.S. 883 (1984)] (that undocumented workers are entitled to labor protections."); 8 USC § 1324a(a)(2). Since, as already noted, defendants have no basis for believing any of the plaintiffs to be undocumented, even this post-trial procedure would not be applicable.

For these reasons, defendants cannot point to remedies calculations as a basis for the discovery they seek.

B. Likewise, Awards of Reinstatement Do Not Require A Determination of Plaintiffs' Immigration Status

Undocumented workers are presumptively entitled to reinstatement, unless the employer has actual knowledge that a given worker is undocumented.[15] EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999. Thus, for essentially the same reasons as those concerning monetary remedies, pre-trial discovery into plaintiffs' immigration or employment authorization status is not required. Moreover, plaintiffs' post-trial reinstatement need not be conditional inasmuch defendants have no "actual" or "constructive" knowledge that any of them are undocumented. Sure-Tan v. NLRB, 467 U.S. 883, 902 (1984) (approving NLRB order of

[15] Similarly, the NLRB has stated that without an affirmative showing that a discriminatee is unauthorized to work in this country, unconditional reinstatement is required. NLRB Memorandum GC 98-15.

conditional reinstatement of undocumented employees); A.P.R.A., *supra*, 134 F.3d at 57 (ordering reinstatement, conditioned upon presentation within a reasonable time, of I-9 documents). In this way, courts are not put in the position of having to determine plaintiffs' work eligibility, and the employer is not required to reinstate a worker whom it knows to be undocumented.

As plaintiffs apprised the Court during the October 1, 2001 hearing on this matter, plaintiffs have already supplied defendants with information they currently have concerning their mitigation efforts, such that any back pay award this Court may make can be appropriately adjusted as needed. As the foregoing authorities make clear, however, this Court is not charged with the task of delving, for remedies purposes, into the technical intricacies of plaintiffs' immigration status.[16] Nor are the plaintiffs themselves necessary capable to make legal determinations as to their status.[17] As such, this provides no basis for defendants' discovery requests.

VI. THE AFTER-ACQUIRED EVIDENCE DOCTRINE DOES NOT AUTHORIZE THE DISCOVERY AT ISSUE

The foregoing reasons demonstrate that the discovery that defendants seek, and the way they seek it, are flatly impermissible. Moreover, defendants' heavy reliance upon the "after-acquired

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[16] Even assuming *arguendo* some remotely imaginable reason for obtaining the requested information, the intricate and complex nature of immigration law has led the Ninth Circuit to conclude that questions concerning the immigration status of workers should be left to the appropriate authorities instead of trying to determine such matters in an unrelated court proceeding where such workers are attempting to assert their rights. Referring to its earlier decision in Apollo Tire, the Ninth Circuit noted, "We hesitate to require the (NLRB) to delve into immigration matters, out of its field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service." Felbro, 795 F.2d at 717-18. The EEOC has likewise determined that it is "not charged with the enforcement of IRCA and should not participate in 'the process of determining an employee's immigration status.'" EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999.

[17] Asking plaintiffs to testify as to their immigration status requires them to draw a legal conclusion that they may not be fully qualified to draw, in part because these intricacies. Many individuals are not aware that they may have a legal right to be in the United States, and it is not uncommon for some individuals from families of blended alienage to be unaware that they are U.S. citizens through birth or through derived or acquired citizenship, or are entitled to derivative legal status. *See generally*, 8 U.S.C. 1431, 1433. In addition, the immigration status of individuals who are the process of legalizing may be difficult to determine with certainty.

evidence" doctrine is wholly misplaced on two grounds: 1) no such evidence is present here; and 2) even assuming *arguendo* that this doctrine applied here, it would not permit defendants to engage in the groundless "fishing expedition" they wish to undertake without regard to statutory schemes such as IRCA, or the appropriate limits imposed by the Federal Rules of Civil Procedure.

A. The Doctrine Does Not Apply Here, Because There Is No "After-Acquired Evidence" To Begin With.

McKennon is inapplicable to the present dispute for the plain reason that there is no "after-acquired evidence" here. For a defendant to properly invoke the after-acquired evidence doctrine, "it must prove that . . . the employee *actually committed the misconduct*." (emphasis supplied) *See, e.g.*, Bullock v. Balis & Co., Inc., 2000 U.S. Dist. LEXIS 18207 (E.D. Pa. 2000); Johnson v. City of Elgin, 2001 U.S. Dist. LEXIS 2109 (N.D. Ill. 2001) (defendants must allege existence of after-acquired evidence). Defendants do not allege that there is evidence before the parties or the Court of *any* "employee wrongdoing that would lead to a legitimate discharge," McKennon, 513 U.S. at 362. Indeed, defendants have *no* legitimate reason whatsoever to believe that this discovery would in fact reveal any evidence of "employee wrongdoing."

Thus, even as a threshold matter, defendants' virtually exclusive reliance on the after-acquired evidence doctrine must fail.

B. McKennon Does Not Authorize Defendants To Embark Upon A Discovery "Fishing Expedition" That Would Trammel IRCA

Even assuming *arguendo* that McKennon were somehow determined to apply to the instant situation, it does not sanction the discovery defendants seek.

Defendants would have the Court believe that McKennon's after-acquired evidence doctrine constitutes an unstated license to conduct discovery otherwise barred by statute – including IRCA -- or limited pursuant to the protections against discovery abuses contained in the Federal Rules of Civil Procedure. Indeed, defendants turn the doctrine on its head, contending that it presumptively justifies any attempts to obtain (alleged) evidence necessary to even invoke the doctrine in the first

place.[18] But nowhere does McKennon authorize a different, more invasive discovery standard wherever a defendant speculatively postulates the possible existence of after-acquired evidence. To the contrary, McKennon only addresses the impact of such evidence *after* it has been obtained. Nothing in McKennon gives defendants license to disregard Congressionally-enacted statutory schemes such as IRCA, or the appropriate limits imposed by the Federal Rules. Notably, the McKennon Court itself pointed out the possibility that the doctrine could be subject to abuse by employers, stating, "The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the [Age Discrimination in Employment] Act is not an insubstantial one," *id*. at 363 (recommending *inter alia* use of Rule 11 sanctions to counter such abuses).

The Court's concern in this regard is echoed in the decisions applying McKennon,[19] Indeed, several courts have expressly criticized employers' use of discovery "fishing expeditions" in pursuit of after-acquired evidence. *See, e.g.*, Miller v. AT&T, 83 F.Supp.2d 700, 706 (S.D.W.V. 2000) ("Even if the after-acquired evidence doctrine applies, it is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages."); Washington v. Lake County, 969 F.2d 250, 255 (7th Cir. 1992) (approving of application of doctrine in a manner "that . . . weakens the incentive for an employer to engage in a fishing expedition"), *citing* O'Driscoll v. Hercules, Inc., 745 F.Supp. 656, 659 (D. Utah 1990); Dodge v. Hunt Petroleum Corp., 1998 U.S. Dist. LEXIS 9963, 3 (N.D. Tex. 1998) (finding that broad scope of defendant's efforts to discover after-acquired evidence may support inference of

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[18] In fact -- despite defendants' virtually exclusive reliance on the "after-acquired evidence" doctrine to legitimate the disputed discovery -- *none* of defendants' recently proposed interrogatories are geared toward such evidence. Six of the eight interrogatories request information about whether plaintiffs have been "lawfully entitled to work in the U.S." *after* their termination from NIBCO. *None* of the interrogatories bear upon plaintiffs' status at the time they applied to NIBCO for employment or, indeed, at any time during that employment. *See* [Proposed] Defendants' Set of Interrogatories Submitted Pursuant to the Hearing on October 1, 2001, and cover letter thereto, dated November 1, 2001. True and correct copies of these materials are appended hereto as Exhibit D. *See also* plaintiffs' response thereto dated November 9, 2001, a true and correct copy of which is appended hereto as Exhibit E.

[19] *See, e.g.*,Frazier Industrial Co., Inc. v. NLRB, 213 F.3d 750, 760 (D.C. Cir. 2000); Watson v. Riverside Osteopathic Hospital, 78 F.Supp.2d 634, 646 (E.D. Mich. 1999); McCray v. DPC Industries, Inc., 875 F.Supp. 384, 389 (E.D. Tex. 1995).

retaliatory purpose). Here –particularly where defendants have no factual basis whatsoever to believe that any of the plaintiffs have engaged in "wrongdoing," *supra* -- there can be no grounds for permitting the unprecedented discovery they so vigorously pursue.[20]

Notwithstanding defendants' strained construal of McKennon, the after-acquired evidence doctrine does not create an independent justification for the discovery defendants seek – discovery that would flout the prohibitions established by IRCA. To the contrary, the courts have pointed out myriad ways in which such evidence may be obtained short of such invasive discovery. For example, the court in Watson, *supra*, observed:

> [T]he present case does not implicate McKennon's concern that 'employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims' asserted by discharged employees. [Citation omitted] [I]n this case, much of the after-acquired evidence came from the testimony of Plaintiff herself, other evidence was provided to [the defendant] by co-workers after Plaintiff's discharge and well before this suit, and all of this merely corroborated [defendant's] prior determination [of the plaintiff's wrongdoing.]

Id., 78 F.Supp.2d at 646. Defendants cannot be heard to complain that the after-acquired evidence doctrine requires this Court to permit discovery prohibited by IRCA.

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[20] The concerns raised by the chilling effect of these highly sensitive yet irrelevant inquiries certainly fall within the "extraordinary equitable circumstances" noted by the U.S. Supreme Court in McKennon that counsel a modification in the application of the "after-acquired evidence" doctrine – that is, even assuming *arguendo* that the doctrine had any application here, which plaintiffs obviously dispute. Indeed, as Magistrate Judge Snyder observed, unlike cases where employees who have committed application fraud or engaged in wrongdoing merely face a cap on damages, "undocumented employees face a much more serious ramification from background discovery -- -- possible deportment [sic] and criminal prosecution." Rivera v. NIBCO, Inc., 2001 U.S. Dist. LEXIS 8335, 14 (E.D. Cal. 2001).

VII. CONCLUSION

For the foregoing reasons, Magistrate Judge Snyder's issuance of the protective order was neither "clearly erroneous" nor "contrary to law." Civ. L.R. 72-303. Plaintiffs therefore respectfully request that the Magistrate Judge's decision be affirmed, and that this Court accordingly enter plaintiffs' proposed protective order.

Dated: November 13, 2001

Respectfully submitted,

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