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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen, et al., Plaintiffs, vs. Swift Transportation Co., Inc., et al., Defendants.	Case No. CV 10-899-PHX-JWS **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION**

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES 1
FACTS 3
II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT ISSUED 7
III. DEFENDANTS' ACTIONS ARE UNLAWFUL 10
IV. BALANCE OF HARDSHIPS FAVORS AN INJUNCTION 16
V. THE PUBLIC INTEREST FAVORS AN INJUNCTION 16
VI. APPROPRIATE REMEDY 17
CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 6

Arrendondo v. Delano Farms Co.,
No. CV F 09-1247 LJO DLB, 2010 WL 3212000 (E.D. Cal. Aug. 10, 2010) 8

Belt v. EmCare, Inc.,
299 F.Supp.2d 664 (E.D. Tex. 2003) 7, 16

Biggs v. Wilson,
1 F.3d 1537 (9th Cir. 1993) 12

Brooklyn Sav. Bank v. O'Neil,
324 U.S. 697 (1945) 11, 12

Cakebread v. Berkeley Millwork & Furniture Co.,
No. 16-CV-00083-RS(DMR), 2016 WL 6834217 (N.D. Cal. Nov. 21, 2016) 15

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 8

Cobell v. Norton,
212 F.R.D. 14 (D.D.C. 2002) 6

D.A. Schulte, Inc., v. Gangi,
328 U.S. 108 (1946) 11

Davison v. City of Tucson,
924 F. Supp. 989 (D. Ariz. 1996) 5

Hoffman-LaRoche v. Sperling,
493 U.S. 165 (1989) 16

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981) 2, 6

Herman v. RSR Services Ltd.,
172 F.3d 132 (2d Cir. 1999) 12

Kaiser v. AT & T,
2002 WL 1362054 (D.Ariz. Apr.15, 2002) 15

Kleiner v. First Nat. Bank of Atlanta,
751 F.2d 1193 (11th Cir. 1985) 6, 8

Lang v. Super. Ct., In and For Cty of Maricopa,
826 P.2d 1228 (Ariz. App. 1992) 14

Logan v. Forever Living Products Intern., Inc.,
52 P.3d 760 (Ariz. 2002) 11

Martin v. Gingerbread House, Inc.,
977 F.2d 1405 (10th Cir. 1992) 12

O'Connor v. Uber Techs., Inc.,
No. C-13-3826 EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014) 6

Palmer v. Pioneer Hotel & Casino,
19 F. Supp. 2d 1157 (D. Nev. 1998) 15

Patel v. 7-Eleven, Inc.,
No. CV 1400519 -PSGD-TBX, 2015 WL 9701133 (C.D. Cal. Apr. 14, 2015) 15

ProtectMarriage.com - Yes on 8 v. Courage Campaign,
680 F. Supp. 2d 1225 (E.D. Cal. 2010) 6

Quillion v. Tenet HealthSystem Phila., Inc.,
673 F.3d 221 (3d Cir. 2012) 13, 14

Regents of Univ. of Cal. v. Am. Broadcasting Cos.,
747 F.2d 511 (9th Cir. 1984) 5

Retiree Support Grp. of Contra Costa Cty. v. Contra Costa Cty.,
No. 12-CV-00944-JST, 2016 WL 4080294 (N.D. Cal. July 29, 2016) 6

Richards v. Holsum Bakery, Inc., CV09-00418-PHX-MHM,
2009 WL 3740725 (D. Ariz. Nov. 5, 2009) 15

Seminiano v. Xyris Enter., Inc.,
602 F. App'x 682 (9th Cir. 2015) 12

Smith v. AHS Okla. Heart, LLC,
No. 11–CV–691–TCK–FHM, 2012 WL 3156877 (N.D. Okla. 2012) 13

Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,
240 F.3d 832 (9th Cir. 2001) 6

Terrebonne, Ltd. of Cal. v. Murray,
1 F. Supp. 2d 1050 (E.D. Cal. 1998) 15

Wang v. Chinese Daily News, Inc.,
623 F.3d 743 (9th Cir. 2010) 7

Winter v. Natural Res. Def. Council, Inc.,
555 U.S 7 (2008) 5, 6

Zarate v. Younglove,
86 F.R.D. 80 (C.D.Cal.1980) 8

Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al., 321 U.S. 590 (1944) 16

Statutes

29 U.S.C. § 206 ..... 8, 13

29 U.S.C. §215 ..... 2, 13

29 U.S.C. §216 ..... 12, 13

A.R.S. § 23-202 11

A.R.S. § 23-351 11

A.R.S. § 23-353 12

A.R.S. § 23-355 12

A.R.S. § 23-1501 11

Regulations

29 C.F.R. § 531.35 11

29 C.F.R. § 778.104 ..... 8, 13

Plaintiffs hereby move for a temporary restraining order and preliminary injunction in accordance with the proposed orders submitted herewith, *inter alia*, (1) enjoining ¶16 and ¶17E of Defendants' new Independent Contractor Operating Agreement ("ICOA" or "Agreement");(2) requiring Defendants to inform all lease operators that ¶¶ 16 and 17E have been enjoined and are no longer operative; (3) enjoining Defendants and their counsel from engaging in any further contacts with current opt-ins and putative class members regarding the matters raised in this suit, including communications that request or require lease operators to enter into agreements that may in any way impact the liability or damages issues, without first informing Plaintiffs' counsel and obtaining permission from the Court; and (4) for sanctions against Defendants, for their improper communications with opt-in Plaintiffs and putative class members. This motion is supported by the exhibits hereto, the Declaration of James Sherwood, the following Memorandum of Points and Authorities and the record before this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court signed its opinion finding Plaintiffs to be employees of Swift and thus, exempt from arbitration on Jan. 5, 2017. A few days later, on Jan. 9, Swift began to require its lease operators (LOs), including lease operators who are FLSA opt-in plaintiffs and/or members of the putative class action claims asserted in the Third Amended complaint, to sign new operating Agreements with Swift. These new Agreements contain unlawful provisions that purport to require drivers who win a reclassification ruling to pay back to Swift the money they have received as a contractor.[1] They also purport to limit the damages that a Contractor can receive for having been misclassified and to make the Contractor liable for Swift's attorneys' fees if Plaintiffs should ultimately fail to prevail on their claims.

These provisions of the new Agreement are patently unlawful in that they attempt to limit by contract statutory rights which Congress made unwaivable and insofar as they purport to limit the Court's authority to impose statutory remedies. The new provisions

[1] *See* Appendix A hereto for the full text of the provisions ¶16-17 of the new Agreement.

also run afoul of the FLSA's anti-discrimination provision, 29 U.S.C. §215(a), insofar as they specifically place additional burdens on individuals who elect to participate in this case.

This Court has the responsibility to ensure that parties in a class and collective action do not engage in abusive, deceptive, or coercive communications with class members. But that is exactly what Swift has done here. By suggesting to current drivers that they may owe Swift money if the drivers win their case, Swift's communication with drivers are clearly deceptive. The new contract provisions are also coercive in that drivers are told that unless they sign the new contract limiting their rights in this case, they cannot keep working for Swift. These new provisions will inevitably chill participation in this class action by causing FLSA Plaintiffs to opt-out of the case or by discouraging them from joining the case. Or it may cause them to cease working for Swift, simply to preserve their rights to collect damages in this case.

Swift's communications with its current drivers are thus deceptive and coercive. The communications may also be unethical. Swift's new agreement was undoubtedly drafted by Swift's attorneys and it was communicated to the opt-ins who are represented parties in this case, without notice to undersigned counsel. Arizona ethical rules prohibit attorneys communicating directly, or through third persons, with individuals they know to be represented about the subject of their representation. Yet it appears that is exactly what Swift's counsel has done.

The public interest, as well as this Court's "duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties," *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981), all counsel in favor of issuance of preliminary injunctive relief: (1) enjoining ¶16 and ¶17E of the new Agreement; (2) requiring Defendants to inform LOs who have already signed the Agreement that paragraphs 16 and 17E have been enjoined and are no longer operative; (3) enjoining Defendants and their counsel from engaging in any further contacts with current opt-ins and putative class members regarding the matters raised in this suit, including

communications that request or require LOs to enter into agreements that may in any way impact the liability or damages issues that are currently pending before this court, without first informing Plaintiffs' counsel and either obtaining counsel's consent to communicate with their clients, or obtaining permission from the Court, and (4) enjoining Defendants from engaging in any further *ex parte* contacts with class members regarding issues relevant to this case, their status or the status of their workers as employees or independent contractors, or their rights under federal or state labor laws.

FACTS

A few days after this Court signed its Order finding Plaintiffs to be employees of Swift exempt from arbitration, Swift rolled out the new Agreement for its current Lease Operator drivers. Ex. A. By Qualcomm (on-board satellite communications system) message, Swift sent its LO drivers the new Agreement and informed them they must sign the Agreement by March 1 or be terminated. Ex. B. Notwithstanding the formal document giving LOs until March 1st to sign the Agreement, LOs are being sent daily Qualcomm messages pressuring them to sign early or risk being placed on "hold" and unable to drive now. *See* Sherwood Decl. ¶7.

The new Agreement states that Lease Operators are independent contractors and it is generally similar in this respect and others to the previous Agreement that this Court construed in its January Order. Doc 862. However, the new Agreement contains two new paragraphs, ¶16 and ¶17 which are of central importance to this motion. These provisions are set forth in full in Appendix A. Paragraph 16 provides that "If any of CONTRACTOR'S workers is determined to be an employee of COMPANY. . . .either party may at its election, rescind this Agreement back to the time of its formation, and both parties would then be returned to their respective positions before it was signed." In the event that either party elects to "rescind" the Agreement, Paragraph 16 then states that the Lease Operator Swift "will owe [Swift] for the period of time this Agreement was in effect, all gross compensation...previously paid to the [LO] by the Company" less any expenses the LO incurred in performance of the Agreement that were not paid for by

Swift. ¶16A.

At the same time, Swift "will immediately owe the [LO] . . . the then-applicable "mean hourly wage" for Occupation Code 53-3032 in the Phoenix, Arizona metropolitan area, as published by the Bureau of Labor Statistics of the U.S. Department of Labor (or, if higher, the federal minimum hourly wage or a state's then-applicable minimum hourly wage but only to the extent [LO's] wage-earning activities occurred in that state), multiplied by [the LO's] total hours spent actually performing on-duty work for COMPANY, consisting of both driving and non-driving time, under any applicable hours-of-service regulations." ¶16B.

Paragraph 16C allows either party to terminate the Agreement on 1 day's notice in the event of a decision reclassifying LOs as employees.[2] Paragraph 17, entitled "Indemnification" contains a provision E which states that the LO agrees to indemnify Swift for all "reasonable attorneys' fees and litigation expenses" that Swift may incur in defending against any claims (whether brought by the LO's workers, or any union, organization or member of the public) alleging that any of the LO's employees is an employee of Swift but which suit is ultimately unsuccessful. The provision applies to such suits brought "at Contractor's instance or with Contractor's consent" and fails to define either those terms or "private organization" or "member of the public."

Swift and its counsel did not notify Plaintiffs' counsel that it was communicating with current drivers who opted in to this case or who are putative members of the class action claims filed in Plaintiffs' Third Amended complaint about the subject of this case. Upon learning of the new Agreement, Plaintiffs' counsel requested a phone conference with Swift's attorneys. Ex. C. During the phone conference, Swift's attorneys refused to answer any questions about Swift's new ICOA, its meaning, or the communications (additional and apart from the ICOA) that Swift had with Plaintiffs. Swift demanded that

[2] A driver terminated on a day's notice may be under load, far from home, in a rural area, stuck at a truck stop or shipper/receiver yard, or any number of other far-flung locations without transportation home. Sherwood Decl. ¶7.

Plaintiffs put their questions in writing before they would answer them. Plaintiffs' counsel objected, but put their questions in writing. Ex. C. In its response, Swift refused to answer any of the written questions it had demanded that Plaintiffs send and it refused to disavow the applicability of ¶¶ 16 and 17 E to the claims in this case, stating "we will not speculate as to whether Paragraphs 16 and 17 of the new ICOA could hypothetically impact the claims in this case." Ex. C.

The new contract provisions are having a profound chilling effect on the lease operators who are being required by Swift to sign the Agreement. Sherwood Decl. ¶7. Because the Agreement could reasonably be read to apply to the claims in this case, and because Swift has refused to disclaim its application to the claims in this case, any reasonable driver who has already opted in and any of the putative class members is made to fear that by signing the new Agreement they are affecting their rights in this case.

I. LEGAL STANDARD FOR ISSUING A TRO/PRELIMINARY INJUNCTION

The Ninth Circuit Court of Appeals explains the appropriate standard for granting preliminary injunctive relief as follows:

> In this Circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that: 1) [the moving party] will suffer irreparable injury if injunctive relief is not granted, 2) [the moving party] will probably prevail on the merits, 3) in balancing the equities the [nonmoving party] will not be harmed more than [the moving party] is helped by the injunction and 4) granting the injunction is in the public interest.
>
> Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor.

Stanley v. Univ. of S. Cal., 13 F.3d1313, 1319 (9th Cir. 1994); s*ee also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S 7, 20 (2008) (same). "The alternative standards are not separate tests but the outer reaches of a single continuum." *Davison v. City of Tucson*, 924 F. Supp. 989, 992 (D. Ariz. 1996) (quoting *Regents of Univ. of Cal. v. Am. Broadcasting Cos.*, 747 F.2d 511, 515 (9th Cir. 1984)).

The standard for a temporary restraining order is substantially the same. *ProtectMarriage.com - Yes on 8 v. Courage Campaign*, 680 F. Supp. 2d 1225, 1228 (E.D. Cal. 2010) (citing *Winter*); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and temporary restraining order standards are "substantially identical"). The Ninth Circuit employs a "sliding scale" approach, according to which these elements are balanced, "so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Courts also have a particular "duty to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co.*, 452 U.S. 89, 99-100 (1981). That control includes restricting communications between an attorney and the class where such communications are abusive, deceptive, or coercive. *Id.* at 101. "The prophylactic power accorded to the court presiding over a putative class action under Rule 23(d) is broad; the purpose of Rule 23(d)'s conferral of authority is not only to protect class members in particular but to safeguard generally the administering of justice and the integrity of the class certification process." *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at *3 (N.D. Cal. May 2, 2014) (invalidating arbitration agreements that "shrouded" a class action waiver within one of many provisions in a Licensing Agreement).

Courts have found a need to limit communications with absent class members where the communications were misleading, coercive or an improper attempt to undermine Rule 23 by encouraging class members not to join the suit. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1206 (11th Cir. 1985) (imposing sanctions for misleading communications with class members); *Retiree Support Grp. of Contra Costa Cty. v. Contra Costa Cty.*, No. 12-CV-00944-JST, 2016 WL 4080294 (N.D. Cal. July 29, 2016) (granting preliminary injunction against false and misleading communication with class); *Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002) (granting preliminary injunction against sending of account statements that interfered with participation in class). The Court has a

similar duty under the FLSA to protect the integrity of the FLSA opt-in process. *See, e.g. Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 756-57 (9th Cir. 2010) (affirming order in FLSA and Rule 23 class action invalidating opt-out forms obtained by virtue of defendants' coercive conduct) *vacated on other grounds* 132 S.Ct. 74 (2011); *Belt v. EmCare, Inc.*, 299 F.Supp.2d 664, 667-68, 670 (E.D. Tex. 2003) ("The Court, having found that Defendants intentionally attempted to subvert both the Court's role in this collective action and the Court's approved notice by unilaterally sending a misleading and coercive letter to potential class members, enjoins the Defendants from further unauthorized communications with absent class members and sanctions Defendant…"). With these standards in mind it is clear that Plaintiffs satisfy the requirements for a preliminary injunction.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF AN INJUNCTION IS NOT ISSUED

As explained in the Declaration of James Sherwood, Defendants' insistence that current Swift LOs sign the new Agreement containing the damages and indemnity provisions set forth in ¶¶ 16 and 17E is having a chilling effect on those driver's interest and ability to participate in this FLSA/class action. The provisions are carefully drafted to give drivers the impression that <u>if they participate in this suit and are successful</u> in establishing that they are FLSA employees, they will be legally bound to return to Swift "all gross compensation" previously paid to the LO in exchange for a mean hourly wage (or the minimum wage if higher) for their hours of work which will somehow be retroactively determined. The provision suggests to participants in the case that they might well owe Swift money as a result of participating in the case. Any driver reading this new provision would reasonably fear that this recalculation of their earnings will be treated as their FLSA "damages" and that if they participate in this lawsuit and are successful, the net result will be that they owe Swift far more money than they will ever receive.[3] That fear is

[3] This fear is not unreasonable. Under the FLSA damages are calculated on a work week basis. Thus, a worker who fails to receive minimum wage in 3 out of 52 weeks would receive damages for those 3 weeks and retain his or her earnings for the other 49 weeks.

more than enough to make any rational individual opt-out of this suit. A defendant's chilling of participation in an FLSA suit is considered "irreparable harm."

> Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable.

Kleiner, 751 F.2d at 1203 (citing *Zarate v. Younglove*, 86 F.R.D. 80, 90 n. 13 (C.D.Cal.1980)). *See Arrendondo v. Delano Farms Co*., No. CV F 09-1247 LJO DLB, 2010 WL 3212000, at *2 (E.D. Cal. Aug. 10, 2010) ("it is likely there will be irreparable injury to the plaintiffs, putative class members, and potential witnesses involved in" chilling participation in case.).

But the new Agreement is even worse than that because ¶17E suggests that <u>if an LO participates in this suit and is not successful</u>, he will be bound to reimburse Swift for all of Swift's attorneys' fees and litigation costs. The threat of liability for such costs is guaranteed to chill participation in a wage lawsuit and, indeed, can only be viewed as designed to accomplish that goal. That threat is not merely coercive to dropping out of the case, it is also deceptive. Swift has no legal authority to make drivers liable for their fees if the drivers are unsuccessful. *See Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978) (holding that statutes awarding fees to the "prevailing party" require a prevailing defendant to show that the claim was "frivolous, unreasonable, or groundless" and that to assess fees "against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation" and would undercut the efforts of Congress to promote vigorous enforcement of laws by including fee shifting provisions).

But under the new contract, drivers have to return all of their earnings for all 52 weeks and receive in exchange the minimum wage for all 52 weeks. Thus any worker who *averaged* more than the minimum wage over the course of 52 weeks, even if there were minimum wage violations by Swift in some weeks, will end up owing Swift money under the provisions of ¶16. "The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks." 29 C.F.R. § 778.104; 29 U.S.C. § 206 ("Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following [minimum wage] rates").

New ¶¶ 16 and 17E of the new Agreement make the terms effective if "any of the CONTRACTOR'S workers" are determined to be employees of Swift. Whether the phrase "any of CONTRACTOR'S workers" includes the signing driver, is ambiguous, but given the language and structure of the Agreement (whereby a Contractor is considered a separate business entity for which either the LO or a third-party drives, the Agreement strongly suggests that any driver who is reclassified becomes subject to Swift's recoupment.

Swift has refused to answer Plaintiffs' questions as to whether these paragraphs apply to opt-ins' claims in this case, stating, "we will not speculate as to whether Paragraphs 16 and 17 of the new ICOA could hypothetically impact the claims in this case." Ex. C hereto. It could be that Swift will claim that it drafted the agreement intending it to apply only to LOs who hire third party drivers. But this in no way diminishes the chilling effects of ¶¶16 and 17E, since drivers now can reasonably read the clause to mean that they are "contractor's workers" within the meaning of the provisions. And, some LOs incorporate themselves and then work for their corporations. Those LOs are employees of the business entity and thus explicitly covered by the provisions of ¶¶16 and 17E. More importantly LOs are not attorneys and the distinction between the Contractor and the Contractor's workers (if there is one) made in ¶¶16 and 17E is sufficiently vague (particularly with language like that in ¶17E which talks about liability for Swift's fees in suits brought "at the CONTRACTOR's instance or with CONTRACTOR's consent" which are clearly causing LOs to be concerned that this lawsuit may trigger the provisions of ¶16 if they are successful and ¶17 if they are not.

The fact that the new Agreement replaces the Agreement at issue in this case does not in any way diminish its chilling effect <u>on this lawsuit</u>. It is not at all clear whether the "reclassification decision" that triggers return of all monies paid by Swift is limited to cases interpreting the new Agreement, or whether a determination in this lawsuit finding LOs to be employees would be sufficient to trigger the obligation to return all earnings to Swift pursuant to ¶16. Likewise, the inclusion of suits brought at the LO's instance or

consent, might be read to require each LO to opt out of any class certified and to withdraw their opt-ins to this case, if they wish not to be affected by paragraphs 16 and 17. The scope of these provisions is ambiguous but no doubt the ambiguity was intentional. The provisions are clearly being read by some LO's to encompass the claims in this case, Plaintiffs' attorneys cannot in good conscience advise them otherwise, and Swifts' attorneys have refused to disavow that they do. Ex. C.

In these circumstances, Plaintiffs have clearly shown that the provisions of ¶¶16 and 17E of the new agreement have a grave potential for chilling participation in this action. They thus meet the first requirement for a preliminary injunction, the showing of a likelihood of irreparable harm.

III. DEFENDANTS' ACTIONS ARE UNLAWFUL

Not only are ¶¶ 16 and 17E likely to have a chilling effect on class members participation in this action, they are demonstrably unlawful. And Swift's written suggestion that an LO signing a contract which promises to effectuate these paragraphs is both misleading and coercive. Swift has no authority under the FLSA to make a successful plaintiff return any funds if reclassified. The Court calculates damages if a driver is reclassified and contractual remedies which conflict with the Court's imposition of FLSA remedies can be given no preclusive effect.

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the

employee's right to liquidated damages.

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (footnotes omitted). *See D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946) ("the purpose of the [FLSA], . . . was to secure for the lowest paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.").

And, in fact, conditioning employment or continued employment on a demand for fees of any kind (such as the demand in ¶16 for return of all compensation paid and in ¶17E for payment of Defendants' attorney's fees) is a crime under Arizona law, A.R.S.§ 23-202, and gives rise to a claim under the Arizona Employment Protection Act, A.R.S. §23-1501(3)(c)(viii). *Logan v. Forever Living Products Intern., Inc.*, 52 P.3d 760, 762 (Ariz. 2002) ("Where an employee is terminated by an employer for refusal to accept extortionate demands by the employer, in violation of A.R.S. § 23–202, the employee has a wrongful termination cause of action under the AEPA.").

Paragraph 16 also violates the FLSA by requiring the mileage wages paid by Swift under the Agreement to be returned to Swift immediately upon a finding that LOs or their workers are employees of Swift. And this contingent right to recapture the payments made under the Agreement continues in perpetuity as ¶16D clearly states that the recapture provisions "survive both the rescission and the termination of this Agreement." To comply with the FLSA, amounts paid as compensation must be paid "free and clear." 29 C.F.R. § 531.35 ("'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.'"). But none of the mileage wages Swift pays pursuant to the new contract can be considered wages paid free and clear because ¶16 says that all of those monies are subject to recapture by Swift if the driver is found to be an employee. While the hourly rates that Swift would then pay workers in place of the recaptured mileage wages might be free and clear, those hourly rates fail to comply with the requirements of the FLSA and A.R.S. § 23-351 that wages be paid in a timely fashion at the next regular payroll, that employees timely receive

all wages due upon discharge or quit, A.R.S. 23-353, and that employers who violate these provisions or fail to pay minimum wages when due may be liable for liquidated and/ or treble damages. 29 U.S.C. §216(b), A.R.S. § 23-355. It simply does not comply with the FLSA or state law to pay workers the minimum wage free and clear months or years after the wage was earned. *Brooklyn Sav. Bank*, 324 U.S. at 704–713 (untimely payment of FLSA overtime wages did not comply with the FLSA and worker was permitted to sue for liquidated damages); *Biggs v. Wilson*, 1 F.3d 1537, 1541 (9th Cir. 1993) ("the FLSA is violated unless the minimum wage is paid on the employee's regular payday").

Paragraph 16 violates the FLSA in other ways. Insofar as Swift believes that the recapture of mileage payments and the substitution of hourly wages will satisfy its FLSA obligations, it will not. As noted above, workers would still be entitled to liquidated damages. *Brooklyn Sav. Bank*, 324 U.S. at 704. More fundamentally, an employer cannot unilaterally impose on a worker, by contract, a settlement of FLSA claims which is precisely what ¶16 purports to do. *See Brooklyn Sav. Bank*, 324 U.S. at 707 (finding FLSA settlement agreement signed by worker invalid); *Seminiano v. Xyris Enter., Inc.*, 602 F. App'x 682, 683 (9th Cir. 2015) ("FLSA claims may not be settled without approval of either the Secretary of Labor or a district court."). Finally, ¶16 is unlawful because it is, in essence, an agreement to indemnify Swift for Swift's own FLSA violations. *See Herman v. RSR Services Ltd.*, 172 F.3d 132, 143 (2d Cir. 1999) (holding that there is no right to contribution or indemnification under the FLSA); *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992) ("a third party complaint by an employer seeking indemnity for an employee is preempted" by the FLSA). Paragraph 16 operates as a form of indemnification because, as long as a worker's mileage wages average more than minimum wage over the course of the Agreement, the provisions of paragraph 16 by which Swift recaptures its mileage payments and substitutes minimum wage hourly payments will be a net positive for Swift. In other words, the worker will not only have to reimburse Swift for its FLSA violations, but disgorge anything the worker earned above the minimum wage in other weeks. That is indemnification on steroids and it is clearly

unlawful. Indeed, under the FLSA, an employer cannot treat a payment above the minimum wage in one week as a credit against the sub-minimum wages in a later or earlier week. "The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks." 29 C.F.R. § 778.104; 29 U.S.C.A. § 206. Each week is a separate obligation. Swift's proposal to aggregate all sums paid, and to credit those against its sum total obligation is manifestly contrary to the FLSA's remedial damage calculation.

Paragraph 17E is equally unlawful because it makes LOs liable for Swift's attorneys' fees in the event that a suit seeking to have a worker treated as a Swift employee is unsuccessful. Such a provision is directly contrary to the fee-shifting provision of the FLSA which allows a fee for a successful plaintiff but which contains no provision allowing fees to a successful defendant. 29 U.S.C. §216(b). *See Smith v. AHS Okla. Heart, LLC*, No. 11–CV–691–TCK–FHM, 2012 WL 3156877 (N.D. Okla. 2012) (refusing to enforce FLSA arbitration agreement that contained a loser pays fee-shifting provision); *Daugherty v. Encana Oil & Gas USA, Inc.*, No. 10–cv–02272–WJM–KLM2011 WL 2791338, at *11 (D. Colo. July 15, 2011) (holding fee-shifting provision in arbitration agreement that allows the employer to recover fees simply by virtue of being the prevailing party is unenforceable). *See also Quillion v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 233-31 (3d Cir. 2012) ("provisions requiring parties to be responsible for their own expenses, including attorney's fees, are generally unconscionable because restrictions on attorneys' fees conflict with federal statutes providing fee-shifting as a remedy.").

The FLSA forbids "any person" "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. 215(a)(3). Conditioning employment on an agreement to return moneys paid if a person is either successful in their suit, or to pay the employer's attorneys' fees and costs if unsuccessful in their suit, is the very definition of discriminatory conduct. Drivers who do not sue Swift are not subjected to the purported new terms, which are effective only

Of further concern here is the fact that the new ICOA seems highly likely to have

been drafted by Swift's lawyers for delivery to opt-in class members and others. It is inconceivable that a contract with this volume of legal language could have been written without lawyers – particularly when the company is in litigation over the very subject of the new language inserted into the agreement, and the contract is imposed a few days after the Court's ruling on reclassification. Plaintiffs' counsel asked opposing counsel to inform them if counsel had known of or reviewed the communication before it was sent to the represented drivers who are part of this case. Ex. C. Swift's counsel refused to answer the questions. *Id.* In light of the legal language of the contract, in light of Swift's complex legal situation in this case, and in light of the ruling which seems to have been the predicate to the new Agreement, there can be little doubt, however, that Swift's attorneys intended the new contractual language to be delivered to opt-in lease drivers they know to be represented by undersigned counsel and which they know may affect their rights or behavior in this case.[4]

Arizona Rules of Professional Conduct, Ethical Rule 4.2 prohibits communications with a party the attorneys know to be represented.

> ER 4.2. Communication with Person Represented by Counsel
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The prohibition is intended in part to prevent unprincipled attorneys from exploiting the disparity in legal skills between attorneys and lay people, and to preserve the integrity of the attorney-client relationship. *Lang v. Super. Ct., In and For Cty of Maricopa*, 826 P.2d 1228, 1230 (Ariz. App. 1992). An attorney may not have a third party deliver communications to a represented party about the subject of the representation, other than through that represented party's attorneys. *See* ER 8.4(a) (prohibiting attorneys from

[4] Plaintiffs' counsel was not advised of the new Agreement in advance of it being sent to drivers. Plaintiffs' counsel was not provided with either the new Agreement or any of the communications urging drivers to sign the agreement (Qualcomm messages, phone conversations, etc.). Counsel had no way to even know which opt-ins were provided with the new Agreement nor readily ascertain the scope of dissemination of the Agreement.

violating, knowingly assisting or inducing another to do violate ethical rules or do so through the acts of another); Cmt 1 to 2003 amendment to ER 8.4. If Swift's attorneys participated in drafting the clauses for delivery to Plaintiffs without sending it through Plaintiffs' counsel, as appears highly likely, Swift's attorneys have violated Arizona ER 4.2 and 8.4.

Courts have both the authority and the duty to inquire into, sanction, and enjoin, ethical violations occurring in cases pending before them. "A district court may discipline an attorney for conduct that violates a California Rule of Professional Conduct by way of its local rules of professional conduct." *Cakebread v. Berkeley Millwork & Furniture Co*., No. 16-CV-00083-RS(DMR), 2016 WL 6834217, at *3 (N.D. Cal. Nov. 21, 2016). *See also Patel v. 7-Eleven, Inc.*, No. CV 1400519 -PSGD-TBX, 2015 WL 9701133, at *7 (C.D. Cal. Apr. 14, 2015) ("In order to maintain ethical standards of professional responsibility, the Court must assess a sanction against Plaintiffs' counsel's conduct that actually punishes counsel for its ethical wrongdoing."). "A failure to sanction Mr. Bayer and Mr. McCollum would be an abdication of the court's responsibility to address and appropriately deal with obvious violations of the Rules of Professional Conduct and ethical canons." *Terrebonne, Ltd. of Cal. v. Murray*, 1 F. Supp. 2d 1050, 1074 (E.D. Cal. 1998). In *Richards v. Holsum Bakery, Inc.*, CV09-00418-PHX-MHM, 2009 WL 3740725, at *6–7 (D. Ariz. Nov. 5, 2009), the court held:

> This Court, however, will not allow Plaintiff's ethical violations to go unpunished. District courts may apply a wide range of sanctions to address ethical violations. *Kaiser v. AT & T*, 2002 WL 1362054 at *8 (D.Ariz. Apr.15, 2002). "Potential sanctions typically include exclusion of evidence, disqualification, dismissal, and imposition of costs and fees." *Id*. (citing *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157, 1167–68 (D. Nev. 1998)). Here, Defendants have requested that Plaintiff should be barred from using any statement, documentation, or information gained from the ex-parte communication, and that he surrender any notes, memos, copies, or other documents memorializing it. Additionally, Defendants ask that this Court award reasonable attorneys' fees and costs associated with investigating and responding to the inappropriate ex-parte communications. The Court will grant both of these requests.

See also Kaiser, 2002 WL 1362054, at *8 (disqualification of counsel who has

unauthorized communication with opposing party).

IV. BALANCE OF HARDSHIPS FAVORS AN INJUNCTION

The balance of hardships clearly favors Plaintiffs. Inasmuch as the provisions of ¶16 and 17E of the new Agreement are unlawful and unenforceable, enjoining those provisions will impose no hardship on Swift. On the other hand, in the absence of an injunction the unlawful provisions in the contract will continue to confuse and intimidate drivers and deter some number of them from participating in this action.

Chilling participation in a case is particularly insidious because neither the Court nor Plaintiffs' counsel can know when a class member refuses to join, or opts out of a case, whether the reason was coercive conduct by the chilling defendant. And notwithstanding any remedial actions by the Court (which may not be seen or understood by class members), it is quite likely that drivers will be chilled from participation regardless. Thus, the harm is worked regardless of later remedial efforts. And the Defendant here may believe that the money it saves by chilling participation, in light of its loss on summary judgment, is significant, regardless of any injunction or sanctions later issued.

V. THE PUBLIC INTEREST FAVORS AN INJUNCTION

The public interest will be served by issuance of an injunction. The remedial statutes invoked by Plaintiffs—the FLSA, Arizona, California, and New York labor law, and the federal forced labor statute—all serve vital public interests as well as protecting the rights of individual workers. The FLSA's rules, are "remedial and humanitarian in purpose." *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590 (1944). A court hearing an FLSA action has the important responsibility to safeguard the rights of unnamed and unknown prospective plaintiffs in a collective action, which it does through supervised communications. *See Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 171 (1989); *Belt*, 299 F. Supp. 2d 664 (sanctioning deceptive and coercive communications by class opponent). Unlawful actions by the Defendant that tend to dissuade drivers from participating in this suit directly undermine that public interest. Issuance of the injunction sought by Plaintiffs will support the public interest in full

enforcement of these labor protections.

VI. APPROPRIATE REMEDY

Because they are facially unlawful, Paragraphs 16 and 17E of Swift's new operating agreement should be enjoined and Swift should be required to inform all workers including those who have previously signed those provisions that they are no longer operative and will in no way affect LO rights to participate in and benefit from this class action. Finally, given the possible role of defense counsel and its putative disregard for the ethical rules effective in this District if shown to have occurred, Defendants and their counsel should be required to disclose their role in preparing and/or reviewing the new Agreement, and if so, enjoined from further contacts with current opt-ins and putative class members regarding the matters raised in this suit, including communications that request or require LOs to enter into agreements that may in any way impact the liability or damages issues that are currently pending before this court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant a temporary restraining order and preliminary injunction:(1) enjoining ¶16 and ¶17E of the new Agreement; (2) requiring Defendants to inform all lease operators including those who have already signed the Agreement that paragraphs 16 and 17E have been enjoined and are no longer operative; (3) enjoining Defendants and their counsel from engaging in any further contacts with current opt-ins and putative class members regarding the matters raised in this suit, including communications that request or require LOs to enter into agreements that may in any way impact the liability or damages issues that are currently pending before this court, without first informing Plaintiffs' counsel and obtaining permission from the Court .

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to all CM/ECF registrants.

s/J. Kroll