IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN ELMY, individually and on behalf of all other similarly situated persons, **Plaintiffs,** **v.** **WESTERN EXPRESS, INC., NEW HORIZONS LEASING, INC., and JOHN DOES 1-5,** **Defendants.**	**CIVIL NO. 3:17-cv-01199** **JUDGE CAMPBELL** **MAGISTRATE FRENSLEY**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY A FAIR LABOR STANDARDS ACT COLLECTIVE ACTION AND AUTHORIZE NOTICE TO BE ISSUED TO THE CLASS

The Named Plaintiff moves the Court to conditionally certify the Plaintiff's minimum wage claims as a collective action under 29 U.S.C. § 216(b) of the Fair Labor Standards Act (FLSA), and to authorize that notice of the action be issued to putative class members and for other miscellaneous relief to effectuate the mailing, emailing, and Qualcomm messaging of notice to class members.

The class is defined as: "all truckers who lease a truck from New Horizons Leasing, Inc. to drive for Western Express, Inc. during the three years preceding the filing of the initial complaint and up through the date of final judgment herein and subject to any equitable tolling for any applicable portion of the limitation period." Compl. ¶ 22 (Doc. 1).[1] ("FLSA Collective") The members of the FLSA Collective are similarly situated in that: (1) they all signed lease agreements with New Horizons Leasing to lease a truck and signed the contracts with Western Express to haul

[1] Excluded from the Collective Action Class are Defendants' legal representatives, officers, directors, assigns, and successors, or any individual who has, or who at any time during the class period has had, a controlling interest in any Defendants; the Judge(s) to whom this case is assigned and any member of the Judges' immediate family. Compl. ¶ 22.

freight for Western Express as "owner operators;" (2) the terms of the leases and the "owner operator" contracts that all members of the FLSA collective signed are substantively identical on all material terms; (3) they were all subject to the same policies and practices of Defendants which prevented them from running an independent business from Defendants but resulted in them being employees of Defendants; (4) they were all victims of Defendants' unlawful policy of classifying such drivers as independent contractors; and (5) they were paid less than the federal minimum wage for all hours worked. Plaintiff contends that the terms of the Lease/Contract that he and all other members of the collective signed and the policies and practices of Defendants created an FLSA employer-employee relationship entitling Plaintiff and the members of the collective to back wages for each of the many work weeks in which they earned less than the minimum wage.

Because there is sufficient evidence at this stage of the collective action that the Named Plaintiff and the members of the Collective are similarly situated, this Court should grant the Plaintiff's request to conditionally certify this collective action and to authorize notice to the putative class by first class mail, email, and Qualcomm. This Court should direct the Defendants to provide names, mailing addresses, email addresses, and an employee number or unique identifier of the FLSA Collective members in an electronic spreadsheet format such as Excel. This Court also should direct the Defendants to supply to the Plaintiff the telephone numbers and the last four digits of the social security numbers for those FLSA Collective members whose notice is returned as undeliverable.

Additionally, for the reasons set forth below, this Court should grant Plaintiff's counsel's requests to call any individual FLSA Collective member whose notice is returned as undeliverable for the purpose of obtaining a current address for re-mailing of the notice, to re-mail notices that are returned as undeliverable if counsel can find better addresses, and to mail and email reminder

postcards and send via Qualcomm a reminder message 21 days before the expiration of the opt-in period to those putative FLSA Collective members who have not opted in to the collective action at that point.

MEMORANDUM

I. STATEMENT OF THE CASE

This case arises out Defendants' attempts to evade the minimum wage requirements of the FLSA by misclassifying Named Plaintiff and all other members of the FLSA Collective. At the beginning of their working relationship with Defendants, Defendants required Named Plaintiffs and members of the FLSA Collective to execute two documents in order to become so-called "owner operators"[2]: an Equipment Lease ("Lease") with Defendant New Horizons Leasing, Inc., and a Contract Hauling Agreement ("Contract") with Defendant Western Express, Inc. These two documents were the same in all material respects for all collective members and the documents outlined the terms of their employment relationship with Defendants. The Lease and Contract were drafted by the Defendants. The two documents reference one another, were presented to drivers as a package, and they form a single lease/operating agreement contract (hereinafter, "Lease/Contract"). The Lease/Contract violates the FLSA rights of Plaintiff and the FLSA Collective members by wrongfully classifying them as "independent contractors," even though the Lease/Contract gave Defendants sufficient control over drivers to create an employer/employee relationship. Defendants' then utilized this improper misclassification to shift expenses onto the members of the FLSA Collective, which resulted in the Defendants paying drivers less than the minimum wage for every hour worked. Indeed, in many weeks, Defendants paid Plaintiffs and members of the FLSA Collective *nothing* at all. This scheme is rampant in the trucking industry,

[2] The term "owner operator" is a misnomer as these drivers lease rather than own the trucks they drive. Accordingly, they are referred to interchangeably as "lease operators" herein.

relegating what was once a solidly middle-class profession to one that often pays poverty-level wages and treats truck drivers like "indentured servants."[3]

The so-called "owner operator" programs run by Defendants and other companies throughout the industry force drivers to work "the equivalent of two full-time jobs,"[4]regularly working "20 hours a day, six days a week"[5] or "around the clock"[6] in order to pay off the massive debt the drivers incur from the truck lease. After paying for their truck, fuel, insurance and other work-related expenses, they may end up earning as little as 67 cents for the week,[7] or even owing the companies money.[8] As a result, drivers lose their homes,[9] have to rely on charity to survive,[10] and/or go into more debt.[11] Drivers work in grueling conditions without benefits normally received by employees like health insurance, workers compensation, Social Security contributions, unemployment insurance or the same level of protection by safety and health regulation.[12] They are away from home for weeks or months as a time.[13] All the while, the companies "retain[] the power to decide how much work to give their drivers," deciding "who gets the easiest and most lucrative routes -- and who gets to work at all."[14] Drivers cannot use their trucks to work for other

[3] *See* Brett Murphy, USA Today, *Rigged. Forced into debt. Worked past exhaustion. Left with nothing.* (June 16, 2017), available at: https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/ (attached as Exhibit G); Steve Viscelli, The Atlantic, *Truck Stop: How One of America's Steadiest Jobs Turned Into One of Its Most Grueling* (May 10, 2016), available at: https://www.theatlantic.com/business/archive/2016/05/truck-stop/481926/ (attached as Exhibit G); *Lydia* DePillis, Washington Post, *Trucking used to be a ticket to the middle class. Now it's just another low-wage job.* (April 28, 2014), available at (https://www.washingtonpost.com/news/wonk/wp/2014/04/28/trucking-used-to-be-a-ticket-to-the-middle-class-now-its-just-another-low-wage-job/?utm_term=.8b22dd6fa8a4 (attached as Exhibit G).
[4] *Truck Stop* at p. 5.
[5] *Rigged* at pp. 11-12.
[6] *Rigged* at p. 20.
[7] *Rigged* at p. 13.
[8] *Rigged* at pp. 2, 16; *Truck Stop* at p. 2.
[9] *Rigged* at p. 8, 22; *Trucking* at p. 3.
[10] *Rigged* at p. 10.
[11] *Rigged* at pp. 10, 16, 22.
[12] *Rigged* at p. 8; *Truck Stop* at p. 2; *Trucking* at p. 2.
[13] *Truck Stop* at p. 5.
[14] *Rigged* at p. 9; *see also Truck Stop* at p. 2; *Trucking* at p. 5.

companies.[15] When drivers are fired or quit, their trucks are seized, along with all the money they paid towards owning it.[16] Companies can also require that the drivers immediately pay the full remaining balance on the lease, compelling drivers to keep working, even as they fall further and further into debt.[17] The Named Plaintiff and FLSA Collective members are similarly situated not only to one another, but to a great many other so-called "owner operators" in the industry.

There are other non-FLSA claims in the case that are not implicated in this motion. Specifically, the Plaintiff also alleges that the Defendants engaged in fraud and negligent misrepresentation under Tennessee common law, and that the Lease/Contract is unconscionable and therefore unenforceable under the Tennessee Uniform Commercial Code, Tenn. Code Ann. §§ 47-2-302 and 47-2A-108. The Plaintiff further alleges that the Defendants were unjustly enriched by misclassifying lease operators and that the Lease/Contract constitutes a forced labor scheme by way of threats of serious financial and professional harm to lease operators by the Defendants in violation of the federal forced labor statutes, 18 U.S.C. §§ 1589 and 1595, and Tennessee Involuntary Labor Servitude statutes, Tenn. Code Ann. §§ 39-13-307 and 39-13-308. The Plaintiff seeks to bring their FLSA action as a collective action and to bring their fraud, misrepresentation, unconscionability, unjust enrichment, and forced labor claims as Rule 23(b)(3) class actions. The instant motion relates only to the FLSA collective action claim.

II. EVIDENCE SUPPORTING THIS MOTION

Defendant Western Express, Inc. ("Western") is a "large tier industry truckload carrier," headquartered in Nashville, Tennessee, with seven other facility locations across the country.[18] Defendant New Horizons Leasing, Inc. ("New Horizons") is a closely related private company

[15] *Rigged* at p. 9; *Truck Stop* at p. 2; *Trucking* at p. 5.
[16] *Rigged* at pp. 1, 3, 9-10.
[17] *Truck Stop* at p. 6.
[18] See Western Express, About, http://www.westernexp.com/about/ (last visited on January 23, 2018).

that is owned and operated by several of the same people who own and operate Western and shares the same address as Western's corporate headquarters in this district. *See* Exhibit A ("Contract" and "Lease" of Named Plaintiff John Elmy) (Plaintiff Elmy's Lease is signed by Erik Morrison, who is the Director of Maintenance for Western Express; Western and New Horizons are both headquartered at 7135 Centennial Place, Nashville, TN).

The Named Plaintiff and the FLSA Collective members (collectively "Plaintiffs") are all truck drivers who entered into a Contract with Defendant Western and a truck Lease with Defendant New Horizons. *See* Exhibit A. The Contracts and Leases signed by the Plaintiffs are materially the same.[19] REDACTED *Decl.* ¶ 5; REDACTED *Decl.* ¶ 5; REDACTED *Decl.* ¶ 8; REDACTED *Decl.* ¶ 5; REDACTED *Decl.* ¶ 8; REDACTED *Decl.* ¶ 5; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 4; REDACTED *Decl.* ¶ 8.[20] The documents are pre-printed forms drafted by the Defendants that the Defendants present to the Plaintiffs as a package on a take-it-or-leave-it basis. REDACTED *Decl.* ¶¶ 2-4, 7; REDACTED *Decl.* ¶¶ 2-4, 7; REDACTED *Decl.* ¶¶ 7, 10; REDACTED *Decl.* ¶¶ 2-4, 7; REDACTED *Decl.* ¶¶ 5-7, 10; REDACTED *Decl.* ¶¶ 2-4, 7; REDACTED *Decl.* ¶¶ 6, 9; REDACTED *Decl.* ¶¶ 1-3, 6; REDACTED *Decl.* ¶¶ 5-7, 10. The Plaintiffs are not permitted to negotiate any of the terms, REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 10; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 10; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 9; REDACTED *Decl.* ¶ 6; REDACTED *Decl.* ¶ 10, and are expected to sign both documents contemporaneously, REDACTED *Decl.* ¶ 4; REDACTED *Decl.* ¶ 4; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 4; REDACTED *Decl.* ¶ 7; REDACTED *Decl.* ¶ 4; REDACTED *Decl.* ¶ 6; REDACTED *Decl.* ¶ 3; REDACTED *Decl.* ¶ 7. Not only are the Lease and the Contract presented to the Plaintiffs as a package, but they operate together as a single document. No Plaintiff

[19] Because all Contracts and Leases are materially the same, Plaintiffs will solely reference the Contract and Lease of Named Plaintiff John Elmy.

[20] The declarations of REDACTED, REDACTED, REDACTED, REDACTED and REDACTED were previously filed under seal as Docs. 39, 40, 41, 42 and 43 respectively, in support of *Plaintiffs Opposition to Motion to Compel Arbitration* (Doc. 36) and have not been re-filed here.

can sign the Lease without also signing the Contract, as is made clear in paragraph 23 of the Lease.[21]

Because all Plaintiffs signed materially similar lease/contracts and, therefore, worked under the same terms and conditions of work, the central issue in this case -- whether those terms and conditions of work created an FLSA employer/employee relationship entitling Plaintiffs to the minimum wage -- is the same for all members of the Collective. Whether the Lease/Contract does, in fact, create an FLSA employment relationship is, of course, a question for the merits that need not be addressed as part of this motion for preliminary certification of the collective action. Nevertheless, it is worth noting that the arguments in favor of Plaintiffs position are strong. *See Plaintiffs Opposition to Motion to Compel Arbitration* (Doc. 36) at 3-9; 13-23.

The documentation attached to this motion shows many weeks in which drivers are not paid the minimum wage for each hour worked each week—indeed many weeks in which they were not paid wages at all. *See e.g.*, Exhibit B (June 2, 2017 Settlement of REDACTED; Dec. 16, 2016 Settlement of REDACTED); REDACTED *Decl.* ¶ 28; REDACTED *Decl.* ¶ 28; REDACTED *Decl.* ¶ 29; REDACTED *Decl.* ¶ 26; REDACTED *Decl.* ¶ 33; REDACTED *Decl.* ¶ 28; REDACTED *Decl.* ¶ 28; REDACTED *Decl.* ¶ 23; REDACTED *Decl.* ¶ 26. Many of these Plaintiffs made so little money that they had to turn in their truck prior to the end of their lease. Additionally, despite being called "owner operators," lease operators gained no equity in the truck or other equipment through lease payments during the term of the lease. New Horizons retained title to the truck (Lease ¶ 14) and claimed all tax benefits related to the truck (Lease ¶ 13). Thus, a lease operator who turned in his or her truck, whether voluntarily or as a result of termination, was left with nothing. REDACTED *Decl.* ¶ 37; REDACTED *Decl.* ¶ 35; REDACTED

[21] Paragraph 23 states: "As additional security for this Agreement, the Lessee will pledge a contract with the Carrier reflected on Schedule 'A' to secure Lease payments to the Lessor." Schedule A identifies the "Carrier" as "Western Express, Inc."

Decl. ¶ 36; [redacted] *Decl.* ¶ 33; [redacted] *Decl.* ¶ 41; [redacted] *Decl.* ¶ 38; [redacted] *Decl.* ¶ 35; [redacted] *Decl.* ¶ 29; [redacted] *Decl.* ¶ 34.

III. ARGUMENT

A. The FLSA Is a Remedial Statute

"The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours, . . . [and to ensure that employees] would be protected from 'the evil of 'overwork' as well as 'underpay.'" *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). "Congress passed the FLSA with broad remedial intent." *Keller v. Miri Microsys. LLC*, 781 F.3d 799, 804 (6th Cir. 2015) (citing *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509-11 (1950) ("[T]he primary purpose of Congress . . . was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.")). The FLSA "was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' . . . Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945). Accordingly, "Courts interpreting the FLSA must consider Congress's remedial purpose." *Keller*, 781 F.3d at 806 (citing *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992)); *see also United States v. Rosenwasser*, 323 U.S. 360, 362, (1945) ("A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."). The broad remedial purposes of the FLSA favor the granting of the Plaintiffs' motion so that putative class members can be timely notified of this lawsuit that protects their right to fair pay.

B. FLSA Representative Actions

"Recognizing that the value of an individual claim might be small and not otherwise economically sensible to pursue, the FLSA provides that a collective action 'may be maintained against any employer ... by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.'" *Bradford v. Logan's Roadhouse, Inc.*, 137 F. Supp. 3d 1064, 1070 (M.D. Tenn. 2015), *citing* 29 U.S.C. § 216(b). "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." 29 U.S.C. § 216(b). Courts typically employ a two-phase inquiry to determine whether the named plaintiffs are similarly situated to proposed opt-in plaintiffs. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 583 (6th Cir. 2009), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Watson v. Advanced Distribution Servs., LLC*, 298 F.R.D. 558, 561 (M.D. Tenn. 2014).

"The first [phase] takes place at the beginning of discovery. The second occurs after all the opt-in forms have been received and discovery has concluded." *Comer*, 454 F.3d at 546. "The first step is conducted early in the litigation process, when the court has minimal evidence." *Shabazz v. Asurion Ins. Serv.*, No. 3:07-0653, 2008 WL 1730318, at *2 (M.D. Tenn. Apr. 10, 2008). Because little discovery, if any, has been completed, "substantial allegations supported by declarations are 'all that is required.'" *Bradford v. Logan's Roadhouse, Inc.*, 137 F. Supp. 3d 1064, 1071 (M.D. Tenn. 2015), *quoting White v. MPW Indus. Servcs., Inc.*, 236 F.R.D. 363, 373 (E.D.Tenn.2006). In contrast, the second stage of the certification process is typically precipitated by a motion for decertification filed by the defendant after discovery is complete and the notice period has closed, at which point "the court has access to more information and employs a 'stricter standard' in

deciding whether class members are, in fact, similarly situated." *Watson*, 298 F.R.D. at 562 (quoting *Comer*, 454 F.3d at 547). *See also O'Brien*, 575 F.3d at 583.

The reason for this two-step process and the relatively liberal first-stage standard for assessing whether class members are "similarly situated" is that unlike in a Rule 23 class action, the statute of limitations is not tolled for putative members of an FLSA class until they affirmatively opt into the action. Thus, it is critical that notice of the right to opt-in issue promptly after the filing of the case if there is a colorable basis for believing the class members may be similarly situated. By design, this two-stage procedure protects the workers' interest in ensuring they receive prompt and timely notice of their right to vindicate their FLSA rights, while also allowing courts to revisit the certification question and to decertify the class should the full factual record reveal that the opt-in class members are not actually "similarly situated." *See Roberts v. Corr. Corp. of Am.*, No. 3:14-CV-2009, 2015 WL 3905088, at *15 (M.D. Tenn. June 25, 2015), *citing Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The statute of limitations is not tolled for any individual class member until that individual has filed a written consent to join form with the court. 29 C.F.R. § 790.21(b)(2). The information contained in a notice form is therefore important to allow a prospective plaintiff to understand his or her interests, and a collective action hinges on 'employees receiving accurate and timely notice concerning [its] pendency [...], so that they can make informed decisions about whether to participate.'"); *see also Rodkey v. Harry & David, LLC*, No. 3:16-CV-311, 2017 WL 2463392, at *4 (S.D. Ohio June 7, 2017) ("Once conditional certification has been granted, sending notice as soon as possible is important in an FLSA collective action because the statute of limitations continues to run until individuals affirmatively opt-in to the action."); *Gaffers v. Kelly Servs., Inc.*, No. 16-10128, 2016 WL 8919156, at *2 (E.D. Mich. Oct. 13, 2016) ("[P]otential opt-in plaintiffs will be irreparably

harmed if discovery is halted and notice is not sent promptly to them, because the limitations period on their claims was not tolled by either the filing of the complaint or the conditional certification of the collective litigation…Unlike in class action cases brought under Rule 23, in collective actions brought via section 216(b) 'all class members who seek relief under [the] FLSA must submit their affidavits of consent before the statute of limitations applying to their individual claims has run.'") (citations omitted).

While the "FLSA does not define the term 'similarly situated,'" the Sixth Circuit has held that "plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien*, 575 F.3d at 585. Plaintiffs need only make "a modest factual showing," that they are similarly situated and courts make the determination "using a fairly lenient standard[, which] typically results in conditional certification of a representative class." *Comer*, 454 F.3d at 547. Further, "[a]t this first stage of conditional certification, the court 'does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations.'" *Bradford v. Logan's Roadhouse, Inc.*, 137 F. Supp. 3d 1064, 1072 (M.D. Tenn. 2015).

Once a plaintiff has made a modest factual showing that all class members are victims of the same unlawful policy, the district court will conditionally certify the proposed class, and the lawsuit will proceed to a period of notification, which will permit potential class members to opt into the lawsuit. The district court has the discretion to facilitate notice to potential plaintiffs of their right to opt-into the action. *See Hoffman-La Roche*, 493 U.S. at 172. Sending notice to potential class members early in a case facilitates the broad remedial purpose of the FLSA and promotes efficient case management. *Ivy v. Amerigas Propane, L.P.*, No. 13-1095, 2014 WL

3591797, at *1 (W.D. Tenn. July 21, 2014)*; see also Kidd v. Mathis Tire & Auto Serv., Inc.*, No. 2:14-CV-02298-JPM, 2014 WL 4923004, at *3 (W.D. Tenn. Sept. 18, 2014) ("In order for the FLSA to serve its remedial function, putative class members must actually become aware of their right to opt in.").

Here, applying the lenient standard of the notice stage, the Plaintiff has demonstrated that he and the members of the proposed FLSA collective are similarly situated because they are all victims of the same unlawful policy -- i.e. Defendants' policy of classifying drivers who work under the Lease/Contract terms as independent contractors. Plaintiff contends that the terms of the Lease/contract create an FLSA employer/employee relationship. If Plaintiff is successful in establishing that fact, that proof will, necessarily, prove "as to all the plaintiffs." *O'Brien*, 575 F.3d at 585. There may be some minor variations in the Lease/Contract agreements signed by the Plaintiff and FLSA Collective members, but they all contain the same key terms bearing on the employee/independent contractor question. Accordingly it is far more efficient to adjudicate their claims as a collective action than as separate individual actions.

It should be noted that the fact that the Defendants may contend plaintiffs are "independent contractors" and not "employees" subject to the FLSA does not defeat notice at this stage as the merits of the Plaintiffs' claims and the Defendants' defenses are not decided at this stage. Indeed, an independent contractor misclassification case is uniquely situated for collective action treatment under FLSA, because such cases involve by definition groups of individuals who have similar job responsibilities and who have been uniformly classified as contractors instead of employees. *See Davis v. Colonial Freight Sys., Inc.*, No. 3:16-cv-00674-TRM-HBG, Doc. 85 at 10-11 (E.D. Tenn. March 2, 2018) (granting conditional certification to lease operator drivers on a national basis, who were classified as independent contractors; no economic reality factor analysis) (attached as

Exhibit C); *In re Penthouse Executive Club Comp. Litig*., No. 10-1145, 2010 U.S. Dist. LEXIS 114743, 2010 WL 4340255 (S.D.N.Y. Oct. 27, 2010) (given that the plaintiffs have a similar job responsibilities and performed services for the same ownership and are classified as contractors, "if such a group does not merit at least preliminary class treatment, one would expect that class treatment would rarely be granted in FLSA actions"); *Labrie v. UPS Supply Chain Solutions*, No. 08-3182, 2009 U.S. Dist. LEXIS 25210, (N.D. Cal. March 18, 2009) (granting conditional certification to delivery drivers on a national basis, who were classified as independent contractors; no economic reality factor analysis); *Lewis v. ASAP Land Express,* No. 07-2226, 2008 U.S. Dist. LEXIS 40768, 2008 WL 2152049, at *1 (D. Kan. May 21, 2008) ("plaintiffs have satisfied the light burden to provide substantial allegations that they were together the victims of a single policy or plan", where they allege a practice of violating the FLSA; no economic reality factor analysis); *Lemus v. Burnham Painting and Drywall Corp*., No. 06-01158, 2007 U.S. Dist. LEXIS 46785, (D. Nev. June 25, 2007) (rejecting argument that determining employment status versus independent contractor status would require a highly individualized inquiry making conditional certification inappropriate); *Williams v. King Bee Delivery, LLC*, No. 5:15-CV-306-JMH, 2017 WL 987452, at *4 (E.D. Ky. Mar. 14, 2017) (granting notice to join FLSA collective action despite defendants' argument that plaintiffs were properly classified as independent contractors); *Benion v. Lecom, Inc.*, No. 15-14367, 2016 WL 2801562, at *9 (E.D. Mich. May 13, 2016), *reconsideration denied*, No. 15-14367, 2016 WL 3254611 (E.D. Mich. June 14, 2016) (granting notice to join FLSA collective action over defendants' objections that plaintiffs' employment status must be determined first).

Taken together, the uniform Leases/Contracts are more than sufficient to meet the lenient standard for "first" or "notice" stage certification. Courts across the country have found

certification to be appropriate in similar circumstances where drivers are working under uniform contracts, further supporting the conclusion that this case is appropriate for notice stage certification. *See, e.g.*, *Davis*, No. 3:16-cv-00674-TRM-HBG, Doc. 85 at 10-11 (granting conditional certification of a class of lease operator drivers who alleged their employer violated the FLSA by misclassifying them as independent contractors and as a result of such misclassification failed to pay drivers minimum wage) (attached as Exhibit C); *Scovil v. FedEx Ground Package Sys., Inc.*, 811 F. Supp. 2d 516, 518 (D. Me. 2011) (granting conditional certification of a class of delivery drivers who alleged their employer violated the FLSA by misclassifying them as independent contractors and as a result of such misclassification failed to pay drivers overtime compensation); *Flores v. Velocity Exp., Inc.*, 12-CV-05790-JST, 2013 WL 2468362 (N.D. Cal. June 7, 2013) ("Plaintiffs have alleged, and Defendants do not dispute, that each individual delivery driver signed an independent contractor agreement, subjecting them to a uniform company policy of treating them as exempt workers under FLSA. Plaintiffs have also alleged . . . that the delivery drivers were all required to wear Velocity uniforms, display the company logo, keep regular routes and hours, pay Velocity for equipment, permit Velocity to deduct from their paychecks income and payroll taxes, and arrive at certain times in advance of their shifts. In other words, Plaintiffs have alleged that each member of the proposed class was "similarly situated" with respect to the material allegations of the complaint."); *Scott v. Bimbo Bakeries, USA, Inc.*, CIV.A. 10-3154, 2012 WL 645905 (E.D. Pa. Feb. 29, 2012) (granting conditional certification of a class of bakery delivery drivers who alleged their employer violated the FLSA by misclassifying them as independent contractors and as a result of such misclassification failed to pay drivers minimum wage and overtime compensation); *Spellman v. Am. Eagle Exp., Inc.*, CIV.A. 10-1764, 2011 WL 4102301 (E.D. Pa. May 18, 2011) (granting

conditional certification of a class of delivery drivers who alleged their employer violated the FLSA by misclassifying them as independent contractors and as a result of such misclassification failed to pay drivers overtime compensation). *See also, Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017) (affirming district court finding that hauling agreements between drivers and carrier that purported to establish independent-contractor relationships were "contracts of employment" within meaning of Federal Arbitration Act); *Doe v. Swift Transportation Co.*, No. 2:10-CV-00899 JWS, 2017 WL 67521, at *15 (D. Ariz. Jan. 6, 2017) (granting summary judgment to drivers that hauling agreements between drivers and carrier that purported to establish independent-contractor relationships were "contracts of employment" within meaning of Federal Arbitration Act); *Steele v. SWS*, LLC, 3:11-CV-60, 2011 WL 3207962 (E.D. Tenn. June 24, 2011) *objections sustained in part and overruled in part*, 3:11-CV-60, 2011 WL 3207802 (E.D. Tenn. July 28, 2011) (granting conditional certification of a class of installation technicians who alleged their employer violated the FLSA by misclassifying them as independent contractors and as a result of such misclassification failed to pay them minimum wage and overtime compensation).

As such, because Plaintiff Elmy has submitted sufficient evidence at the notice stage to establish that the FLSA Collective members are similarly situated for purposes of conditionally certifying this collective action, this Court should grant the motion for conditional certification.

IV. THIS COURT SHOULD FACILITATE NOTICE.

The district court has the discretion to facilitate notice to potential plaintiffs of their right to opt-into the action. *See Hoffman-La Roche*, 493 U.S. at 172. Under the FLSA, the statute of limitations is 3 years (or potentially 2 years if the violation is ultimately determined not to be willful). 29 U.S.C. §255(a). To facilitate notice, this Court should direct the Defendants to provide to Plaintiff's counsel in an electronic spreadsheet format such as Excel, the following information,

each contained in a separate column: first name, last name, street address, city, state, zip, email address, and employee number of class members who drove for the Defendants at any time in the 3 years preceding the filing of the complaint. The Defendants alone are in possession of the information necessary to provide notice to potential class members, and courts uniformly require defendants to supply the names for notice. *Hoffman-LaRoche*, 493 U.S. at 170; *Evans v. Caregivers, Inc.*, No. 3:17-cv-0402, 2017 WL 2212977, at *7 (M.D. Tenn. May 19, 2017); *McClain v. First Acceptance Corp.*, 2017 Wage & Hour Cas. 2d (BNA) 267637 (M.D. Tenn. 2017); *Brown v. Consol. Rest Operations, Inc.*, No. 3:12-00788, 2013 WL 4804780, at *7 (M.D. Tenn. Sept. 6, 2013).[22] Additionally, "courts within the Sixth Circuit have routinely approved dual notification through regular mail and email." *McClain*, 2017 WL 3268026, at *4 (quoting *Evans*, 2017 WL 2212977, at *7); *see also Williams v. King Bee Delivery, LLC*, No. 5:15-cv-306-JMH, 2017 WL 987452, at *7 (E.D. Ky. Mar. 14, 2017); *Fenley v. Wood Grp. Mustang, Inc.*, 170 F. Supp. 3d 1063, 1074 (S.D. Ohio 2016).

Plaintiff also proposes a short text advisory, attached hereto as Exhibit E, about the notice in this case be sent via electronic means to the Qualcomm devices that Western requires all current lease operators to have onboard. Contract ¶ 7.I. The Qualcomm has a small computer-like screen that enables wireless written communications, similar to a text message, between the company and the driver. (The device also transmits GPS coordinates to Western and has macro keys that enable acceptance of loads and other commitments to be made in real time).[23] Western regularly sends

[22] The list should be produced not only for purposes of sending judicial notice, but also because the list of putative class members is discoverable on independent grounds recognized by the United States Supreme Court and the Federal Rules of Civil Procedure governing discovery of potential witnesses.

[23] *See e.g.:*

> [Trucking company] maintains a satellite system called "Qualcomm" in all its trucks. …This system, which is similar to email, connects each truck with central dispatch. Each truck has a keyboard and a small screen for the driver to send and receive messages. When a message is received by the system, a light on the dashboard illuminates and a beep is emitted. As a safety precaution, the truck must be stopped to send messages. Additionally, the system only allows drivers to send messages

information to its drivers by Qualcomm. [redacted] *Decl.* ¶ 21; [redacted] *Decl.* ¶ 18; [redacted] *Decl.* ¶ 22; [redacted] *Decl.* ¶ 19; [redacted] *Decl.* ¶ 24; [redacted] *Decl.* ¶ 21; [redacted] *Decl.* ¶ 20; [redacted] *Decl.* ¶ 17; [redacted] *Decl.* ¶ 20. Western should be directed to post the Qualcomm notice (without pulling the notice), once per week within a 9am to 5pm (local time) window during the notice period.[24] Since Western dispatchers regularly send communications to drivers by Qualcomm, the short advisory by this means can be expected to reach all putative class members who are current Western lease operators. The Qualcomm message alerting current lease operators to the case and where they can find the notice if they wish to learn more, will be an important and non-burdensome way to reach all current drivers for Western. *See Doe 1 v. Swift Transportation Co.*, No. 2:10-CV-00899 JWS, 2017 WL 735376, at *7 (D. Ariz. Feb. 24, 2017) (ordering curative notice to be sent to putative class members via Qualcomm); *Petrone v. Werner Enterprises, Inc.*, No. 8:11CV401, 2013 WL 12176452, at *2 (D. Neb. Apr. 1, 2013) (ordering FLSA notice to be send to putative class members via Qualcomm because defendant "use[d] its Qualcomm messaging system as a means of regular communication" with drivers).

Furthermore, because people occasionally move without leaving a valid forwarding address, this Court should direct the Defendants to promptly supply telephone numbers and the last four digits of social security numbers for those FLSA collective members whose notice is returned as undeliverable, to assist with location efforts, including calling[25] FLSA collective

> to dispatch. Therefore, if someone at [the company] other than dispatch sends a driver a Qualcomm message, the driver's response will go back to dispatch.

Tubbs v. Wynne Transp. Servs. Inc., CIV A H-06-0360, 2007 WL 1189640 (S.D. Tex. Apr. 19, 2007) (cites omitted).

[24] Upon information and belief, Western can deliver the notice to current lease operators, but can also pull it off the screens of recipients. Thus Western should be directed not to pull the advisory once sent. Further, if such delivery is made at night, it might be missed by the driver the next day, when followed by the numerous other instructions and information which are transmitted to drivers around the clock.

[25] Such calls would be limited to telling drivers that Plaintiffs' counsel has been authorized by the Court to mail the driver important information about a lawsuit for wage violations that they may want to participate in and counsel is calling to obtain a mailing address.

members whose notice is returned as undeliverable, or a skip trace to find the current address for such individual within the time period provided for by this notice, so that notice can then be re-mailed. *See Ott v. Publix Super Markets, Inc.*, 298 F.R.D. 550, 557 (M.D. Tenn. 2014) (compelling production of telephone numbers of potential class members for the purpose of obtaining mailing addresses). Courts routinely order defendants to provide this information in similar cases for the purpose of locating putative class members. *See Gieseke v. First Horizon Home Loan Corp.*, No. 04-2511-CM-GLR, 2007 WL 445202, at *4 (D. Kan. Feb. 7, 2007), *aff'd as modified*, No. CIV.A. 04-2511-CM, 2007 WL 1201493 (D. Kan. Apr. 23, 2007) ("[D]istrict courts appear to routinely order defendants in FLSA collective actions to produce information, including social security numbers, necessary for locating putative class members.") (citing *Rincon v. B.P. Sec. & Investigations, Inc.*, No. Civ. A. H–06–538, 2006 WL 3759872, at *3 (S.D. Tex. Dec. 19, 2006) (ordering defendant to provide the dates of birth and social security numbers for any putative class member whose mailed notice was returned as undeliverable).[26]

In fact, the *Gieseke* court noted that "[T]he requested disclosure of social security numbers was appropriate '[g]iven the important FLSA rights at issue, the long history of disclosure of social security numbers of putative class members in various contexts (including under the FLSA), and the ready ability to protect confidentiality through the use of a protective order.'" *Gieseke*, 2007 WL 445202, at *3 (quoting *Rees*, 2006 WL 3251829, at *2. The *Gieseke* court goes on to apply a "balancing test [that] considers the highly personal and confidential nature of social security

[26] *See also, Rees v. Souza's Milk Transp., Co.*, No. 1:05–cv–00297 AWI TAG, 2006 WL 3251829, at *1 (E.D. Cal. Nov. 08, 2006) (ordering defendant to disclose social security numbers for eleven FLSA class members for whom mailing to a last known address was insufficient); *Patton v. Thomson Corp.*, 364 F.Supp.2d 263 (E.D.N.Y. 2005) (ordering defendant employer to provide the names, addresses, social security numbers, and employment dates of all putative FLSA class members); *Babbitt v. Albertson's, Inc.*, No. C 92–1883 SBA (PJH), 1992 WL 605652, at *5–6 (N.D. Cal. Nov. 30, 1992) (finding the list of names, addresses, telephone numbers and social security numbers of past and present employees relevant in a putative employment discrimination class action, and compelling production of such information)).

numbers and the harm that can flow from disclosure, then balances it against the plaintiffs' need for the information to notify prospective class members." *Id.* at *4. Ultimately, the court held that "[t]he fact that notices using the addresses provided by Defendant have been returned as undeliverable provides sufficient justification for Plaintiffs' present request that Defendant provide social security numbers for these putative class members." *Id.*

Here, the Plaintiff seeks only the last four numbers of the social security numbers along with telephone number—which is even less invasive than that sought by the plaintiffs in *Gieseke*—and the Plaintiff seeks this information only for those putative class members whose notice is returned undeliverable. Under the balancing test that "most courts addressing the issue have applied," *id.*, the Plaintiff's request is reasonable and adequately accounts for the individuals' privacy interests.

Additionally, courts have routinely approved the sending of follow-up postcard reminders. Such follow-up postcards contribute to dissemination among similarly situated employees and serves what the Supreme Court in *Hoffmann-La Roche v. Sperling* recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." 493 U.S. at 172. The reminder also serves the purpose "to inform as many potential plaintiffs as possible of the collective action and their right to opt-in". *Chhab v. Darden Restaurants, Inc.*, 11 Civ. 8345(NRB), 2013 WL 5308004, *16 (S.D.N.Y. Sept. 20, 2013). Accordingly, courts have regularly approved the sending of a reminder notice to class members who have not responded after the mailing of the initial notice. *See, e.g., Sharp v. Mecca Campus Sch., Inc.*, Case 2:16-cv-02686-cgc, 2017 WL 1968684, at *3 (W.D. Tenn. May 11, 2017) (approving plaintiff's proposed reminder notice postcard to be sent following the mailing and emailing of the proposed notice); *Kutzback v. LMS Intellibound, LLC*, No. 2:13-cv-2767-JTF-cgc,

2014 WL 7187006, at *12 (W.D. Tenn. Dec. 16, 2014) (allowing a reminder postcard, citing "the concern that all potential opt-in plaintiffs properly receive notification of the collective action"), *aff'd by Kutzback*, No. 2:13-cv-2767-JTF, 2015 WL 1393414, at *7 (W.D. Tenn. Mar. 25, 2015).[27]

Although the most common notice period to opt into litigation is 60 days, many courts extend the opt-in period when special factors exist making it difficult for all class members to receive notice and join within the shorter period. *Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472 (E.D. La. 2006) (180 days for migrant farmworkers to file Consents to Sue); *Salinas-Rodriguez v. Alpha Services, L.L.C.*, No. Civ.A. 3:05CV44WHBAGN, 2005 WL 3557178, at *4 (S.D. Miss. Dec. 27, 2005) (180 days to join for class of foreign H-2B workers); *Roslies-Perez v. Superior Forestry Serv., Inc.*, 652 F. Supp. 2d 887, 900 (M.D. Tenn. 2009) (allowing 120-day opt-in period for migrant farmworkers); *Ware v. T-Mobile USA*, 828 F. Supp. 2d 948, 956 (M.D. Tenn. 2011) (granting a 120-day opt-in period for call center employees); *Amos v. Lincoln Property Co.*, No. 3:17-cv-37, 2017 WL 2935834, at *4 (M.D. Tenn. July 7, 2017) (granting 90-day opt-in period for business managers for residential property management company); *Williams v. Bally's La., Inc.*, Civil Action No. 05-5020, 2006 WL 1235904, at *3 (E.D. La. May 5, 2006) (120 days' notice); *Cranney*, 2008 WL 608639, at *5 (90 days). This is particularly so, where, as here, the class involves a transient or migratory workforce. *See Recinos-Recinos*, 233 F.R.D.at472; *Salinas-*

[27] *See also, Helton v. Factor 5, Inc.*, C 10–04927 SBA, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012); *Graham v. Overland Solutions, Inc.*, 10 Civ. 672 BEN (BLM), 2011 WL 1769737, *4 (S.D. Cal. May 9, 2011); *Chhab v. Darden Restaurants, Inc.*, 2013 WL 5308004 at *16 (approving reminder letter); *Guzelgurgenli v. Prime Time Specials Inc.*, 883 F. Supp. 2d 340, 357-8 (E.D.N.Y. 2012) (listing cases); *Helton v. Factor 5, Inc.*, 10 Civ. 04927, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012) (approving post card reminder); *In re Janney Montgomery Scott LLC Financial Consultant Litigation*, 06 Civ. 3202, 2009 WL 2137224 (E.D. Pa. July 16, 2009) (same); *Hart v. U.S. Bank NA*, CV 12-2471-PHX-JAT, 2013 WL 5965637 (D. Ariz. Nov. 8, 2013); *Morris v. Lettire Const., Corp.*, 896 F. Supp. 2d 265, 275 (S.D.N.Y. 2012) ("Given that notice under the FLSA is intended to inform as many potential plaintiffs as possible of the collective action and their right to opt-in, we find that a reminder notice is appropriate."); *Sanchez v. Sephora USA, Inc.*, No. 11–CV–3396, 2012 WL 2945753, at *6 (N.D. Cal. July 18, 2012) ("[C]ourts have recognized that a second notice or reminder is appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in."); *Gee v. SunTrust Mortg., Inc.*, No. 10–CV–1509, 2011 WL 722111, at *4 (N.D. Cal. Feb. 18, 2011); *Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010) ("Particularly since the FLSA requires an opt-in procedure, the sending of a postcard is appropriate.").

Rodriguez, 2005 WL 3557178, at *4; *Roslies-Perez*, 652 F. Supp. 2d at 900. Here, the Plaintiff requests that the notice period extend to 180 days because the class consists of truckers who are on the road for months at a time. Furthermore, the Defendants will not be prejudiced by extending the period. Because individuals who do not opt in are not precluded from bringing their own individual FLSA actions later, an extended notice period only serves to consolidate claims and avoid a multiplicity of redundant litigation. Accordingly, this Court should grant the Plaintiff a 180-day notice period.

V. THIS COURT SHOULD APPROVE THE PLAINTIFFS' PROPOSED NOTICE

Copies of the notice, Qualcomm message/reminder, and reminder postcard the Plaintiff proposes to send to the class members are attached to his motion as Exhibits D, E and F, respectively. The notice informs FLSA collective members in neutral language of the nature of this action, of their right to participate in it by returning their consent to sue (by mail, fax or email, or by submitting it electronically on Plaintiffs' counsel's website), and the consequences of their joining or not joining the action. The Qualcomm message/reminder simply and impartially alerts current lease operators to the case and where they can find the full notice if they wish to learn more. The reminder postcard succinctly reminds putative FLSA collective members of the case and the deadline for returning the consent to sue. Plaintiff's counsel will bear the cost of mailing, emailing, and re-mailing the notices, as well as the cost of mailing the reminder postcard.

VI. CONCLUSION

The record shows that the Plaintiff is situated similarly with respect to the putative FLSA collective. Accordingly, the Plaintiff respectfully requests that this Court:

(1) Grant the Plaintiff's request to conditionally certify this collective action and to authorize notice to the putative class by first class mail, email and Qualcomm;

(2) Direct the Defendants to provide in an electronic spreadsheet format such as Excel, the following information, each contained in a separate column: names, addresses, email addresses, and an employee number or unique identifier of the FLSA collective members;

(3) Approve the Plaintiff's forms of notice, Qualcomm message/reminder and reminder postcard to putative FLSA collective members;

(4) Direct the Defendants to supply to the Plaintiff the last four digits of the social security numbers of those FLSA collective members whose notice is returned as undeliverable;

(5) Permit Plaintiff's counsel to call any individual whose notice is returned as undeliverable for the purpose of obtaining a current address for re-mailing of the notice;

(6) Authorize Plaintiff's counsel to re-mail notices that are returned as undeliverable for those individuals counsel can find better addresses; and

(7) Authorize Plaintiff's counsel to mail and email reminder postcards and send via Qualcomm a reminder message 21 days before the expiration of the opt-in period to those putative FLSA collective members who have not opted in to the collective action at that point.

Respectfully Submitted,

Lesley Tse

Lesley Tse (*pro hac vice*)
Michael J.D. Sweeney (*pro hac vice*)
Getman, Sweeney & Dunn, PLLC
260 Fair Street
Kingston, New York 12401
Telephone: (845) 255-9370
Fax: (845) 255-8649
Email: ltse@getmansweeney.com

Justin L. Swidler, Esq. (*pro hac vice*)
Swartz Swidler, LLC
1101 Kings Hwy N., Ste 402
Cherry Hill, NJ 08034
Tel: (856) 685-7420
Fax: (856) 685-7417
Email: jswidler@swartz-legal.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2018, a copy of the foregoing document and any attachments were electronically filed with the Court and electronically served on the date reflected in the ECF system upon:

Mark E. Hunt
R. Eddie Wayland
King & Ballow Law Offices
315 Union Street Ste. 1100
Nashville, TN 37201
Phone: (615) 259-3456
Fax: (615) 726-5417

By: */s/ Lesley Tse*
Lesley Tse