Drew R. Hansen, Esq. (State Bar No. 218382)
dhansen@tocounsel.com
Suzanne Cate Jones, Esq. (State Bar No. 157496)
sjones@tocounsel.com
Kenneth E. Johnson, Esq. (State Bar No. 115814)
kjohnson@tocounsel.com
THEODORA ORINGHER PC
535 Anton Boulevard, Ninth Floor
Costa Mesa, California 92626-7109
Telephone: (714) 549-6200
Facsimile: (714) 549-6201

Attorneys for Defendants CENTRAL REFRIGERATED SERVICE, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES

THEODORA ORINGHER COUNSELORS AT LAW

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

GABRIEL CILLUFFO, KEVIN SHIRE, and BRYAN RATTERREE individually and behalf of all other similarly situated persons,

Plaintiffs,

vs.

CENTRAL REFRIGERATED SERVICES, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES,

Defendants.

Case No. ED CV 12-00886 VAP (OPx)
Honorable Virginia A. Phillips

DEFENDANTS' NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION, AND TO DISMISS OR IN THE ALTERNATIVE STAY ACTION

Date: August 20, 2012
Time: 2:00 p.m.
Crtrm.: 2

Date Action Filed: June 1, 2012

Discovery Cutoff: None Set
Motion Cutoff: None Set
Trial Date: None Set

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 20, 2012 at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the above entitled Court located at 3470 Twelfth Street, Riverside, California, 92501, defendants Central Refrigerated Service, Inc., Central Leasing, Inc., Jon Isaacson, and Jerry Moyes (collectively "Defendants"), will move, and hereby do move, for an order compelling arbitration of the claims alleged by each one of the Plaintiffs in this action, including but not limited to, named Plaintiffs Gabriel Cilluffo, Kevin Shire, and Bryan Ratteree, as well as each and every one of the "Opt-In Plaintiffs" who have filed (or choose to file in the future) Notices of Consent to join this action.[1]

An order compelling all of the Plaintiffs and Opt-In Plaintiffs to arbitrate their claims *on an individual basis* in Utah is warranted because their written contracts with Defendants Central Leasing, Inc. ("Central Leasing") and Central Refrigerated Service, Inc. ("CRS") require that the claims in the Complaint be resolved by arbitration, in Salt Lake City, Utah. Moreover, Defendants Jon Isaacson and Jerry Moyes are alleged by Plaintiffs to be officers, directors, and part owners of Central Leasing and/or CRS. These allegations are sufficient to allow both individuals to enforce the arbitration clauses contained in the contracts with Central Leasing and CRS.

Defendants also move for an order to dismiss, or in the alternative, stay further proceedings in this action pending the completion of final and binding arbitration.

This Motion is made pursuant to Rules 12(b)(1), 12(b)(3) and/or 12(b)(6) of the

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[1] The Opt-In Plaintiffs include, but are not limited to, the following 28 individuals: John Blanton, Lindy Bronson, Robert Charlton, Landon Clifford, Vincent Crupi, Jerome Dubiak, Christopher Fosha, Rueben Fuller, Marcio Gonzalez, David Gordon, Steven Hendren, Brian Horton, Jr., Christopher Hugues, Michael Linn, Jason Mabrey, Stephen Mooney, Lisa Mullenix, Loyd ("Tony") Pace, Aaron Pengilly, Joey Perkins, Brandon Phillips, Jr., Michael Rapp, Robey Ritter, Kris Schwartzwald, James Schwein, William Scott, Michael Sinnamon, and Matthew Stabenow.

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Federal Rules of Civil Procedure,[2] and Sections 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3, 4. While the FAA governs this dispute, if the Court concludes otherwise for any reason, this Court should alternatively compel all of the named Plaintiffs and Opt-In Plaintiffs to arbitrate their disputes with Defendants on an individual basis in accordance with the Utah Uniform Arbitration Act (see Utah Code Ann. §§ 78B-11-101 *et seq.*).

This motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of William J. Baker, Jr., Robert D. Baer, and Drew R. Hansen, the exhibits accompanying these declarations, all other papers, pleadings and records on file herein, and on such other matters as may properly come before the Court at oral argument or otherwise.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on June 25, 2012.

DATED: July 16, 2012 THEODORA ORINGHER PC

By: /s/ Drew R. Hansen
Drew R. Hansen
Suzanne Cate Jones
Kenneth E. Johnson
Attorneys for Defendants CENTRAL REFRIGERATED SERVICE, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES

[2] Federal courts across the country have concluded that motions to enforce an arbitration clause may properly be brought pursuant to FRCP 12(b)(1), b(3), and/or (b)(6).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case does not belong in this Court. Proceeding here is in direct violation of the parties' written agreements, which mandate that the present dispute be arbitrated in Salt Lake City, Utah on an individual basis.

The named Plaintiffs in this matter (*i.e.*, Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree), as well as the 28 additional opt-in Plaintiffs, are former or current long-haul truckers who leased trucks from Utah-based Central Leasing, Inc. ("Central Leasing") and provided nationwide freight transportation services, as independent contractors, to Utah-based Central Refrigerated Service, Inc. ("CRS").[3] Each of the agreements signed by Plaintiffs with Central Leasing and CRS contains a mandatory arbitration clause along with a class action waiver.

Plaintiffs' complaint pleads two claims: alleged failure to pay minimum wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206, and alleged violation of federal criminal laws which prohibit "forced labor," 18 U.S.C. §§ 1589, 1595.[4] These claims fall squarely within the scope of the two agreements Plaintiffs executed with Central Leasing and CRS, which broadly require arbitration of any dispute arising in connection with or relating to the agreements. [Declaration of Robert D. Baer ("Baer Decl."), Exs. A-G at § 21; Declaration of William J. Baker, Jr. ("Baker

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[3] The Complaint erroneously names "Central Refrigerated Services, Inc." as a defendant. The actual name of the company is "Central Refrigerated Service, Inc."

[4] On their face, both claims fail against Central Leasing since it was simply a lessor of equipment and never Plaintiffs' employer. Similarly, CRS – the defendant with whom Plaintiffs entered into a business arrangement to provide transportation services – also was never Plaintiffs' employer during the time period upon which Plaintiffs base their claims. Recognizing this obvious difficulty in connection with alleging employment-type claims against a lessor and business contractor, the Complaint erroneously argues that defendants "misclassified" Plaintiffs as independent contractors.

Decl."), Exs. A-G at §18.]

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. section 1 *et seq.*, a court must compel arbitration if: (1) ". . . a valid agreement to arbitrate exists" and (2) "the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Id.* This test is plainly met here. The Plaintiffs executed two or more written agreements governing their relationships with Defendants, agreeing that "***[a]ny dispute . . . arising in connection with or relating to*** this Agreement, its terms, or its implementation . . . will be fully and finally resolved by arbitration . . . ." [Baer Decl. Exs. A-G at §21 (emphasis added); Baker Decl. Exs. A-G at § 18 (emphasis added).] Since this language encompasses the instant dispute, the Court should compel the parties to arbitrate, consistent with the FAA's "strong federal policy in favor of arbitration." *Chiron*, 207 F.3d at 1128.

While the FAA governs this dispute, if the Court concludes otherwise for any reason, this Court should alternatively compel Plaintiffs to arbitrate their disputes with Defendants on an individual basis in accordance with Utah law.[5]

Defendants respectfully request that this Court compel arbitration, and dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), (b)(3) and/or

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[5] After the Complaint was served in this case, Defendants' counsel met and conferred with Plaintiffs' counsel as required by Local Rule 7-3 on June 25, 2012. Defendants advised Plaintiffs' counsel that Plaintiffs' claims are subject to arbitration, and requested that Plaintiffs agree to arbitrate this dispute in accordance with the parties' written agreements. [Declaration of Drew R. Hansen, ¶ 3.] Plaintiffs' counsel did not dispute the existence of the arbitration agreements, but claimed that they are not enforceable. [*Id.*] Plaintiffs are wrong. The Court should order all disputes alleged in the Complaint to final and binding arbitration. In addition, the Court's order should encompass not only the claims of the 3 named plaintiffs, but also the claims of the 28 "opt-in" plaintiffs who have filed notices of consent to sue.

(b)(6), on the ground that all claims alleged therein are subject to arbitration. In the alternative, the Court should stay further proceedings in this action pending the conclusion of the arbitration.

II. FACTUAL BACKGROUND

A. The Parties

1. Defendant Central Refrigerated Service, Inc.

Defendant CRS is one of the nation's largest refrigerated trucking companies and specializes in transporting temperature sensitive freight (such as fresh produce, meat, dairy products, beverages and chemicals) for its customers from pick-up point to ultimate destination around the country by tractor-trailers, and (more recently) also by refrigerated inter-modal transport (railroad cars) and trucks. [Baker Decl. ¶3.] CRS is a Nebraska corporation headquartered in a 55-acre, seven building facility located in Salt Lake City, Utah. [Compl. ¶36; Baker Decl. ¶3.] Its main terminal is located in Salt Lake City, Utah.[6] [Baker Decl. ¶4.]

CRS uses both drivers employed by CRS and independent contractor drivers to transport freight for its customers. [*Id.*, ¶6.] Customers contact CRS to arrange for transportation of their goods, and CRS then generates the transportation information and relays it to either a company driver or independent contractor to make the pick-up and delivery. [*Id.*]

Each of CRS's independent contractor drivers, including the Plaintiffs in this

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[6] CRS also operates satellite terminals in Georgia and Colorado, as well as in Fontana, California. [Baker Decl. ¶4.] The general purpose for these terminals is to provide a site where drivers can choose to have maintenance and repair work done. In addition, dispatchers (individuals who serve as liasons between drivers and CRS for communications on the road) are housed in CRS' main terminal and some of the satellite terminals. All customer orders are placed in Salt Lake City, and all freight assignments originate from Utah. Drivers do not report to any particular terminal before transporting loads, and do not pick up or drop off loads at such terminals, but instead typically begin and complete their routes at locations dictated by CRS' customers. [*Id.*]

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action, signs a Contractor Agreement with CRS (the "IC Contract"). [Baker Decl. ¶7; Exs. A-G; Compl. ¶6.] Unlike company drivers, independent contractor drivers use their own equipment to transport goods, choose the days and times of their operations, turn down loads if they do not want to take them, select the routes to be traveled, and decide where to take rest stops and breaks. [Baker Decl. ¶8 & Exs. A-G §§ 1,2,15.] The independent contractor drivers also select, among other things, their fuel and oil stops, repair shops, and pay their own repair and maintenance expenses, use taxes, fuel charges, and other fees. [*Id.*, Exs. A-G §§ 2(F),10,11.] Independent contractor drivers may hire their own assistants and employees to work for them (and frequently do so), and may expand their businesses to include multiple trucks.[7] [Baker Decl. ¶¶ 8, 12 & Exs. A-G §§7, 8, 15.] The IC Contract expressly provides that the contractor "shall direct the operation of the Equipment" and the "manner and performance of its compliance with the Agreement and shall be solely responsible for the direction and control of its employees." [Baker Decl. Exs. A-G § 15.] The IC Contract further confirms that the contractor "shall determine the method, means, and manner of performing services under this Agreement." [*Id.*]

Independent contractor drivers are paid for each loaded mile that goods are transported, with additional amounts paid for other services provided like loading and unloading. [Baker Decl. ¶ 9 & Exs. A-G § 2.] Because they are responsible for the costs of operating their equipment and payment to any employees involved in the transportation of freight loads which they have accepted, independent contractor drivers

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[7] For example, opt-in plaintiff Lisa Mullenix leased two trucks for her business, one of which she drives herself. She hired two employees to operate her second truck. Named plaintiff Kevin Shire hired another driver, Ian Cummings, to work with him in his business. Opt-in plaintiffs Brandon Phillips and Matthew Stabenow were employed by other independent contractor drivers, then became independent contractors themselves, providing transportation services to CRS. Opt-in plaintiff Marcio Gonzalez also was employed by another independent contractor at one point. [Baker Decl. ¶ 12.]

are paid significantly more per mile to transport freight than employee drivers (who have no such expenses and no opportunity to profit through reducing or controlling such costs). [Baker Decl. ¶9.] Independent contractor drivers agree to hold CRS harmless from any liability to a shipper arising out of their failure to properly and timely deliver freight consigned to them for delivery, and for cargo damage or loss in the event a claim is made against CRS by a third party regarding any shipment handled by the independent contractor. [Baker Decl. Exs. A-G, §§ 5(B), 8(B).]

2. Defendant Central Leasing, Inc.

Defendant Central Leasing, Inc. ("Central Leasing"), a Nevada corporation, also is headquartered in Salt Lake City, Utah. [Compl. ¶38; Baer Decl. ¶3.] Central Leasing leases equipment — both trucks and trailers — used in the trucking industry. Most of this equipment is new, but some is pre-owned and/or has previously been leased to another person or entity. [Baer Decl. ¶3.]

A significant portion of Central Leasing's business is leasing tractor-trailers to independent contractor drivers who intend to provide transportation services to trucking companies. At the time these independent contractor drivers lease equipment from Central Leasing, they generally have not yet entered into an independent contractor agreement with a motor carrier. If the independent contractor drivers desire to provide transportation services to CRS, they enter into a contract with CRS after they have acquired one or more tractor-trailers. [*Id.*]

Some of CRS's independent contractor drivers obtain their equipment by leasing it from Central Leasing. Others do not. Thus, for example, some independent contractor drivers own their tractor-trailers or have leased them from other vendors. A significant portion of the transportation services provided to CRS by independent contractors is actually performed by drivers who are employees of the independent contractors and who have no relationship — as employees or independent contractors —with CRS. [*Id.*] Here, each of the Plaintiffs leased a truck from Central Leasing for their respective businesses. [*Id.*, ¶ 4.] Indeed, according to the Complaint, all of the putative

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"plaintiffs," *i.e.*, individuals on whose purported behalf the named plaintiffs bring the instant class action, also leased a truck from Central Leasing. *See* Complaint, ¶28.

When a driver leases a truck from Central Leasing, he or she enters into an "Equipment Leasing Agreement" (the "Lease"). [Compl. ¶57; Baer Decl. ¶4.] A driver who enters into the Lease agrees to lease a certain tractor, specified on Schedule A of the Lease, in exchange for the lease payments specified on the Schedule. [Baer Decl. Exs. A-G.] The driver does not become an employee of Central Leasing (or for that matter CRS) by entering into a Lease. Indeed, the Lease states on its face that "the relationship between Lessor and Lessee shall always be only that of lessor and lessee." [Baer Decl. Exs. A-G at § 16.]

3. The Individual Defendants

Defendant Jon Isaacson is a resident of Utah, and defendant Jerry Moyes is a resident of Arizona. [Baker Decl. ¶5.]

4. The 3 Named Plaintiffs, 28 Additional "Opt-In" Plaintiffs, And Putative Class

In addition to the three named plaintiffs, 28 other individuals have filed Notices of Consent to sue under the FLSA, to join the litigation as "party plaintiffs." 29 U.S.C. § 216(b). Each of the 3 named plaintiffs, as well as each of the 28 "party plaintiffs," executed a Lease with Central Leasing and an IC Contract with CRS which contain mandatory arbitration clauses and enforceable class action waivers. [Baer Decl. ¶4 & Exs. A-G; Baker Decl. ¶7 & Exs. A-G.] In each case, the Lease and IC Contract were signed, and Plaintiffs took possession of their leased trucks, when they were physically present at Defendants' headquarter locations in Salt Lake City, or in Conley, Georgia. [Compl. ¶¶ 104, 113, 120; Baer Decl. ¶4; Baker Decl.¶7.] None of the Plaintiffs executed any agreement with any of the defendants in California. [*Id.*]

Each Lease and IC Contract signed by the Plaintiffs contains a choice-of-law clause, specifying that Utah law will apply. [Baer Decl. Exs. A-G at §21; Baker Decl. Exs. A-G at §18.]

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Plaintiffs seek to certify a nationwide class. The named plaintiffs — as well as the "opt-in" plaintiffs — ***reside all over the United States***. For example, the 31 Plaintiffs who are either named or have "opted in" to date appear to reside in at least the following different states: Utah, Alabama, Nebraska, Nevada, New Mexico, Washington, California, Colorado, Georgia, Idaho, Missouri, Oklahoma and Texas. [Baker Decl. Exs. A-G.] ***Plaintiffs also performed their services for CRS all over the country***. Indeed, collectively the Plaintiffs have logged mileage in all 48 of the contiguous United States, and the District of Columbia. According to CRS' business records, the cumulative miles driven by these 31 Plaintiffs outside the State of California is approximately 95%, with a few of the Plaintiffs never having driven a single mile in California as an independent contractor. [*Id.*, ¶11.] This means that the vast majority of the work performed for CRS by Plaintiffs occurred in states other than California. [*Id.*.] Additionally, there are multiple states in which Plaintiffs drove more total mileage than the State of California, including Illinois (6.3%), Nebraska (6.3%),and Wyoming (5.9%). [*Id.*]

The below chart summarizes the Plaintiffs' residence (as reflected on their agreements with Defendants) along with the location where Plaintiffs executed their respective Leases and IC Contracts.

	Name	State Of Residence	State Where Contracts Were Executed
1.	Blanton, John	Texas	Utah
2.	Bronson, Lindy	Idaho	Utah
3.	Charlton, Robert	Nevada	Utah
4.	Cilluffo, Gabriel	California	Utah
5.	Clifford, Landon	Georgia	Georgia
6.	Crupi, Vincent	Nevada	Utah
7.	Dubiak, Jerome	New Mexico	Utah
8.	Fosha, Christopher	California	Utah
9.	Fuller, Rueben	Georgia	Utah

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	Name	State Of Residence	State Where Contracts Were Executed
10.	Gonzalez, Marcio	Nebraska	Utah
11.	Gordon, David	California	Utah
12.	Hendren, Steven	California	Utah
13.	Horton, Jr., Brian	Georgia	Utah
14.	Hugues, Christopher	Missouri	Utah (1st Lease)/ Georgia (2nd lease)
15.	Linn, Michael	Utah	Utah
16.	Mabrey, Jason	Washington	Utah
17.	Mooney, Stephen	California	Georgia (1st Lease)/ Utah (2nd Lease)
18.	Mullenix, Lisa	Indiana	Utah (3 leases)/ Georgia (4th Lease)
19.	Pace, Loyd (Tony)	Oklahoma	Utah
20.	Pengilly, Aaron	Idaho	Utah
21.	Perkins, Joey	Alabama/Nevada	Utah
22.	Phillips, Brandon	Georgia	Utah
23.	Rapp, Michael	Georgia	Utah
24.	Ratterree, Bryan	Washington	Utah
25.	Ritter, Robey	Utah	Utah
26.	Schwartzwald, Kris	Colorado	Utah
27.	Schwein, James	California	Georgia (1st Lease)/ Utah (2nd Lease)
28.	Scott, William	Texas	Utah
29.	Shire, Kevin	California	Utah
30.	Sinnamon, Michael	North Carolina	Georgia
31.	Stabenow, Matthew	Arizona	Utah

The 31 different Plaintiffs present a variety of unique work histories and relationships with CRS. For example, the 3 named plaintiffs reside in two different states, worked as drivers for CRS for different periods of time and had different routes.

(See Ratterree,[8] Shire[9] and Cilluffo[10] footnotes below). The 28 opt-in plaintiffs also had varying experiences with CRS. By way of example only, opt-in plaintiff Lindy Bronson was an employee driver for 2 months in 2006, and then entered into a business arrangement with CRS to provide independent contractor transportation services from 2006 through 2009. Mr. Bronson then went to work somewhere else for approximately ten months. He then returned to CRS as an employee driver, driving CRS-owned equipment, from January through August 2010. Bronson then became an independent contractor for CRS again, and leased a different truck from Central Leasing, from August 2010 through February 2012. [Baker Decl. ¶16.] The Complaint makes no attempt to reconcile these facts with the allegations that drivers are somehow "forced"

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[8] Named plaintiff **Bryan Ratterree**, who resides in Spokane, Washington and attended truck driver school in Utah, was a contracted long-haul driver for CRS for about a month, from November 18, 2010 to December 27, 2010. [Compl. ¶¶24,120,124; Baker Decl. Ex. B.] Before becoming an independent contractor driver, he was an employee driver with CRS for about three months. [Compl. ¶120.] Ratterree executed a Lease in Utah with Central Leasing, and an IC Contract in Utah with CRS, on November 18, 2010. [*Id.*; Baer Decl. Ex. B; Baker Decl. Ex. B.]

[9] Named plaintiff **Kevin Shire**, who resides in Sacramento, California, was a contracted long-haul driver for CRS for approximately nine months, from April 2009 to January 2010. [Compl. ¶¶23,113.] He employed at least one employee named Ian Cummings, who assisted him in his trucking business. [Baker Decl. ¶¶12, 14.] Before becoming an independent contractor driver, he was an employee driver with CRS for about three months. [Compl. ¶112.] Shire executed a Lease in Utah with Central Leasing, and an IC Contract in Utah with CRS, on April 8, 2009. [*Id.*, ¶122,113; Baer Decl. Ex. C; Baker Decl. Ex. C.] Shire's business arrangement with CRS involved a "dedicated run" transporting beverages for Coors. [Baker Decl. ¶14.]

[10] Named plaintiff **Gabriel Cilluffo**, who resides in Highland, California, was a contracted long-haul driver for CRS for approximately three months, from March 2011 to June 2011. [Compl. ¶¶ 22,103,109.] He alleges that previously, he had been an employee driver with CRS for about eight months. [*Id.*, ¶¶100,103.] Cilluffo executed a Lease in Utah with Central Leasing, and an IC Contract in Utah with CRS, on March 8, 2011. [*Id.*, ¶120; Baer Decl. Ex. D; Baker Decl. Ex. D.]

to become independent contractors, when the reality is that they may voluntarily elect to remain employees who drive CRS-owned equipment.[11]

B. The Arbitration Agreements

Both the Lease and the IC Contract, signed by all 31 Plaintiffs, contain a mandatory arbitration clause. [Compl. ¶6.] Section 21 of the Lease contains an arbitration clause and choice of law provision, providing in relevant part:

> **GOVERNING LAW AND ARBITRATION.** This Agreement shall be governed by the laws of the State of Utah. Any dispute (including a request for preliminary relief) arising in connection with or relating to this Agreement, its terms, or its implementation including any allegation of a tort, or of breach of this Agreement, or of violations of Applicable Law, including but not limited to the DOT Leasing Regulations will be fully and finally resolved by arbitration in accordance with (1) the Commercial Arbitration Rules (and related arbitration rules governing requests for preliminary relief) of the American Arbitration Association ("AAA"); (2) the Federal Arbitration Act (ch. 1 of tit. 9 of United States Code, with respect to which the parties agree that this Agreement is not an exempt "contract of employment") or, if the Federal Arbitration Act is held not to apply, the arbitration laws of the State of Utah; and (3) the procedures that follow. Notwithstanding anything to the contrary contained or referred to herein, no consolidated or class arbitrations will be conducted. If a court of arbitrator decides for any reason not to enforce this ban on consolidated or class arbitrations, the parties agree that this provision, in its entirety, will be null and void, and any disputes between the parties will be resolved by court action, not arbitration. A Demand for Arbitration will be filed with the AAA's office located in or closest to Salt Lake City, Utah,

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[11] Plaintiffs falsely assert in the Complaint that they were "forced" to sign the Lease and IC Contract because they needed to lease a truck as a means of transportation, or "otherwise" they would have "no practical way home." [Compl. ¶ 60.] This makes no sense. Plaintiffs were employee drivers who requested to become independent contractor drivers. They have not alleged — and cannot truthfully allege — that they could not simply remain employee drivers if they did not want to sign these agreements, and thus "get home" the way they always "got home" as employee drivers.

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> and will be filed within the time allowed by the applicable statute of limitations. . . . The place of the arbitration hearing will be Salt Lake City, Utah. . . .

[Baer Decl. Exs. A-G at § 21.]

The IC Contract also contains an arbitration clause, in Section 18, which is substantively identical to the language of the Lease quoted above. [Baker Decl. Exs. A-G at § 18.) In direct contravention of their agreements to arbitrate their disputes with Central Leasing and CRS, Plaintiffs are pursuing this action in a federal court alleging claims that directly "arise in connection with and relate to" their agreements.

III. THIS DISPUTE IS SUBJECT TO BINDING ARBITRATION

A. Arbitration Is Compelled Under The Federal Arbitration Act

The Court should enforce the arbitration provisions contained in the Lease with Central Leasing, and the IC Contract with CRS, under the FAA. [See Baer Decl. Exs. A-G at § 21; Baker Decl. Exs.A-G at § 18.] The parties specifically agreed that the FAA would apply to this dispute.

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[T]he Supreme Court has interpreted the phrase 'involving commerce' very broadly, holding that it extends beyond 'persons or activities within the flow of interstate commerce' to include anything that affects commerce." *Clay v. Permanente Med. Grp., Inc.*, 540 F. Supp. 2d 1101, 1105 (N.D. Cal. 2007). It is appropriate to apply the FAA here because the arbitration clause is a written provision in a Lease and IC Contract involving commerce within the meaning of 9 U.S.C. section 2.

The FAA reflects "a liberal federal policy favoring arbitration" and requires courts to compel arbitration of any claim covered by a written and enforceable arbitration agreement. *AT & T Mobility LLC v. Concepcion*, _ U.S. _, 131 S.Ct. 1740,

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1745–47, 179 L.Ed.2d 742 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (recognizing "liberal federal policy favoring arbitration agreements").

In ruling on a motion to compel arbitration, the Court's role is limited to determining whether: (1) there is an agreement between the parties to arbitrate; (2) the claims at issue fall within the scope of the agreement; and (3) the agreement is valid and enforceable. *Lifescan, Inc. v. Pernaier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If those questions are answered in the affirmative, the court must compel the parties to arbitrate their claims. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration.")

Under the FAA, a court must compel arbitration if: (1) ". . . a valid agreement to arbitrate exists" and (2) "the agreement encompasses the dispute at issue." *Chiron Corp.*, 207 F.3d at 1130. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "The standard for demonstrating arbitrability is not high. [. . .] Such [arbitration] agreements are to be rigorously enforced." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

1. The Parties Entered Into Valid Arbitration Agreements

Before compelling arbitration, "courts must first make a threshold finding that the document [at issue] at least purports to be . . . a contract" committing the parties to arbitrate the contract's validity. *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991). Courts then "must strictly enforce any agreement to arbitrate." *Id.* at 477. The Leases and IC Contracts here were executed by all parties and clearly provide that "[a]ny dispute . . . arising in connection with or relating to [them], [their]

terms, or [their] implementation . . .will be fully and finally resolved by arbitration...." [See Baer Decl. Exs. A-G at § 21; Baker Decl. Exs. A-G at § 18.]

2. Plaintiffs' Claims Fall Within The Scope Of The Arbitration Clauses

"To require arbitration, [the Plaintiffs'] factual allegations need only 'touch matters' covered by the contract containing the arbitration clause. . . ." *Simula*, 175 F.3d at 721 (arbitration clause providing for arbitration of all disputes "arising in connection with" parties' development agreement broadly construed as reaching every dispute between parties having significant relationship to agreement and all disputes having their origin or genesis in agreement). There can be no dispute that the language in the instant clause is very broad. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397, 87 S.Ct. 1801 (1967) ("any controversy or claim arising out of or relating to this Agreement" is a broad arbitration clause); *see also Chiron Corp.*, 207 F.3d at 1131 (clause requiring arbitration of any dispute "relating to" agreement "broad and far reaching"). Moreover, courts have held that claims necessarily "touch upon" the parties' agreement where, as here, the claims relate to a relationship that would not have existed "but for" the agreement. Such claims "touch upon" the parties' agreement because they "stem[] from the parties' relationship." *Bosinger v. Phillips Plastics Corp.*, 57 F. Supp. 2d 986, 993 (S.D. Cal. 1999).

The arbitration agreements here broadly encompass "[a]ny dispute . . . arising in connection with or relating to this Agreement, its terms, or its implementation including any allegation of a tort, or of breach of this Agreement, or of violations of Applicable Law . . ." [Baer Decl. Exs. A-G at § 21.] Plaintiffs' claims fall squarely within the scope of these broad arbitration clauses. Specifically, the Complaint expressly references both the Lease and IC Contract, *see* Compl. ¶ 6, and their claims relate to a relationship that would not have existed "but for" the agreements. In addition, Plaintiffs allege numerous disputes that either arise under or relate to different provisions of the Lease and the IC Contract. For example, Plaintiffs challenge Section

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15 of the IC Contract, which states that the "**CONTRACTOR shall be considered an independent contractor and not an employee of COMPANY**." [*Id.*, ¶71.] To assert their challenge, Plaintiffs rely upon language contained in Section 5(A) of the IC Contract, while ignoring other language which contradicts their contention.[12] [*Id.*, ¶72.]

The Complaint also challenges the economic terms of the Lease, alleging that Plaintiffs are charged "tens of thousands of dollars per year" under the Lease. [*Id.*, ¶10.] The contract provisions identified describe in detail the allocation of expenses between the independent contractor, CRS, and Central Leasing, and relate directly to Plaintiffs' allegations. [*Id.*, ¶¶82-83.] Plaintiffs also raise issues relating to the requirement that the independent contractors post a performance bond, which arise under Section 6 of the IC Contract, [*id.*, ¶84], and claims relating to the termination and default provisions, [*id.*, ¶¶13, 16, 89.] Plaintiffs also assert claims arising under and relating to Section 12 of the Lease, titled "Events of Default." [*Id.*, ¶¶15, 91-94.]

The Complaint alleges that the referenced provisions of the Lease and IC Contract "are unlawful and unconscionable." [*Id.*, ¶69.] That allegation alone places the dispute squarely within the scope of the arbitration clauses of both the Lease and the IC Contract. Plaintiffs' claim that certain parts of the contract are unlawful or unconscionable creates a dispute that is subject to arbitration. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"); *see also* Utah Code Ann. § 78B-11-107(3) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled

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[12] Specifically, Plaintiffs ignore the statement that "[t]he parties agree that this provision is set forth solely to conform with FMCSA regulations, and shall not be used for any other purposes including any attempt to classify CONTRACTOR as an employee of COMPANY. As noted in 49 C.F.R. §376.12(c)(1), nothing in the provisions of the DOT Leasing Regulations is intended to impact the independent contractor status of CONTRACTOR or its drivers." [Baer Decl. Exs. A-G § 5(A).]

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and whether a contract containing a valid agreement to arbitrate is enforceable.").

Each of the foregoing allegations plainly "touches matters" covered by the Lease and IC Contract. Accordingly, Plaintiffs' claims are properly the subject of arbitration.

3. The Arbitration Agreements Apply To The Individual Defendants, Not Just Central Leasing And CRS

Defendants Isaacson and Moyes are alleged by Plaintiffs to be officers, directors, and part owners of Central Leasing and/or CRS. [Complaint, ¶¶45-49.] These allegations are sufficient to allow both individuals to enforce the arbitration clauses contained in Plaintiffs' contracts with Central Leasing and CRS. *See, e.g., Amisil Holdings Ltd. v. Clarium Capital Management*, 622 F.Supp.2d 825, 831-839 (N.D. Cal. 2007) (summarizing status of law in Ninth Circuit regarding enforcing arbitration agreement against non-signatories and concluding that "under agency principles, the claims against the individual defendants should be arbitrated"); *see also Ellsworth v. American Arbitration Ass'n*, 148 P.3d 983, 989 n. 11 (Utah 2006) (nonsignatory may enforce agreement if alleged to be agent of contracting party); *I-Link Inc. v. Red Cube Int'l AG*, 2001 WL 741315 (D. Utah 2001) (arbitration may be compelled by alleged agent of contract signatory).

4. The FAA Applies To Plaintiffs' Claims

Plaintiffs signed a written Lease and a written IC Contract with Defendants containing broad and mandatory arbitration clauses along with class action waivers. While Plaintiffs' counsel declined to provide any details regarding his basis for opposing this motion, he previewed during the "meet and confer" required by Local Rule 7-3 that Plaintiffs will argue that the arbitration agreements are "not enforceable." Accordingly, Defendants briefly address anticipated arguments below.

(a) FLSA Claims Are Subject To Being Arbitrated

To the extent Plaintiffs argue that disputes arising under the FLSA are not subject to arbitration, this argument has been flatly rejected by the Ninth Circuit. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996) (holding that FLSA lawsuit

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alleging minimum wage violations was subject to arbitration). In *Kuehner*, the Ninth Circuit rejected the plaintiff's arguments, holding that earlier precedent which "questions the competence of arbitrators to decide FLSA claims" is no longer persuasive. *Id.* at 319-320. Consequently, the Court of Appeal affirmed the district court's decision to stay proceedings, under Section 3 of the FAA, pending arbitration of the plaintiff's FLSA claims. *See also Gilmer*, 500 U.S. at 26 ("statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA").

(b) The FAA's Employment Exemption Does Not Apply Because Plaintiffs Are Independent Contractors

Plaintiffs may also argue that the FAA does not apply to the Lease and IC Contract because of the FAA's statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Plaintiffs are wrong and this argument should be rejected as well. The Supreme Court has held that this exemption only applies to contracts of **employment** of transportation workers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). The Lease is not an employment agreement, and no driver became an employee of Central Leasing (or for that matter CRS) by entering into a Lease for a truck. Indeed, the Lease states on its face that "the relationship between Lessor and Lessee shall always be only that of lessor and lessee." [Baer Decl. Exs. A-G at § 16.]

Similarly, the IC Contract between independent contractor drivers and CRS specifically provides that each Plaintiff "**shall be considered an independent contractor and not an employee of COMPANY.**" [Baker Decl. Exs. A-G at § 15.] Federal courts have relied upon similar contractual language to conclude that lawsuits filed by long haul truck drivers, who lease their equipment and provide services as

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independent contractors, are subject to arbitration under FAA.[13] *See Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035-36 (D. Ariz. 2003); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835 at *6 (D.Minn. 2008) (enforcing arbitration agreement because plaintiff "has not established that he was functionally an employee of defendant"); *Owner-Operator Independent Drivers Ass'n v. United Van Lines, LLC,* 2006 WL 5003366 (E.D. Mo. 2006) (compelling arbitration because "the ICOA is not a contract of employment under the FAA").

Plaintiffs may seek to rely on some earlier district court decisions as purported support for an argument that their claims are exempt from mandatory arbitration. *See, e.g., Gagnon v. Serv. Trucking Inc.* 266 F. Supp. 2d 1361 (M.D. Fla. 2003).[14] Such cases have been discredited and not followed by other courts, because they were wrongly decided. As explained in the 2011 decision issued by the court in *Port Drivers Federation 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 463 (D.N.J. 2011), these wrongly-decided cases rely upon Federal Interstate Motor Carrier Act regulations to reach the conclusion that truck drivers must be treated as employees as a matter of law — because of the extensive federal requirements imposed upon the motor carrier-owner/operator relationship. This reasoning is inherently flawed, as explained in the *Port Drivers Federation* decision, because it completely ignores the Legislature's instruction within those *same regulations* specifically stating that the regulations are **not intended** "to affect whether the lessor . . . is an independent contractor or an

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[13] Consistent with this intention, the arbitration clauses of both the IC Contract and Lease each provide that arbitration will be conducted in accordance with the FAA, and that the agreement "is not an exempt 'contract of employment'" within the meaning of Section 1 of the FAA. (Baer Decl. Exs. A-G at § 21; Baker Decl. Exs. A-G at § 18.)

[14] Other decisions which follow *Gagnon* include *Owner-Operator Indep. Ass'n v. Landstar Sys., Inc.*, 2003 WL 23941713 (M.D. Fla. 2003), and *Owner-Operator Indep. Drivers Ass'n, Inc. v. C.R. England, Inc.*, 325 F. Supp. 2d 1252 (D. Utah 2004).

employee of the authorized carrier lessee." 49 C.F.R. § 376.12(c)(4).[15] *Port Drivers Federation*, 757 F. Supp. 2d at 472 n. 3 (D.N.J. 2011) (refusing to follow *Gagnon*, since its reasoning was inconsistent with section 376.12(c)(4)); *see also Davis,* 2008 WL 4755835 at *6 (refusing to follow *Gagnon*, since it "cannot be reconciled with 49 C.F.R. § 376.12(c)(4)"); *United Van Lines,* 2006 WL 5003366, at *3, n. 3 (section 376.12(c)(4) negates the interpretation adopted by *Gagnon*); *Swift Transp.,* 288 F. Supp. 2d at 1035 n. 3 (declining to follow *Gagnon*).

To the extent Plaintiffs object to arbitration on the ground that they are allegedly "employees," rather than lessees as specified in the Lease, or independent contractors as specified in the IC Contract, this issue would be one for the arbitrator to decide. "Application of the FAA's transportation worker exemption is a threshold question of arbitrability in the dispute between [plaintiff] and [defendant]. Parties can agree to have arbitrators decide threshold questions of arbitrability." *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011), *citing Rent-A-Center West, Inc. v. Jackson*, _ U.S. _, 130 S. Ct. 2772, 2777, 177 L. Ed. 2d 403 (2010).[16] As in *Green*, the arbitration agreements in this case incorporate the Commercial Arbitration Rules of the American Arbitration Association, which "provide that an arbitrator has the power to

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[15] Consistent with that conclusion, the Lease specifically provides that "nothing in the provisions of the DOT Leasing Regulations is intended to impact the independent contractor status of CONTRACTOR or its drivers." [Baer Decl. Exs. A-G at § 5(A).] Although the Complaint quotes other portions of Section 5(A), Plaintiffs conspicuously omit this language from the pleading. [Compl. ¶72.]

[16] Plaintiffs may seek to argue *dictum* found in *In re van Dusen*, 654 F.3d 838 (9th Cir. 2011) (denying plaintiff's writ of mandate petition concerning district court's decision to grant motion to compel arbitration), in order to claim that this issue cannot be decided by the arbitrator. *Van Dusen's dictum* is not relevant here. Moreover, *Van Dusen* was decided one month before *Green*, and thus identifies the legal issue as "one of first impression in the federal courts of appeal." 654 F.3d at 845. That statement is no longer true, since *Green* specifically rejected Plaintiffs' argument on this point.

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determine his or her own jurisdiction over a controversy between the parties." *Id.* Plaintiffs cannot avoid arbitration simply by attempting to contradict their previous agreements to be treated as independent contractors.

(c) The Prohibition Of Class Or Consolidated Arbitration Is Enforceable Under The FAA

Finally, Defendants anticipate that Plaintiffs will challenge the class action waiver embedded in the arbitration clauses. [Baer Decl. Exs. A-G, § 21; Baker Decl. Exs. A-G, § 18.] However, the prohibition on class actions is fully enforceable under the FAA. Each of the arbitration clauses includes the following language:

> Notwithstanding anything to the contrary contained or referred to herein, ***no consolidated or class arbitrations will be conducted***. If a court of arbitrator decides for any reason not to enforce this ban on consolidated or class arbitrations, the parties agree that this provision, in its entirety, will be null and void, and any disputes between the parties will be resolved by court action, not arbitration.

[*Id.* (emphasis added).] The Supreme Court has ruled that such express waivers of class-wide arbitration are lawful.

In 2011, the Supreme Court specifically upheld class-wide arbitration waivers in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court started from the principle that the FAA was enacted to reflect "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Id.* at 1745. Its ruling in *Concepcion* followed from its earlier decisions in *Southland v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) and *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), where it held that state statutes or judicial rules treating agreements to arbitrate in a different manner

from other agreements were impermissible under the FAA.[17] *Concepcion* emphasizes that arbitration agreements are to be enforced "according to their terms," 131 S. Ct. at 1748, and that "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are not permitted." *Id.* at 1747-48. Applying this principle, the Supreme Court held that a common law legal doctrine, based upon unconscionability, could not be used to invalidate a prohibition against class-wide arbitration because such a rule "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.*

Federal district courts, in this district and elsewhere, have recognized that *Concepcion* allows enforcement of contractual prohibitions against class arbitration, and overrules state court cases which in the past have purported to invalidate any such provisions. *Morvant v. P.F. Chang's Bistro, Inc.*, 2012 WL 1604851 *7, fn. 3 (N.D. Cal. 2012) (collecting cases from the Central and Northern Districts of California); *Quevado v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011). These cases make clear that the prohibition against class or consolidated arbitrations, contained in the contracts at issue on this motion, are fully enforceable.[18]

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[17] Just one year prior to its decision in *Concepcion*, the U.S. Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, _ U.S. _, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). In that case, the U.S. Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 1775. The Court emphasized that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776.

[18] To the extent Plaintiffs seek to argue that *Concepcion* is limited to the consumer context, and thus somehow inapplicable because of California Supreme Court precedent on the enforceability of class action waivers in the employment context, such an argument has been flatly rejected by multiple courts in the Ninth Circuit. *See, e.g., Morvant*, 2012 WL 1604851 at *7. Furthermore, the California Court of Appeal (footnote continued)

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Because the parties' contracts require that the claims in Plaintiffs' Complaint be "fully and finally" resolved by arbitration in Utah, the Court should order Plaintiffs to arbitrate their claims on an individual basis in accordance with the FAA.

B. In The Alternative, Arbitration May Be Compelled Under The Utah Uniform Arbitration Act

Pursuant to the parties' agreements, should the Court decline to order arbitration under the FAA for any reason, arbitration should be compelled under the Utah Uniform Arbitration Act ("UUAA"). Each of the arbitration agreements signed by Plaintiffs specifically provides that "if the Federal Arbitration Act is held not to apply, the arbitration laws of the State of Utah" will be applicable. [Baer Decl. Exs. A-G, § 21; Baker Decl. Exs. A-G, § 18.] This explicit language in the parties' agreements provides an alternative basis upon which to enforce the agreements to arbitrate this dispute.

The UUAA (*i.e.*, Utah Code Ann. §§ 78B-11-101 *et seq.*) applies to "any agreement to arbitrate made on or after May 6, 2002." Utah Code Ann. § 78B-11-104(1). The contracts at issue in this case satisfy that threshold requirement. The UUAA does not contain any exemption similar to the transportation employee exemption contained in Section 1 of the FAA.[19] See Utah Code Ann. § 78B-11-107(1)

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recently upheld a class action waiver in an employment agreement based on the *Concepcion* decision, which overruled California law invalidating class action waivers. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 206 Cal.App.4th 949 (2nd Dist. 2012) (putative class action against employer for wage and hour violations; upholding trial court's orders granting employer's motion to compel arbitration and dismissing plaintiff's class claims; concluding that trial court correctly found that arbitration agreement and class action waivers were effective, and ruled appropriately in granting motion to compel arbitration and dismissing class claims).

[19] By contrast, Arizona state law contains a transportation workers exemption similar to that found in Section 1 of the FAA. *In re van Dusen,* 654 F.3d at 842 n. 3. Here, the parties have agreed that Utah law is to apply to this dispute. For this additional reason, the Ninth Circuit's *dictum* in *Van Dusen*, which criticized the district court's decision to compel arbitration pursuant to the FAA and *Arizona* law, has no relevance.

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("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract"). Utah law reflects a "strong public policy favoring arbitration 'as an approved, practical, and inexpensive means of settling disputes and easing court congestion.'" *Buckner v. Kennard*, 99 P.3d 842, 847 (Utah 2004), *quoting Chandler v. Blue Cross Blue Shield of Utah*, 833 P.2d 356, 358 (Utah 1992). "The use of arbitration as an alternative to traditional judicial proceedings should therefore be encouraged." *Buckner, supra*, 99 P.3d at 847-848. Utah's strong policy in favor of arbitration supports the enforcement of Plaintiffs' arbitration agreements.

Where, as here, a contract specifically refers to state law as an applicable alternative to the FAA, the Court should enforce the agreement to arbitrate under the state law specified in the contract if the Court concludes that the FAA does not apply. *See, e.g., Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004). In *Palcko*, the Third Circuit held that state law could be invoked to enforce the terms of the parties' arbitration agreement once it was determined that the plaintiff's employment fell within the FAA exemption for employees who are directly engaged in interstate commerce. The court relied upon the fact that the parties' arbitration agreement itself stated that "[t]o the extent that the *Federal Arbitration Act* is inapplicable, Washington law pertaining to agreements to arbitrate shall apply," holding that "we see no reason to release the parties from their own agreement." *Id.* at 597. The *Palcko* rule has been applied in lawsuits brought by employed truck drivers, who fall within the "contracts of employment" exemption to the FAA. *E.g., Shanks v. Swift Transp. Co., Inc.*, 2008 WL 2513056 at *4 (S.D.Tex. 2008)) (arbitration agreement enforced under Texas law, in case brought by employed truck driver); *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 529-530 (S.D. N.Y. 2003) (dismissing lawsuit filed by employed truck driver, on ground that arbitration clause is enforceable under New York law).

The UUAA also expressly provides that contractual prohibitions against

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consolidated arbitrations are enforceable. Utah Code Ann. § 78B-11-111(3) (court may not order consolidation of claims of party to agreement to arbitrate if agreement prohibits consolidation). Utah case law also confirms that enforcement of class action waivers in arbitration agreements is permitted. For example, in *Miller v. Corinthian Colleges, Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011), the court rejected plaintiff's argument that a class action waiver rendered the arbitration clause unconscionable. "[T]he Court cannot find that the class action waivers are substantively unconscionable under Utah law." *Id.* at 1349. These authorities confirm that Utah law is fully consistent with the U.S. Supreme Court's interpretation of federal law on this issue.

In the event Plaintiffs argue that Utah law should not be controlling, this Court should enforce the Utah choice of law provision under a California choice of law analysis, since it is the governing standard to determine the applicable law. *See Orr v. Bank of Am.*, 285 F.3d 764, 772 n. 4 (9th Cir. 2002) (federal court sitting in diversity applies the forum state's choice of law rules); *RCR Plumbing and Mechanical, Inc. FKA Ampam RCR Cos. v Ace American Ins. Co.*, 2011 WL 2412556 *8 (C.D.Cal.2011) (Phillips, J.). California uses the test set forth in *Nedlloyd Lines B.V. v. Superior Court* to determine whether to enforce a choice of law provision. 3 Cal.4th 459 (1992). Under *Nedlloyd*, California will apply the law indicated by the choice of law provision where: "(1) the chosen state has a substantial relationship to the parties or their transaction," or where "(2) there is any other reasonable basis for the parties' choice of law." *Id.* at 466. "If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law." *Id.*

Where either test is met, the court proceeds to the second step and "determine [s] whether the chosen state's law is contrary to a fundamental policy of California." *Nedlloyd*, 3 Cal.4th at 466. Where "there is a fundamental conflict with California law," the court proceeds to the third step and determines whether California has a "materially greater interest" than the chosen state in the determination of the particular issue. *Id.* "If California has a materially greater interest than the chosen state, the choice of law

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shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy." *Id.*

Applying the *Nedlloyd test* here, the chosen state (Utah) "has a substantial relationship to the parties or their transaction." Specifically, the Defendants are located in Utah. [Baker Decl. ¶¶3,4; Baer Decl. ¶3.] Moreover, thirty of the thirty-one Plaintiffs executed at least one Lease and IC Contract in Utah.[20] [Baker Decl. ¶7; Baer Decl. ¶4.] For these and other reasons, this element of the *Nedlloyd* test is met. See *RCR Plumbing and Mechanical, Inc.*, 2011 WL 2412556 *8 (requirement satisfied where both defendants incorporated in chosen state).

Utah's law is also not contrary to a fundamental policy of California. See *RCR Plumbing and Mechanical, Inc.*, 2011 WL 2412556 *8-9 ("There is no bright line definition of a "fundamental policy"; "fundamental policy" must be "substantive," and "may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining powers.) There is no "fundamental policy" of either California, or any other state in which a plaintiff resides, which would preclude enforcement of the arbitration clauses contained in the Lease or the IC Contract. Accordingly, if for any reason this Court concludes that the FAA does not apply to this dispute, the arbitration agreements should be enforced under Utah law.

IV. THE COURT SHOULD DISMISS THE COMPLAINT, OR IN THE ALTERNATIVE STAY FURTHER PROCEEDINGS PENDING THE CONCLUSION OF THE ARBITRATION

Defendants respectfully request that the Court dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), (b)(3) and/or (b)(6), or in the alternative stay

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[20] None of the Plaintiffs executed any agreement with any of the defendants in California. [Baker Decl. ¶7; Baer Decl. ¶4.]

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further proceedings pending the conclusion of the arbitration. Section 3 of the FAA permits this Court to stay this action pending the conclusion of individual arbitrations between the Plaintiffs and Defendants. See 9 U.S.C. § 3. The UUAA similarly allows a court to stay an action pending the completion of arbitration. See Utah Code Ann. 78B-11-108(7).

This Court also has the discretion to dismiss, rather than stay this action. In *Sparling v. Hoffman Constr. Co.* 864 F.2d 635 (9th Cir. 1988), the Ninth Circuit affirmed the district court's decision to dismiss, rather than stay, the plaintiff's lawsuit on the ground that all claims were subject to arbitration. The Ninth Circuit concluded that "the arbitration clause was broad enough to bar all of plaintiff's claims since it required [plaintiff] to submit all claims to arbitration." *Id.* at 638. *See also Daoud v. Ameriprise Fin. Serv., Inc.*, 2011 WL 6961586 at *6 (C.D.Cal. 2011) ("Here, as discussed above, the class action waiver is enforceable, leaving only Ms. Dauod's individual claims remaining in this action. Because those claims are subject to arbitration, the Court finds that dismissal of the action is appropriate.")

In this case, a dismissal is appropriate, since the claims asserted fall squarely within the scope of the arbitration clauses, and because the prohibition against consolidated or class arbitration is enforceable.

V. CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court grant their motion to compel arbitration and dismiss the action, or in the alternative to stay this action pending the completion of arbitration.

DATED: July 16, 2012 THEODORA ORINGHER PC

By: /s/ Drew R. Hansen
Drew R. Hansen
Attorneys for All Defendants