SUSAN MARTIN (AZ#014226)
DANIEL BONNETT (AZ#014127)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
dbonnett@martinbonnett.com
smartin@martinbonnett.com

DAN GETMAN (*Pro Hac Vice*)
GETMAN & SWEENEY PLLC
9 Paradies Lane
New Paltz, NY 12561
(845) 255-9370
dgetman@getmansweeney.com

Attorneys for Plaintiffs

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.	**No. CV 10-899-PHX-JWS** **PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY A FAIR LABOR STANDARDS ACT COLLECTIVE ACTION AND AUTHORIZE NOTICE TO BE ISSUED TO THE CLASS**

Plaintiffs move the court to conditionally certify plaintiffs' 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 of notice to class members.

The class is defined as: **"all truckers who lease a truck from IEL to drive for SWIFT 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." 2nd Am. Cplt., Para. 38.**[1]

Because there is sufficient evidence at this stage of the collective action that plaintiff is similarly situated to potential class members, plaintiffs' request to conditionally certify this collective action and to authorize notice to the putative class should be granted. Defendant should be directed to provide names and addresses of the class members in standard electronic format. Defendant should be directed to supply to plaintiff with the last four digits of the social security numbers for those class members whose notice is returned as undeliverable.

MEMORANDUM

I. STATEMENT OF THE CASE

This case arises out of two documents that each Plaintiff and each putative class member entered into: a truck lease agreement with Defendant Interstate Equipment Leasing and an "independent contractor operating agreement" (ICOA) with Defendant Swift Transportation, Inc. Plaintiffs allege that these two documents (which must be signed at the same time and which reference each other) form a single lease/operating agreement contract which violated the FLSA rights of Plaintiffs and other similarly situated truck drivers by wrongfully classifying them as "independent contractors" rather than employees. Under the FLSA, a company is an "employer" notwithstanding a

[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. Second Amended Complaint, para. 42.

designation of contractor status, when it "suffers or permits" the putative employee to perform work.[2]

There are other non-FLSA claims in the case that are not implicated in this motion. Specifically, Plaintiffs also allege that the lease/independent operating agreement contracts (hereafter "lease/ICOA contracts") are unconscionable and unenforceable because (1) they give Defendants the right to place drivers in default for any or no reason at any time during the term of the contract, (2) they give Defendants the right, once drivers are in default, not only to seize the truck, but to demand full payment of the balance of the lease along with other charges; and (3) they allow Defendants to change the terms of the contract unilaterally; drivers must accept these changes on threat of being placed in default. Finally, Plaintiffs allege that the lease/ICOA contract constitutes a scheme of "forced labor" in violation of 18 U.S.C. §1589 and 1595. Plaintiffs seek to bring their FLSA action as a collective action and to bring their unconscionability 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

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[2] "Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA. *See Rutherford Food Corp. v. McComb,* 331 U.S. 722, 729 (1947); *Usery v. Pilgrim Equipment Co.,* 527 F.2d 1308, 1315 (5th Cir. 1976).. Similarly, the subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above." *Real v. Driscoll Strawberry Associates, Inc.,* 603 F.2d 748 (9th Cir. 1979). In fact, "the relevant provision of the FLSA, 29 U.S.C. § 203(g), defines "employ" as including "to suffer or permit to work." This is " 'the broadest definition [of 'employ'] that has ever been included in any one act,' " *United States v. Rosenwasser,* 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black)),FN5 and it encompasses "working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category," *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51, 67 S.Ct. 639, 91 L.Ed. 809 (1947); *Torres-Lopez v. May,* 111 F.3d 633 (9th Cir. 1997).

Defendant Swift is the largest truckload carrier in the world. Ex. E, Swift Website, Our History, http://www.swifttrans.com/c-clamp.aspx?id=174. Swift has terminals sprinkled throughout the United States, including its international headquarters within this district. Defendant IEL is a closely related company to Swift, owned and operated by the some of the same people who own and operate Swift. Ex. A, Corporate Information. Plaintiffs allege that Swift and IEL operate as a single enterprise for purposes of the FLSA. Second Am. Complaint para. 68; 29 U.S.C. 203(s).

The named plaintiffs are truck drivers, each of whom entered into a truck lease with IEL and an independent operating agreement with Swift.[3] Exs. D, F & G. Each Plaintiff is presented with these two documents at the same time and is required to accept them both as a package. Exs. D& F. The lease agreement specifically references the ICOA agreement with Swift and requires that the ICOA agreement remain in effect for the lease to remain in effect. Ex. Leases G-2 & H-2 ¶¶12(g).

Once they sign the Lease/ICOA contract and begin driving for Swift, Swift exercises total control over their work. For example, The ICOA specifically states that, **"While operating the Equipment under COMPANY'S authority, COMPANY shall have exclusive possession, control and use of the equipment during the term of this Agreement."** Exs. F-1, G-1, H-1, I-1, ICOA ¶5A. Plaintiffs contend that this total control will ultimately be found sufficient to establish FLSA liability for truckers who do not make minimum wage in each work week.[4]

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[3] Over the years Defendants have used a number of different versions of each document. However, the different versions do not vary in any material respect.

[4] The Ninth Circuit in *Donovan v. Sureway Cleaners* 656 F.2d 1368, 1370 (9th Cir. 1981), described the FLSA test of employment: "In determining whether a person is an "employee" for purposes of social legislation such as the FLSA, the courts have identified a number of factors that should be considered. Although the list is not exhaustive, the court in *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), identified the following relevant factors: 1) The degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the

Swift sets work rules for plaintiffs through the use of a Manual of more than 200 pages with which drivers were required to comply. See Ex. M, Swift Manual, and listing of instructions culled from the manual, Ex. M-1; Ex. ICOAs, F-1, H-1 ¶16; G-1, I-1 ¶17. Swift also monitored the drivers' every move through a GPS enabled QualComm unit that measures the driver's mileage, speed, adherence to route, stopping and starting. Ex. M, Swift Manual, Sec. 7. The QualComm device also enables Swift to send instructions to drivers in real time and to dispatch them to the next job. Id. If a driver turned down jobs that were offered, Swift would refuse to route them to additional jobs. Ex. K, Qualcomm Message re Load. Swift set a "speed governor" on each truck that set maximum speed and engine revolutions per minute. Ex. M, Swift Manual, Sec. 7. Swift also tells plaintiffs where to go to pick up loads, when to deliver the load by, and what route to take to get there. If plaintiffs failed to follow Swift's suggested route, they were subjected to financial penalties. Ex. L, Qualcomm Messages re Route. Plaintiffs were only permitted to drive loads for Swift; they could not take their trucks to other carriers who would pay more money. Exs. F, Van Dusen ¶14& 16, G, Sheer ¶10, 12, H, Sykes ¶16, & I, Hoffman ¶9, 15. Swift could also fire the drivers at will. Ex. G-1, ¶17. In fact, Swift fired plaintiff Joseph Sheer even though he violated no law and no work rule. Ex. G, Sheer Decl., ¶14-21. Once Swift terminated his ICOA, he was deemed to be in "default" of his lease. *Id.* at ¶21-32. Defendants demanded repossession of the truck and

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alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business." Of these factors, the degree of the employer's control is generally considered the "ultimate," or "crucial" determinant. *Brock v. Superior Care, Inc.* 840 F.2d 1054, 1058 (2d Cir. 1988), however, each and every factor suggest employment status here.

began billing him for all remaining lease payments due on the truck (approximately $32,000). Id. Defendants' ability to fire plaintiffs, repossessing their leased trucks, and demanding the remaining lease payments is the means by which defendants enforced control over the plaintiffs, and is further evidence of defendants' employment of plaintiffs within the meaning of the FLSA. Plaintiffs reference defendants' contracts and manuals governing the plaintiff drivers only to illustrate the common elements of control, as the merits are not to be determined at this early stage. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976). Similarly, the subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above." *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979).

Similarly, 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.* settlement sheets attached to the Getman Declaration, Ex. H-3 Sykes Settlements & I-2 Hoffman Settlements. Plaintiffs Sykes, Van Dusen and Hoffman made so little money while leasing a truck, that they could not afford to continue to work for Swift, make the required lease payments, pay for gas, tolls, insurance, taxes, maintenance, equipment, bonding, and bear all the other charges Swift required them to bear, and still support themselves and their families. Ex. F, H, & I, Decls. Plaintiff Hoffman made so little money his personal vehicle was repossessed and he and his wife became homeless, both forced to live in the truck. He had to cut back on his heart medication even though he had four prior heart attacks. Ex. I, Hoffman Decl. 13-28. Plaintiff Sykes was operating at a loss – that is he made no money at all -- despite eleven weeks of working for Swift, which led to his inability to pay for fuel oil for the family's home in Pennsylvania. Sykes's family (including three children) were forced to live for a period without heat. Ex. H, Sykes Decl., ¶ 13. Plaintiff Van

Dusen could not keep up with home mortgage payments or even keep enough money in her account to pay for required training courses. Ex. F, Van Dusen Decl., ¶ 13, 18. Each of these plaintiffs made so little money that they had to turn in their truck.

ARGUMENT

1. 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. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), quoting *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942). 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), quoting Message of the President to Congress, May 24, 1934. The FLSA was conceived to combat worker exploitation. *Scott v. Otts*, 2006 WL 870369, *4 (N.D. Ga. 2006), citing *Evans v. Continental Motors Corp.*, 105 F. Supp. 784, 793 (D. Mich. 1952).

2. FLSA Representative Actions

Section 16(b) of the FLSA provides that a person may maintain an action on "behalf of himself…and other employees similarly situated. 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). Thus, there are only two requirements to proceed as a representative action: (1) all plaintiffs must be "similarly situated;" and (2) a plaintiff must consent in writing to take

part in the suit.[5] This latter requirement means that a representative action follows an "opt-in" rather than an "opt-out" procedure. *See Brown v. Money Tree Mortg., Inc.*, 222 F.R.D. 676, 678 (D. Kan. 2004). When employees are shown to be similarly situated, the district court has the discretion to implement the representative action procedure by facilitating notice to potential plaintiffs of their right to opt-into the action. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172 (U.S. 1989). Such notice should be "timely, accurate, and informative." *Id.* Sending notice to inform all similarly situated employees of the action "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits." *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335, 336 (2d Cir. 1979).

Courts in Arizona employ the common two-staged process in determining whether to certify a collection action under Section 216(b). *Madrid v. Peak Construction, Inc.*, 09-CV-00311-JWS, at pp. *18-19 (D. Ariz. Opinion and Order dated July 23, 2009)(Sedwick, J) (attached to the Court's copy pursuant to L.R. Civ. P. 7.1(d)(4)); *Singleton v. Adick* 2009 WL 3710717, 3 -5 (D. Ariz. Nov. 2, 2009)(Tielborg, J); *Stickle v. SCI Western Market Support Center, L.P*, 2009 WL 3241790, 2 -3 (D. Ariz. Sept. 30, 2009) (Murgia, J); *Hutton v. Bank of America*, 2007 WL 5307976 at *1 (D. Ariz. Mar. 31, 2007).

Under the two-step approach, the court determines, "on an ad hoc case-by-case basis, whether plaintiffs are similarly situated." *Thiessen*, 267 F.3d at 1102 (citing *Mooney v. Aramco Servs. Co .*, 54 F.3d 1207, 1213 (5th Cir. 1995). This requires the court to first make "an initial 'notice stage' determination of whether plaintiffs are 'similarly situated.'" *Id.; Madrid*, at p. 19. At this notice stage, which generally occurs

[5] Rule 23 standards do not apply to FLSA opt-in class. *Thiessen v. Gen. Elec.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (collective actions are "independent of and unrelated to, the requirements for class actions under Rule 23").

early in the case before discovery has begun, the court "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Theissen,* 267 F.3d at 1102; *Madrid,* 2010 Wl 339047 at *9. If a plaintiff can survive this hurdle, 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 second stage is typically precipitated by a motion for decertification filed by the defendant after discovery is complete. *Mooney,* 54 F.3d at 1214. At this stage, the court makes yet another determination whether the proposed class members are similarly situated. However, because discovery is complete, the court utilizes a much stricter standard to determine whether the claimants are, in fact, similarly situated. *Madrid,* at p. 19. While conditional certification at the first stage is by not automatic, *see Adams v. School Board of Hanover County,* 2008 WL 5070454 (E.D.Va. Nov.26, 2008), Plaintiffs' burden is "lenient." *Madrid,* at p. 19. "All that need be shown by the plaintiff is that some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." *Wertheim v. State of Arizona,* 1993 WL 603552, at *1 (D.Ariz. Sept. 30, 1993); *In re Wells Fargo Home Mortgage Overtime Pay Litig.,* WL 3045994, at *14 (N.D.Cal. Oct. 18, 2007). Given the light burden, motions to conditionally certify a class for notification purposes are "typically" granted. *Lemus v. Burnham Painting & Drywall Corp.,* 2007 WL 1875539, at *3 (D.Nev. June 25, 2007) ("the court usually relies on the pleadings and any affidavits submitted, and applies a lenient standard which typically results in 'conditional certification' of a representative class"). To proceed to the notification stage of the litigation, Plaintiffs' allegations need neither be "strong [n]or conclusive." *Rehwaldt v. Elec. Data Sys. Corp.,* 1996 WL 947568, at *4 (W.D.N.Y. March 28, 1996). The evidence must only show that there is

some "factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice." *Bonila v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1138 n. 6 (D.Nev. 1999).

The reason for this two-step process with its relatively liberal first-stage standard for assessing the question of whether class members are "similarly situated" arises because, unlike a Rule 23 class action, 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.** *See Thiessen,* 267 F. 3d at 1105; *Hipp v. Liberty National*, 252 F. 3d 1208, 1216-1217 (11th Cir. 2001) *cert. denied* 534 U.S. 1127. The second-stage proceeding, which occurs after an opportunity for discovery, allows the Court to revisit the "similarly situated" question on a full factual record and to decertify the class if the facts demonstrate that the initial 'conditioning ruling' was erroneous. Thus the two-stage procedure protects the interests of workers' in ensuring they receive prompt and timely notice of their right to vindicate their FLSA rights while simultaneously ensuring that only claims on behalf of genuinely similarly situated workers go on trial.

Courts recognize that collective action notification normally occurs before the Parties have had the chance to engage in extensive fact discovery. *See Delgado v. Ortho-McNeil, Inc.*, 2007 WL 2847238 (C.D.Cal. Aug.7, 2007) (citing *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 990 (C.D.Cal. 2006) ("Given the limited amount of evidence generally available at this stage, the court will generally apply a fairly lenient standard.")). That is why in making a determination in whether to conditionally certify a proposed class for notification purposes only, courts do not review the underlying merits of the action. *See Williams v. Trendwest Resorts, Inc.*, 2006 WL 3690686, at *3-4 (D. Nev. Dec. 7, 2006) (citing *Frank v. Capital Cities Comm., Inc.*, 88 F.R.D. 674, 676

(S.D.N.Y.1981)). "It is not the Court's role to resolve factual disputes ... or ... decide substantive issues going to the ultimate merits ... at the preliminary certification stage of an FLSA collective action." *Barrus v. Dick's Sporting Goods, Inc.*, 456 F.Supp.2d 224, 230 (W.D.N.Y. 2006) (internal citations omitted). *See also, e.g., Stanfield v. First NLC Fin. Servs., LLC*, 2006 WL 3190527, at *4 (N.D.Cal. Nov.1, 2006) ("the Court will not evaluate the merits of Plaintiffs' claims under the FLSA at this point in the litigation").

Although the FLSA does not define the term "similarly situated," courts have generally agreed that a plaintiff must show that there are "some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA." *Stickle*, 2009 WL 3241790 at *2-3;, *Wertheim v. State of Arizona*, 1993 WL 603552, at *1. Plaintiffs bear the burden of showing that the putative class members are similarly situated with the group of employees they wish to represent. This burden is light. *Madrid, supra.* Plaintiffs must show "only that their positions are similar, not identical, to those positions held by the putative class members." *Brechler v. Qwest Communications Intern., Inc.*, 2009 WL 692329, at *1 (D.Ariz. Mar. 17, 2009) (similarly situated, does not mean "identically situated."). *See also Bayles v. Amer. Med. Response*, 950 F.Supp. 1053, 1066 (D. Colo. 1996) (courts "require nothing more than substantial allegations that the putative class members were together victims of a single decision, policy, or plan").

Here, applying the lenient standard of the notice stage, plaintiffs have demonstrated that they are similarly situated to a group of employees who also were subjected to FLSA violations by defendant. First, all potential class members, like plaintiff, performed similar work — driving for Swift – under similar conditions – i.e. pursuant to lease/ICOA agreements labeling them as independent contractors. All potential class members derive their claims from the same documents – i.e. a lease

agreement with IEL and an ICOA agreement with Swift. If the named Plaintiffs are correct that those documents place sufficient control in Swift for the named Plaintiffs to be employees then they establish that same fact for all class members.

To be sure, there are some minor variations in the lease/ICOA contracts signed by the Plaintiffs and class 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.[6]

It should be noted that the fact that defendants will contend plaintiffs are "independent contractors" and not "employees" subject to the act does not defeat notice at this stage as the merits of plaintiffs' claims and defendants' defenses are not decided at this stage. *Clincy v. Galardi South Enterprises, Inc.*, 2010 WL 966639 (N.D.Ga. Mar. 12, 2010) (granting notice to independent contractors for joining FLSA claims); *Labrie v.*

[6] A short list of relevant contract provisions which apply to all plaintiffs follows: Swift can terminate plaintiffs at any time. Sheer & Hoffman ¶17(A); Sykes and Van Dusen ¶16; Termination of Swift ICOA results in default of the IEL lease. Sheer & Sykes Lease ¶12(g);Far reaching remedies for default, including acceleration of all lease payments. Sheer & Sykes Lease ¶13; Continued effectiveness of the IEL Lease is dependent on Swift. Sheer Lease ¶2, Sykes Lease ¶2(e), Sykes Lease Schedule D, Sykes Lease "Authorization and Assignment" attachment, Sheer Lease "Authorization for Deduction" attachment; Plaintiffs prohibited from hauling goods for 3rd party while operating under Swift authority, Sheer, Hoffman, Sykes, Van Dusen ¶5(A); Control in contract and lease, e.g. Required to have Qualcomm, Sheer & Hoffman ¶5(C), Sykes & Van Dusen ¶5(D); Swift may amend the contract whenever it wishes, subject to either QualComm approval by driver or termination of contract, Sheer & Hoffman ¶2(D), Sykes & Van Dusen ¶2(C); Plaintiffs required to post $1,500 performance bond, Sheer, Hoffman, Sykes and Van Dusen ¶6;Plaintiffs are required to have certain insurance, Sheer, Hoffman, Sykes and Van Dusen ¶8;Plaintiffs are responsible for payment of all basic operating expenses, Sheer, Hoffman, Sykes and Van Dusen ¶11; Plaintiffs are required to authorize deductions from pay for "obligation to third parties" from compensation, Sheer & Hoffman ¶16, Sykes & Van Dusen ¶14;Payment of Fuel Surcharge to ICs, Sheer & Hoffman ¶2(B), Sykes Schedule D(C), Van Dusen Schedule D(B);List of Deductions from plaintiffs' pay, Sheer, Hoffman, Sykes and Van Dusen Schedule B, Sykes Lease Schedule D.

UPS Supply Chain Solutions, Inc., 2009 WL 723599 (N.D.Cal. Mar. 18, 2009)(certified class of UPS truck drivers claiming misclassification as independent contractors).

Plaintiff has submitted sufficient evidence at the notice stage to establish that the trucker plaintiffs are similarly situated for purposes of conditionally certifying this collective action.

3. An Order Prohibiting Retaliation for Participation in the Case is Required.

At least 64 truckers have joined this case so far, with more joining every week. However, most of these individuals no longer work for Swift. Current truckers still under lease from IEL, have been terrified to join this case and few have done so. *Getman Decl.* Given that the Lease/ICOA permits defendants to put plaintiffs in default ***for any or for no reason***, current truckers are afraid that joining this case will result in being put in default, having their truck repossessed, their maintenance and other escrow accounts seized, their performance bonds called, and still they will be required to pay all remaining lease payments to defendants (without a truck to enable them to earn the money to pay these exorbitant charges). Further, drivers put in default risk Swift placing negative references to a "default" in their DAC Report.[7] Accordingly, an order specifically prohibiting retaliation and prohibiting unilateral "default" without cause of any plaintiffs who join this case is required, so that these trucker class members may join without fear of retaliation. Plaintiffs have requested that defendants abjure retaliation, including the ability to put plaintiffs in default for no reason, unilaterally. Ex. Q Yet defendants have refused to discuss any limitation on their ability to default drivers whenever they wish, suggesting that defendants indeed seek to chill participation in this case, and thus reduce their liability by extra-legal means.

[7] The DAC Report is the employment screening tool used by the entire trucking industry. Negative references from an employer such as Swift, indicating that a driver was in "default" in their lease, can blackball a driver from the profession. *See eg.* Ex. H, Sykes Decl. ¶21. *See* Ex. N, HireRight.com.

4. Defendant Should Be Directed to Assist Plaintiffs' Counsel in Facilitating Notice.

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). Defendant should be directed to provide names, addresses, and email addresses of the class members who drove for defendants at any time in the last 3 years, in an electronic format such as Excel, to facilitate notice. Defendants alone are in possession of the information necessary to mail the attached notice and Courts uniformly require defendants to supply the names for notice. *Czubara v. Hamilton Mortg. Co*., 2006 WL 5526617 (D.Ariz. Jun.5, 2006); *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).[8]

Furthermore, since sometimes plaintiffs move without leaving a valid forwarding address, defendants should be directed to promptly supply telephone numbers and the last four digits of social security numbers, but only for those class members whose notice is returned as undeliverable, to assist with location efforts or a skip trace to find the current address for such individual within the time called for this notice, so that notice can then be re-mailed. *See, Recinos-Recinos v. Express Forestry, Inc*., 233 F.R.D. 472, 482 (E.D. La. 2006)(ordering production of telephone numbers of potential class members); *Blake v. Colonial Savings*, 2004 WL 1925535, at * 2 (S.D. Tex. Aug. 16, 2004) (ordering production of telephone numbers and social security numbers); *Patton v. Thomson Corp*., 364 F.Supp.2d 263, 268 (E.D.N.Y. 2005) (telephone numbers and social security numbers); *Dietrich v. Liberty Square, LLC*, 230 F.R.D. 574, 580-581 (N.D. Iowa 2005) (telephone numbers); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 395 (W.D.N.Y. 2005) (same); *Geer v. Challenge Finance Investors Corp*, 2005 WL 2648054, at *5 (D. Kan.

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

2005) (same); *Bell v. Mynt Entertainment, LLC,* 223 F.R.D. 680, 683 (S.D. Fla. 2004) (same); *De La Rosa Ortiz v. Rain King,Inc.*, 2003 WL 23741409, at * 1 (S.D. Tex. Mar. 10, 2003); *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100388 (D. Minn. Jan. 23, 2002) (same).

Plaintiffs also request that the Court order Defendant to post Notice of this lawsuit and an adequate number of Consents to Sue in a conspicuous location in Swift's work locations, such as terminals, yards, mechanic shops, recruiting locations, loading and unloading facilities, where it will be visible to driver class members. This is particularly important here, as most truck drivers are on the road for months at a time, and often do not receive mail at their homes until they eventually return, which here may be months after the notice period is completed. *Getman Decl.*

Posting of notice contributes to dissemination among similarly situated employees and serves what the Supreme Court recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172, 110 S.Ct. 482, 487 (1989). Posting is an efficient, non-burdensome method of notice that courts regularly employ. *See Sherrill v. Sutherland Global Servs. Inc.*, 487 F.Supp.2d 344, 351 (W.D.N.Y. 2007) (allowing notice to be posted at defendant's places of business for 90 days and mailed to all class members); *Castillo v. P & R Enterprises, Inc.*, 517 F.Supp.2d 440, 449 (D.D.C. 2007)(ordering notice posted in "(1) Defendant's offices, or (2) office spaces designated for Defendant's use in third-party buildings"); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492 -493 (E.D.Cal. 2006) (finding that posting of notice in the workplace and mailing is appropriate and not punitive); *Veliz v. Cintas Corp.*, 03 Civ. 1180, 2004 WL 2623909, at * 2 (N.D.Cal. Nov. 12, 2004) (citing Court order to post notice in all workplaces where similarly situated persons are employed); *Garza v. Chicago Transit Authority*, 2001 WL 503036, at *4 (N.D.Ill. May 8, 2001)(ordering defendant to post notice in all its terminals); *Johnson v.*

American Airlines, Inc., 531 F.Supp. 957, 961 (D.C.Tex. 1982)(finding that sending notice by mail, "posting on company bulletin boards at flight bases and publishing the notice without comment in American's The Flight Deck, are both reasonable and in accordance with prior authority"); *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, 679 (S.D.N.Y. 1981)(requiring defendant to "permit the posting of copies of public bulletin boards at FP offices"); *Soler v. G & U, Inc.*, 86 F.R.D. 524, 531-32 (S.D.N.Y. 1980)(authorizing plaintiffs to "post and mail the proposed Notice of Pendency of Action and Consent to Sue forms"). Your Honor directed posting of notice at the workplace in *Bados Madrid v. Peak Construction, Inc.*, 2009 WL 2983193 (D.Ariz. Sept. 17, 2009)(posting not onerous).

Similarly, as E-Mail has become more ubiquitous, FLSA notices have also been sent by e-mail as well as by mail. *See e.g. Lewis v. Wells Fargo & Co.*, 669 F.Supp.2d 1124 (N.D.Cal. 2009); *Cranney v. Carriage Services, Inc.*, 2008 WL 608639 (D.Nev. Feb. 29, 2008); *Kane v. Gage Merchandising Services, Inc.*, 138 F.Supp.2d 212, 216 (D.Mass. 2001). Since e-mails are frequently spam, they are more routinely ignored, but nevertheless, may be an adjunct method of notice to assist in advising the putative class about the case.

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.*, 2005 WL 3557178 (S.D.Miss. Dec. 27, 2005)(180 days to join for class of foreign H-2B workers); *Williams v. Bally's Louisiana, Inc.*, 2006 WL 1235904 (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. *Recinos-Recinos, supra*. Here,

plaintiffs request 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, defendants will not be prejudiced by extending the period. Since 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. Plaintiffs seek a 180 day notice period in this case.

V. PLAINTIFF'S PROPOSED NOTICE SHOULD BE APPROVED

A copy of the notice the Plaintiff proposes to send to the class members is attached to his motion as Exhibit 1. This notice informs class members in neutral language of the nature of this action, of their right to participate in it by filing a consent to sue form with the Court and the consequences of their joining or not joining the action. Plaintiff's counsel will bear the cost of mailing and emailing the notices.

CONCLUSION

The record shows that the Plaintiff is situated similarly with respect to the putative class. Accordingly, plaintiffs' request to conditionally certify this collective action and to authorize notice to the putative class should be granted. Defendant should be directed to provide names and addresses of the class members as defined on page 1, *supra,* in standard electronic format. Defendant should be directed to supply to plaintiff with the last four digits of the social security numbers but only for those class members whose notice is returned as undeliverable. This Court should enter an order prohibiting retaliatory conduct by defendant that will chill class member participation. The plaintiffs' form of notice should be approved.

Respectfully submitted this Tenth day of May, 2010.

Martin & Bonnett, P.L.L.C.

s/Susan Martin
Daniel Bonnett
Jennifer Kroll
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900

Dan Getman
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
Telephone: (845) 255-9370

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. A COPY of the attached documents were mailed this 10th day of May, 2010 to Defendants:

Gary David Shapiro
Littler Mendelsen PC
900 3rd Ave
New York, NY 10022

James N. Boudreau
Littler Mendelsen, P.C. (Philadelphia)
Three Parkway, 1601 Cherry Street, Suite 1400
Philadelphia, PA 19102

s/ Anibal Garcia