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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION

Through this motion, defendants seek leave of this Court to conduct immigration-related discovery that was previously limited and barred by the Court's protective order of June 18, 2001 (the "Protective Order"). Specifically, defendants not only insist that this information can only be obtained through deposition examination, but intend *to reopen the depositions of the twenty plaintiffs who will already have been deposed* by the time this motion is heard. Defendants' justification for this unnecessarily intrusive and logistically nightmarish scenario is based entirely on their interpretation of the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. ___, 122 S. Ct. 1275 (2002), from which they boldly discern the following legal "axiom":

> *It is now therefore axiomatic that, part and parcel to the Hoffman Plastic decision, parties in an employment dispute must first be entitled to ascertain the extent a plaintiff was lawfully employed in the United States prior to ultimately learning the extent of his or her potential lawful claims. Accordingly, Hoffman Plastic reveals that the Court's Protective Order constitutes invited error.*[1]

In their haste to capitalize upon Hoffman, however, defendants misunderstand and overstate what the Supreme Court actually held. Although defendants might wish that Hoffman were a discovery case, it is not. Moreover, the extensive new deposition discovery they demand fails to satisfy the criteria of Fed.R.Civ.P. 26(c). Therefore, defendants' motion should be denied, and the Court should adopt plaintiffs' compromise alternative.

In Section II, plaintiffs will demonstrate how defendants misrepresent the Supreme Court's decision, and why it does not authorize the extensive discovery defendants seek. Plaintiffs will also address the serious and highly prejudicial consequences of allowing defendants to conduct discovery

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[1] Defts.' Opening Brief at 2:20-24. Defendants' persistent invocation of the "invited error" doctrine, here and elsewhere in their brief, is mysterious. That doctrine provides that "one may not complain on review of errors below for which he is responsible." *Sovak v. Chugai Pharmaceutical Co.*, 2002 WL 531396 * 3 (9th Cir. 2002) , citing *Deland v. Old Republic Life Ins. Co*, 758 F.2d 1331, 1336-37 (9th Cir. 1985). The gist of the "invited error" doctrine is that where one party offers inadmissible evidence, which is received, opponent may then offer similar facts whose only claim to admission is that they negative or explain or counterbalance prior inadmissible evidence, presumably upon the same fact, subject, or issue." Black's Law Dictionary (5th ed. 1979), 742. However, this doctrine is irrelevant here because this case is not before a reviewing court. Nor has any "inadmissible evidence" been improperly admitted, since no evidence at all has been placed before the Court at this stage of this action.

into plaintiffs' immigration status.

Section III will set forth a judicially efficient compromise proposal that would address the legitimate interests and needs of both sides. Under this proposal, plaintiffs will provide the Court *in camera* with indisputable proof of their work authorization -- including a certification from the Social Security Administration as to their authorization to work in the United States throughout the back pay period. This would enable the Court to deduct from any overall back pay award the back pay of those plaintiffs – if any – who cannot proffer such proof. Thus, this process will ensure that defendants will not be required to satisfy any back pay judgment which is arguably not consistent with Hoffman. Moreover, it will obviate the need for plaintiffs to undergo immigration-related questioning, if not reopened depositions, which would be intrinsically humiliating and highly invasive because of the sensitive nature of their subject matter. Finally, because it would obviate the need for the 20 additional depositions that defendants want, the current trial date of October 8, 2002 would be maintained.

II. ARGUMENT

Plaintiffs acknowledge the central holding of Hoffman – that an employee's immigration status will condition her entitlement to back pay remedies. Moreover, plaintiffs will assume *arguendo* (for purposes of this motion only) that: (1) Hoffman's rationale applies to back pay remedies under Title VII as well as the National Labor Relations Act[2]; and (2) if information

[2] Defendants have not bothered to provide the Court with any reasons why Hoffman, a case arising under the National Labor Relations Act, should be found applicable to Title VII, and plaintiffs do not concede the veracity of that assumption. Among other things, there is a significant difference in the purposes each statute was enacted to achieve. As the Hoffman Court noted, "the 'award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have suffered harm'". Id., slip op. at 14 n.6. In contrast to the "make whole" purposes of the NLRA, however, Title VII's far more expansive remedies (including back pay, front pay, compensatory and punitive damages, broad equitable and injunctive relief, and attorneys' fees) were enacted by Congress not only to make discrimination victims whole, but additionally to deter future employer misconduct. *See, e.g.*, Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1360 (9th Cir. 1985) **("**Title VII was designed to deter and remedy discrimination on the basis of group characteristics"); Perez v. Globe Airport Security Svcs., Inc., 253 F.3d 1280, 1288 (11th Cir. 2001) (observing that Congress intended Title VII to both remedy and deter discrimination, court held that severing costs and fees provisions from arbitration agreement would frustrate

indicating a plaintiff's undocumented status after her termination by defendant NIBCO were present in the record of this case, it would be relevant to determining the extent of her entitlement to back pay.

Nevertheless, not even an expansive reading of Hoffman would support defendants' cumbersome and unworkable scheme to reopen the overwhelming majority of plaintiff depositions. To the contrary, because of its potential to chill plaintiffs in the exercise of their rights under Title VII, the depositions defendants seek are not supported by the criteria set out in Fed.R.Civ.P. 26(c). Lastly, the new round of depositions they envision would create needless delay, expense, and logistical difficulties.

A. Hoffman Provides No Guidance As To How Plaintiffs' Immigration Status May Permissibly Be Discovered, Let Alone Provide A Blank Check For Defendants To Conduct A "Fishing Expedition."

Because defendants misrepresent Hoffman, it is important to correctly understand the Court's opinion for what it decided, and what it did not.

In Hoffman, the Supreme Court decided that the National Labor Relations Board ("NLRB" or "Board") improperly awarded back pay to an undocumented employee who had been retaliatorily fired in violation of the National Labor Relations Act ("NLRA"). The Court reasoned that providing back pay to undocumented workers as a remedy for illegal employer actions ran counter to the federal policy against unlawful immigration, and that Congress could not have intended that the back pay remedy would be available to undocumented workers. As a result, the Court vacated the Board's back pay award to the employee – who, in a post-trial remedies proceeding[5] had testified as to his immigration status before the General Counsel's objection to the employer's line of questioning was sustained.

Contrary to defendants' overbroad portrayal of Hoffman, however, the Supreme Court *did*

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both purposes, in that it would "reward the employer for its actions and fail to deter similar conduct by others.")

[5] Indeed, the word "discovery" appears only once in the Court's opinion, in a discussion of the Form I-9 process that is carried out at the time of hire. Hoffman, slip op. at 10.

not address the use of discovery by employers seeking to determine a plaintiff's immigration status. There is absolutely no discussion of the discovery process (whether civil or administrative). Nor did the Supreme Court ever discuss, let alone endorse, the process by which the information was obtained in the compliance proceedings. It did not ratify unfettered, "fishing expedition" discovery, or discuss how the balancing factors set out at Fed.R.Civ.P 26(c) would apply to the discovery of such sensitive and potentially prejudicial information.[5] Quite the opposite: the question of *how* a plaintiff's immigration status may be learned was simply not before the Court. As the NLRB stated in its underlying decision – *i.e.,* the subject of the appeal that led to the Court's ruling in Hoffman – *"there is no issue before us as to whether the judge should have barred the Respondent from questioning Castro about his eligibility for employment."* Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060, 1061 n.9 (1998) (emphasis supplied) (noting irregularity of the means by which that information made its way into the ALJ's decision, but observing that no exception thereto had been raised by the Board.[6]). (Defendants' argument (Defts.' Opening Brief at 9:15-23) that the Hoffman Board found such discovery proper is thus flatly incorrect and seriously mischaracterizes its decision.)

Accordingly, Hoffman *nowhere* addresses the issue of *how* an undocumented employee's immigration status may permissibly come to light in the first place. *Nowhere* does it speak to the permissible manner of discovery where -- as here – there is no evidence whatsoever that any of the plaintiffs are undocumented. Yet – irrespective of the balancing mandated by Fed.R.Civ.P. 26(c) -- defendants ask this Court to conclude that the theoretical existence of immigration-related information that may be relevant to the extent of remedies justifies *any* conceivable method of discovery that could uncover any such information. But the mere fact that each of the plaintiffs belongs to a national origin minority community does not entitle defendants to conduct oppressive discovery into their immigration status with a fervor that would certainly be absent otherwise.

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[6] The Board noted that "[a]t the end of the questioning, the judge stated he was sustaining the objection. Nonetheless, in his written decision, he made factual findings based on Castro's admission." Id. Oddly enough, the Board did not file an exception to the ALJ's findings based on that irregularity. Id.

Indeed, it is well worth noting that defendants have already verified each plaintiff's employment authorization through the I-9 process at least two, if not three, times as a result of the changes in ownership of the Fresno facility during the relevant time period. Plaintiffs are unaware of even one instance where defendants called any plaintiff's immigration status into question during their employment there. It is not until now that plaintiffs have filed this Title VII action against defendants that their immigration status is being called into question. The intrusive discovery that defendants now seek is, for that reason, strongly suggestive of actionable retaliation under Title VII.

B. Plaintiffs Have A Legitimate Interest In Being Protected From Deposition Questions About Their Immigration Status

Rule 26(c) of the Federal Rules of Civil Procedure provides that the district court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" that could be caused her in the civil discovery process. *See also* Fed.R.Civ.P. 30(d)(4) (concerning terminations of depositions in order to seek protective order against oppressive questioning).

As plaintiffs have already noted in their several submissions relating to the Protective Order, permitting defendants freely to depose them on sensitive matters relating to their immigration status would create a significant chilling effect that would profoundly impact plaintiffs' ability to pursue this litigation and enforce their rights under Title VII. *See, e.g.,* In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery concerning plaintiffs' immigration status, noting that such discovery could inhibit their pursuit of their legal rights "because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives"); John Dory Boat Works., Inc., 229 N.L.R.B. 844 (1977) (Board enjoined employer from calling employees' immigration status into question, noting that the impact upon witnesses of immigration-related

[9] A copy of the referenced slip opinion in the Flores matter is appended hereto for the convenience of the Court as Exhibit A.

questions at Board proceeding "ranged from unsettling to devastating and certainly affected their ability to testify.").

Notably, the reality of this chilling effect was recently reaffirmed, post-Hoffman, by the Central District in a Fair Labor Standards Act action in which the plaintiffs sought their unpaid wages. Recognizing the obligation to balance the need for the discovery sought against its potential to harm plaintiffs' legitimate interests, the district court rejected the employers' motion to compel plaintiffs to produce immigration-related documents. In so doing, the court observed:

> [A]s the Magistrate Judge found, there is an *in terrorem* effect to the production of such documents. It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation.

Flores v. Albertsons, Inc., 2002 U.S. Dist. LEXIS 6171, 20 (C.D. Cal. April 9, 2002) (slip op. at 11:16-19.).[9]

Although Flores concerns FLSA wage claims for work already performed, as opposed to Title VII back pay remedies, the district court's observation about the intimidating effect of immigration-related discovery is accurate, and applies here with full force. Allowing defendants to examine each plaintiff about her or his immigration status will have exactly such an *in terrorem* effect – *i.e.,* one of the precise sort that the Court has acknowledged as a serious concern in this case. Rivera, et al. v. NIBCO, Inc., et al., 204 F.R.D. 647, 651 (E.D. Cal. 2001). Defendants' invasive proposal will only serve to effectively deprive plaintiffs of their legal entitlement to pursue the protections afforded them by Title VII because they would almost certainly withdraw from the case if faced with that prospect. (It is interesting to note that defendants' current insistence on depositions is at odds with their previous willingness to use other, less intimidating means of discovery.[10]) Indeed, it is difficult not to perceive the threat of deposition questions about

[10] Although defendants are currently insisting that information concerning plaintiffs' immigration status can only be obtained through depositions, they previously represented that they could obtain the same information through interrogatories, and in fact proposed a set of interrogatories to plaintiffs on November 1, 2001. *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

immigration status as, in essence, a strategy to force plaintiffs to drop out of this case for fear of adverse immigration consequences.

It is important to note that such questions will have a negative impact not only on those who may not be documented but, indeed, on *all* 25 plaintiffs. The experience of immigrating to another country – often times as refugees fleeing wars and persecution, dealing with the Immigration & Naturalization Service and other governmental bureaucracies, and having to navigate an extremely complex technical and legal process in order to adjust one's immigration status -- is a very oppressive process for most individuals. Because, for the majority of the plaintiffs, this lawsuit has been their first encounter with the judicial system in the United States, the entire discovery process has been filled with anxiety and apprehension. Being required to undergo further deposition examination and answer questions that, in effect, demand that each plaintiff re-justify her presence in the United States would be a humiliating and embarrassing experience that would needlessly demoralize plaintiffs, and weaken their resolve to see this case through to its end.[11]

C. Reopening And Rescheduling 20 Depositions Would Needlessly Create A Logistical Nightmare And Impose Still Further Delay

Plaintiffs are extremely skeptical of the logistical nightmare that defendants' proposed re-depositions would entail. Likewise, the courts are clear that the requests to reopen discovery must be closely scrutinized, *see, e.g.*, McGlinchy v. Shell Chemical Co., 845 F.2d 802, 809 (9th Cir. 1988) (court found that reopening discovery, including the taking of additional depositions, would be

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appended hereto as Exhibit B. In the December 10, 2001 hearing on this matter, defendants stated, "that's something that we are willing to agree to" (referring to interrogatories). 29:1-3.

[11] As the Court noted in the October 1, 2001 hearing on this matter, "[a] major concern by the plaintiffs, which is understandable, is a potential chilling effect, policy considerations that have been addressed by a number of courts that an order requiring disclosure of certain information could subject any plaintiff to perhaps a criminal prosecution, perhaps deportation, other collateral-type consequences, which could both in this case and in other cases have a detrimental effect upon plaintiffs and potential plaintiffs. I'm certainly well aware of that. If an employer has violated the laws, it certainly is not good policy. In fact, it is bad policy to allow a situation whereby essentially unfettered discovery that an employee -- I'm not saying in this case, but just in terms of policy, that an employer could somehow either deliberately or as a matter of consequence intimidate employees or former employees from either pursuing legitimate claims or causes of action or pursuing them to closure." 5:11-25; 6:1-2.

highly prejudicial to defendants due to resulting delay and expense). Although defendants will doubtless attempt to conjure up for the Court a scenario under which these legions of re-depositions could be easily undertaken with assembly-line efficiency and *de minimis* cost, this could not be more at odds with reality.

Getting to the present stage in the depositions, where roughly 80 percent of the plaintiffs have been deposed, has necessitated Herculean efforts by all involved. Each such deposition has not only involved several hours of preparation time per plaintiff, but also the complicated logistics of scheduling those preparation sessions to coincide with attorney and interpreter availability, as well as to accommodate plaintiffs' work schedules, transportation, unexpected illnesses, and family responsibilities, including the need to find alternative childcare for children or grandchildren under their care. Indeed, due to the need to also factor in defense counsel's availability for the depositions themselves, the types of scheduling problems mentioned are exacerbated still further. Requiring interpreters and court reporters to come in a second time for the same witnesses will add significantly to the extremely large deposition costs already incurred by the parties. Little wonder, then, that although plaintiffs' depositions commenced in January, they have yet to be completed despite all parties' best efforts. There is no reason to think that any of these obstacles will disappear if the parties must now attempt to reset 20 new depositions.[12]

Defendants' re-deposition scenario would also create significant economic hardship for plaintiffs, inasmuch as many have had to miss work and thus lose one (or, in some cases, two) days' wages – a serious matter to low-wage workers who are responsible for supporting their families. Requiring those plaintiffs who have already had to give up additional income to do so again would needlessly impose upon them a doubly harsh burden.

[12] Although defendants' proposed re-depositions may be shorter than the original depositions, the logistical and scheduling issues promise to be just as taxing. Due to the time it takes to prepare plaintiffs for the depositions, particularly here on such a sensitive and difficult subject, and the use of interpreters, only a few plaintiffs could be produced each week. Furthermore, it is almost inevitable that some scheduled depositions will need to be postponed due to illness, family emergencies, or other unexpected scheduling complications.

Moreover, if defendants were permitted to conduct the laborious depositions and re-depositions they seek, the current October 8, 2002 trial date would almost certainly have to be vacated, as they themselves acknowledge. While the delay may benefit defendants in that their potential liability is indefinitely postponed, it prejudices plaintiffs in their ability to prove up their case as memories fade and witnesses become more difficult to locate. This is particularly so in light of the fact that there have already been two changes to the trial date in this case, which was originally set for July, 2001. Discovery has been open since just after the complaint was filed in October 1999; indeed, the Court has already seen fit to impose limits on written discovery and depositions. The Court should hold the parties to the trial date previously negotiated and ordered.

D. Should Defendants' Motion For Additional Depositions Be Granted, Plaintiffs Are Entitled To Redepose Defendants In Order To Present An "Unclean Hands" Defense

The doggedness with which defendants have pursued this discovery issue -- in light of no record evidence at all as to the existence of *any* undocumented plaintiffs -- may suggest that defendants have information about plaintiffs' purported lack of work authorization that they have not disclosed. If the Court grants defendants' motion for reconsideration and allows them to extend discovery *inter alia* to reopen the more than 20 plaintiff depositions already taken and concluded, therefore, plaintiffs are equally entitled to reopen most of not all of the approximately nineteen depositions already taken of defendants' management personnel at the Fresno facility, including but not limited to the plant managers, administrative managers, human resources staff, and all department and shift supervisors. These current and former employees, if anyone, would possess relevant information indicating actual or constructive knowledge by defendants of any plaintiff's lack of work authorization in violation of federal immigration laws.[13]

The doctrine of unclean hands could bar defendants from claiming that they are not liable for backpay. The doctrine of unclean hands rests on the maxim that he who comes in equity must come with clean hands. Camp v. Jeffer, Mangel, Butler & Marmaro, 35 Cal. App. 4th 620, 638 (1995). In

[13] 8 U.S.C. § 1324a(f) (criminal penalties against employers for knowingly employing persons not authorized to work in the United States).

California, the doctrine of unclean hands may apply to legal as well as equitable claims. Id. The misconduct in question "must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants." Id. at 638-39. Here, defendants' actual or constructive knowledge of any plaintiff's lack of authorized work status would relate directly to their assertion that such status should prevent recovery of backpay.

Thus, if evidence of such actual or constructive knowledge by defendants is "discovered," then this case is more aptly analyzed under NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997), which found that the Board properly granted two undocumented workers conditional reinstatement and back pay where the employer knowingly hired them, rather than Hoffman, which involved an "innocent" employer who did not knowingly violate the immigration laws. In A.P.R.A., the Second Circuit affirmed the Board's decision to award back pay from the date of the unlawful employment practice to the date when the workers could be reinstated in compliance with the company's normal I-9 process, or to toll back pay recovery at the expiration of a reasonable period of time which the employees were given in order to comply with the I-9 process. Id., 134 F.3d at 56-57.

In the present context, if the Court grants defendants' proposed discovery to reveal the identities of any plaintiffs who may be undocumented, plaintiffs would in fairness deserve an equal opportunity to rebut any advantage defendants could gain from a showing that any plaintiff was not entitled to work in the United States after being terminated by NIBCO. If NIBCO's knowledge of any plaintiff's undocumented status were demonstrated, defendants would be estopped from claiming that they are not liable for back pay given their violations of immigration laws as well. Moreover, pursuant to A.P.R.A., such discovery would be just as relevant to the extent of plaintiffs' back pay remedies – albeit from the standpoint of establishing, not eliminating them.

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III. PLAINTIFFS' PROPOSAL BALANCES ALL PARTIES' CONCERNS

Instead of defendants' proposed second wave of depositions, plaintiffs propose a streamlined post-judgment proceeding *in camera* that would keep the current trial date and avoid unnecessary invasion of plaintiffs' privacy.

Defendants have consistently argued that the reason they should be allowed to conduct discovery has been to obtain information that might limit their damages, particularly as it relates to back pay. Assuming this to be true, plaintiffs offer the following compromise which addresses defendants' stated back pay concern, and does so without the need to disclose the identity of any plaintiffs that might be undocumented.[14] In such a proceeding – that would, of course, be required only if plaintiffs prevail in this litigation -- the Court would offset any back pay judgment to the extent that any plaintiffs were not able to supply clear and unquestionable proof to the Court of their legal status during the back pay period.

Such proof would consist of:

1. A declaration under penalty of perjury from each plaintiff that she was lawfully entitled to work in the United States during the back pay period, accompanied by documents establishing that entitlement; and

2. A formal certification from the Social Security Administration ("SSA") attesting that the Social Security number proffered by each plaintiff belongs to her or him, and confirming that each plaintiff was authorized to work throughout the back pay period.

Back pay for any plaintiffs who did not obtain such a certification would not be assessed against defendants for the period from March 27, 2002 (the date Hoffman was decided), or other appropriate date determined by the Court, forward. After those reductions were made, the Court would total *in camera* all back pay awards and assess an aggregate back pay award covering all plaintiffs, without disclosing to defendants the individual amounts. Upon receipt of the aggregate

[14] Plaintiffs first proposed this process to defendants on April 1, 2002. Defendants, however, summarily rejected it on the same day.

amount from defendants, plaintiffs' counsel would distribute to each of the plaintiffs with certification the individual amounts to which they were each entitled.

This post-judgment procedure would be used only if plaintiffs prevail and back pay is awarded as part of the judgment. It could be undertaken quickly and simply, enabling the parties and the Court to avoid the massive delays that would result from reopening the 20 depositions of plaintiffs that have already been taken.[15] It is consistent with the parties' agreement that bifurcation of the liability phase from a subsequent remedies phase is desirable and would contribute to judicial efficiency.[16] It ensures that defendants would not be required to satisfy any back pay judgment that was arguably contrary to Hoffman. And – just like the stipulated *in camera* review procedure now being utilized by Magistrate Judge Snyder with respect to personnel files from plaintiffs' former employers – it protects the identities of any affected plaintiffs from potential disclosure to third parties.[17] Indeed, it is difficult to think of a more exact and efficient manner for the Court to determine which plaintiffs would be entitled to back pay.

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[15] Plaintiffs' counsel have already determined, after making the appropriate inquiries with SSA's legal department, that this proposal is feasible and that SSA would be able to provide the Court with the described certification once a consent form is obtained from each of the plaintiffs in order to protect their privacy interests under the Social Security Act and accompanying regulatory guidelines. Section 1106(a) of the Social Security Act, 42 U.S.C. § 301, *et seq.*, and Program Operations Manual System (POMS), RM 00206.010, GM 03307.235. Once the consent forms are filed with the agency, it would undertake the investigative steps necessary to make the certification. *Plaintiffs are prepared to file these consent forms as soon thereafter the court approves of this alternative procedure so that the certification process will be concluded well before the trial date.* This Court noted in the October 1, 2001 hearing on this matter that it was open to bifurcating the discovery of immigration-related information as long as it could be done quickly. 26:16-21; 27:9-10.

[16] January 28, 2000 Scheduling Conference Order at 10:18-11:5.

[17] Conducting review of these documents *in camera* is, of course, well within the authority of the Court. *See, e.g.*, Fed.R.Evid. 611(a) (court may control presentation of evidence inter alia in order to "protect witnesses from harassment or undue embarrassment"). As the Court is well aware, courts routinely conduct *in camera* inspections of privileged or otherwise sensitive documents as part of the factfinding process, including in situations in which one party is not enabled to review all or part of the evidence being inspected by the court. *See, e.g.*, Thomas & Betts Corp. v. Panduit Corp., 1997 U.S. Dist. LEXIS 563, *14 (magistrate judge's *in camera* review of privileged documents revealed absence of provable damages); Fed.R.Evid. 612 (if a writing used to refresh recollection claimed to contain unrelated matter, court shall excise any irrelevant portions *in camera*; "[a]ny portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal."); Cal. Evid. Code §§ 915(b) (*in camera* review of assertedly privileged or trade secret material); 1042(d) (requiring *in camera* hearing "outside the presence of defendant and his counsel" where § 1041 claim of privilege as to criminal informant's identity raised by a law

IV. CONCLUSION

Plaintiffs' proposed compromise ensures that defendants would not be required to satisfy back pay judgments to any plaintiffs who may be undocumented, while protecting plaintiffs' legitimate interests in being free from harassing and oppressive discovery. In addition, from the standpoint of judicial economy, it would avoid the massive complications and delays that defendants' requested depositions would impose upon the parties and the Court.

Accordingly, for the foregoing reasons, defendants' motion should be denied, and plaintiffs' proposed compromise should be adopted by this Court.

Dated: April 17, 2002

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enforcement agency); § 1045(b) (*in camera* procedure for review of peace officer personnel records sought in litigation). S*ee also* Pitchess v. Superior Court, 11 Cal. 3d 531, 538-39 (1974).