AMERICAN ARBITRATION ASSOCIATION

GABRIEL CILLUFFO, et al, Claimants, v. CENTRAL REFRIGERATED SERVICE, INC., et al, Respondents.	77 160 00126 13 PLT (Collective Matter)

CLAIMANTS' BRIEF AS REQUESTED BY ORDER OF JULY 31, 2013

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INTRODUCTION

This Fair Labor Standards Act (FLSA) collective action arbitration was filed by truck drivers who transported cargo for Respondents using trucks leased from Respondents. Although Claimants' Agreements with Respondents designate them as "independent contractors," Claimants allege that Respondents exercised complete control over Claimants' work and that Respondents were, as a matter of economic reality, employers of Claimants. As employers, Respondents are liable for their failure to compensate Claimants in compliance with the minimum wage provisions of the FLSA.

The instant briefing addresses four preliminary questions: (1) Whether the AAA Employment Rules should apply to this Arbitration; (2) whether the fees set forth in the Employment Rules for employer-promulgated plans apply; (3) whether the District Court's Order compelling collective arbitration of this FLSA claim is binding on the Arbitration, and (4) even if the District Court's Order for collective arbitration is held not to control, whether the arbitration should, nevertheless, proceed as a collective arbitration.

STATEMENT OF THE CASE

A. Course Of Proceedings

On June 1, 2012, Claimants Gabriel Cilluffo, Kevin Shire, and Bryan Ratteree (hereafter together with all others who have opted in to this case

collectively referred to as "Claimants" or " the Drivers") filed a collective and class action complaint in the federal district court for the Central District of California against Respondents Central Refrigerated Services, Inc. ("CRS"), Central Leasing, Inc. ("CLI"), and two of the owners and operators of those companies, Respondents Jon Isaacson and Jerry Moyes (collectively "Respondents" or "Central"). *See* Complaint in Case No. 5:12-cv-00886-VAP-OP. The Drivers' federal complaint alleged that the Contractor and Leasing Agreements they signed with Respondents constituted contracts of employment and that Respondents, as employers of the Drivers, violated the minimum wage provisions of the Fair Labor Standards Act (FLSA) as well as federal forced labor statutes. *See id.*

Respondents moved to stay or dismiss the federal action and for an order compelling arbitration under the Federal Arbitration Act (FAA) and the Utah Uniform Arbitration Act (UUAA) based on the arbitration clauses contained in each Contractor and Lease Agreement. *See* Docs. 25-28.[1] The Drivers opposed the motion arguing, *inter alia,* that they were exempt from arbitration pursuant to §1 of the FAA which makes clear that that Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *See* Doc. 40; 9 U.S.C. §1. In an Order entered

[1] Unless otherwise indicated, all citations to Docs. refer to documents in Case No. 5:12-cv-00886-VAP-OP.

on September 24, 2012, the District Court held that the Drivers are clearly transportation workers for purposes of the FAA §1 exemption. *See* Doc. 53 at pp. 7-9. The Court then analyzed the relationship between the Drivers and Respondents under the common law of agency and concluded that, despite the fact that the Agreements labeled the Drivers as "independent contractors," the Drivers were, in fact, employees of Respondents. *See id.* Accordingly, the Court concluded that arbitration could not be compelled pursuant to §1 of the FAA. *See id.* at p. 9. However, because the UUAA contains no similar exclusion for employees, the Court ordered arbitration and stayed further court proceedings pursuant to the UUAA. *See id.* at p. 14.

At that point, Respondents requested that the Court clarify its order referring the case to arbitration to indicate that the arbitration of the Drivers' FLSA claims was to take place on an individual basis. Respondents based their argument on the language in the Agreements which states that "no consolidated or class arbitration will be conducted." *See* Doc 58. On November 8, 2012, the District Court denied Respondents' request finding that, while the Agreements prohibit class arbitration, the Agreements "do not prohibit collective arbitration of Plaintiffs' FLSA claims." *See* Doc. 61. The Court ruled that "Plaintiffs' FLSA claims should be collectively arbitrated" but that arbitration of Plaintiffs' forced labor claims (which were filed as a Rule 23 class action) "must be pursued on an individual basis." *See* Doc 61 at

p. 4. Respondents moved for reconsideration of this Order. *See* Doc. 67. The Court agreed to reconsider in light of the additional arguments made by Respondents, *see* Doc. 77 at p. 4, and, after reconsidering issued an extensive opinion reaffirming its original order compelling collective arbitration of Plaintiffs' FLSA claims, *see* Doc 77 at p. 7. Respondents then filed a motion for leave to file an interlocutory appeal from the order compelling collective arbitration of the FLSA claims, *see* Doc 82, which the Court denied in another opinion, *see* Doc. 89. Finally, Respondents filed a motion to stay arbitration pending resolution of their petition for mandamus to the Ninth Circuit in which they alleged that the District Court had committed clear error in interpreting the Agreements to allow collective arbitration of Claimants' FLSA claims. *See* Doc 84. The District Court denied the stay of arbitration and the Ninth Circuit denied the petition for writ of mandamus. *See* Doc. 94 and Case No. 13-70700 Doc. 7.

On November 26, 2012, the Drivers filed a demand for collective arbitration of their FLSA claims with the AAA under the AAA's Employment Rules. *See* 11/26/12 Letter from D. Getman and Collective Demand for Arbitration attached as Exhibit A. Respondents repeatedly argued that the collective arbitration was premature, as they would be asking for reconsideration and/or appeal of the issue, and that the Commercial Rules applied to the arbitration. *See* 11/28/12 Letter from D. Hansen; 12/4/12 Letter from D. Hansen; 2/6/13 Email from D. Hansen attached

as Exhibit B. Both parties briefed the rules issue for the AAA. *See id.*; *see also* 11/30/12 Letter from D. Getman; 12/18/12 email from D. Getman; 12/19/12 email from D. Hansen attached as Exhibit C. Respondents argued in favor of the Commercial Rules; the Drivers argued that because Rule 1 of the AAA Commercial Rules specifically states that the Employment Rules should apply to employment disputes, the Employment Rules should be applied to this Fair Labor Standards Act claim. *See id.* On December 19, 2013, the AAA made an initial determination that the Employment Rules apply to the arbitration and that the parties should select an Arbitrator from the Employment List. *See* 12/19/13 email from A. Shoneck attached as Exhibit D. Shoneck. After expiration of the AAA's stay while Respondents filed their numerous reconsideration and appeal motions, the arbitration proceeded collectively under the Employment Rules when Respondents' motions were all denied. The AAA also assessed fees in accordance with the Employment Rules for employer promulgated plans for a collective arbitration. *See* 3/20/13 Letter from A. Shoneck attached as Exhibit E.

The parties then went through several rounds of arbitrator selection, finally agreeing on Arbitrator Patrick Irvine. A management conference between the parties and Arbitrator Irvine was held on July 31, 2013. As a result of the management conference, Arbitrator Irvine issued a Scheduling Order on July 31, 2013 and requested briefing on the issues addressed herein.

B. Facts

The Drivers are interstate truck drivers who simultaneously entered into a "Lease Agreement" to lease a truck from CLI, and a "Contractor Agreement" in which they agreed to turn the truck over to CRS for the purpose of hauling freight for CRS. CRS and CLI are private companies, owned and operated by related individuals (including Respondents JON ISAACSON and JERRY MOYES) for a common business purpose, i.e. moving freight interstate for customers of CRS. The Lease and Contractor Agreements are both pre-printed form agreements drafted by Respondents. *See* 9/18/13 Decl. of K. Shire at ¶ 4; 9/23/13 Decl. of G. Cilluffo at ¶ 4. The two Agreements are presented to the Drivers as a package and must be signed at the same time. See *9/18/13 Shire Decl.* at ¶ 2; *9/23/13 Cilluffo Decl.* at ¶ 2. They are not subject to negotiation, but must be accepted by the Drivers on a take-it-or-leave-it basis. See *9/18/13 Shire Decl.* at ¶¶ 5, 7; *9/23/13 Cilluffo Decl.* at ¶¶ 5, 8. The Drivers are not permitted to take copies of the Agreements off CRS's premises prior to signing in order to review them or consult with an attorney. *See 9/18/13 Shire Decl.* at ¶ 6; *9/23/13 Cilluffo Decl.* at ¶ 6. In many cases the Drivers were presented with the Agreements far from their homes leaving them with no practical way home except by signing the Agreements and obtaining a truck. *See 9/23/13 Cilluffo Decl.* at ¶ 7.

The terms of the two Agreements were identical for all the Drivers. The Lease Agreement provides that a Driver will pay "rent" to CLI in exchange for the right to operate the truck during the term of the lease. *See* Lease Agreement attached as Exhibit F at ¶¶ 1, 2. Leases are typically for a 2 to 3 year period with total rent payments ranging from $47,500 to $129,500. *See, e.g.* Docs. 26-1 – 26-7. The truck remains, at all times, the property of CLI. Exhibit F at ¶ 7. The Lease also requires the Driver to enter into a Contractor Agreement with CRS, or another motor carrier approved by CLI, for the term of the Lease. *Id.* at ¶ 6. Termination of the required Contractor Agreement for any reason, or failure to pay the weekly rent within 5 days of the due date, places the Driver in "default" of his lease, *id.* at ¶ 12 (a) & (g), and gives CLI the right to terminate the lease, accelerate the due date of all rent for the full term of the lease, and take immediate possession of the truck, *id.* at ¶ 13. The Driver may not terminate the lease for any reason. Even in the event of a violation of the agreement by CLI, the Driver must pay all rent payments for the full term of the Lease without setoff, deduction, or counterclaim of any nature for wrongdoing by CLI. *Id.* at ¶¶ 2F, 4.

Pursuant to the requirement of the "Lease Agreement" each of the Drivers simultaneously signed a "Contractor Agreement" with CRS in which he or she agreed "to furnish" CRS the Equipment – i.e. the truck -- that he just rented from CLI for the purpose of hauling freight for CRS. *See* Contract Agreement attached

as Exhibit G at ¶ 1. The Agreement gives CRS "exclusive possession, control, and use the Equipment for the duration of the Agreement and [CRS] shall assume complete responsibility for the operation of the Equipment during such time." *Id.* at ¶ 5A. CRS agrees to furnish freight for the Driver to haul in the truck during the term of the lease though no minimum amount of freight is guaranteed. *Id.* at ¶ 1. In exchange for furnishing his leased truck and labor to CRS, the Driver receives a per mile rate as compensation. *Id.* at ¶ 2. Each Driver must agree to have his rent payments deducted from his compensation as well as other amounts owing to CRS or CLI. Out of the remainder, the Driver must agree to pay virtually every expense associated with the operation of the truck including insurance, fuel, oil, repairs, fuel taxes, highway use tax, and permits. *Id.* at ¶¶ 8, 11. The Driver also agrees to equip the truck with a Qualcomm satellite communications system meeting CRS standards so that Respondents can communicate their directives to the Drivers. *Id.* at ¶5C. Recognizing that the Drivers are unlikely to be able to provide all of these services themselves, the Contractor Agreement indicates that CRS will provide, at the Drivers' expense, insurance, ¶ 8D, a fuel credit card, highway use tax filings, ¶ 2F.x, CRS owned repair shops, ¶ 2F.vi, operating reserve account, ¶ 4. As a practical matter the Drivers must rely on CRS to provide all of these services. The Drivers must agree to comply with CRS policies and requirements. *Id.* at ¶ 7D. The Contractor Agreement can be terminated by CRS for any or no reason on ten days'

notice, despite the fact that this automatically places the Driver Claimant in default of his Lease Agreement. *Id.* at ¶ 14. Both the Contractor Agreement, and the Lease Agreement, contain Arbitration clauses. Exhibit G at ¶ 18, Exhibit F at ¶ 21.[2]

After entering into these Agreements, the Drivers perform the same work, subject to the same CRS supervision, as CRS' regular employee drivers. 7/27/12 Decl. of G. Cilluffo at ¶ 7; 8/9/12 Decl. of D. Costlow at ¶ 7; 8/6/12 Decl. of A. Pengilly at ¶ 7; 7/17/12 Decl. of J. Perkins at ¶ 7; 8/8/12 Decl. of B. Ratterree at ¶ 7; 7/16/12 Decl. of K. Shire at ¶ 7. The only difference is that, rather than being assigned a company-owned truck, the Drivers lease a company-owned truck and then immediately cede complete control of it back to Respondents. As a result of this circular lease arrangement, Respondents are able to exert far greater control over the job performance of the Drivers than can be exerted over their regular employee drivers. This is because the Contractor Agreement allows CFS to terminate the Contractor Agreement at will and the Lease Agreement treats such termination as a default by the Driver, giving Respondents the right to seize the truck and demand immediate payment of all rent for the remaining period of the Lease. Thus, Respondents not only have the ability to terminate the Drivers as

[2] The two arbitration clauses are identical. Indeed, it appears that the arbitration clause in the Contractor Agreement was pasted into the Lease Agreement since the Lease clause refers to the "Company" and the "Contractor," just as in the Contractor Agreement arbitration clause. "Company" and "Contractor" are not used anywhere else in the Lease and, indeed, are not defined in the Lease.

drivers, but the ability to impose financial ruin on the Drivers for any or no reason at all.[3] With this power, Respondents are able to, and do, control all aspects of the Drivers' employment including what jobs they perform, how those jobs are performed, how much money the Drivers can make, their departure and arrival times, the routes they take, where they can obtain gas, and the speed they drive. *See, e.g., 7/27/12 Cilluffo Decl.* at ¶¶ 10-16; *7/16/12 Shire Decl.* at ¶¶ 12-16.

POINT ONE

THE AAA's EMPLOYMENT RULES APPLY TO THIS ARBITRATION.

The Fair Labor Standards Act dispute in this case is, by definition, an employment dispute since the FLSA only applies to "employees" and how much they are paid. The Drivers allege that they were employees of Respondents and that Respondents did not pay them the FLSA minimum wage. That is the only claim in this case. Moreover, the District Court already found the Drivers to be employees as a predicate to determining whether the Federal Arbitration Act should apply to their FLSA claim.[4] The Court found the Drivers are employees, not

[3] The "default" of the lease is reported to the Driver's DAC report (a detailed summary of a driver's work history), which is universally used in the trucking industry as a pre-employment screening tool, thereby making it virtually impossible to obtain work as a truck driver again, and the amount due on the lease is reported to a credit agency, ruining the Drivers' ability to drive for other companies. *See, e.g., 7/27/12 Cilluffo Decl.* at ¶¶ 26-29; *8/8/12 Ratterree Decl.* at ¶¶ 26-28.

[4] The District Court found that the Drivers were employees and that the FAA did not apply to this dispute. *See* Doc. 53 at pp. 7-9. *See* 9 U.S.C. § 1 stating as

independent contractors, and sent this case to arbitration under the Utah Uniform Arbitration Act (UUAA). Thus this case is an employment claim brought by the Drivers who were found by the Court to be employees.

Accordingly, the Drivers filed this arbitration under the AAA's Employment Rules. *See* Exhibit A. Respondents opposed application of the Employment Rules, filing at least two letter briefs and sending various emails to the AAA asking the AAA to administer the claim under the Commercial Rules. *See* Exhibit B. Respondents argued that the form contract they imposed on the Claimant truckers calls for arbitration under the AAA's Commercial Rules. *See* Exhibit C. The AAA denied Respondents' arguments, finding that the case would be administered under the Employment Rules. *See* Exhibit D. In accordance with its practices however, the AAA told Respondents they could address the issue again with the Arbitrator. *Id.*

Respondents have now raised the issue and their argument should once again be rejected. Respondents' only basis for claiming that the Commercial Rules should be applied is the language in the arbitration clause of the Agreements to the effect that disputes will be resolved "in accordance with the Commercial Arbitration Rules of the AAA." *See* Exhibits B and C. As the AAA recognized,

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"nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

however, that reference to the Commercial Rules does not resolve the question because the Commercial Rules specifically call for the application of the Employment Rules for "disputes arising out of an employer promulgated plan." *See* AAA Commercial Rules Rule 1 fn + ("A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures."). The AAA's conclusion that this is a dispute arising out of an "employer promulgated plan" to which the Commercial Rules dictate applying the Employment Rules was clearly correct.

The AAA rules do not define an "employer promulgated plan" except in contradistinction to an "individually negotiated employment agreement or contract." AAA Employment Rules Rule 47. However, both federal case law and AAA decisions make clear that an arbitration agreement is part of an employer-promulgated plan when it was created, drafted and promulgated by an employer; when the contract is identical for all employees; when the contract is a preprinted form contract; when the agreement is part of terms and conditions of employment that an employee is required to agree to prior to commencing employment; and when the agreement exists between an employer and a low ranking employee who does not have the ability to individually negotiate the terms of the agreement. *See, e.g., Carlile v. Russ Berrie & Co., Inc.*, SACV08-0887 AG(RNBX), 2008 WL 4534281 (C.D. Cal. Oct. 6, 2008) ("[T]he arbitration agreement at issue is clearly

an 'employer-promulgated' plan. Neither party disputes that the agreement was "created, drafted, and promulgated" by Defendant."); *E.E.O.C. v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 448 F. Supp. 2d 458, 465 (E.D.N.Y. 2006) (arbitration agreement was part of employer-promulgated plan because agreement was on preprinted form undisputedly drafted by the defendant, identical agreement signed by several employees, agreement was part of terms and conditions of employment that plaintiff was required to agree to prior to commencing employment, plaintiff was not type of high level employee who would negotiate the terms and conditions of employment, and agreement was not individually negotiated by plaintiff); *ARBITRATION BETWEEN CLAIMANT RESPONDENT (Elec., Elec. Equip. & Components except Computers)*, AAA REDACTED, 2012 WL 2832682 (AAA Mar. 9, 2012) (arbitration agreement was part of employer-promulgated plan because employment agreement was uniform, with identical provisions governing arbitration, and no employee below CEO and COO, including claimant, ever attempted to negotiate different terms). *Compare IN THE MATTER OF ARBITRATION BETWEEN: CLAIMANT, Claimant RESPONDENT (Elec., Elec. Equip., & Components, except computers), Respondent*, AAA REDACTED, 2012 WL 2832668 (AAA June 8, 2012) (arbitration agreement was not part of employer-promulgated plan because claimant was not offered a

preprinted form and told "take it or leave it," and claimant was a high-ranking employee who had the ability to negotiate his own employment agreement).

The Agreements here are clearly employer-promulgated plans. They are preprinted form contracts undisputedly created, drafted and promulgated by Respondents CRS and CLI. *See 9/18/13 Shire Decl.* at ¶ 4. They are identical for all the Drivers and none of the provisions of the Agreements were subject to individual negotiation. *See* Docs. 26-1 – 26-7, 27-1 – 27-7; *9/18/13 Shire Decl.* at ¶ 7. To the contrary, the Drivers were not even allowed to take the agreements off CRS's premises in order to review them prior to signing, *see 9/18/13 Shire Decl.* at ¶ 6, nor are the Drivers, as truck drivers, the kind of high level employees that would typically negotiate individual agreements, *see 9/18/13 Shire Decl.* at ¶ 8. The Agreements were simply part of the terms and conditions of work that the Drivers were required to accept on a "take it or leave it" basis prior to starting work for CRS. *See 9/18/13 Shire Decl.* at ¶ 5.

Indeed, the District Court has already found that the Agreements were contracts of employment when it held that the Agreements fell within the FAA §1 exemption because they were "contracts of employment of . . . workers engaged in foreign or interstate commerce." *See* Doc. 53 at pp. 7-9. If the Lease and Contractor Agreements are contracts of employment for purposes of the FAA they are surely contracts of employment for purposes of the AAA Rules.

Even apart from the District Court's ruling, the dispute here is clearly an employment and not a commercial dispute between businesses. The Drivers are seeking to vindicate their rights under one of the most fundamental federal statutes designed to regulate the workplace and protect employees. As the introductory paragraph of the AAA Employment Rules makes clear, the Employment Rules were designed specifically to allow for arbitration of "Federal and State laws reflecting societal intolerance for certain workplace conduct. . . ." AAA Employment Rules at p. 5, Introduction. The Employment Rules incorporate the Due Process protocol for employment disputes. AAA Employment Rules at pp. 6-7, The Fairness Issue: The Due Process Protocol. Moreover, the Employment Rules enable "parties to have complaints heard by an impartial person . . . with expertise in the employment field. Both employers and individual employees benefit by having experts resolve their disputes without costs of delay of litigation." AAA Employment Rules at p. 7, AAA's Employment ADR Rules. The fact that Respondents contest that they are employers subject to the FLSA does not change the fact that the *dispute* is an *employment* dispute over rights conferred by an *employment* statute to which the special rules and protections afforded by the Employment Rules should apply.

Finally, there is no harm in applying the Employment Rules. As all parties recognize, whether the Drivers were employees of the Respondents is the central

merits issue in this case. If it is ultimately determined that the Drivers were employees, either by virtue of the fact that the District Court has already so held or as a result of a *de novo* consideration of that issue by the Arbitrator, then the decision to apply the Employment Rules will have been the correct one. On the other hand, if it is determined that the Drivers are not employees, then the decision will still have been the correct one since the *dispute* is about employment, but, even if it is viewed as the incorrect decision, Respondents will have won the arbitration and they will not have been harmed in any way by the application of the Employment Rules. The converse approach advocated by Respondents creates a chicken-and-egg problem where the Drivers must first prove the merits of their case—that they were employees --in order to benefit from the special rules designed for deciding the merits of an employment dispute. Such circularity makes no sense. This is clearly an employment dispute and the AAA was correct in treating it as such. For all of these reasons, the Arbitrator should affirm the AAA decision to apply the Employment Rules to this arbitration.

POINT TWO

THE FEES SET FORTH IN THE EMPLOYMENT RULES FOR AN EMPLOYER-PROMULGATED PLAN APPLY TO THIS CASE.

As set forth in Point One, *supra*, the AAA determined that this matter should be arbitrated under the AAA Employment Rules and, as a result, the fees, and fee allocation, set by those Rules also apply to this arbitration. The Employment Rules

themselves contain two separate and distinct arbitration costs sections, one for disputes arising out of employer-promulgated plans and the other for disputes arising out of individually-negotiated employment agreements and contracts. *See* AAA Employment Rules at p. 8. Since the AAA's finding that the Employment Rules apply was based on its determination that this was a dispute about an employer-promulgated plan, the AAA found that the fees, and fee allocation, associated with such plans should apply. The AAA's determination was clearly correct for the reasons set forth above and, accordingly, the AAA's fee ruling should be affirmed.

POINT THREE

THE DISTRICT COURT'S DETERMINATION THAT THIS ARBITRATION BE DETERMINED COLLECTIVELY IS CONCLUSIVE.

The Drivers filed their FLSA action in District Court as a "collective action" as was their right under 29 U.S.C. § 216(b). Respondents' motion to compel arbitration asked the District Court to send the case to "individual" arbitration. *See* Doc. 25, pp. 2, 3, 9, 10, 29. After the District Court ruled that the Utah Arbitration Act required arbitration of the claims in this case on September 24, 2012, *see* Doc. 53, Respondents asked the Drivers to agree that the Court's order meant that all claims would have to be individually litigated. *See* Docs. 59-1. Claimants disagreed with Respondents' interpretation and refused to stipulate to that effect. *Id.* Respondents then asked the District Court to "clarify" that its Order compelling

arbitration required "individual" arbitration of all claims. *See* Doc. 58, p. 5. Claimants responded, arguing that under the doctrine of *expressio unius,* the arbitration clause's prohibition on class actions and joinder, must be taken to explicitly permit non-excluded forms of action such as an FLSA's "collective action." *See* Doc. 59.

On November 8, 2012, the District Court denied Respondents' clarification request, stating,

> As Plaintiffs note, however, the [arbitration clause's class action] Prohibition does not prohibit collective arbitrations. An action brought under the FLSA is a collective action, not a class action. The Prohibition only prohibits consolidated or class arbitrations. Therefore, the Prohibition does not prohibit collective arbitration of Plaintiffs' FLSA claims; Plaintiffs' FLSA claims should be collectively arbitrated.

See Doc. 61 at p. 4. The key difference between a collective action brought under the FLSA and a Rule 23 class action is that, in the former, "class members must opt into the suit in order to be bound by the judgment in it, while in a class action governed by Fed. R. Civ. P. 23 they must opt out not to be bound by the judgment." *Espenscheid v. Direct Sat USA, LLC,* 688 F.3d 872, 874 (7th Cir. 2012) (emphasis in original); *see also Wilkie v. Gentiva Health Servs., Inc.*, 2010 WL 3703060, *3 n. 5 (E.D. Cal. Sep. 16, 2010); *Ferrell v. ConocoPhillips Pipe Line Co.*, 2010 WL 1946896, *3 (C.D. Cal. May 12, 2010). (emph. added). In addition to stating that "Plaintiffs' FLSA claims should be collectively arbitrated," the

Court also tolled the statute of limitation for putative class members for the period of September 14, 2012 through the arbitration of all claims and directed that Consents to Sue could be filed in both the Court and the arbitral forum. *Id., pp. 4-5.*

After the Court held that Claimants' FLSA claim should be arbitrated collectively, Respondents moved for reconsideration again arguing that the Agreements did not allow for such collective arbitrations. The District Court agreed to reconsider Respondents' additional arguments and then entered another detailed opinion rejecting Respondents' arguments and reaffirming its Order compelling collective arbitration. *See* Doc. 77. Respondents then began a vehement campaign in the courts to change the result including a request for a stay, a request for interlocutory appeal, and a mandamus petition with the Ninth Circuit. In each instance, Respondents' asked the courts to rule that the Agreements prohibited collective arbitration of the Drivers FLSA claims and at no point did they argue that the Arbitrator, rather than the District Court, was the proper forum to decide the issue. In the end, all of Respondents' efforts to overturn the District Court's order compelling collective arbitration were denied. *See* District Court Docs. 89, 94, 98 and 101, and Ninth Circuit Court of Appeals, Doc. 7.

Respondents' attempt to re-raise this same issue before the Arbitrator should be summarily rejected. Having explicitly requested the District Court to rule on the question of whether the FLSA arbitration should be individual or collective,

Respondents cannot be heard to complain that the District Court should not have considered the issue or that the issue was more properly one for the Arbitrator. Nor do the Respondents' have any basis for appealing the District Court's ruling to the Arbitrator. The Court's order that the FLSA claim should be collectively arbitrated is part of the Court's order compelling arbitration and the Arbitrator has no authority to overrule the terms of that Order referring the case to arbitration. District courts frequently set forth in their orders compelling arbitration the terms under which the arbitration will take place. *See, e.g., Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807, 820 (D. Md. 2012) (ordering that the arbitration will take place in Maryland applying Colorado law); *Wolf v. Nissan Motor Acceptance Corp.*, 10-CV-3338 NLH KMW, 2011 WL 2490939, *7 (D.N.J. June 22, 2011), *appeal dismissed* (Sept. 5, 2012), *reconsideration denied*, CIV. 10-3338 NLH/KMW, 2012 WL 1079340 (D.N.J. Mar. 29, 2012) (ordering that the costs of arbitration must be shared by the parties); *IJL Dominicana S.A. v. It's Just Lunch Int'l, LLC*, CV08-5417-VAP, 2009 WL 305187, *5 (C.D. Cal. Feb. 6, 2009) (ordering that arbitration may proceed as a class or consolidated action and that the arbitration may include claims for punitive and exemplary damages).

Moreover, it was entirely proper for the District Court to decide the issue of collective arbitration. The Supreme Court has clearly held that whether a case

should be litigated on a class or individual basis is one for the courts to determine as a gateway matter. *See e.g. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (Court rather than arbitrator decides whether arbitration to occur on class or individual basis, noting "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."); *AT&T Mobility LLC v. Concepcion*, -- U.S. --, 131 S. Ct. 1740, 1751 (2011) (" We find it unlikely that in passing the FAA Congress meant to leave the disposition of these [class or individual] procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925"). Defendants' decision to present this issue to the District Court and the Court's order compelling collective arbitration of the Drivers' FLSA claim is clearly consistent with this Supreme Court authority, is binding on this Arbitration, and should not be revisited.

POINT FOUR

IF THE ARBITRATOR DECIDES TO RECONSIDER THE TERMS OF THE DISTRICT COURT'S ORDER REFERRING THE CASE TO COLLECTIVE ARBITRATION, THE SAME RESULT SHOULD OBTAIN UNDER THE *EXPRESSIO UNIUS* DOCTRINE.

As set forth above, Respondents have no right to relitigate in arbitration an express ruling made by the Court in response to their own multiple requests that the Court determine if arbitration should be handled collectively or individually. However, even if the Arbitrator determines to revisit the question, he would

doubtless reach the same conclusion reached by the Court – that this case should be collectively arbitrated.

The District Court properly found that the arbitration clause[5] permitted "collective actions" by expressing the prohibitions against class actions and joinder of claims. "The doctrine of *expressio unius est exclusio alterius* instructs that when certain matters are mentioned in a contract, other similar matters not mentioned were intended to be excluded." *In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007); *A2D Technologies Inc. v. MJ Sys., Inc.*, 269 F. App'x 537, 542 (5th Cir. 2008) ("the principle of *expressio unius est exclusio alterius* counsels us that 'the expression in a contract of one or more things of a class implies the exclusion of all not expressed, even though all would have been implied had none been expressed.'"); Corbin on Contracts § 24.28 (5th ed.) ("If the parties in their contract have specifically named one item or if they have specifically enumerated several items of a larger class, a reasonable inference is that they did not intend to include other, similar items not listed.").

The doctrine of *expressio unius* is a commonly applied method for discerning the drafting party's intent with respect to what is to be included and what is to be excluded from coverage by a document, whether a contract or a

[5] The class waiver states, "…no consolidated or class arbitrations will be conducted. If a court or 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…"

statute. *See, e.g., A2D Technologies Inc.* 269 F. at 542 ("the Agreement's specific inclusion of past claims in the release and its silence regarding future claims indicates that the parties did not intend to release future claims."); *Corley v. Infinity Leader Ins. Co., Inc.*, 113 F. App'x 478, 480-81 (3d Cir. 2004) ("the choice of one classification excludes all others that are of greater quantum."); *Robbins v. Am. Bearing & Power Transmission, Inc.*, 181 F.3d 103 (6th Cir. 1999) ("The doctrine of *expressio unius est exclusio alterius* strongly suggests that because tort is specifically mentioned and contract is not, then courts do not have the discretion to disallow interest on amounts accruing on a contract after a settlement offer has been rejected."); *Laurin v. Providence Hosp.*, 150 F.3d 52, 60 (1st Cir. 1998) ("By specifying but one criterion which excuses day nurses from shift rotation… the CBA plainly implied that other criteria did not warrant waivers of the shift-rotation requirement"); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("The specificity and precision of [33 U.S.C.A. § 1369], and the sense of it, persuade us that it is designed to exclude the unlisted section 1313."). Defendants do not contest that Utah law recognizes and applies the *expressio unius* doctrine.[6]

[6] In *Kocherhans v. Orem City*, 266 P.3d 190, 195-96 (Utah Ct. App. 2011), the Utah Court of Appeals wrote that,

> [the] interpretive maxim *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another," applies "where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an

Here, the arbitration clause was drafted by Respondents, highly sophisticated businesses and their principals, and any ambiguity must therefore be construed against them. *Ellsworth v. Am. Arbitration Ass'n*, 2006 UT 77, 148 P.3d 983, 988 (2006) ("Any ambiguity in a contract is to be construed against the drafter"). The question resolved by the *expressio unius* doctrine is whether the arbitration provision meant to include unmentioned FLSA collective actions by the explicit expression of prohibited similar forms of action – the class and consolidation devices. Clearly, a collective action is not a class action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1525 (2013) ("Rule 23 actions are fundamentally different from FLSA collective actions"); *Smith v. T-Mobile USA Inc.*, 570 F.3d

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> inference that the latter was not intended to be included within the statute." *See Monson v. Carver*, 928 P.2d 1017, 1024–25 (Utah 1996) (internal quotation marks omitted). Without any legal arguments to the contrary, it appears reasonable to interpret the legislature's decision as one not expressly requiring deputy positions in light of its grant of considerable discretion to a municipality in arranging its mode of governance. With this view in mind, we conclude that Kocherhans has failed to demonstrate that the City was required by section 1106 to concentrate its deputy-like responsibilities in a single at-will "deputy" department head position, rather than to disburse those functions, as the City appears to have done, among the merit division managers within each city department.

And see, Mifflin v. Shiki, 77 Utah 190 (1930) (applying expression unius doctrine to contract for broker's commission); *Buckle v. Ogden Furniture & Carpet Co.*, 216 P. 684, 685-86 (Utah 1923) (applying *expressio unius* doctrine to legislature's listing of causes of action which may be tried in distant jurisdictions);

1119, 1122 (9th Cir. 2009) (detailing "structural distinctions between a FLSA collective action and a Rule 23 class action"); *McElmurry v. U.S. Bank Nat. Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007) ("there are differences between a collective action brought pursuant to § 216(b) and a class action brought under Rule 23"); *Ferrell* 2010 WL 1946896 at *3 (" FLSA's collective action vehicle is distinct from the class action procedure under Federal Rule of Civil Procedure 23."). For example, a putative class acquires an independent legal status once it is certified under Rule 23. By contrast, under the FLSA, "conditional certification" does not produce a class with an independent legal status, nor join additional parties to the action. *Genesis Healthcare Corp.*, 133 S. Ct. at 1525. Further, in a collective action class members must opt into the suit in order to be bound by the judgment in it, while in a class action governed by Fed. R. Civ. P. 23 they must opt out not to be bound by the judgment. *Espenscheid* 688 F.3d at 874 . The two types of actions are simply not the same. *See* the District Court's determination that a collective action is not a class action (Doc. 61 at p. 4).

And an FLSA action is not a "consolidated action" governed by Fed. R. Civ. P. 42. Consolidation is a method by which a court may efficiently resolve otherwise legally independent claims which happen to share a common question of law or fact. *Mork v. Loram Maint. of Way, Inc.*, 844 F. Supp. 2d 950, 956 (D. Minn. 2012), citing Fed. R. Civ. P. 42(a). A FLSA collective action, in contrast, is a mechanism in

which one claim can vindicate the rights of many. *Id. See also Laos v. Grand Prize Motors, Inc.*, 11-CIV-22973, 2012 WL 718713 (S.D. Fla. Mar. 6, 2012) ("The requirement that members of the collective action under 29 U.S.C. § 216(b) be 'similarly situated' is a flexible one, and is different from that required under Federal Rules of Civil Procedure 20 (joinder), 23 (class actions), and 42 (severance)"). Since a collective action is neither a class action, nor a consolidated action, the waiver cannot be construed to waive collective action rights, set forth in federal law. 29 U.S.C. §216(b). Indeed, under the *expressio unius* doctrine, a list of prohibitions including some items but excluding others is presumed to permit the unexpressed. *See e.g., Pennsylvania Cellular Tel. Corp. v. Zoning Hearing Bd. Buck Twp.*, 127 F. Supp. 2d 635, 642 (M.D. Pa. 2001) ("under the well-established principle of statutory construction, '*expressio unius est exclusio alterius*,' the ordinance's explicit expression of prohibited uses for the industrial district indicates an intention to permit those uses not classified as prohibited").

POINT FIVE

IF THE ARBITRATOR DECIDES TO RECONSIDER THE TERMS OF THE DISTRICT COURT'S ORDER REFERRING THE CASE TO COLLECTIVE ARBITRATION, THE SUPREMACY CLAUSE MANDATES THAT THE FAIR LABOR STANDARDS ACT (FLSA) BE EFFECTUATED OVER STATE LAWS TO THE CONTRARY.

If the arbitrator finds that the District Court's order compelling collective arbitration need not be followed, and then determines not to apply the *expressio*

unius doctrine, then the Arbitrator must consider whether the Supremacy Clause requires implementing the Fair Labor Standards Act over a state statute conflicting with it.

The Supremacy Clause of the Constitution, Article VI, Cl. 2, provides that "any state law, however clearly within a State's acknowledged power, which interferes or is contrary to federal law, must yield." *Free v. Bland,* 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L.Ed.2d 180 (1962). Preemption may be explicit or implied. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Implied preemption may be found "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). State law may not frustrate operation of federal law even though the state legislature in passing its law had some purpose in mind other than one of frustration. *Perez v. Campbell*, 402 U.S. 637, 651-2 (1971). Two federal statutes here pre-empt any Utah statute interpreted to contradict federal law. First, the FLSA itself enshrines the ability of workers to join together in a "collective action" as a "right." 29 U.S.C. §216(b). Second, the National Labor Relations Act protects workers' right to join together in "concerted action" for mutual aid and benefit, such as by bringing a federal suit together in a "collective action." *52nd St. Hotel Associates*, 321 NLRB at 633; *Harco Trucking*, 344 NLRB No. 56 at 479 (2005).

Defendants may argue that the "federal policy" favoring arbitration should animate the decision in this arena. However, the FAA (where the federal policy is expressed) does not apply to contracts for interstate truckers and has been held inapplicable by the District Court here. 9 U.S.C. § 1. Thus, federal decisions holding that the FAA takes precedence over the FLSA or the NLRA are simply inapplicable here. The FLSA and NLRA statutes will be examined in turn.

A. The FLSA Affords Workers The Statutory "Right" To Proceed Collectively.

With the FLSA, enacted in 1938, Congress radically shifted the playing field for employees and employers.[7] For the first time, employment in the U.S. would not be left to the unregulated negotiating power of employers and employees, with the resulting terms inevitably set by the more powerful employers. Employers and

[7] On June 25, 1938, Congress enacted the FLSA, creating a minimum standard for hourly wages and a maximum number of hours an employee could work without receiving overtime compensation. 29 U.S.C. §§ 206, 207. The FLSA was enacted to eliminate labor conditions that are detrimental to the health, efficiency, and general welfare of workers. 29 U.S.C. §202. The Act specifically forbids employers and employees to agree to terms which are deemed in violation of the minimum statutory requirements. In his message to Congress urging passage of the Act, President Roosevelt explained that the Act is intended to ensure workers "a fair day's pay for a fair day's work" because "[a] self-supporting and self-respecting democracy can plead no ... economic reason for chiseling workers' wages or stretching workers' hours." H.R. Rep. No. 101-260, at 8-9 (Sept. 26, 1989) (reprinted in 1989 U.S.C.C.A.N. 696, 696-97).

employees were no longer able to "bargain" over every term of employment. Instead, the FLSA set nationwide terms based on federal policy (relating to minimum wage, overtime, and child labor), all designed to remedy perceived inadequacies in the "marketplace" where labor and capital individually and collectively otherwise "bargained" over work terms. In practice, this meant that no longer would employers' terms, no matter how stingy, be presented to employees on a take it or leave it basis. *See e.g. Tony & Susan Alamo Found.* 471 U.S. at 302 .

The FLSA is fundamentally a limitation on the right to contract for covered employers and employees – prohibiting contracts failing to pay the minimum wage or overtime premium pay. *Brooklyn Sav. Bank*, 324 U.S. at 706-07 ("The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 at 1545 (7th Cir. 1987) (Easterbrook, J., concurring) (The FLSA was "designed to defeat rather than implement contractual arrangements").

Congress enacted the FLSA to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C.A. § 202, and to "secure for the

lowest paid segment of the nation's workers a subsistence wage," *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946), because "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency…", *Brooklyn Sav. Bank v. O'Neil*, 324 U.S.697, 708-09 (1945). Payment of the minimum wage to "all" workers also prevents substandard wages from being used as "an unfair method of competition" against law-abiding competitors. 29 U.S.C. § 202(a)(3); *see Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948) ("Rights granted to employees under the Fair Labor Standards Act ... are 'charged or colored with the public interest.'"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (allowing employees to contract out of FLSA protections would result in an impermissible downward pressure on wages across the market); H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6-7 ("No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors".)

To have the FLSA be effective, Congress intended it to cover all similarly situated workers. Indeed, the Supreme Court has repeatedly stated that the FLSA's purpose is to make sure ALL covered workers are paid minimum wage. "**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 System, Inc.*, 450 U.S. 728, 739 (1981) (citations omitted and emph. added). 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.**' ..." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (emph. added). *See also U.S. v. Rosenwasser*, 323 U.S. 360, 363 (1945) ("**no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.**") (emph. added). Applying the FLSA to "all" affected workers protects employees from being undercut by other employees willing to work for less and protects law abiding employers from being undercut by unscrupulous employers willing to violate the law. *See Tony & Susan Alamo Found.*, 471 U.S. at 302 .

Congress has established a complex of enforcement measures to make the FLSA effective, including:

- Department of Labor administrative enforcement,
- Department of Labor enforcement in court, on an individual and group basis,
- Employees have a private right of action,
- Employees can proceed collectively as a "private attorney general," and

- Employers are liable for prevailing workers' attorneys' fees and costs.[8]

The mechanisms by which FLSA enforcement is undertaken by "private attorneys general" are integral to the Congressional purposes. *Turner v. Perry Township*, No. 3:03-cv-0455, 2005 WL 6573783, *3 (S.D. Ohio Dec. 30, 2005) ("the Sixth Circuit has emphasized the private attorney general theory of fee recovery: the importance of bringing these [FLSA] cases, even if only nominal damages are recovered to vindicate employee rights and Congressional policy.").

B. Collective Actions Are Fundamental to Implementing the Federal Statutory Scheme.

The collective action procedure in 29 U.S.C. §216(b) implements the Congressional purpose of comprehensive enforcement in several ways. First, the

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[8] *See United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co., Inc.* 732 F.2d 495, 501 - 502 (6th Cir. 1984), where the court wrote:

> The design of the [FLSA] is intended to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard living" for workers. 29 U.S.C. § 202(a). The availability and award of attorney fees under § 216(b) must reflect the obvious congressional intent that the policies enunciated in § 202 be vindicated, at least in part, through private lawsuits charging a violation of the substantive provisions of the wage act. Moreover, the purpose of § 216(b) is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances; "[o]bviously Congress intended that the wronged employee should receive his full wages ... without incurring any expense for legal fees or costs".

Supreme Court has noted that "A collective action allows [FLSA] plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Second, the ability to bring a collective action under the FLSA also overcomes "'the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Third, the ability to bring collective actions also encourages attorneys to take FLSA cases for larger groupings of workers in situations where a single individual action for say a few thousand dollars, would seem to be an ill-advised use of limited attorney time. FLSA claims are generally small dollar claims for minimum hourly wage and overtime. Practically speaking, there are not sufficient attorneys to handle every small dollar FLSA claim for every individual worker who is cheated, were collective actions so easy to evade through arbitration clauses.

Fourth, FLSA collective actions allow workers to bring their claims while not being a named plaintiff. As the Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge

employers' violations of their rights. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) ("The danger of witness intimidation is particularly acute with respect to current employees ... over whom the employer, by virtue of the employment relationship, may exercise intense leverage."). The collective action process allows workers to effectively sue their current employer and have their claims heard, without being perceived as the ringleader, which the named plaintiff must do. That is why almost all FLSA cases are brought by former, rather than current employees. Named Plaintiffs endure real risks, not just with their current employer, but even with respect to an industry. Thus, even former employees have a reasonable fear that sticking their necks out to collect the small sums due for minimum wage violations could kill their professional careers if it is known that they brought litigation against their employer.[9] *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011); *Does I thru XXIII v. Advanced Textile Corp.* 214 F.3d 1058 (9th Cir. 2000) (permitting anonymous filings because of risks to FLSA plaintiffs).

[9] Information pertaining to former employees' willingness to bring claims against an employer remains on the internet indefinitely, thereby potentially harming a career well into the future.

Without the statutory right to band together with similarly situated persons, many employees would be deprived of compensation they have earned through their labor without any possibility of redress, either because they do not know their rights, because they are afraid to assert them, or do not have the resources or a practical mechanism to assert their rights. *Raniere*, 2011 WL 5881926 at *15-*17.

C. The FLSA "Right" to Proceed Collectively Cannot Be Waived Except Where Such Waiver Is Permitted By A Federal Statute.

The collective action proceeding was defined as a "right" by Congress when it wrote: "The **right** provided by this subsection to bring an action by or on behalf of any employee… ". 29 U.S.C. §216(b). This right is integral to FLSA's comprehensive remedial scheme,[10] and encourages private attorneys' general to take meritorious FLSA cases. The Supreme Court has noted the important purpose fulfilled by the collective action section:

> …§ 16(b), expressly authorizes employees to bring collective … actions "in behalf of ... themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982 ed.). Congress has stated its policy that … plaintiffs should have the opportunity to proceed collectively. A collective action allows… plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.

[10] In 2011, there were 6,335 FLSA cases filed in federal court, but only 139 of these were filed by the DOL. Judicial Business of the United States Courts, 2010 Annual Report of the Director at p. 127 (Table C-2), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (last visited on Aug. 26, 2013). Minimum wage claims handled by DOL in 2008 averaged only $392 per worker. http://www.dol.gov/whd/statistics/2008FiscalYear.htm (last visited on Sept. 20, 2013).

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (ADEA incorporating FLSA collective action). Only through collective actions can small minimum wage violations be effectively remedied. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). It would make little sense for Congress to have established such a detailed and comprehensive enforcement system on the one hand, and yet to allow companies to bypass that effectiveness through the simple expedient of having an employee sign a pre-employment waiver. Collective actions, like liquidated damages and attorneys' fees are implicates not left to employers' discretion; they are a fundamental statutory "right."

In *Barrentine*, 450 U.S., the Supreme Court noted that FLSA rights are unwaivable *by contract* or otherwise, citing numerous prior decisions which recognized FLSA rights as unwaivable, even in collective bargaining situations:

> This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. **Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement. "The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts.... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage**

> **requirements, cannot be utilized to deprive employees of their statutory rights."**

Barrentine, 450 U.S. at 740-741 (voluminous cites omitted). The non-waivability of FLSA rights, includes the rights set forth in §216(b) of the statute as the Supreme Court has recognized. *Brooklyn Sav. Bank*, 324 U.S. at 704-07 (prohibiting waiver of §216(b) right to liquidated damages and noting that to allow such waiver would "thwart the legislative policy the FLSA was designed to effectuate").

Indeed, 29 U.S.C. §216(c) provides a specific mechanism for waiver of FLSA rights, but only upon a settlement supervised by the U.S. Department of Labor. Otherwise, "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740-741 (*citations omitted).*

Since the FLSA precludes negotiation between employers and employees about certain terms of employment, the Supreme Court has repeatedly found that FLSA rights may not be "waived" by an employee. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."); *D.A. Shulte, Inc.*, 328 U.S. 108 . In Section 216, the very section that establishes the collective action and fee shifting processes, Congress specified that the only way

an employee may waive her FLSA rights is to do so under supervision of the U.S. Department of Labor. 29 U.S.C. § 216(c). In *Tony & Susan Alamo Found.,* 471 U.S. at 302 , the Supreme Court noted that "the purposes of the [FLSA] require that it be applied even to those who would decline its protections" and continued:

> If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. *Cf. Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 101 S. Ct. 1437, 67 L.Ed.2d 641 (1981); *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945). Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.

Id., at 302. Thus the Supreme Court, interpreting Congress's intentions as set forth in the FLSA, prohibits employees from agreeing to decline statutory protections, whether in advance or during employment. *Id.; Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943(2d Cir. 1959)(employee may not waive FLSA claim by falsely recording hours worked).

No federal court has ever permitted a "collective action waiver" to be effectuated for collective claims being heard in court. Some federal courts have found that the federal policy expressed in the Federal Arbitration Act, 9 U.S.C. §1 supersedes the federal collective action policy (e.g. by allowing arbitration clauses to contain a requirement that claims be heard individually). But here, the District

Court found the FAA did not apply. The question is thus whether the UUAA, a state law, can insulate the evisceration of the Congressional policy allowing employees to vindicate their FLSA rights collectively. No court has ever held that a state statute may vitiate the clear Federal policy calling for FLSA rights to be enforced collectively.

Under the Supremacy Clause, the courts have regularly noted that the Congressional purposes motivating the FLSA preempt state law that interferes with Congressional purposes. *See e.g. Contreras v. Corinthian Vigor Ins. Brokerage, Inc*., 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (Congressional purpose in FLSA anti-retaliation provision preempts California law insulating reporting of undocumented aliens); *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405 (10th Cir. 1992) (FLSA preempts third-party common law complaint); *See Singer v. City of Waco, Tex*., 324 F.3d 813 (5th Cir. 2003) (finding that state common law offset claims to FLSA damages are prohibited); *See also Donovan v. Pointon,* 717 F.2d 1320 (10th Cir. 1983) (state law counterclaims for advances and conversion inappropriate in FLSA action)*;Morgan v. SpeakEasy, LLC,* 625 F. Supp. 2d 632, 659–60 (N.D. Ill. 2007) (quantum meruit and unjust enrichment pertaining to wages covered by FLSA may not stand). Even if the UUAA permits class action waivers, the Supremacy Clause renders the federally guaranteed right to participate

in collective actions to enforce FLSA rights supreme over any state law sanctioned waiver of such rights. 29 U.S.C. § 216(b).

POINT SIX

IF THE ARBITRATOR DECIDES TO RECONSIDER THE TERMS OF THE DISTRICT COURT'S ORDER REFERRING THE CASE TO COLLECTIVE ARBITRATION, THE SUPREMACY CLAUSE MANDATES THAT THE NATIONAL LABOR RELATIONS ACT (NLRA) BE EFFECTUATED OVER STATE LAWS TO THE CONTRARY.

A. Prohibitions on Class or Collective Actions Addressing Wages and Working Conditions Violates the National Labor Relations Act.

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in ***other concerted activities*** for the purpose of collective bargaining or ***other mutual aid or protection***, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (emphasis added). Under Section 8 of the NLRA, it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C.A. § 158(a)(1).

"[A] lawsuit **filed** in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 under the National Labor Relations Act." *Brady v. National Football League,* 644 F.3d

661, 673 (8th Cir. 2011) (emphasis in original) (citing *Mohave Elec. Co-op Inc. v. NLRB,* 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000); *Altex Ready Mixed Concrete v. NLRB,* 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB,* 486 F.2d 686, 689 (1st Cir. 1973)). The NLRB has determined, and courts have agreed, that class actions constitute a form of concerted action by employees when those suits address wages or working conditions. *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975), *enfd. mem.* 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); *see also, United Parcel Service*, 252 NLRB 1015 (1980), *enfd.* 677 F.2d 421 (6th Cir. 1982), *Saigon Gourmet*, 353 NLRB 1063 (2009), *127 Restaurant Corp. D/B/A Le Madri Restaurant*, 331 NLRB 269 (2000), and others.

> Section 7 of the Act extends to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 thus specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Id*. at 566. The Court in *Eastex, supra*, underscored that the express language of Section 7 protects concerted activities for the broad purpose of "mutual aid or protection," in addition to concerted activity for "self-organization" and "collective bargaining." *Id*. at 565.

52nd St. Hotel Associates, 321 NLRB 624, 633 (1996).

Collective Action Suits under the Fair Labor Standards Act are concerted activity protected by the NLRA:

> The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is

> protected, concerted activity under Section 7 of the Act. See, e.g., *Moss Planing Mill Co*., 103 NLRB 414, 418-419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953); *Poultrymen's Service Corp*., 41 NLRB 444, 462-463 (1942), enfd. 138F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co*., 55 NLRB 798, 799 (1944), enfd. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Triangle Tool & Engineering*, 226 NLRB 1354, 1357 fn. 5 (1976); *Joseph De Rario, DMD, P.A*., 283 NLRB 592, 594 (1987); and *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

52nd St. Hotel Associates, 321 NLRB at 633. In *Saigon Gourmet*, 353 NLRB 1063, 1064 (2009), the Board also found that concertedly asserting wage and hour claims is protected concerted activity.

The foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests by acting in concert. A mandatory arbitration agreement that prohibits all class, collective and/or joint employee efforts to obtain redress for violation of employment law necessarily inhibits protected concerted activity in violation of Section 7 of the NLRA.

B. A Contract That Interferes with Concerted Activity in Violation of the NLRA Is Void.

Unlawful contracts that violate federal law cannot be enforced as a matter of federal common law:

> There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen v. Hoffman*, 174 U.S. 639, 19 S. Ct. 839, 43 L. Ed. 1117 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share.

> The Court found the undertaking illegal and refused to enforce it, saying:
>
> > "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it...." *Id*., at 654, 19 S. Ct., at 845.
> > "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id*., at 669, 19 S. Ct., at 851.
>
> The rule was confirmed in *Continental Wall Paper Co. v. Louis Voight & Sons Co*., 212 U.S. 227, 29 S. Ct. 280, 53 L. Ed. 486 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Id*., at 262, 29 S. Ct., at 292.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-78 (1982). *See also, California v. U.S*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable").

Indeed, even the most blatant breach of a contract does not allow enforcement of an unlawful contract contrary to the law:

> The Court cannot enforce the parties' subcontract, even though CLS through Barbara Moore, its principal officer, has blatantly violated the terms and conditions of the subcontract with MGC, for it is plainly contrary to law. *See Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc*., 988 F.2d 288, 290 (1st Cir. 1993); *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 790 (4th Cir. 1987). The Court further finds that MGC is barred from injunctive relief by the doctrine of unclean hands.

> *See Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 64 S. Ct. 622, 88 L. Ed. 814 (1944) ("[A] federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law."); *United States v. Felici*, 208 F.3d 667, 670-71 (8th Cir.2000) ("The doctrine of unclean hands is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.").

Morris-Griffin Corp. v. C & L Serv. Corp., 731 F. Supp. 2d 488, 489-90 (E.D. Va. 2010). *See also* Williston On Contracts, §12:1; Restatement, Second, of Contract, §178.

The foregoing principles of common law apply to arbitration agreements. For example, in *U-Haul Company of California, Inc*., 347 NLRB 375, 377-78 (2006), *enfd.* 2007 WL 4165670 (D.C. Cir. 2007), the employer violated the NLRA by maintaining a mandatory arbitration policy that would reasonably be construed as prohibiting an employee from filing an unfair labor practice charge with the Board. The NLRB explained why even an implied suggestion that the arbitration provision supplanted rights under the NLRA was unlawful:

> [T]he breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy.

U-Haul Co. of California, 347 NLRB at 377.

With respect to activity subject to Sections 7 or 8 of the NLRA, courts normally defer to the exclusive competence of the NLRB. However, when enforcement of a contract would be a violation of the NLRA, that rule of exclusive competence does not apply:

> As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 780, 3 L.Ed.2d 775 (1959). *See also Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S. Ct. 161, 165-166, 98 L. Ed. 228 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S. Ct. 847, 853, 92 L. Ed. 1187 (1948) (footnotes omitted).

Kaiser Steel Corp., 455 U.S. at 83-84 . In other words, because the courts cannot be used as tools to enforce illegal contracts, they must be able to refuse to enforce private agreements that violate the NLRA. In *Kaiser*, the Supreme Court succinctly explained why the primary jurisdiction of the NLRB yields to the judicial obligation to abstain from enforcement of illegal agreements:

> While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which

> violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

Kaiser Steel Corp., 455 U.S. at 86.[11]

C. The NLRB's Decision In *D.R. Horton* Demonstrates That The NLRA Trumps Conflicting State Statutes.

In the recent decision, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), the NLRB found that class and collective action waivers contained in an arbitration clause violate the NLRA to the extent they do not permit a class or collective action in both court and arbitration, citing numerous prior cases such as *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); and *J. H. Stone & Sons*, 33 NLRB 1014 (1941), *enfd. in relevant part*, 125 F.2d 752 (7th Cir. 1942). The NLRB went on to find that the Federal Arbitration Act did not authorize employers to demand waivers of concerted activity. "[T]he Supreme Court's jurisprudence under the FAA, permitting enforcement of

---

[11] Even state courts determine whether enforcement of a contractual provision would violate the NLRA:

> Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel*, 455 U.S. at 83-84, 102 S. Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S. Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield*, 395 U.S. at 429, 89 S. Ct. at 1158, 22 L.Ed.2d at 393.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 199 (Ind. Ct. App. 1987). To find otherwise would lead to a result abhorrent to preservation of the robust, employee-protective goals of the NLRA.

agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the [NLRA].'" *D. R. Horton, Inc.*, 357 NLRB No. 184 at *12.

D.R. Horton has had a mixed reaction in the courts with some decisions giving deference to the Board's determination that the NLRA trumps the FAA and others rejecting it.[12] It is important to note however, that all courts that have refused to affirm the NLRB's *D.R. Horton* decision, have done so by finding that the Federal Arbitration Act "trumps" the NLRA (another federal statute). *See e.g. Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013) (rejecting Board's authority to interpret FAA, and finding the FAA was re-enacted after the FLSA and thus is a later-enacted statute); *Richards v. Ernst & Young,* LLP, 11-17530, 2013 WL 4437601 (9th Cir. Aug. 21, 2013) (Court "should not defer to the NLRB's decision in D.R. Horton because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act."); *Sutherland v. Ernst & Young LLP*, 12-304-CV, 2013 WL 4033844 (2d Cir. Aug. 9, 2013) (dicta applying FAA over *Horton*). To the extent that the Board in *Horton* held that the NLRA protects concerted activity in a

[12] *Compare Herrington v. Waterstone Mortg. Corp.*, No. 11–cv–779–bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012) (giving deference to NLRB and sending case to collective arbitration) and *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011) (deferring to *Horton*) to *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 841–46, No. 11–CV–05405YGR, 2012 WL 1604851, at *8–12 (N.D. Cal. May 7, 2012) (rejecting *Horton*).

wage hour lawsuit, this principle is not contested by any court.

But cases finding that the FAA trumps the NLRA are not relevant because the District Court found that the FAA does not apply to this case at all. As discussed above, under the Supremacy Clause, the decisions finding the FAA trumps the NLRA cannot be read to permit a state statute to take precedence over the federal statute. *D.R. Horton* thus remains good law for the position that the NLRA protects collective action lawsuits. The Supremacy Clause simply does not permit conflicting state law to "trump" federal statutes. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L.Ed.2d 883 (1987) (A state law is preempted "if it interferes with the methods by which the federal statute was designed to reach this goal."); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S. Ct. 1732, 123 L.Ed.2d 387 (1993) ("[w]here a state statute conflicts with, or frustrates, federal law, the former must give way.").

Under the Supremacy Clause, the Congressional policy expressed in 29 U.S.C. § 216(b) is integral to the FLSA enforcement and may not be avoided under the authority of a conflicting state statute such as the UUAA.

CONCLUSION

The FAA correctly determined that this case should be administered under the AAA's Employment Rules. The Drivers' FLSA claims must be collectively arbitrated.

Dated: September 23, 2013

Respectfully Submitted,

/s/ Dan Getman

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ATTORNEYS FOR CLAIMANTS

EXHIBIT A

GETMAN SWEENEY

Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
845-255-9370
fax 845-255-8649

November 26, 2012

Adam Shoneck
Case Filing Specialist
American Arbitration Association
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
VIA EMAIL: casefiling@adr.org

Lance Tanaka
American Arbitration Association
1400 16th Street, Suite 400
Denver, CO 80202
VIA EMAIL: tanakal@adr.org

Re: Cilluffo, et al., v. Central Refrigerated Service, Inc., et al.,

Dear Mr. Shoneck and Mr. Tanaka:

This letter is to summarize the Claimant's filing (to occur in the AAA office closest to Salt Lake City, Utah (which Mr. Shoneck informed me was Denver). The filing includes the following:

1. Demand for Arbitration, including Parties' and Representatives Contact Information attachment,
2. Complaint in District Court, which sets forth the FLSA claim at issue referenced in the demand,
3. All consents to sue in this matter to date,
4. Court's September 24, 2012 Order compelling arbitration under the Utah Arbitration Act,
5. November 8, 2012 Order compelling collective action arbitration of Claimants' FLSA claims, and
6. ICOA and lease for all named plaintiffs.

Based on the discussion earlier today between Mr. Shoneck and me, I am filing this demand as an employment (rather than commercial) demand because 1) the FLSA claim raised herein is an employment claim, and 2) because the District Court's September 24th Order already determined

that the trucker Claimant's herein are employees. *See 9/24/12 Order, pp. 6-9.*[1] You advised me to file using the labor and employment demand form, notwithstanding that the agreement says that the AAA's commercial rules would apply based on the Court's determination and the nature of the claim. You indicated that the form of our filing would not be binding on the AAA (or arbitrator) but that the form of the filing would also not prejudice our clients, even if the form for the claim was later determined to the contrary.

As to the filing fee, we believe that there can be no doubt that the arbitration agreement is part of an employer-promulgated plan. Respondents drafted the form agreements and presented the agreements to claimants to sign on a take it or leave it basis. All forms are identical and are not individually negotiated. Accordingly, we believe that the filing fee for Claimants is $175, as stated in the AAA's rules:

> For Disputes Arising Out of Employer-Promulgated Plans:
>
> Arbitrator compensation is not included as part of the administrative fees charged by the AAA. Arbitrator compensation is based on the most recent biography sent to the parties prior to appointment. The employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation. Arbitrator compensation, expenses as defined in section (iv) below, and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.
>
> (i) Filing Fees
>
> In cases before a single arbitrator, a nonrefundable filing fee capped in the amount of $175 is payable in full by the employee when a claim is filed, unless the plan provides that the employee pay less.

Thank you for your attention to this matter. Please let me know immediately if anything further is required to effectuate this filing.

---

[1] The Court ruled in the 9/24/12 Order that:

> Therefore, although the factors are mixed, the Court finds, based on the Complaint and the moving papers, that Plaintiffs are employees, not independent contractors. **Having determined that Plaintiffs are employees,** the Court must also determine whether Plaintiffs are "transportation workers" engaged in "foreign or interstate commerce" in order to determine whether the Section 1 exemption applies. 9 U.S.C. § 1; *Circuit City Stores v. Adams,* 532 U.S. 105, 112, 115 (2001). There is no dispute that Plaintiffs are transportation workers engaged in interstate commerce: they are truck drivers that deliver freight across the country. (Mot. at 3.) Accordingly, the Court finds that the Section 1 exemption applies, and therefore, the Court refuses to compel arbitration under the FAA. (emph. added)

Sincerely,

/s/ Dan Getman

Dan Getman

CC. Susan Martin
Jennifer Kroll
Lesley Tse
Edward Tuddenham
Drew Hansen
Suzanne Jones

American Arbitration Association
Dispute Resolution Services Worldwide

Please visit our website at www.adr.org if you would like to file this case online.
AAA Customer Service can be reached at 800-778-7879

Employment Arbitration Rules Demand for Arbitration

Please visit our website at www.adr.org if you would like to file this case online.

Mediation: *If you would like the AAA to contact the other parties and attempt to arrange mediation, please check this box.* ☐ *There is no additional administrative fee for this service.*

Parties (Claimant)

Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree
Name of Claimant:
(see contact information on attached sheet)
Address:

City: State Zip:

Phone: Fax:

Email Address:

Dan Getman (and see contact information on attached sheet)
Representative's Name (if known):
Getman & Sweeney, PLLC
Firm (if applicable):
9 Paradies Lane
Address:
New Paltz NY 12561
City: State Zip:
845-255-9370 845-255-8649
Phone: Fax:
dgetman@getmansweeney.com
Email Address:

Parties (Respondent):

Central Refrigerated Serv., Inc.(and see contact info on attached)
Name of Respondent:
5175 West 2100 South
Address:
West Valley City UT 84120
City: State Zip:
(801) 924-7000
Phone: Fax:

Email Address:

Drew R. Hansen (and see contact information on attached sheet)
Representative's Name (if known):
Theodora Oringher, PC
Firm (if applicable):
535 Anton Boulevard, Ninth Floor
Address:
Costa Mesa CA 92626-7109
City: State Zip:
(714) 549-6200 (714) 549-6201
Phone: Fax:
dhansen@tocounsel.com
Email Address:

Claim: What was/is the employee's annual wage range?
Note: This question is required by California law.

☒ Less than $100,000 ☐ $100,000 - $250,000 ☐ Over $250,000

Amount of Claim: undetermined at present

Claim involves:

☒ Statutorily Protected Rights ☐ Non-statutorily protected rights

In detail, please describe the nature of each claim.
You may attach additional pages if necessary.

Fair Labor Standards Act collective action as set forth in the attached Complaint.

Other Relief Sought: ☒ Arbitration Costs ☒ Attorney's Fees ☒ Interest ☐ Punitive/Exemplary Damages ☒ Other: Liquidated Damages

Neutral: Please describe the qualifications for arbitrator(s) to hear this dispute:

FLSA experience, collective/class experience

Hearing: Estimated time needed to present case at hearing:

Hours: 80.00 Days: 10.00

Hearing locale: Salt Lake City, UT

☐ Requested by Claimant ☒ Locale provision included in the contract

Filing Fee: ☒ Employer-Promulgated Plan fee requirement or $175 *(max amount per AAA rules)*

☐ Standard Fee Schedule for individually negotiated contracts ☐ Flexible Fee Schedule for individually negotiated contracts

Amout Tendered: $175.00

Notice: To begin proceedings, please send a copy of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100 Voorhees, NJ 08043. Send the original Demand to the Respondent.

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. Only those disputes arising out of employer promulgated plans are included in the consumer definition. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 1-877-528-0879. If you have any questions regarding the waiver of administrative fees, AAA Case Filing Services can be reached at 877-495-4185.

Signature of claimant or representative: Dan Get Date: 11/26/12

EXHIBIT B

THEODORA ORINGHER
COUNSELORS AT LAW

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DREW R. HANSEN
dhansen@tocounsel.com
(714) 549-6112
File No. 81143.05003

November 28, 2012

VIA E-MAIL ONLY

Lance Tanaka
Tara Parvey
American Arbitration Association
1400 16th Street, Suite 400
Denver, CO 80202
Tanakal@adr.com
ParveyT@adr.org

Re: Cilluffo et al. v. Central Refrigerated Service, Inc. et al.

Dear Mr. Tanaka and Ms. Parvey:

My firm represent Respondents in the above-captioned arbitration proceeding. In addition, please note that Camille Johnson of Snow Christensen & Martineau will be serving as counsel for Respondents in this matter. Respondents respectfully request that AAA please ensure that my firm and Ms. Johnson are copied on all future correspondence relating to this proceeding. Ms. Johnson's contact information is as follows:

10 Exchange Place
11th Floor
PO Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000
Email: cnj@scmlaw.com

This letter follows my telephone conversation with Mr. Tanaka on November 27, 2012. As I discussed with him, Respondents object to the arbitration demand initiated by Claimants on November 26, 2012 (the "Demand"). As requested by Mr. Tanaka, Respondents send this letter to confirm their objections in writing, in advance of filing their formal response to the Demand. (Respondents reserve their rights to formally respond to the Demand "within 15 days after confirmation of notice of filing of the demand is sent by the AAA," (see Commercial Rule No. R-4(b)).)

Specifically, Respondents object to the following key, preliminary issues:

First, and most importantly, Claimants' attempt to proceed as a collective arbitration, rather than as multiple bilateral (individual) arbitrations, is improper and premature. It is

improper because the manner in which the arbitrations must proceed is an issue that is now pending in federal court; it is premature because the arbitrations cannot proceed at the same time the federal court system is addressing whether they must proceed on an individual basis as opposed to a collective action. Accordingly, the arbitration(s) should be held in abeyance until the District Court and/or the Ninth Circuit resolve this key issue regarding the manner in which the arbitration must proceed. This process could take several months or longer.

As background, in September 2012, the District Court granted Respondents' Motion to Compel Arbitration *seeking individual arbitrations*. (See Exhibit 1 [September 24, 2012 Order]). Then, Judge Phillips issued another order on November 8, 2012, erroneously concluding that "[t]he Prohibition [in the instant arbitration agreement] only prohibits consolidated or class arbitrations. Therefore, the Prohibition does not prohibit collective arbitration of Plaintiffs' FLSA claims; Plaintiffs' FLSA claims should be collectively arbitrated." (See Exhibit 2, attached [November 8, 2012 Order]). Respondents promptly moved for reconsideration of Judge Phillips' November 8, 2012 Order (concerning the issue of bilateral and collective arbitrations), and that motion is currently set for hearing on December 17, 2012 at 2:00 p.m. (See Exhibit 3, attached [Motion for Reconsideration]).

For a multitude of reasons, Respondents believe that Judge Phillips will revise her November 8, 2012 ruling to instruct that any arbitrations initiated by Claimants must proceed on an individual basis. This is because her November 8, 2012 Order is in direct conflict with the recent Supreme Court decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010), as well as other recent Supreme Court precedent and applicable law. In *Stolt-Nielsen*, the United States Supreme Court emphasized that a group-wide arbitration is a matter of consent, and that courts cannot interpret an arbitration agreement to allow arbitrations to proceed collectively unless the parties have specifically agreed to do so, because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen*, 130 S.Ct. at 1773-76 (party may not be compelled to submit to class arbitration "unless the parties agreed to authorize class arbitration"). Here, the parties' agreement to arbitrate does not authorize any type of collective or class arbitration proceeding of any kind. To the contrary, the language of the arbitration provision at issue clearly prohibits all group arbitrations. The contracts state as follows: "**Notwithstanding anything to the contrary contained or referred to herein, no consolidated or class arbitrations will be conducted. If a court or 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**." (See Exhibit 4, attached [Independent Contractor Operating Agreement and Vehicle Lease Agreement]). Because group arbitrations are not permitted under the plain language of the parties' contracts, proceeding with a collective arbitration is in direct conflict with the parties' intentions and Supreme Court precedent. The District Court's focus (in its November 8, 2012 Order) on whether the agreement's "Prohibition" *does not prohibit* "collective" arbitration is simply wrong,

and an approach specifically rejected by *Stolt-Nielsen*.[1] Accordingly, the decision is clear error and should be corrected by the District Court directly, or on appeal by the Ninth Circuit.[2]

Respondents intend to ask Claimants to stipulate to a stay of this arbitration proceeding, pending the outcome of their motion for reconsideration and/or any appeal to the Ninth Circuit. If Claimants will not stipulate to a stay of this arbitration proceeding, Respondents will ask the District Court to stay it. If Judge Phillips refuses to do so for any reason, Respondents will seek a stay from the Ninth Circuit. For all of the foregoing reasons as well as others, it makes no sense for the arbitration initiated by Claimants to go forward at this time.

Second, Respondents vehemently oppose Claimants' assertion that this arbitration is to be governed by AAA's employment rules. All of the contracts signed by the parties (*i.e.*, the independent contractor operating agreements and vehicle lease agreements) unambiguously state that any arbitration will be resolved **"in accordance with (1) the Commercial Arbitration Rules (and related arbitration rules governing requests for preliminary relief) of the American Arbitration Association ('AAA')**." (See Exhibit 4, attached [Representative Independent Contractor Operating Agreement and Vehicle Lease Agreement]). There is nothing in the agreements to suggest that this dispute is subject to the AAA's employment rules. To the contrary, both of the relevant agreements state that "the parties agree that this Agreement is not an exempt 'contract of employment,'" (*id.* at Section 18 of the ICOA and Section 21 of the Lease Agreement), and that Claimants are independent contractors and lessees, not employees. Because the agreements clearly instruct that the AAA *Commercial*

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[1] As Respondents discuss in their motion for reconsideration (see Exhibit 3), Judge Phillips' November 8, 2012 Order is also directly contrary to her correctly-decided September 24, 2012 Order. Respondents' Motion to Compel Arbitration specifically requested "[a]n order compelling all of the Plaintiffs and Opt-In Plaintiffs to arbitrate their claims *on an individual basis*," (see Exhibit 5, attached [Motion to Compel Arbitration at p.2 (Notice of Motion)]), and the Court granted that Motion, without any limitations. Consequently, there is no ambiguity about what relief was requested by Respondents (and thus granted) by the Court's September 24, 2012 Order. It is equally clear that Judge Phillips considered Claimants' argument regarding "collective arbitration" as part of the Motion to Compel Arbitration and rejected it. Given that the Court already considered Claimants' collective-action argument and rejected it, the November 8, 2012 Order must be corrected because it is not simply a "clarification" of the Court's September 24, 2012 Order, but rather a ruling that is in direct conflict with it, and directly opposed to the relief sought by Respondents.

[2] In the unlikely event that Judge Phillips refuses to revise her erroneous November 8, 2012 Order, Respondents will appeal the ruling to the Ninth Circuit. Respondents believe there would be an automatic right to appeal, under both the Federal Arbitration Act and the Utah Uniform Arbitration Act ("UUAA"), because the November 8, 2012 Order is for all practical purposes a denial of their motion to compel arbitration. Respondents specifically and repeatedly requested that arbitration be ordered on an *individual basis*. A ruling compelling arbitration on a collective action basis is directly contrary to that request.

Arbitration Rules shall apply to any arbitration (and the District Court has never declared otherwise, or that that this arbitration is to be governed by AAA's employment rules), Claimants' position should be promptly rejected.

Finally, Claimants' assertion that Judge Phillips "already determined that the trucker Claimant's herein are employees" as part of her September 24, 2012 Order is just wrong and a blatant misconstruction of the District Court's ruling. The Court was clear that its ruling was based on the *allegations of the Complaint alone*, not on any *evidence*. Such a ruling plainly is not dispositive of the ultimate issue in this case (*i.e.*, whether Plaintiffs are correctly categorized as independent contractors). Moreover, Judge Phillips' statement was unnecessary *dictum*, since the employee/independent contractor issue was irrelevant under the UUAA, the Utah arbitration act pursuant to which she granted Respondents' Motion to Compel Arbitration (since that statute does not have a "transportation worker" exemption). It will be the ***arbitrators'*** job to decide the issue of whether Claimants are independent contractors, through plenary trial on the merits at each ***individual*** arbitration, with full consideration of relevant evidence and not simply on the basis of allegations in pleadings. At the conclusion of that process, Respondents are confident that the arbitrators eventually appointed to handle each individual arbitration will conclude Claimants are indeed independent contractors.

Should you have any questions regarding the foregoing, please do not hesitate to contact me or Ms. Johnson.

Sincerely,

Drew R. Hansen

Drew R. Hansen

cc: Camille Johnson, Esq. (via email)
Dan Getman, Esq. (via email)
Lesley Tse, Esq. (via email)

902105.1/81143.05002

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File No. 81143.05003

December 4, 2012

VIA E-MAIL ONLY

Adam Shoneck
American Arbitration Association
1400 16th Street, Suite 400
Denver, CO 80202
ShoneckA@adr.org

Re: Cilluffo et al. v. Central Refrigerated Service, Inc. et al.

Dear Mr. Shoneck:

We received and reviewed Dan Getman's letter of November 30, 2012, responding to my letter of November 28, 2012, in which Respondents asked the Association to refrain from proceeding with this arbitration proceeding until such time as the various legal issues concerning the propriety of collective arbitration have been resolved by the U.S. District Court for the Central District of California and/or the U.S. Court of Appeals for the Ninth Circuit. We respectfully disagree with the points raised by Mr. Getman and continue to maintain that Claimants' desire to race forward with a collective arbitration is illogical, inefficient and improper.

Mr. Getman does not dispute that Respondents' motion for reconsideration of the November 8, 2012 Order remains pending in the Central District of California. Nor does he dispute that the motion for reconsideration is presently set for hearing on December 17, 2012. All that Mr. Getman does is to recite the arguments that Claimants plan to make to the District Court in opposing the motion and assert that he is confident of the merits of his position. However, Respondents are equally confident that the District Court will reverse its November 8, 2012 ruling, including because, among other reasons, it is demonstrably wrong. Regardless of whether Respondents or Claimants prove to be correct on this issue, ***the crucial point for the Association to understand is that the District Court judge (i.e., Judge Phillips) is the only person who can decide the merits of the reconsideration motion***. Neither Claimants, Respondents, nor the Association have the power to resolve that question. It therefore makes sense to wait and see what Judge Phillips decides to do later this month. What Mr. Getman is suggesting instead is that the parties race forward with a very expensive group-wide arbitration that could become moot in the not too distant future. Mr. Getman provides no legitimate basis for insisting that Plaintiffs must proceed immediately with their arbitrations, rather than simply wait a handful of weeks until the issue has been addressed by Judge Phillips, or (if necessary) waiting for the federal courts to rule on any appellate proceedings which may result from that ruling.

Mr. Getman similarly does not dispute that Respondents will appeal the November 8, 2012 Order to the Ninth Circuit should Judge Phillips refuse to change her decision. He instead argues that the November 8, 2012 Order cannot be possibly appealed to the Ninth Circuit. However, Mr. Getman is wrong. As Claimants well know, Respondents have a right to appeal the *denial* of a motion to compel arbitration under both the Federal Arbitration Act and the Utah Uniform Arbitration Act. See 9 U.S.C. § 16; Utah Code Ann. § 78B-11-101(1). Furthermore, it is Respondents' position that the District Court effectively denied their motion to compel arbitration by ordering a collective arbitration. Respondents clearly and repeatedly sought to compel *individual arbitrations* as part of their motion to compel arbitration and Claimants cannot dispute this point. Given that Respondents only sought to compel individual arbitrations (not a group-wide or collective proceeding), the Court's November 8, 2012 Order is directly contrary to the relief Respondents' requested. Thus, for all practical purposes, the Court denied Respondents' motion to compel arbitration, and Respondents have a right to appeal.

While we understand that Claimants have a contrary view, ***the crucial fact for the Association to understand is that the only tribunal that can resolve whether Respondents have a right to appeal the November 8, 2012 Order is the Ninth Circuit***. As with Respondents' reconsideration motion, neither Claimants, Respondents, nor the Association have the power to resolve whether Respondents have a right to an appeal. Rather than racing ahead blindly as Claimants propose, Respondents submit that it would be much more efficient to wait and see what transpires regarding Respondents' appellate rights.[1]

Mr. Getman's November 30 letter also ignores the fact that his firm waited quite some time before initiating arbitration. He filed his lawsuit more than six months ago, in June 2012, and opposed Respondents' request to dismiss the lawsuit in favor of arbitration. Then, he failed to initiate arbitration for months after the District Court issued its September 24, 2012, Order, which granted Respondents' motion to compel individual arbitration. Instead, it was only after he obtained an erroneous "clarification" of that Order, in November 2012, that he suddenly initiated this proceeding, in late November. Plaintiffs' sudden desire to move forward at this time is a transparent attempt to try to seize upon the District Court's erroneous Order before it can be corrected, in the hopes that Plaintiffs can force collective arbitration proceedings to become well advanced before the error can be remedied. Mr. Getman does not claim that any prejudice will result from waiting for the federal courts to rule on

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[1] In the event Respondents are denied an automatic right to an appeal by the Ninth Circuit, they will immediately ask the District Court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292, which Judge Phillips has the power to do. Respondents could further seek appellate review through a petition for writ of mandamus. Thus, there are a myriad of ways in which appellate review may be obtained by Respondents.

Respondents' Motion for Reconsideration, as well as any appellate proceedings which may result from that ruling. Nor will Claimants suffer any irreparable harm by waiting several months for the collective arbitration issue to be resolved.

By contrast, Respondents would suffer significant prejudice, and expense, by being required to arbitrate on a collective basis, where there is no contractual authorization to do so. Under Claimants' proposal, the parties should now invest a great deal of time, effort, and money in proceeding with a collective arbitration, without the right to obtain judicial review of the propriety of the collective procedure until after an arbitration award has been issued. It makes far more sense to permit the District Court (and, if necessary, the Court of Appeal) to address the propriety of collective arbitration now before the parties are required to spend substantial time and money to litigate the merits of the dispute in a improper and unauthorized manner.

Finally, although we are still in the process of reviewing the documentation Claimants filed with the Association yesterday afternoon (i.e., December 3), it appears that three of the Claimants (i.e., the named representatives: Messrs. Cilluffo, Ratterree and Shire) filed three separate arbitration demands seeking to arbitrate certain causes of action on an individual basis. While Respondents generally speaking have no objection to proceeding with arbitration on an individual basis for these three individuals (or any other person who has filed a notice of consent to sue in the underlying lawsuit and submits an individual arbitration demand), since that is precisely what Respondents have been saying is required for months, it should go without saying that each Claimant is obligated to raise within his or her individual arbitration all arbitrable claims against the Respondents, including any claims which they believe they may have under the FLSA. It is not appropriate to allow Claimants to split their claims between an "individual" arbitration proceeding, and a separate, multi-party "collective" arbitration raising only issues under the FLSA. Considerations of economy, efficiency, consistency, and fairness demand that Messrs. Cilluffo, Ratterree, and Shire (as well as all other individuals who wish to pursue a claim individually against Respondents) assert any and all claims that they believe they may have against Respondents in their respective *individual arbitration* proceedings. Because Claimants are instead seeking to split their claims and proceed on separate fronts in arbitration, Respondents respectfully submit that Claimants' filings on December 3 provide yet another reason to hold the arbitrations in abeyance until the federal court clarifies the manner in which the arbitrations should proceed. Without this guidance, Claimants are suggesting that the parties embark on a process that is utterly illogical, inefficient and improper.[2]

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[2] Respondents intend to submit a letter objecting to the Claimants' December 3 filings sometime later this week. Respondents respectfully request that the Association refrain from taking any action regarding the December 3 filings until Respondents have an opportunity to submit their written objections.

For all of the foregoing reasons as well as others, Respondents respectfully submit that the Association should immediately stay this matter. Staying the arbitration under the present circumstances not only makes sense for objective reasons, but also because a stay under these circumstances is contemplated by the Association's own rules, such as Rule 3 of the Supplemental Rules for Class Arbitration, which provide that arbitration proceedings shall be stayed when a party wishes to seek judicial review of a clause construction award.[3] The same reasons of economy and efficiency behind Rule 3 apply here. Respondents therefore respectfully submit that the Association should stay this matter.[4]

Should you have any questions regarding the foregoing, please do not hesitate to contact me, or my co-counsel Camille Johnson.

Sincerely,

Drew R. Hansen

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[3] As I explained in my November 28 correspondence, the Commercial Arbitration Rules govern this dispute. The parties' arbitration agreements expressly provide that the Commercial Arbitration Rules govern. As such, the Commercial Arbitration Rules also govern Claimants' December 3 filings. Mr. Getman's November 30 letter does not establish any reason to apply the Association's employment rules to this dispute or the December 3 filings. Nor does he point to anything in the record where the District Court made a determination that the Commercial Rules should not be applied, and no such statement was ever made by Judge Philips.

[4] Claimants repeat their false assertion that Judge Phillips "already determined that the trucker Claimant's herein are employees" in both Mr. Getman's November 30 letter and Claimants' December 3 filings. As pointed out in my November 28 letter to the Association, the District Court *did not* purport to usurp the Arbitrator's authority to decide this key disputed fact, nor did the District Court have the authority to do so. Only last week, the U.S. Supreme Court again emphasized that in deciding whether to compel arbitration, a trial court's authority is limited to determining whether an enforceable arbitration agreement exists, and may not go beyond that limited authority to determine the merits of the underlying dispute. *Nitro-Lift Technologies, LLC v. Howard*, __ U.S. __, 2012 Daily Journal D.A.R. 15843 (Nov. 26, 2012) (*per curiam* reversal of the lower court, which improperly "assumed the arbitrator's role" by deciding the merits of the dispute rather than simply ordering it to arbitration). The fact that Mr. Getman again repeats this assertion does not make it correct. His assertion is not only wrong as a matter of law, but a blatant misconstruction of Judge Phillips' September 24, 2012 Order, which merely analyzed the allegations in Claimants' complaint.

cc: Camille Johnson, Esq. (via email)
Dan Getman, Esq. (via email)
Lesley Tse, Esq. (via email)

Lesley Tse

From:	Drew R. Hansen <dhansen@tocounsel.com>
Sent:	Wednesday, February 06, 2013 1:10 PM
To:	Adam Shoneck
Cc:	Camille Johnson; Suzanne C. Jones; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Lesley Tse
Subject:	FW: Arbitrations against Central Refrigerated Service, Inc., et al.
Attachments:	84 MOTION to Stay Case pending Resolution of D's Interlocutory Appellate Rights.pdf

Dear Adam:

As a follow up to my below email, I first want to reiterate that there is no reason for the AAA to lift the stay that is currently in place. Respondents' motion for stay – which was properly noticed to be heard on March 11 – is not moot. The motion for a stay expressly states in the caption page that a stay should be granted "pending the resolution of their interlocutory appellate **rights**," and, as discussed in the Motion, these "rights" include the resolution of Respondents' contemplated writ of mandamus. (See, e.g., Notice of Motion at p. 2 ; Motion at pp. 1, 3 and 5.) In short, the entire premise behind Claimants' request for lifting the stay is unfounded.

Second, we reject -- as Judge Phillips has also rejected – Claimants' accusations about "delay." They are both unfair and unfounded. Claimants made these same types of accusations in opposing Respondents' motion for interlocutory certification, and Judge Phillips correctly rejected them, concluding that Respondents have acted in a timely manner. Indeed, to the extent there has been any unnecessary delay, it is Claimants who delayed the resolution of disputed matters, not Respondents. Specifically, Judge Phillips issued her original ruling on Respondents' motion to compel arbitration on September 24, 2012. Thereafter, **Claimants took no steps to initiate any arbitration proceedings for more than two months**. At that time, Claimants understood the Court's September 24, 2012 ruling mandated individual arbitrations for all of the claims at issue, and indeed had informed Respondents' counsel (in early October) that *Claimants* planned to appeal Judge Phillips' September 24, 2012 ruling compelling arbitration. Claimants thereafter failed to institute any arbitration proceedings, or to appeal the district court's ruling. Instead, on November 8 (without any hearing or motion pending), Judge Phillips suddenly "clarified" her arbitration ruling to provide for both collective and individual arbitrations. Since that time, Respondents' position has been and continues to be that Judge Phillips' ruling is contrary to law as well as the plain language of the parties' arbitration agreements. Several weeks after Judge Phillips issued her erroneous November 8 order, Claimants finally filed their first demand for arbitration.

Although Claimants have delayed the resolution of this matter on multiple occasions, Respondents have conversely acted promptly and diligently every step of the way to correct Judge Phillips' erroneous November 8 order. First, Respondents moved for reconsideration of Judge Phillips' decision on November 19, filing an *ex parte* application on November 16 to have their reconsideration motion heard on shortened notice. *Claimants opposed that ex parte*. Ironically, Claimants also opposed Respondents' motion for reconsideration by arguing, among other things, that Respondents filed their motion for reconsideration too soon. Then, when the reconsideration motion was denied (on other grounds) on December 13, Respondents immediately commenced the process for filing a motion for interlocutory certification, by meeting and conferring with Claimants. When Respondents' counsel informed Claimants that they would scramble to try to file the interlocutory certification motion by December 24, Claimants' counsel indicated that they did not want to have their opposition due on December 31. Respondents graciously agreed to postpone their filing until the end of December. Because of the holidays, the motion for interlocutory certification was filed on January 3, 2013, a mere three weeks after the reconsideration motion was denied. Judge Phillips denied Respondents' motion for interlocutory certification on January 30, 2013. On February 1, Respondents reiterated that they intended to promptly

prepare and file a writ of mandamus with the Ninth Circuit. There can be no dispute based on this record that Claimants' accusations of "delay" are unreasonable, and that Respondents always have moved diligently and promptly in seeking appellate review.

Respondents have likewise complied with all of the AAA's requirements under Rule 1 concerning a motion for a stay. The motion for a stay was filed by the established deadline (i.e., January 11, 2013) and is set to be heard within 60 days of that date (i.e., on March 11, 2013). Furthermore, contrary to Claimants' false accusations, Respondents selected a proper hearing date for the motion. March 11 was selected in order to allow sufficient time for Respondents to draft and file a petition for writ of mandamus with the Ninth Circuit should the district court erroneously deny Respondents' request for interlocutory certification. That exact scenario has now played out. Accordingly, Respondents are in the process of drafting their contemplated writ petition and will ensure that it is filed with the Ninth Circuit in advance of the March 11 hearing date. Judge Phillips can then decide, on March 11, whether the motion for a stay should be granted pending the resolution of Respondents' writ petition.

Respondents also have good grounds for requesting a stay from Judge Phillips. Indeed, other district courts have issued stays pending the resolution of a writ petition. It is further common practice for a party to request a stay from a district court before seeking a stay from the Ninth Circuit. For these and other reasons, Respondents are well within their rights to seek a stay from the district court pending the resolution of their writ of mandamus.

Moreover, contrary to Claimants' assertions that the writ of mandamus will be unsuccessful, neither Claimants, Judge Phillips, nor the AAA get to resolve whether Respondents' writ of mandamus is meritorious. Pursuant to a series of Orders issued by Judge Phillips, each individual driver has been erroneously instructed to pursue his or her claims in *two separate arbitration proceedings*. Respondents do not believe that this dual-track arbitration procedure is consistent with the parties' arbitration agreements, or the law. Nowhere in the parties' arbitration agreements is there any indication that they intended to require each plaintiff's claims to be divided between two separate arbitration proceedings. Nor have the parties ever once asserted such an intention at any time during the course of this litigation. Claimants never once advocated for such a bifurcated and inefficient process in opposing Respondents' motion to compel arbitration, and it would make no economic sense for Respondents to consent to a dispute resolution scheme that requires them to separately litigate each plaintiff's complaint in two (or more) independent proceedings that are taking place at the same time. Respondents specifically asked Judge Phillips to compel "individual arbitrations." Yet Judge Phillips *sua sponte* created an unheard of dual-track procedure involving both a collective arbitration and individual arbitrations, without a legal basis for doing so. For multiple reasons, including all those that are discussed in Respondents' motion for reconsideration and motion for interlocutory certification, Respondents respectfully submit that an egregious mistake of law has been committed in this case, and that Respondents' writ of mandamus will be granted. As such, the stay of the arbitration proceedings should remain in place.

Should you have any questions regarding the foregoing, please let me know.

Regards,

Drew

Drew R. Hansen
Attorney at Law

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From: Drew R. Hansen
Sent: Friday, February 01, 2013 7:21 PM
To: Adam Shoneck
Cc: Camille Johnson; Suzanne C. Jones; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Lesley Tse
Subject: RE: Arbitrations against Central Refrigerated Service, Inc., et al.

Dear Adam:

We write in response to the letter that was sent to you today by Mr. Getman. We will provide a fuller response to his correspondence next week, but we wanted to let you know today that his arguments are incorrect, and we disagree with his asserted positions. Respondents' Motion for a Stay is not moot and it is still on calendar with the district court. Moreover -- contrary to Mr. Getman's letter -- the request for a stay is not based on Respondents' interlocutory certification motion alone. *The request is also based on Defendants' anticipated writ of mandamus to the Ninth Circuit*. (*See, e.g.,* the attached Motion for a Stay in the introduction at p. 1 (stating that "in addition to the Interlocutory Certification Motion, Defendants will be filing a petition for writ of mandamus with the Ninth Circuit should doing so become necessary, to seek appellate review of the [Court's] Orders."); in the Notice of Motion at p. 2 (declaring that a stay is appropriate because Defendants "will file a petition for writ of mandamus with the Ninth Circuit should do so become necessary"); and at page 5, (citing law indicating that a stay is appropriate "to allow a party to pursue a petition for writ of mandamus before the Ninth Circuit.").) The Introduction to the Motion for a Stay states that "[a]lthough Defendants are confident they will prevail on appeal (either through interlocutory certification . . . **or a petition for writ of mandamus**), they need not establish that they will succeed to obtain a stay." *Id*. at p.3. For all of these reasons as well as others, it is incorrect for Claimants to advise you that Respondents' motion for a stay is somehow moot.

Similarly, there is no merit to Mr. Getman's false accusations of improper delay. We scheduled the Motion for a Stay to be heard within the 60-day timeframe required by the AAA rules, and selected a hearing date that would allow sufficient time to draft and file a petition for writ of mandamus with the Ninth Circuit should doing so become necessary before the hearing occurs. Now that the district court has denied Respondents' motion for interlocutory certification, Respondents will draft their contemplated writ petition and make sure *it is filed with the Ninth Circuit in advance of the March 11 hearing date*. The district court can then decide whether the motion for a stay should be granted pending the resolution of the writ petition. This is exactly what Rule 1 contemplates and Claimants have not provided any reason for the AAA to depart from its rules.

Enjoy your weekend.

Best,

Drew

From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Friday, February 01, 2013 1:58 PM
To: Adam Shoneck
Cc: Camille Johnson; Suzanne C. Jones; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham
Subject: Arbitrations against Central Refrigerated Service, Inc., et al.

Please see the attached documents. Thank you.

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EXHIBIT C

GETMAN SWEENEY

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November 30, 2012

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Re: Cilluffo, et al., v. Central Refrigerated Service, Inc., et al.,

Dear Mr. Shoneck, Mr. Tanaka and Ms. Parvey:

This letter is to respond to Respondents' letter, dated November 28, 2012, objecting to Claimants' arbitration demand in the above-referenced proceeding.

Contrary to Respondents' assertions, Claimants' collective arbitration is neither improper nor premature and should proceed. Respondents demanded that Claimants file their claims in arbitration rather than in Court. Claimants have now done so. The District Court granted Respondents' request to stay the litigation in the District Court while the case proceeds in arbitration. Respondents now want to stay the arbitration as well "for several months or longer." There is no basis for the AAA to now halt proceedings because Respondent wishes to take further action in Court. Arbitration in this form was directed by the District Court and that ruling is in effect; it is final. No Court has stayed arbitration. Since Respondents demanded that Claimants' claims proceed in arbitration, Claimants proceeded in arbitration. Respondents' argument that a stay should now issue to allow further Court proceedings should be presented to the Arbitrator, not to the AAA.

Respondents' claim that collective arbitration is improper and premature because they have filed a motion to reconsider with the District Court presents no grounds to delay the collective arbitration proceedings. Likewise, Respondents' assertion that should their motion to reconsider

by denied, they will appeal Judge Phillips's ruling to the Ninth Circuit also presents no grounds to delay the arbitration proceedings. Respondents have no grounds for reconsideration and no right of appeal to the Ninth Circuit. Thus, it would be inappropriate and unproductive to stay the collective arbitration.

As set forth in Plaintiffs' opposition to Defendants' motion for reconsideration, which is attached hereto, Defendants cannot prevail on their motion for reconsideration. Motions for reconsideration are disfavored and rarely granted. *Brown v. U.S.*, CV 09-8168 ABC, CR 03-847 ABC, 2011 WL 333380, at *1 (C.D. Cal. Jan. 31, 2011) (citation omitted). Such motions in the Central District of California are subject to the "stringent standards" of Local Rule 7-18. *Id.* at *1. Respondents' motion for reconsideration will be denied because Respondents have no grounds to move for reconsideration. To the contrary, Respondents' reconsideration motion does only one thing – it repeats written argument made in support of the original motion -- the argument that *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) bars a collective action – and that is the one thing specifically forbidden by Local Rule 7-18. As Respondents' motion will be denied for failure to comply with Local Rule 7-18 and for rehashing arguments already made in violation of the Local Rule, Claimants' collective arbitration should proceed immediately. The motion is also untimely and should be dismissed for that reason as well.

Respondents' argument that the Court's order to arbitrate Claimants' FLSA claims collectively is somehow precluded by *Stolt-Nielsen* was already raised in their reply brief on the motion to compel and properly rejected by the District Court. *Stolt-Nielsen* does not say anything about whether arbitration clauses prohibiting consolidated or class actions also prohibit collective actions. There was no failure to consider material facts by the Court in rejecting Respondents' argument. Indeed, other courts have rejected Respondents' claim regarding *Stolt-Nielsen*. *See, e.g., Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F. Supp. 2d 445, 446 (S.D.N.Y. 2011) (where applicability of *Stolt-Nielsen* was addressed in briefing and court ordered arbitration of FLSA claims under arbitration rules of Financial Industry Regulatory Authority ("FINRA") despite FINRA prohibition of class actions because "'collective action' is not encompassed within the term 'class action'"). *See* 1:10-cv-03735, Doc. 32, at p. 7.

Further, in arguing that under *Stolt-Nielsen*, courts cannot interpret an arbitration agreement to allow collective arbitrations unless the parties have *expressly* agreed to do so, Respondents misrepresent the ruling in *Stolt-Nielsen*. In *Stolt-Nielsen*, the arbitration clause at issue was silent with respect to whether class arbitration was permitted, but the parties went a step further and stipulated that they had reached no agreement regarding class arbitration. *Id.* at 1765. Nevertheless, AnimalFeeds filed a demand for class arbitration and the arbitration panel allowed arbitration to proceed on a class-action basis. Stolt-Nielsen appealed and the case eventually ended up before the Supreme Court, which analyzed whether the arbitration clause permitted class arbitration. *Id.* at 1770.

The Court began with the principle that interpretation of an arbitration agreement is controlled by state law as well the Federal Arbitration Act. *Id.* at 1773. In "construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties," *id.* at 1773-74, and may not compel a party "to submit to class arbitration unless there is a

contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Normally, in the absence of an explicit statement in an agreement regarding class arbitration, the next step would be to examine the contract as a whole to determine whether, properly construed, it evidenced such an agreement. However, the Court in *Stolt-Nielsen* had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," *id.* at 1776, fn 10, because of Stolt-Nielsen's and AnimalFeeds' stipulation that "no agreement ha[d] been reached on that issue." *Id.* at 1766. Given that stipulation, there was nothing to interpret. In the stipulated absence of an agreement to permit class arbitration, the FAA precluded the arbitration panel from imposing class arbitration. *Id.* at 1776.

Thus, the fact that an agreement does not explicitly reference class arbitration does not decide the issue unless, as in *Stolt-Nielsen,* the parties stipulate that there was no agreement on class arbitration. Absent such a stipulation – and there is none here – the ordinary rules of contract interpretation must be applied to discern whether an agreement, properly construed, reflects an intent to permit class arbitration. *See generally, Smith & Wollensky Restaurant Group, Inc., v. Passow et al.*, 831 F. Supp. 2d 390 (D. Mass. 2011) (finding that absent a stipulation barring class actions *Stolt Neilson* requires an arbitrator to "decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration"); *Galakhova v. Hooters of America, Inc.,* 34-2010-00073111-CU-OE-GDS (CA. Sup. Ct., Sacramento County July 27, 2010 (same) (attached hereto); *Fisher v. Gen. Steel Domestic Sales, LLC,* No. 10-cv-01509-WYD-BNB, 2010 WL 3791181 (D. Colo. Sept. 22, 2010) (analyzing holding of *Stolt-Nielsen*).

Contrary to Respondents' assertions, *Stolt-Nielsen* in no way holds that an arbitration agreement must expressly and specifically state that the parties agree to collective arbitration in order to find that the parties intended such collective arbitration to be permitted. As the District Court for the Northern District of California in *Vazquez v. ServiceMaster Global Holding Inc.* explained:

> [I]n *Stolt–Nielson,* the Supreme Court was using the word "'silent' in the sense that they had not reached any agreement," not in the literal sense that there were no words in the contract discussing class arbitration one way or the other. *See* 130 S. Ct. at 1768. **The Supreme Court has never held that a class arbitration clause must explicitly mention that the parties agree to class arbitration in order for a decisionmaker to conclude that the parties consented to class arbitration.** Rather, the Supreme Court has held that parties must *consent* to class arbitration. *Id.* at 1775… In *Stolt–Nielson* itself, the Supreme Court indicated that it would be appropriate for the decisionmaker to consider the "sophisticat[ion]" of the parties, and even the "tradition of class arbitration" in the field, when determining whether a contract was truly "silent" as to class arbitration. 130 S. Ct. at 1775. In this case, the failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the "silence" discussed in *Stolt–Nielson.*

C 09–05148 SI, 2011 WL 2565574, at *3, fn 1 (N.D. Cal. June 29, 2011) (emphasis added).

Here, the District Court correctly applied ordinary rules of contract interpretation, specifically the doctrine of *expressio unius est exclusio alterius*. The Court was presented with and considered

the sophistication of the parties, the tradition of collective actions in FLSA claims, and full briefing as to whether the parties' agreement was truly "silent" as to collective arbitration. And here, the Court found that Respondents, who are admittedly sophisticated corporate entities, drafted the arbitration clause. The contract between the parties clearly shows that Respondents were concerned that Claimants might claim that they were employees and thus be subject to the Fair Labor Standards Act, but still specifically left out collective actions from the waiver that included consolidated and class actions. Thus, under the doctrine of *expressio unius est exclusio alterius*, the Court correctly held that the arbitration agreement, properly construed, reflected an intent to permit class arbitration. *Stolt-Nielsen*, and the other cases cited by Respondents do not invalidate the reasoning of the Court that the arbitration agreement authorizes FLSA collective actions.

Additionally, Respondents have no right of appeal to the Ninth Circuit. Respondents moved the Court to compel arbitration. The District Court compelled arbitration. The Court's November 8th Order clarified that the FLSA claims would be arbitrated on a collective basis. Respondents argue that the Court's refusal to compel "individual" arbitration of claims renders an appeal permissible. However, the Federal Arbitration Act, 9 U.S.C. § 16 limits appeals. Subsection (a) governs when appeals as of right are available and subsection (b) governs interlocutory appeals under 28 U.S.C. 1292(b). None of the sections permitting appeal as of right apply to the District Court's November 8th Order. The Section governing appeal as of right cited by Respondents clearly limits the right to appeal to orders *denying* arbitration. The courts have held that §16(a)(1)(B) means what it says – that a party may only appeal a denial of a motion to compel arbitration. The Courts, including the Ninth Circuit, have universally held that denials of any other conditions, limitations or attributes of the arbitration do not give rise to an appeal as of right. *Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1153 -1154 (9th Cir. 2004) (dismissing appeal from district court order compelling arbitration before the defendants' employment dispute resolution program instead of the National Association of Securities Dealers as the defendant had requested); *Augustea Impb Et Salvataggi v. Mitsubishi Corp.,* 126 F.3d 95 (2d Cir. 1997) (denying appeal as of right to order compelling arbitration in New York instead of London); *Adams v. Monumental General Cas. Co.*, 541 F.3d 1276 (11th Cir. 2008) (compelling arbitration under one agreement instead of two is not appealable).

The Ninth Circuit is clear that a party who obtains an order compelling arbitration may not appeal any other aspects of that order which might displease it. The reason for this is that the FAA's underlying purpose is to see that arbitrations are conducted quickly and expeditiously.

> The Federal Arbitration Act represents Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Sink v. Aden Enter. Inc.*, 352 F.3d 1197, 1200 (9th Cir.2003) (*quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Section 16 of the Act "endeavor[s] to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 98 (2d Cir.1997) (*quoting Filanto, S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir.1993)) (additional citations omitted).

Bushley, 360 F.3d at 1153-54. *Bushley* is one of many decisions that hold that district court interlocutory orders compelling arbitration are not appealable. In *Dees v. Billy*, 394 F.3d 1290, 1292–93 (9th Cir. 2005), the Ninth Circuit joined numerous other circuits in holding that an order compelling arbitration and staying the case is not immediately appealable. *See also Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 961 (9th Cir. 2007).

Respondents' claim that despite the fact that the Court ordered arbitration, it has a right of appeal because they didn't get the precise form of arbitration they had hoped for, would create an exception that would swallow "section 16's purpose of promoting arbitration and 'prevent[ing] parties from frustrating arbitration through lengthy preliminary appeals…'" *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 98-99 (2d Cir.1997) (citation omitted).

Similarly there is no right of appeal over the District Court's determination that the FLSA claims are to be collectively arbitrated under Utah law. The courts are clear that there is no pendent appellate jurisdiction unless the issues "(a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Cunningham v. Gates*, 229 F.3d 1271, 1284-85 (9th Cir. 2000) (citations omitted). *See Smith v. Massachusetts Mut. Life Ins. Co.*, 427 F. App'x 574 (9th Cir. 2011); *Braintree Laboratories, Inc. v. Citigroup Global Markets Inc.*, 622 F.3d 36, 44 (1st Cir. 2010) ("Instances in which the exercise of pendent appellate jurisdiction is appropriate are hen's-teeth rare") (citation omitted). *See also IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996) (drawing bright line rule that there is no pendent appellate jurisdiction under section 16 of the FAA). Accordingly, Claimants' arbitration should not be frustrated by a stay to pursue a frivolous appeal in the Ninth Circuit and should instead proceed without delay.

Finally, Respondents object to Claimants filing an employment arbitration demand rather than a commercial arbitration demand. However, the filing was based on the discussion that I had with Mr. Shoneck on November 26th and because 1) the FLSA claim raised herein is an employment claim, and 2) the District Court's September 24th Order already determined that the trucker Claimants herein are employees. *See 9/24/12 Order, pp. 6-9.* Respondents argue that our assertion that Judge Phillips already determined that Claimants are employees is "wrong" and a "blatant misconstruction". However, the September 24th Order clearly states, "the Court finds… that Plaintiffs are employees, not independent contractors." *See 9/24/12 Order, p. 9.* At most, Respondents' arguments to the contrary may be presented to an arbitrator.

For all the foregoing reasons, Claimants' collective arbitration should not be stayed and should proceed forthwith. Should you have any questions, please feel free to contact me.

Sincerely,

/s/ Dan Getman

Dan Getman

CC. Susan Martin
Jennifer Kroll
Lesley Tse
Edward Tuddenham
Drew Hansen
Suzanne Jones
Camille Johnson

Lesley Tse

From:	Lesley Tse
Sent:	Tuesday, December 18, 2012 5:10 PM
To:	'Adam Shoneck'; Dan Getman; Drew R. Hansen
Cc:	Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter
Subject:	RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]
Attachments:	5A.6.2 Email re 12-3-12 stay.pdf

Dear Mr. Shoneck:

As we learned from you when we first called to raise this issue, the AAA makes an initial determination if the arbitration is an employment or commercial dispute. We believe this determination was resolved by the Court, however, when Judge Phillips sent this case to arbitration and did so declaring that Claimants are not independent contractors, but are employees. In the Order dated September 24, 2012, sending these cases to arbitration, Judge Phillips specifically made a finding that, under the agreement between the parties, Claimants here are employees and not independent contractors stating, "the Court finds, based on the Complaint and the moving papers, that Plaintiffs are employees, not independent contractors." On November 8, 2012, Judge Phillips found that the arbitration agreement does not prohibit collective arbitrations and directed that the FLSA claim be arbitrated collectively.

Furthermore, the claims relate to Claimants' employment status and are not "commercial" disputes. The collective arbitration raises only claims under the Fair Labor Standards Act, 29 U.S. C. 201, *et seq.* This claim is entirely related to the employment relationship and has nothing to do with any matters which commercial arbitrators would be expected to have competence. FLSA claims are regularly arbitrated under the employment rules. For example, issues in the collective arbitration will be whether defendants are "joint employers," *see e.g. Johnson v. Unified Government of Wyandotte County/Kansas City*, 371 F.3d 723, 727-28 (10th Cir. 2004), whether the Respondents paid the minimum wage, 29 U.S.C. 206, whether the claimants' payments for truck, insurance, equipment, gas, tolls, bonds, etc. act as *de facto* deductions from the minimum wage due Claimants, *see Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). The individual demands are no different, as they all raise identical employment matters: violation of the Federal Forced Labor statutes, 18 U.S.C. §§ 1589 and 1595; federal common law fraud concerning material aspects of employment, Utah common law fraud concerning material aspects of employment, Utah common law negligent misrepresentation concerning material aspects of employment, Utah UCC employment contract unconscionability, and Utah common law unjust enrichment due to employment misclassification. These claims revolve around the central argument that Respondents employed Claimants, but as found by the District Court, misclassified them as independent contractors. Again, the issues that are raised by these claims are issues typically handled in employment arbitration and would be better handled by arbitrators familiar with employment law, not commercial arbitrators with no experience in this area.

Respondents write, "the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA's Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied." This is absurd. We recited in each and every cover letter addressed to you, that, "You previously advised me to file using the labor and employment demand form, notwithstanding that the agreement says that the AAA's commercial rules would apply based on the Court's determination and the nature of the claim." Respondents claim that it had no idea that the AAA

believes the employment rules apply, simply is contradicted by all the facts. If Respondents had any doubt about the accuracy of our scores of letters, they could have simply asked. Respondents never did so and never sought clarification.

Respondents claim that "Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred." This is unreasonable as Respondents received Claimants' demands. Respondents also received Claimants' cover letter which informed them that, "I am filing this demand as an employment (rather than commercial) demand because 1) the claims raised herein are employment claims, and 2) because the District Court's September 24th Order already determined that the trucker Claimant herein is an employee. *See 9/24/12 Order, pp. 6-9.*" Respondents were well aware that the AAA was administering these matters as they had extensive communication with you and perhaps others at the AAA, writing countless letters and apparently making numerous *ex parte* phone calls as well. If the AAA were not administering the arbitrations, why would Respondents send any communications at all? The AAA is not obligated to send Respondents a letter formally uttering the word "administering." The AAA administers the matters by administering them, as it did here. The AAA's administration is no secret, it is well known to Respondents from the first demand and by all subsequent communications and dealings with the parties. If there was any doubt that the AAA was administering the demands, Respondents could have enquired, instead of simply communicating with the AAA about the administration. They did not do so, because they knew the answer to a question so obvious it needed not be asked.

As to Respondents' contention that they are somehow prejudiced by treating the demands as already "administered" under the employment rules, Respondents claims are surprising and frankly, unbelievable. Respondents chose not to seek a stay of arbitration, though it had every opportunity to do so. Respondents told Claimants they would move for a stay of arbitration on December 3rd (see attached emails). Respondents made two other motions to the District Court, first moving for reconsideration of the Court's clarification order and second, moving for expedited consideration of that motion. Both were denied. Both could have included a stay request, though neither did. Respondents even told the AAA that it planned to move for a stay of arbitration weeks ago, writing, "If Claimants will not stipulate to a stay of this arbitration proceeding, Respondents will ask the District Court to stay it. If Judge Phillips refuses to do so for any reason, Respondents will seek a stay from the Ninth Circuit." See 11/28/2012 Letter from Drew Hansen at p. 3. But Respondents simply never did. The only stay in effect is the one that Respondents requested staying litigation in the District Court while the case proceeds in arbitration. There is absolutely no reason for the AAA to halt proceedings simply because Respondents wish to take further frivolous action in Court. Arbitration in this form was directed by the District Court and that ruling is in effect. No Court has reversed that ruling or stayed arbitration.

Since the individual and collective arbitration demands were filed, Respondents have never moved the court for a stay of arbitration, instead attempting to address matters with the AAA and the Court seriatim – no doubt to string out these cases as long as possible. Respondents have belabored the issue of arbitral administration with the AAA in many, many letters. Respondents write, "At the very least, Respondents should have 30 days from yesterday to file a motion seeking a stay with the District Court." There is no basis for extending the deadline.

Please let me know if you have any questions. Thank you,

Sincerely,

Dan Getman

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 10:32 AM
To: Dan Getman; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Thank you Mr. Getman. To clarify, Mr. Hansen voiced his objections to me and I requested his written comment on the matter.

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
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Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Monday, December 17, 2012 10:29 AM
To: Adam Shoneck; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Shoneck, we will make every effort to reply to yet another of Respondents' unsolicited letters by today. But due to several other briefs that are pressing, I cannot guarantee it. If not, it will be to you tomorrow. I would urge that the AAA cut off this extensive string of communications after this. Thanks, Dan

---

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 8:53 AM
To: Drew R. Hansen; Dan Getman
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen, thank you for your email.

Mr. Getman:

We request Claimants' comment on the below. If at all possible, we request that Claimant submit comment today given the tight timelines involved.

Thank you,

Adam Shoneck

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Saturday, December 15, 2012 3:02 PM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Adam:

Thank you for providing us with the information below regarding a stay of arbitration. As we discussed yesterday afternoon on the phone (and have indicated previously), the parties' arbitration agreements specifically provide that the instant arbitrations will be conducted in accordance with the AAA's Commercial Arbitration Rules. (See Lease at section 21 and Contractor Agreement at section 18.) Accordingly, pursuant to Rule 1 of the AAA's Commercial Arbitration Rules, these are the rules that should apply to the parties' arbitrations. See Commercial Arbitration Rules, R-1. Agreement of Parties ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA"). Because we do not see a specific rule addressing stays in the context of the Commercial Arbitration Rules, please advise what Rule or Procedure the AAA usually follows with respect to stays in arbitrations governed by the AAA's Commercial Arbitration Rules.

Even assuming *arguendo* that Rule 1 of the AAA's Employment Arbitration Rules is relevant, that Rule states that Respondents have 30 days "after the AAA's commencement of administration" to seek judicial intervention, in order for the AAA to suspend administration of the arbitration. As we discussed with you yesterday, Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred. Indeed, Respondents have not received any letters at all. Nor have Respondents been advised by the AAA that any case numbers have been assigned, or that a case manager has been assigned to any of the proceedings. To the contrary, yesterday's communication from you was the first communication from the AAA that contained anything other than a message acknowledging that the AAA had received the parties' communications about the propriety of Claimants' desire to initiate arbitration while motions were still pending with the district court and appellate issues abound.

Moreover, prior to our conversation yesterday (when you mentioned in passing that the Employment Rules may govern the arbitrations but acknowledged that the decision is not final and that no written decision has been provided to the

parties on that issue), the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA' s Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied.

Accordingly, to the extent that Rule 1 of the AAA's Employment Arbitration Rules is applied for purposes of staying the arbitration here (and despite Respondents' continuing objection to the conclusion that the Employment Rules govern), Respondents believe that the only reasonable interpretation of Rule 1 is that Respondents have at least 30 days from the date the AAA indicates in writing that it has commenced the arbitrations under the Employment Rules to seek judicial intervention with respect to a stay. Since there has yet to be any formal commencement of administration of the arbitration by the AAA and no notice from the AAA as to which rules apply to the various arbitrations, Respondents respectfully submit that the thirty days provided by Rule 1 cannot possibly have begun to run. At the very least, Respondents should have 30 days from yesterday to file a motion seeking a stay with the District Court.

As my colleague, Suzanne Jones, and I discussed with you, this unusually complex case has not proceeded in a typical fashion following the filing of Claimants' initial demand on November 26, 2012 for a variety of reasons, including because of the motion for reconsideration pending before the District Court. You confirmed during our discussion yesterday that the AAA has not sent any letters to the parties or taken other steps with respect to administration of the arbitrations. However, you advised that one possible interpretation of Rule 1 could be that the 30 days under Rule 1 began to run from Claimants' initial filing date. In such case, judicial intervention would need to be sought by December 26, 2012. We responded that Rule 1 does not state that *any conduct by the Claimants* triggers the 30 day time period; instead, the Rule focuses solely on *the AAA's conduct* -- i.e., the AAA's "commencement of administration." In short, Respondents do not believe that a "Claimants' Demand Filing Date" interpretation is consistent with the Rule's plain language. If that was what the drafters intended by Rule 1, they would have said Respondents have 30 days "after Claimants file a demand" to seek judicial intervention -- not (as stated in the Rule) "after the AAA's commencement of administration."

There are other reasons why Respondents do not believe a "Claimants' Demand Filing Date" interpretation of Rule 1 is appropriate. As a preliminary matter, until two days ago, Respondents' motion for reconsideration remained pending before the District Court, and Judge Phillips had not indicated whether or not she would revise her ruling concerning a collective arbitration. Respondents have further made it clear that they intend to appeal Judge Phillips' ruling and will be filing various motions and briefs in that regard in the next several weeks.

In addition, as a practical matter, it would be very difficult for Respondents if they must seek judicial intervention with respect to a stay by December 26, 2012. As you can imagine, counsel have holiday plans with their families. If judicial intervention must be sought by December 26 (which is an incorrect interpretation of Rule 1 for the reasons explained above), this will impose an extreme hardship on counsel during the holidays in order to meet the deadline. Moreover, as we discussed with you, under the District Court's Local Rules, any party filing a motion must "meet and confer" with the other side at least 10 days before filing the motion. See Central District of California, Local Rule 7-3. When we met and conferred with Claimants' counsel yesterday regarding several motions (including the motion for a stay), Claimants requested an extension of time to file their opposition to one of the motions in light of the holidays. Respondents have agreed to that extension, such that Plaintiffs' opposition to the motion for interlocutory certification of an appeal will not be due until the second week of January 2013. As a similar courtesy, Respondents would ask that Rule 1 be interpreted to allow Respondents a reasonable period of time to file a motion seeking judicial intervention with respect to a stay, so that Respondents likewise can enjoy the holidays with their families.

For all of the foregoing reasons, Respondents respectfully submit that the AAA has not commenced the administration of any arbitration proceeding, let alone all of the actions filed by Claimants. Nor has the AAA rendered a written conclusion as to which rules apply to the various arbitrations. It is therefore unclear how Rule 1 has any application at all at the present time. Even if it does have some relevance, the 30-day deadline under Rule 1 has not begun to run. Please kindly confirm that the AAA agrees with the foregoing or at the very least that Respondents have 30 days from yesterday to file any motion for a stay with the District Court.

Regards,

Drew

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Friday, December 14, 2012 1:43 PM
To: Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen:

Thank you for your email. I note your statement below regarding Respondent's intention to file for stay of arbitration.

As per Rule 1 of our Employment Arbitration Rules (attached for your reference), where a party seeks judicial intervention, the AAA will stay its administration for 60 days or until the court rules on the motion to stay, whichever occurs first. In order to invoke the Rule 1 stay, Respondent should provide the AAA with a copy of its motion to stay arbitration that has been filed with the court. If the court orders these matters stayed, the AAA will suspend our administration until the stay is lifted.

Please contact me with any questions or concerns.

Sincerely,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
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www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Thursday, December 13, 2012 10:14 PM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam:

Please be advised that Respondents intend to promptly ask Judge Phillips to certify her ruling for appeal pursuant to 28 U.S.C. section 1292. In order to comply with procedural requirements, the motion will likely be heard in late January or early February. Defendants also intend to promptly pursue a petition for writ of mandamus with the Ninth Circuit. Until both of these appellate issues are resolved, it makes no sense for the AAA to proceed with any arbitrations.

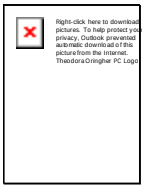
Please also be advised that Respondents will seek an injunction/stay of any arbitration proceedings from the appropriate federal court should doing so become necessary.

Please let me know if you have any questions regarding the foregoing.

Best,

Drew

Drew R. Hansen
Attorney at Law



THEODORA ORINGHER PC
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Email: dhansen@tocounsel.com
Bio: Drew R. Hansen
Website: www.tocounsel.com

Please consider the environment before printing this e-mail.

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Thursday, December 13, 2012 4:18 PM
To: Dan Getman; Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Getman:

Thank you for your email. We are still reviewing all filings and submissions, but should be able to respond shortly.

Thank you,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

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Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610

Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Thursday, December 13, 2012 6:21 PM
To: Adam Shoneck; Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam, I write to inform the AAA, that the District Court denied Respondents' motion for reconsideration (see attached), thereby reaffirming that FLSA claims are to be arbitrated collectively and other claims are to be arbitrated individually. I note that this is exactly what Claimants have done in all respects. Please let me know if you have any questions.

Dan Getman
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
845-255-9370
fax 845-255-8649
email: dgetman@getmansweeney.com
website: http://getmansweeney.com

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 10, 2012 8:06 AM
To: Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Counsel:

I do not believe we will require further comments on either the collective or individual submissions at this time. Should we need them in the future, we will advise and set a response deadline.

I will be in touch regarding the result of our review of the filings and comments hopefully today.

Thank you,

Adam Shoneck

Adam Shoneck
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Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Friday, December 07, 2012 4:50 PM
To: Cheryl Hunter; Adam Shoneck; Lance K. Tanaka
Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Attached please find Claimants' response to Respondents' letter.

Lesley A. Tse, Esq.
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz NY 12561
phone: (845) 255-9370
fax: (845) 255-8649
email: ltse@getmansweeney.com
web: www.getmansweeney.com

From: Cheryl Hunter [mailto:cah@scmlaw.com]
Sent: Friday, December 07, 2012 3:57 PM
To: Adam Shoneck; Lance K. Tanaka

Cc: Camille Johnson; Drew R. Hansen; Lesley Tse; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Re: *William Adams v. Central Refrigerated Service, Inc., et al.*
Jason Alley v. Central Refrigerated Service, Inc., et al.
Keith Baumgardner v. Central Refrigerated Service, Inc., et al.
LaSalle Boston v. Central Refrigerated Service, Inc., et al.
Shawn Bowman v. Central Refrigerated Service, Inc., et al.
Lindy Bronson v. Central Refrigerated Service, Inc., et al.
Hope Brooks v. Central Refrigerated Service, Inc., et al.
Timothy Brookshire v. Central Refrigerated Service, Inc., et al.
Casey Bruce v. Central Refrigerated Service, Inc., et al.
Robert Charlton v. Central Refrigerated Service, Inc., et al.
Mark Cluckey v. Central Refrigerated Service, Inc., et al.
Darryl Costlow v. Central Refrigerated Service, Inc., et al.
Riccardo Crolli v. Central Refrigerated Service, Inc., et al.
Vincent Crupi v. Central Refrigerated Service, Inc., et al.
Jerome Dubiak v. Central Refrigerated Service, Inc., et al.
James Dubin v. Central Refrigerated Service, Inc., et al.
Christopher Fosha v. Central Refrigerated Service, Inc., et al.
Rueben Fuller v. Central Refrigerated Service, Inc., et al.
Marcio Gonzalez v. Central Refrigerated Service, Inc., et al.
David Gordon v. Central Refrigerated Service, Inc., et al.
Jon Hanks v. Central Refrigerated Service, Inc., et al.
William Helring v. Central Refrigerated Service, Inc., et al.
Steven Hendren v. Central Refrigerated Service, Inc., et al.
Christopher Hugues v. Central Refrigerated Service, Inc., et al.

Please find attached correspondence from Camille N. Johnson concerning the referenced proceedings. A hard copy will follow via U.S. mail.

Cheryl A. Hunter
Legal Assistant
Direct: (801) 322-9254
cah@scmlaw.com

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10 Exchange Place Eleventh Floor Salt Lake City, Utah 84111
Phone: (801) 521-9000 | Fax: (801) 363-0400 | www.scmlaw.com

Lesley Tse

From:	Drew R. Hansen <dhansen@tocounsel.com>
Sent:	Wednesday, December 19, 2012 2:46 AM
To:	Adam Shoneck
Cc:	Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter; Dan Getman; Lesley Tse
Subject:	RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Adam:

Respondents disagree with virtually everything set forth in Mr. Getman's email.

As an initial matter, until last Friday when we received the email from you regarding a stay, Respondents never had been notified by the AAA that the Employment Rules might have any relevance here. On the contrary, the contracts at issue expressly state that the Commercial Arbitration Rules govern. Until the AAA advises Respondents in writing that it has made a preliminary determination regarding which rules it believes apply, I do not see how any one could reasonably argue that Respondents should have known they had to comply with Rule 1, let alone that the 30-day deadline referenced in Rule 1 was running. If Respondents had filed a motion to stay the proceedings previously and then advised the AAA that it had to stay the proceedings as a result of Rule 1, Claimants would no doubt have used that fact to argue that Respondents were conceding the employment rules govern. To suggest that Respondents had to pre-determine what the AAA's conclusion would be without having an official answer from the AAA is simply not fair or reasonable. Nor should Respondents have to comply with Rule 1 simply because Claimants incorrectly state in their various demands that the employment rules govern. The fact is Respondents were (and still are) waiting *for the AAA* to make its initial assessment regarding several preliminary issues, including the applicable rules. Because no such decision has ever been announced by the AAA, the deadline referenced in Rule 1 could not possibly have begun to run.

Lacking any facts or basis for asserting what is meant by Rule 1's use of the words "commencement of administration," Claimants just make it up. They argue that the AAA has been "administering" the arbitrations "by administering them." This reasoning is circular and just plain wrong. As we discussed when we spoke on Friday, the AAA had not yet "commenced administering" the arbitrations because of the complex nature of this matter and the unusual way in which it had proceeded with the multiple preliminary exchanges between the parties and unresolved issues in the District Court. Indeed, there has been no case matter number provided for any of the proceedings, no case manager assigned, and no letters indicating when Respondents must file their

responses. The parties have instead been dealing with a Customer Intake Specialist (i.e., you) regarding the many preliminary issues.

Moreover, as a practical matter, Mr. Getman provides no reason why Respondents should not be given until some time in January to file a motion for a stay. Nor has he explained how Claimants will be prejudiced in any way if Respondents are given several weeks to move for a stay of the arbitration proceedings. Mr. Getman is instead taking the ridiculous position that Respondents must file a brief on December 26 -- the day after Christmas -- without any regard for my family's holiday plans or those of my colleagues. This is disturbing, given that my office recently granted Mr. Getman an extension of time to oppose Respondents' contemplated motion for interlocutory certification because he wanted to spend time with his family during the holidays.

As for Mr. Getman's claims concerning my December 3 email, he is correct that Respondents previously met and conferred regarding a motion for a stay of the arbitration proceedings. However, as Mr. Getman is aware, I advised him on December 14 (prior to my conversation with you and before you sent your email that afternoon) that the motion was not yet ripe because the AAA had not decided whether the arbitrations would go forward. Put another way, why would Respondents ask the Court to enjoin the arbitration proceedings when the AAA was in the process of deciding whether it would proceed. If the AAA agreed that it should wait until Respondents' appellate rights are resolved, it would not be necessary for Respondents to seek a stay. Shortly after Mr. Getman and I spoke at noon on December 14, I received your email that referenced Rule 1 of the Employment Arbitration Rules. Suzanne Jones and I then spoke with you, and I promptly advised Mr. Getman in writing that we would be proceeding with our previously contemplated motion for a stay. Because it takes some time to draft a quality motion and we are not in a position to get anything on file by December 26 without negatively impacting the holiday plans of myself and my colleagues, Respondents respectfully request that the AAA find Rule 1's deadline has not been triggered or in the alternative grant Respondents an extension of time to file a motion for a stay (i.e., until January 11). We will, of course, protect Respondents' interests if forced to do so by December 26, but there is no reason why the AAA should unnecessarily compel individuals to work over the holidays.

I would appreciate it if you could let me know AAA's position regarding the deadline by noon on Wednesday.

Finally, contrary to the arguments being advanced by Mr. Getman below, there has never been any ruling by the District Court that the AAA Employment Rules have any relevance here. Indeed, the only AAA Rules mentioned in any of the parties' submissions to the District Court have been the AAA's Commercial Arbitration Rules. This is because those are the rules that the parties agreed would govern any arbitration between them. Mr. Getman's entire argument with respect to why he

believes the AAA Employment Rules must be used instead rests on two faulty premises. First, he relies on the District Court's erroneous conclusion that Plaintiffs were employees, not independent contractors. However, that conclusion was based only on the pleadings alone -- essentially the same level of importance as surviving a motion to dismiss. This is not a factual finding based on any evidence, and Plaintiffs' mere allegations in a complaint cannot be used to bootstrap their conclusion that the parties' agreement to a certain set of rules must now be tossed aside because they pled in their complaint that they are employees. There is absolutely no authority -- legal or otherwise-- for such an approach. Similarly, Plaintiffs' argument that the claims they have pled should be handled by arbitrators with employment law experience is not a justification for ignoring the parties' agreement to use the Commercial Arbitration Rules. This argument conflates the issue of arbitrator selection with what rules should be applied. These are obviously two separate questions and who the arbitrators should be for the arbitrations does not support Claimants' arguments as to which rules govern the disputes.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Regards,

Drew

From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Tuesday, December 18, 2012 2:10 PM
To: Adam Shoneck; Dan Getman; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Mr. Shoneck:

As we learned from you when we first called to raise this issue, the AAA makes an initial determination if the arbitration is an employment or commercial dispute. We believe this determination was resolved by the Court, however, when Judge Phillips sent this case to arbitration and did so declaring that Claimants are not independent contractors, but are employees. In the Order dated September 24, 2012, sending these cases to arbitration, Judge Phillips specifically made a finding that, under the agreement between the parties, Claimants here are employees and not independent contractors stating, “the Court finds, based on the Complaint and the moving papers, that Plaintiffs are employees, not independent contractors.” On November 8, 2012, Judge Phillips found that the arbitration agreement does not prohibit collective arbitrations and directed that the FLSA claim be arbitrated collectively.

Furthermore, the claims relate to Claimants’ employment status and are not “commercial” disputes. The collective arbitration raises only claims under the Fair Labor Standards Act, 29 U.S. C. 201, *et seq*. This claim is entirely related to the employment relationship and has nothing to do with any matters which commercial arbitrators would be expected to have competence. FLSA claims are regularly arbitrated under the employment rules. For example, issues in the collective arbitration will be whether defendants are “joint employers,” *see e.g.*

Johnson v. Unified Government of Wyandotte County/Kansas City, 371 F.3d 723, 727-28 (10th Cir. 2004), whether the Respondents paid the minimum wage, 29 U.S.C. 206, whether the claimants' payments for truck, insurance, equipment, gas, tolls, bonds, etc. act as *de facto* deductions from the minimum wage due Claimants, *see Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). The individual demands are no different, as they all raise identical employment matters: violation of the Federal Forced Labor statutes, 18 U.S.C. §§ 1589 and 1595; federal common law fraud concerning material aspects of employment, Utah common law fraud concerning material aspects of employment, Utah common law negligent misrepresentation concerning material aspects of employment, Utah UCC employment contract unconscionability, and Utah common law unjust enrichment due to employment misclassification. These claims revolve around the central argument that Respondents employed Claimants, but as found by the District Court, misclassified them as independent contractors. Again, the issues that are raised by these claims are issues typically handled in employment arbitration and would be better handled by arbitrators familiar with employment law, not commercial arbitrators with no experience in this area.

Respondents write, "the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA's Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied." This is absurd. We recited in each and every cover letter addressed to you, that, "You previously advised me to file using the labor and employment demand form, notwithstanding that the agreement says that the AAA's commercial rules would apply based on the Court's determination and the nature of the claim." Respondents claim that it had no idea that the AAA believes the employment rules apply, simply is contradicted by all the facts. If Respondents had any doubt about the accuracy of our scores of letters, they could have simply asked. Respondents never did so and never sought clarification.

Respondents claim that "Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred." This is unreasonable as Respondents received Claimants' demands. Respondents also received Claimants' cover letter which informed them that, "I am filing this demand as an employment (rather than commercial) demand because 1) the claims raised herein are employment claims, and 2) because the District Court's September 24th Order already determined that the trucker Claimant herein is an employee. *See 9/24/12 Order, pp. 6-9.*" Respondents were well aware that the AAA was administering these matters as they had extensive communication with you and perhaps others at the AAA, writing countless letters and apparently making numerous *ex parte* phone calls as well. If the AAA were not administering the arbitrations, why would Respondents send any communications at all? The AAA is not obligated to send Respondents a letter formally uttering the word "administering." The AAA administers the matters by administering them, as it did here. The AAA's administration is no secret, it is well known to Respondents from the first demand and by all subsequent communications and dealings with the parties. If there was any doubt that the AAA was administering the demands, Respondents could have enquired, instead of simply communicating with the AAA about the administration. They did not do so, because they knew the answer to a question so obvious it needed not be asked.

As to Respondents' contention that they are somehow prejudiced by treating the demands as already "administered" under the employment rules, Respondents claims are surprising and frankly, unbelievable. Respondents chose not to seek a stay of arbitration, though it had every opportunity to do so. Respondents told Claimants they would move for a stay of arbitration on December 3rd (see attached emails). Respondents made two other motions to the District Court, first moving for reconsideration of the Court's clarification order and second, moving for expedited consideration of that motion. Both were denied. Both could have included a stay request, though neither did. Respondents even told the AAA that it planned to move for a stay of arbitration weeks ago, writing, "If Claimants will not stipulate to a stay of this arbitration proceeding, Respondents will ask

the District Court to stay it. If Judge Phillips refuses to do so for any reason, Respondents will seek a stay from the Ninth Circuit." See 11/28/2012 Letter from Drew Hansen at p. 3. But Respondents simply never did. The only stay in effect is the one that Respondents requested staying litigation in the District Court while the case proceeds in arbitration. There is absolutely no reason for the AAA to halt proceedings simply because Respondents wish to take further frivolous action in Court. Arbitration in this form was directed by the District Court and that ruling is in effect. No Court has reversed that ruling or stayed arbitration.

Since the individual and collective arbitration demands were filed, Respondents have never moved the court for a stay of arbitration, instead attempting to address matters with the AAA and the Court seriatim – no doubt to string out these cases as long as possible. Respondents have belabored the issue of arbitral administration with the AAA in many, many letters. Respondents write, "At the very least, Respondents should have 30 days from yesterday to file a motion seeking a stay with the District Court." There is no basis for extending the deadline.

Please let me know if you have any questions. Thank you,

Sincerely,

Dan Getman

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 10:32 AM
To: Dan Getman; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Thank you Mr. Getman. To clarify, Mr. Hansen voiced his objections to me and I requested his written comment on the matter.

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Monday, December 17, 2012 10:29 AM
To: Adam Shoneck; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Shoneck, we will make every effort to reply to yet another of Respondents' unsolicited letters by today. But due to several other briefs that are pressing, I cannot guarantee it. If not, it will be to you tomorrow. I would urge that the AAA cut off this extensive string of communications after this. Thanks, Dan

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From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 8:53 AM
To: Drew R. Hansen; Dan Getman
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen, thank you for your email.

Mr. Getman:

We request Claimants' comment on the below. If at all possible, we request that Claimant submit comment today given the tight timelines involved.

Thank you,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Saturday, December 15, 2012 3:02 PM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Adam:

Thank you for providing us with the information below regarding a stay of arbitration. As we discussed yesterday afternoon on the phone (and have indicated previously), the parties' arbitration agreements specifically provide that the instant arbitrations will be conducted in accordance with the AAA's Commercial Arbitration Rules. (See Lease at section 21 and Contractor Agreement at section 18.) Accordingly, pursuant to Rule 1 of the AAA's Commercial Arbitration Rules, these are the rules that should apply to the parties' arbitrations. See Commercial Arbitration Rules, R-1. Agreement of Parties ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA"). Because we do not see a specific rule addressing stays in the context of the Commercial Arbitration Rules, please advise what Rule or Procedure the AAA usually follows with respect to stays in arbitrations governed by the AAA's Commercial Arbitration Rules.

Even assuming *arguendo* that Rule 1 of the AAA's Employment Arbitration Rules is relevant, that Rule states that Respondents have 30 days "after the AAA's commencement of administration" to seek judicial intervention, in order for the AAA to suspend administration of the arbitration. As we discussed with you yesterday, Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred. Indeed, Respondents have not received any letters at all. Nor have Respondents been advised by the AAA that any case numbers have been assigned, or that a case manager has been assigned to any of the proceedings. To the contrary, yesterday's communication from you was the first communication from the AAA that contained anything other than a message acknowledging that the AAA had received the parties' communications about the propriety of Claimants' desire to initiate arbitration while motions were still pending with the district court and appellate issues abound.

Moreover, prior to our conversation yesterday (when you mentioned in passing that the Employment Rules may govern the arbitrations but acknowledged that the decision is not final and that no written decision has been provided to the parties on that issue), the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA' s Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied.

Accordingly, to the extent that Rule 1 of the AAA's Employment Arbitration Rules is applied for purposes of staying the arbitration here (and despite Respondents' continuing objection to the conclusion that the Employment Rules govern), Respondents believe that the only reasonable interpretation of Rule 1 is that Respondents have at least 30 days from the date the AAA indicates in writing that it has commenced the arbitrations under the Employment Rules to seek judicial intervention with respect to a stay. Since there has yet to be any formal commencement of administration of the arbitration by the AAA and no notice from the AAA as to which rules apply to the various arbitrations, Respondents respectfully submit that the thirty days provided by Rule 1 cannot possibly have begun to run. At the very least, Respondents should have 30 days from yesterday to file a motion seeking a stay with the District Court.

As my colleague, Suzanne Jones, and I discussed with you, this unusually complex case has not proceeded in a typical fashion following the filing of Claimants' initial demand on November 26, 2012 for a variety of reasons, including because of the motion for reconsideration pending before the District Court. You confirmed during our discussion yesterday that the AAA has not sent any letters to the parties or taken other steps with respect to administration of the arbitrations. However, you advised that one possible interpretation of Rule 1 could be that the 30 days under Rule 1 began to run from Claimants' initial filing date. In such case, judicial intervention would need to be sought by December 26, 2012. We responded that Rule 1 does not state that *any conduct by the Claimants* triggers the 30 day time period; instead, the Rule focuses solely on *the AAA's conduct* -- i.e., the AAA's "commencement of administration." In short, Respondents do not believe that a "Claimants' Demand Filing Date" interpretation is consistent with the Rule's plain language. If that was what the drafters intended by Rule 1, they would have said Respondents have 30 days "after Claimants file a demand" to seek judicial intervention -- not (as stated in the Rule) "after the AAA's commencement of administration."

There are other reasons why Respondents do not believe a "Claimants' Demand Filing Date" interpretation of Rule 1 is appropriate. As a preliminary matter, until two days ago, Respondents' motion for reconsideration remained pending before the District Court, and Judge Phillips had not indicated whether or not she would revise her ruling concerning a collective arbitration. Respondents have further made it clear that they intend to appeal Judge Phillips' ruling and will be filing various motions and briefs in that regard in the next several weeks.

In addition, as a practical matter, it would be very difficult for Respondents if they must seek judicial intervention with respect to a stay by December 26, 2012. As you can imagine, counsel have holiday plans with their families. If judicial intervention must be sought by December 26 (which is an incorrect interpretation of Rule 1 for the reasons explained above), this will impose an extreme hardship on counsel during the holidays in order to meet the deadline. Moreover, as we discussed with you, under the District Court's Local Rules, any party filing a motion must "meet and confer" with the other side at least 10 days before filing the motion. See Central District of California, Local Rule 7-3. When we met and conferred with Claimants' counsel yesterday regarding several motions (including the motion for a stay), Claimants requested an extension of time to file their opposition to one of the motions in light of the holidays. Respondents have agreed to that extension, such that Plaintiffs' opposition to the motion for interlocutory certification of an appeal will not be due until the second week of January 2013. As a similar courtesy, Respondents would ask that Rule 1 be interpreted to allow Respondents a reasonable period of time to file a motion seeking judicial intervention with respect to a stay, so that Respondents likewise can enjoy the holidays with their families.

For all of the foregoing reasons, Respondents respectfully submit that the AAA has not commenced the administration of any arbitration proceeding, let alone all of the actions filed by Claimants. Nor has the AAA rendered a written conclusion as to which rules apply to the various arbitrations. It is therefore unclear how Rule 1 has any application at all at the present time. Even if it does have some relevance, the 30-day deadline under Rule 1 has not begun to run. Please kindly confirm that the AAA agrees with the foregoing or at the very least that Respondents have 30 days from yesterday to file any motion for a stay with the District Court.

Regards,

Drew

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Friday, December 14, 2012 1:43 PM
To: Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen:

Thank you for your email. I note your statement below regarding Respondent's intention to file for stay of arbitration.

As per Rule 1 of our Employment Arbitration Rules (attached for your reference), where a party seeks judicial intervention, the AAA will stay its administration for 60 days or until the court rules on the motion to stay, whichever occurs first. In order to invoke the Rule 1 stay, Respondent should provide the AAA with a copy of its motion to stay arbitration that has been filed with the court. If the court orders these matters stayed, the AAA will suspend our administration until the stay is lifted.

Please contact me with any questions or concerns.

Sincerely,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043

Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Thursday, December 13, 2012 10:14 PM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam:

Please be advised that Respondents intend to promptly ask Judge Phillips to certify her ruling for appeal pursuant to 28 U.S.C. section 1292. In order to comply with procedural requirements, the motion will likely be heard in late January or early February. Defendants also intend to promptly pursue a petition for writ of mandamus with the Ninth Circuit. Until both of these appellate issues are resolved, it makes no sense for the AAA to proceed with any arbitrations.

Please also be advised that Respondents will seek an injunction/stay of any arbitration proceedings from the appropriate federal court should doing so become necessary.

Please let me know if you have any questions regarding the foregoing.

Best,

Drew

Drew R. Hansen
Attorney at Law

THEODORA ORINGHER PC
535 Anton Boulevard, Ninth Floor
Costa Mesa, CA 92626-7109
Main: 714.549.6200 Fax: 714.549.6201

Email: dhansen@tocounsel.com
Bio: Drew R. Hansen
Website: www.tocounsel.com

Please consider the environment before printing this e-mail.

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Thursday, December 13, 2012 4:18 PM
To: Dan Getman; Lesley Tse; Cheryl Hunter

Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Getman:

Thank you for your email. We are still reviewing all filings and submissions, but should be able to respond shortly.

Thank you,

Adam Shoneck

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Thursday, December 13, 2012 6:21 PM
To: Adam Shoneck; Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam, I write to inform the AAA, that the District Court denied Respondents' motion for reconsideration (see attached), thereby reaffirming that FLSA claims are to be arbitrated collectively and other claims are to be arbitrated individually. I note that this is exactly what Claimants have done in all respects. Please let me know if you have any questions.

Dan Getman
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
845-255-9370
fax 845-255-8649
email: dgetman@getmansweeney.com
website: http://getmansweeney.com

****

****

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 10, 2012 8:06 AM
To: Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Counsel:

I do not believe we will require further comments on either the collective or individual submissions at this time. Should we need them in the future, we will advise and set a response deadline.

I will be in touch regarding the result of our review of the filings and comments hopefully today.

Thank you,

Adam Shoneck

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Friday, December 07, 2012 4:50 PM
To: Cheryl Hunter; Adam Shoneck; Lance K. Tanaka
Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Attached please find Claimants' response to Respondents' letter.

Lesley A. Tse, Esq.
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz NY 12561
phone: (845) 255-9370
fax: (845) 255-8649
email: ltse@getmansweeney.com
web: www.getmansweeney.com

From: Cheryl Hunter [mailto:cah@scmlaw.com]
Sent: Friday, December 07, 2012 3:57 PM
To: Adam Shoneck; Lance K. Tanaka
Cc: Camille Johnson; Drew R. Hansen; Lesley Tse; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Re: *William Adams v. Central Refrigerated Service, Inc., et al.*
Jason Alley v. Central Refrigerated Service, Inc., et al.
Keith Baumgardner v. Central Refrigerated Service, Inc., et al.
LaSalle Boston v. Central Refrigerated Service, Inc., et al.
Shawn Bowman v. Central Refrigerated Service, Inc., et al.
Lindy Bronson v. Central Refrigerated Service, Inc., et al.
Hope Brooks v. Central Refrigerated Service, Inc., et al.
Timothy Brookshire v. Central Refrigerated Service, Inc., et al.
Casey Bruce v. Central Refrigerated Service, Inc., et al.
Robert Charlton v. Central Refrigerated Service, Inc., et al.
Mark Cluckey v. Central Refrigerated Service, Inc., et al.
Darryl Costlow v. Central Refrigerated Service, Inc., et al.
Riccardo Crolli v. Central Refrigerated Service, Inc., et al.
Vincent Crupi v. Central Refrigerated Service, Inc., et al.
Jerome Dubiak v. Central Refrigerated Service, Inc., et al.
James Dubin v. Central Refrigerated Service, Inc., et al.
Christopher Fosha v. Central Refrigerated Service, Inc., et al.
Rueben Fuller v. Central Refrigerated Service, Inc., et al.
Marcio Gonzalez v. Central Refrigerated Service, Inc., et al.
David Gordon v. Central Refrigerated Service, Inc., et al.
Jon Hanks v. Central Refrigerated Service, Inc., et al.
William Helring v. Central Refrigerated Service, Inc., et al.
Steven Hendren v. Central Refrigerated Service, Inc., et al.
Christopher Hugues v. Central Refrigerated Service, Inc., et al.

Please find attached correspondence from Camille N. Johnson concerning the referenced proceedings. A hard copy will follow via U.S. mail.

Cheryl A. Hunter
Legal Assistant
Direct: (801) 322-9254
cah@scmlaw.com

SNOW, CHRISTENSEN & MARTINEAU P.C.
SALT LAKE CITY • ST. GEORGE

1886 2011 125 YEARS OF SERVICE

10 Exchange Place Eleventh Floor Salt Lake City, Utah 84111
Phone: (801) 521-9000 | Fax: (801) 363-0400 | www.scmlaw.com

EXHIBIT D

Lesley Tse

From: Adam Shoneck <shonecka@adr.org>
Sent: Wednesday, December 19, 2012 1:53 PM
To: Drew R. Hansen; Dan Getman
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter; Lesley Tse
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Counsel:

Thank you for your comments on these issues. The AAA has made the initial, administrative determination that it will administer these matters in accordance with the Employment Arbitration Rules. This determination may be raised to the arbitrators for a final ruling once appointed.

Without making a determination on the issue of the triggering date for the Rule 1 stay, the AAA grants Respondent's requested extension to comply with the requirements for invoking the Rule 1 stay; therefore, the AAA will stay its administration of these matters for 60 days upon receipt of a copy of Respondent's motion to stay arbitration that has been filed with the court. The AAA must receive a copy of the filed motion on or before January 11, 2013 in order to grant the Rule 1 stay.

Sincerely,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Wednesday, December 19, 2012 2:46 AM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter; Dan Getman; Lesley Tse
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Adam:

Respondents disagree with virtually everything set forth in Mr. Getman's email.

As an initial matter, until last Friday when we received the email from you regarding a stay, Respondents never had been notified by the AAA that the Employment Rules might have any relevance here. On the contrary, the contracts at issue expressly state that the Commercial Arbitration Rules govern. Until the AAA advises Respondents in writing that it has made a preliminary determination regarding which rules it believes apply, I do not see how any one could reasonably argue that Respondents should have known they had to comply with Rule 1, let alone that the 30-day deadline referenced in Rule 1 was running. If Respondents had filed a motion to stay the proceedings previously and then advised the AAA that it had to stay the proceedings as a result of Rule 1, Claimants would no doubt have used that fact to argue that Respondents were conceding the employment rules govern. To suggest that Respondents had to pre-determine what the AAA's conclusion would be without having an official answer from the AAA is simply not fair or reasonable. Nor should Respondents have to comply with Rule 1 simply because Claimants incorrectly state in their various demands that the employment rules govern. The fact is Respondents were (and still are) waiting *for the AAA* to make its initial assessment regarding several preliminary issues, including the applicable rules. Because no such decision has ever been announced by the AAA, the deadline referenced in Rule 1 could not possibly have begun to run.

Lacking any facts or basis for asserting what is meant by Rule 1's use of the words "commencement of administration," Claimants just make it up. They argue that the AAA has been "administering" the arbitrations "by administering them." This reasoning is circular and just plain wrong. As we discussed when we spoke on Friday, the AAA had not yet "commenced administering" the arbitrations because of the complex nature of this matter and the unusual way in which it had proceeded with the multiple preliminary exchanges between the parties and unresolved issues in the District Court. Indeed, there has been no case matter number provided for any of the proceedings, no case manager assigned, and no letters indicating when Respondents must file their responses. The parties have instead been dealing with a Customer Intake Specialist (i.e., you) regarding the many preliminary issues.

Moreover, as a practical matter, Mr. Getman provides no reason why Respondents should not be given until some time in January to file a motion for a stay. Nor has he explained how Claimants will be prejudiced in any way if Respondents are given several weeks to move for a stay of the arbitration proceedings. Mr. Getman is instead taking the ridiculous position that Respondents must file a brief on December 26 -- the day after Christmas -- without any regard for my family's holiday plans or those of my colleagues. This is disturbing, given that my office recently granted Mr. Getman an

extension of time to oppose Respondents' contemplated motion for interlocutory certification because he wanted to spend time with his family during the holidays.

As for Mr. Getman's claims concerning my December 3 email, he is correct that Respondents previously met and conferred regarding a motion for a stay of the arbitration proceedings. However, as Mr. Getman is aware, I advised him on December 14 (prior to my conversation with you and before you sent your email that afternoon) that the motion was not yet ripe because the AAA had not decided whether the arbitrations would go forward. Put another way, why would Respondents ask the Court to enjoin the arbitration proceedings when the AAA was in the process of deciding whether it would proceed. If the AAA agreed that it should wait until Respondents' appellate rights are resolved, it would not be necessary for Respondents to seek a stay. Shortly after Mr. Getman and I spoke at noon on December 14, I received your email that referenced Rule 1 of the Employment Arbitration Rules. Suzanne Jones and I then spoke with you, and I promptly advised Mr. Getman in writing that we would be proceeding with our previously contemplated motion for a stay. Because it takes some time to draft a quality motion and we are not in a position to get anything on file by December 26 without negatively impacting the holiday plans of myself and my colleagues, Respondents respectfully request that the AAA find Rule 1's deadline has not been triggered or in the alternative grant Respondents an extension of time to file a motion for a stay (i.e., until January 11). We will, of course, protect Respondents' interests if forced to do so by December 26, but there is no reason why the AAA should unnecessarily compel individuals to work over the holidays.

I would appreciate it if you could let me know AAA's position regarding the deadline by noon on Wednesday.

Finally, contrary to the arguments being advanced by Mr. Getman below, there has never been any ruling by the District Court that the AAA Employment Rules have any relevance here. Indeed, the only AAA Rules mentioned in any of the parties' submissions to the District Court have been the AAA's Commercial Arbitration Rules. This is because those are the rules that the parties agreed would govern any arbitration between them. Mr. Getman's entire argument with respect to why he believes the AAA Employment Rules must be used instead rests on two faulty premises. First, he relies on the District Court's erroneous conclusion that Plaintiffs were employees, not independent contractors. However, that conclusion was based only on the pleadings alone -- essentially the same level of importance as surviving a motion to dismiss. This is not a factual finding based on any evidence, and Plaintiffs' mere allegations in a complaint cannot be used to bootstrap their conclusion that the parties' agreement to a certain set of rules must now be tossed aside because they pled in their complaint that they are employees. There is absolutely no authority -- legal or otherwise-- for such an approach. Similarly, Plaintiffs' argument that the claims they have pled should be handled by arbitrators with employment law experience is not

a justification for ignoring the parties' agreement to use the Commercial Arbitration Rules. This argument conflates the issue of arbitrator selection with what rules should be applied. These are obviously two separate questions and who the arbitrators should be for the arbitrations does not support Claimants' arguments as to which rules govern the disputes.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Regards,

Drew

From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Tuesday, December 18, 2012 2:10 PM
To: Adam Shoneck; Dan Getman; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Mr. Shoneck:

As we learned from you when we first called to raise this issue, the AAA makes an initial determination if the arbitration is an employment or commercial dispute. We believe this determination was resolved by the Court, however, when Judge Phillips sent this case to arbitration and did so declaring that Claimants are not independent contractors, but are employees. In the Order dated September 24, 2012, sending these cases to arbitration, Judge Phillips specifically made a finding that, under the agreement between the parties, Claimants here are employees and not independent contractors stating, "the Court finds, based on the Complaint and the moving papers, that Plaintiffs are employees, not independent contractors." On November 8, 2012, Judge Phillips found that the arbitration agreement does not prohibit collective arbitrations and directed that the FLSA claim be arbitrated collectively.

Furthermore, the claims relate to Claimants' employment status and are not "commercial" disputes. The collective arbitration raises only claims under the Fair Labor Standards Act, 29 U.S. C. 201, *et seq.* This claim is entirely related to the employment relationship and has nothing to do with any matters which commercial arbitrators would be expected to have competence. FLSA claims are regularly arbitrated under the employment rules. For example, issues in the collective arbitration will be whether defendants are "joint employers," *see e.g. Johnson v. Unified Government of Wyandotte County/Kansas City*, 371 F.3d 723, 727-28 (10th Cir. 2004), whether the Respondents paid the minimum wage, 29 U.S.C. 206, whether the claimants' payments for truck, insurance, equipment, gas, tolls, bonds, etc. act as *de facto* deductions from the minimum wage due Claimants, *see Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). The individual demands are no different, as they all raise identical employment matters: violation of the Federal Forced Labor statutes, 18 U.S.C. §§ 1589 and 1595; federal common law fraud concerning material aspects of employment, Utah common law fraud concerning material aspects of employment, Utah common law negligent misrepresentation concerning material aspects of employment, Utah UCC employment contract unconscionability, and Utah common law unjust enrichment due to employment misclassification. These claims revolve around the central argument that Respondents employed Claimants, but as found by the District Court, misclassified them as independent contractors. Again, the issues that are raised by these claims are issues typically handled in employment

arbitration and would be better handled by arbitrators familiar with employment law, not commercial arbitrators with no experience in this area.

Respondents write, "the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA's Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied." This is absurd. We recited in each and every cover letter addressed to you, that, "You previously advised me to file using the labor and employment demand form, notwithstanding that the agreement says that the AAA's commercial rules would apply based on the Court's determination and the nature of the claim." Respondents claim that it had no idea that the AAA believes the employment rules apply, simply is contradicted by all the facts. If Respondents had any doubt about the accuracy of our scores of letters, they could have simply asked. Respondents never did so and never sought clarification.

Respondents claim that "Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred." This is unreasonable as Respondents received Claimants' demands. Respondents also received Claimants' cover letter which informed them that, "I am filing this demand as an employment (rather than commercial) demand because 1) the claims raised herein are employment claims, and 2) because the District Court's September 24th Order already determined that the trucker Claimant herein is an employee. *See 9/24/12 Order, pp. 6-9.*" Respondents were well aware that the AAA was administering these matters as they had extensive communication with you and perhaps others at the AAA, writing countless letters and apparently making numerous *ex parte* phone calls as well. If the AAA were not administering the arbitrations, why would Respondents send any communications at all? The AAA is not obligated to send Respondents a letter formally uttering the word "administering." The AAA administers the matters by administering them, as it did here. The AAA's administration is no secret, it is well known to Respondents from the first demand and by all subsequent communications and dealings with the parties. If there was any doubt that the AAA was administering the demands, Respondents could have enquired, instead of simply communicating with the AAA about the administration. They did not do so, because they knew the answer to a question so obvious it needed not be asked.

As to Respondents' contention that they are somehow prejudiced by treating the demands as already "administered" under the employment rules, Respondents claims are surprising and frankly, unbelievable. Respondents chose not to seek a stay of arbitration, though it had every opportunity to do so. Respondents told Claimants they would move for a stay of arbitration on December 3rd (see attached emails). Respondents made two other motions to the District Court, first moving for reconsideration of the Court's clarification order and second, moving for expedited consideration of that motion. Both were denied. Both could have included a stay request, though neither did. Respondents even told the AAA that it planned to move for a stay of arbitration weeks ago, writing, "If Claimants will not stipulate to a stay of this arbitration proceeding, Respondents will ask the District Court to stay it. If Judge Phillips refuses to do so for any reason, Respondents will seek a stay from the Ninth Circuit." See 11/28/2012 Letter from Drew Hansen at p. 3. But Respondents simply never did. The only stay in effect is the one that Respondents requested staying litigation in the District Court while the case proceeds in arbitration. There is absolutely no reason for the AAA to halt proceedings simply because Respondents wish to take further frivolous action in Court. Arbitration in this form was directed by the District Court and that ruling is in effect. No Court has reversed that ruling or stayed arbitration.

Since the individual and collective arbitration demands were filed, Respondents have never moved the court for a stay of arbitration, instead attempting to address matters with the AAA and the Court seriatim – no doubt to string out these cases as long as possible. Respondents have belabored the issue of arbitral administration with the AAA in many, many letters. Respondents write, "At the very least, Respondents should have 30 days

from yesterday to file a motion seeking a stay with the District Court." There is no basis for extending the deadline.

Please let me know if you have any questions. Thank you,

Sincerely,

Dan Getman

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 10:32 AM
To: Dan Getman; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Thank you Mr. Getman. To clarify, Mr. Hansen voiced his objections to me and I requested his written comment on the matter.

American Arbitration Association
Dispute Resolution Services Worldwide

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Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Monday, December 17, 2012 10:29 AM
To: Adam Shoneck; Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Shoneck, we will make every effort to reply to yet another of Respondents' unsolicited letters by today. But due to several other briefs that are pressing, I cannot guarantee it. If not, it will be to you tomorrow. I would urge that the AAA cut off this extensive string of communications after this. Thanks, Dan

---

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 17, 2012 8:53 AM

To: Drew R. Hansen; Dan Getman
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen, thank you for your email.

Mr. Getman:

We request Claimants' comment on the below. If at all possible, we request that Claimant submit comment today given the tight timelines involved.

Thank you,

Adam Shoneck

Adam Shoneck
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Fax: 877 304 8457
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www.adr.org

From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Saturday, December 15, 2012 3:02 PM
To: Adam Shoneck
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Adam:

Thank you for providing us with the information below regarding a stay of arbitration. As we discussed yesterday afternoon on the phone (and have indicated previously), the parties' arbitration agreements specifically provide that the instant arbitrations will be conducted in accordance with the AAA's Commercial Arbitration Rules. (See Lease at section 21 and Contractor Agreement at section 18.) Accordingly, pursuant to Rule 1 of the AAA's Commercial Arbitration Rules, these are the rules that should apply to the parties' arbitrations. See Commercial Arbitration Rules, R-1. Agreement of Parties ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA"). Because we do not see a specific rule addressing stays in the context of the Commercial Arbitration Rules, please advise what Rule or Procedure the AAA usually follows with respect to stays in arbitrations governed by the AAA's Commercial Arbitration Rules.

Even assuming *arguendo* that Rule 1 of the AAA's Employment Arbitration Rules is relevant, that Rule states that Respondents have 30 days "after the AAA's commencement of administration" to seek judicial intervention, in order for the AAA to suspend administration of the arbitration. As we discussed with you yesterday, Respondents have not received any notice ***from the AAA*** that it has "commenced administration" of the arbitrations, which means that the triggering event for the deadline set forth in Rule 1 has not occurred. Indeed, Respondents have not received any letters at all. Nor have Respondents been advised by the AAA that any case numbers have been assigned, or that a case manager has been assigned to any of the proceedings. To the contrary, yesterday's communication from you was the first communication from the AAA that contained anything other than a message acknowledging that the AAA had received the parties' communications about the propriety of Claimants' desire to initiate arbitration while motions were still pending with the district court and appellate issues abound.

Moreover, prior to our conversation yesterday (when you mentioned in passing that the Employment Rules may govern the arbitrations but acknowledged that the decision is not final and that no written decision has been provided to the parties on that issue), the AAA had not given Respondents (or Claimants for that matter) any indication that it believed the AAA' s Employment Arbitration Rules might apply to these arbitrations. Because Respondents had no indication from the AAA that it believes the Employment Rules apply here, it would be fundamentally unfair and a violation of due process to suddenly impose a time limit that already had been running before Respondents had any indication from the AAA that the rule applied.

Accordingly, to the extent that Rule 1 of the AAA's Employment Arbitration Rules is applied for purposes of staying the arbitration here (and despite Respondents' continuing objection to the conclusion that the Employment Rules govern), Respondents believe that the only reasonable interpretation of Rule 1 is that Respondents have at least 30 days from the date the AAA indicates in writing that it has commenced the arbitrations under the Employment Rules to seek judicial intervention with respect to a stay. Since there has yet to be any formal commencement of administration of the arbitration by the AAA and no notice from the AAA as to which rules apply to the various arbitrations, Respondents respectfully submit that the thirty days provided by Rule 1 cannot possibly have begun to run. At the very least, Respondents should have 30 days from yesterday to file a motion seeking a stay with the District Court.

As my colleague, Suzanne Jones, and I discussed with you, this unusually complex case has not proceeded in a typical fashion following the filing of Claimants' initial demand on November 26, 2012 for a variety of reasons, including because of the motion for reconsideration pending before the District Court. You confirmed during our discussion yesterday that the AAA has not sent any letters to the parties or taken other steps with respect to administration of the arbitrations. However, you advised that one possible interpretation of Rule 1 could be that the 30 days under Rule 1 began to run from Claimants' initial filing date. In such case, judicial intervention would need to be sought by December 26, 2012. We responded that Rule 1 does not state that *any conduct by the Claimants* triggers the 30 day time period; instead, the Rule focuses solely on *the AAA's conduct* -- i.e., the AAA's "commencement of administration." In short, Respondents do not believe that a "Claimants' Demand Filing Date" interpretation is consistent with the Rule's plain language. If that was what the drafters intended by Rule 1, they would have said Respondents have 30 days "after Claimants file a demand" to seek judicial intervention -- not (as stated in the Rule) "after the AAA's commencement of administration."

There are other reasons why Respondents do not believe a "Claimants' Demand Filing Date" interpretation of Rule 1 is appropriate. As a preliminary matter, until two days ago, Respondents' motion for reconsideration remained pending before the District Court, and Judge Phillips had not indicated whether or not she would revise her ruling concerning a collective arbitration. Respondents have further made it clear that they intend to appeal Judge Phillips' ruling and will be filing various motions and briefs in that regard in the next several weeks.

In addition, as a practical matter, it would be very difficult for Respondents if they must seek judicial intervention with respect to a stay by December 26, 2012. As you can imagine, counsel have holiday plans with their families. If judicial intervention must be sought by December 26 (which is an incorrect interpretation of Rule 1 for the reasons explained above), this will impose an extreme hardship on counsel during the holidays in order to meet the deadline. Moreover, as we discussed with you, under the District Court's Local Rules, any party filing a motion must "meet and confer" with the other side at least 10 days before filing the motion. See Central District of California, Local Rule 7-3. When we met and conferred with Claimants' counsel yesterday regarding several motions (including the motion for a stay), Claimants requested an extension of time to file their opposition to one of the motions in light of the holidays. Respondents have agreed to that extension, such that Plaintiffs' opposition to the motion for interlocutory certification of an appeal will not be due until the second week of January 2013. As a similar courtesy, Respondents would ask that Rule 1 be interpreted to allow Respondents a reasonable period of time to file a motion seeking judicial intervention with respect to a stay, so that Respondents likewise can enjoy the holidays with their families.

For all of the foregoing reasons, Respondents respectfully submit that the AAA has not commenced the administration of any arbitration proceeding, let alone all of the actions filed by Claimants. Nor has the AAA rendered a written conclusion as to which rules apply to the various arbitrations. It is therefore unclear how Rule 1 has any application at all at the present time. Even if it does have some relevance, the 30-day deadline under Rule 1 has not begun to run. Please kindly confirm that the AAA agrees with the foregoing or at the very least that Respondents have 30 days from yesterday to file any motion for a stay with the District Court.

Regards,

Drew

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Friday, December 14, 2012 1:43 PM
To: Drew R. Hansen
Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Hansen:

Thank you for your email. I note your statement below regarding Respondent's intention to file for stay of arbitration.

As per Rule 1 of our Employment Arbitration Rules (attached for your reference), where a party seeks judicial intervention, the AAA will stay its administration for 60 days or until the court rules on the motion to stay, whichever occurs first. In order to invoke the Rule 1 stay, Respondent should provide the AAA with a copy of its motion to stay arbitration that has been filed with the court. If the court orders these matters stayed, the AAA will suspend our administration until the stay is lifted.

Please contact me with any questions or concerns.

Sincerely,

Adam Shoneck

American Arbitration Association
Dispute Resolution Services Worldwide

Adam Shoneck
Customer Intake Specialist
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E-mail: shonecka@adr.org
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From: Drew R. Hansen [mailto:dhansen@tocounsel.com]
Sent: Thursday, December 13, 2012 10:14 PM
To: Adam Shoneck

Cc: Camille Johnson; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com; Lesley Tse; Cheryl Hunter; Dan Getman
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam:

Please be advised that Respondents intend to promptly ask Judge Phillips to certify her ruling for appeal pursuant to 28 U.S.C. section 1292. In order to comply with procedural requirements, the motion will likely be heard in late January or early February. Defendants also intend to promptly pursue a petition for writ of mandamus with the Ninth Circuit. Until both of these appellate issues are resolved, it makes no sense for the AAA to proceed with any arbitrations.

Please also be advised that Respondents will seek an injunction/stay of any arbitration proceedings from the appropriate federal court should doing so become necessary.

Please let me know if you have any questions regarding the foregoing.

Best,

Drew

Drew R. Hansen
Attorney at Law

THEODORA ORINGHER PC
535 Anton Boulevard, Ninth Floor
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Main: 714.549.6200 Fax: 714.549.6201

Email: dhansen@tocounsel.com
Bio: Drew R. Hansen
Website: www.tocounsel.com

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Thursday, December 13, 2012 4:18 PM
To: Dan Getman; Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Mr. Getman:

Thank you for your email. We are still reviewing all filings and submissions, but should be able to respond shortly.

Thank you,

Adam Shoneck

Adam Shoneck
Customer Intake Specialist
1101 Laurel Oak Road Suite 100
Voorhees, NJ 08043
Tel: 856 679 4610
Fax: 877 304 8457
E-mail: shonecka@adr.org
www.adr.org

From: Dan Getman [mailto:dgetman@getmansweeney.com]
Sent: Thursday, December 13, 2012 6:21 PM
To: Adam Shoneck; Lesley Tse; Cheryl Hunter
Cc: Camille Johnson; Drew R. Hansen; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Adam, I write to inform the AAA, that the District Court denied Respondents' motion for reconsideration (see attached), thereby reaffirming that FLSA claims are to be arbitrated collectively and other claims are to be arbitrated individually. I note that this is exactly what Claimants have done in all respects. Please let me know if you have any questions.

Dan Getman
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845-255-9370
fax 845-255-8649
email: dgetman@getmansweeney.com
website: http://getmansweeney.com

****

From: Adam Shoneck [mailto:shonecka@adr.org]
Sent: Monday, December 10, 2012 8:06 AM
To: Lesley Tse; Cheryl Hunter

Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Dear Counsel:

I do not believe we will require further comments on either the collective or individual submissions at this time. Should we need them in the future, we will advise and set a response deadline.

I will be in touch regarding the result of our review of the filings and comments hopefully today.

Thank you,

Adam Shoneck

Adam Shoneck
Customer Intake Specialist
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From: Lesley Tse [mailto:ltse@getmansweeney.com]
Sent: Friday, December 07, 2012 4:50 PM
To: Cheryl Hunter; Adam Shoneck; Lance K. Tanaka
Cc: Camille Johnson; Drew R. Hansen; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: RE: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Attached please find Claimants' response to Respondents' letter.

Lesley A. Tse, Esq.
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From: Cheryl Hunter [mailto:cah@scmlaw.com]
Sent: Friday, December 07, 2012 3:57 PM
To: Adam Shoneck; Lance K. Tanaka
Cc: Camille Johnson; Drew R. Hansen; Lesley Tse; Dan Getman; Susan Martin; Jennifer Kroll; Edward Tuddenham; Suzanne C. Jones; Kenneth E. Johnson; markw@smesteel.com
Subject: Central Refrigerated Service, Inc., et al. [IWOV-iDocs.FID766652]

Re: *William Adams v. Central Refrigerated Service, Inc., et al.*
Jason Alley v. Central Refrigerated Service, Inc., et al.
Keith Baumgardner v. Central Refrigerated Service, Inc., et al.
LaSalle Boston v. Central Refrigerated Service, Inc., et al.
Shawn Bowman v. Central Refrigerated Service, Inc., et al.
Lindy Bronson v. Central Refrigerated Service, Inc., et al.
Hope Brooks v. Central Refrigerated Service, Inc., et al.
Timothy Brookshire v. Central Refrigerated Service, Inc., et al.
Casey Bruce v. Central Refrigerated Service, Inc., et al.
Robert Charlton v. Central Refrigerated Service, Inc., et al.
Mark Cluckey v. Central Refrigerated Service, Inc., et al.
Darryl Costlow v. Central Refrigerated Service, Inc., et al.
Riccardo Crolli v. Central Refrigerated Service, Inc., et al.
Vincent Crupi v. Central Refrigerated Service, Inc., et al.
Jerome Dubiak v. Central Refrigerated Service, Inc., et al.
James Dubin v. Central Refrigerated Service, Inc., et al.
Christopher Fosha v. Central Refrigerated Service, Inc., et al.
Rueben Fuller v. Central Refrigerated Service, Inc., et al.
Marcio Gonzalez v. Central Refrigerated Service, Inc., et al.
David Gordon v. Central Refrigerated Service, Inc., et al.
Jon Hanks v. Central Refrigerated Service, Inc., et al.
William Helring v. Central Refrigerated Service, Inc., et al.
Steven Hendren v. Central Refrigerated Service, Inc., et al.
Christopher Hugues v. Central Refrigerated Service, Inc., et al.

Please find attached correspondence from Camille N. Johnson concerning the referenced proceedings. A hard copy will follow via U.S. mail.

Cheryl A. Hunter
Legal Assistant
Direct: (801) 322-9254
cah@scmlaw.com

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EXHIBIT E

American Arbitration Association
Dispute Resolution Services Worldwide

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fax: 877-304-8457

Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
www.adr.org

March 20, 2013

VIA E-MAIL

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RE: Cilluffo and other individuals
v.
Central Refrigerated Service, Inc. Central Leasing, Inc., Jon Isaacson, and Jerry Moyes

Dear Counsel:

As you are aware, the Rule 1 abeyance in these matters ended March 12, 2013. We understand that the Respondent continues to pursue a stay of arbitration with the courts. Should the court issue a stay of arbitration, please provide a copy of the court order as soon as it becomes available.

As you are also aware, by letter dated December 14, 2012, the AAA notified the parties of its decision to accept these filings in accordance with our Employment Arbitration Rules, and that the AAA would administer these disputes as arising from employer-promulgated plans. This determination remains in place at this time. The parties are free to raise these issues to the appointed arbitrators for final rulings.

To date, we have received a total of one hundred-fourteen (114) filings on behalf of individuals and one filing for treatment as a collective action. Attached you will find a spreadsheet noting the names of each individual filer and his or her state of residence.

This will also acknowledge receipt of payment in the amount of $175.00 from each Claimant, and an additional $175.00 from Claimants toward the $3,350.00 filing fee for the collective action.

As communicated by email on March 19, 2013, we are not yet ready to proceed in the twenty-two cases involving residents of California. This includes the collective action filing as that matter necessarily includes those residents. We will contact the parties regarding these matters as soon as possible.

There are ninety-two (92) individual cases involving non-California residents. Respondent's portion of the filing fee in each matter is $925.00, for a total of $85,100.00. We request that Respondent submit payment of this fee on or before Wednesday, April 3, 2013.

Please feel free to contact me with any questions.

Sincerely,

Adam Shoneck
Case Filing Specialist
856-679-4610
ShoneckA@adr.org
Supervisor: Tara Parvey, ParveyT@adr.org

EXHIBIT F

Contract #: 16265

EQUIPMENT LEASING AGREEMENT

This Equipment Leasing Agreement (hereinafter called this "Lease" or the "Lease") is entered into by and between Central Leasing, Inc., a Nevada corporation with its principal address at P.O. Box 26297, Salt Lake City, UT 84126 ("Lessor"), and Bryan Ratterree whose residence or principal place of business is at 4313 So. Sunny Creek Cir, Spokane, Washington 99224 ("Lessee").

1. **LEASE OF EQUIPMENT.** Lessor hereby agrees to lease to Lessee, and Lessee hereby agrees to lease, for business purposes only, from Lessor, the equipment and other personal property (herein, together with all replacements, improvements, substitutions, additions and accessions therefor and thereto, collectively called the "Equipment" and individually called an "Item of Equipment" or "Item") described in Schedule A, attached hereto and incorporated herein. Each reference herein to "Lessor's Assigns" means any purchaser, transferee, assignee, or secured party referred to in Section 15 hereof and any of their assignees, and in the case of any partnership or trust shall also include each partner or beneficiary thereof, including each stockholder of any corporate partner or beneficiary.

2. **LEASE TERM AND RENT.**

A. Term. The term of this Lease shall be as set forth in Schedule A, attached hereto and incorporated herein.

B. Down Payment. Upon execution of this Agreement, Lessee shall pay Lessor the amount set forth in Schedule A as a non-refundable down payment for the lease of the Equipment.

C. Lease Payments. Lessee shall pay Lessor, as rent for use of the Equipment, the amount set forth in Schedule A until the expiration date of this Agreement, together with all such additional charges that may be provided herein. If Lessee fails to make any and all of the payments specified above within ten (10) days of the due date, Lessee agrees to pay, in addition to all collection costs incurred by Lessor, including reasonable attorney fees, interest on all amounts past due at the rate of one and one-half (1.5%) per month or the maximum legal rate allowed by applicable state law, whichever is higher.

D. Additional Charges. After delivery of the Equipment, Lessee shall pay Lessor, in addition to the amount specified above, all charges for structural alteration, special equipment, painting, lettering or artwork requested by Lessee. Such charges shall be separately invoiced and shall be due upon receipt. Lessee shall obtain written authorization from Lessor prior to making any alteration to the Equipment. Lessee shall bear the cost of any modification or additional equipment required to bring the Equipment into compliance with statutory regulations implemented after execution of this Agreement.

E. Deduction Authorization. Lessee hereby authorizes Lessor to make all arrangements necessary to have all payments set forth herein deducted from Lessee's compensation to be paid by the authorized motor carrier for whom Lessee will be providing transportation services under an Operating Lease Agreement pursuant to Paragraph 6 herein. In the event that the compensation to be paid to Lessee by operating carrier identified in Paragraph 6 is insufficient to pay the amounts owed to Lessor under this Agreement, Lessor may require Lessee to immediately pay to Lessor any additional amount owed.

F. Offset: Lessee hereby waives any and all existing and future claims, defenses, and offsets against any rent or other payments due hereunder. Lessee agrees to pay the rent and other amounts hereunder regardless of any claim, defense, or offset that may be asserted on its behalf.

3. **DELIVERY AND ACCEPTANCE.** Lessee will select the type, quality and supplier of each Item of Equipment. Lessor shall not be liable to Lessee for any failure or delay in obtaining delivery of any Equipment. Upon delivery of any Item of Equipment to Lessee, Lessee will forthwith inspect such Item and, unless Lessee gives Lessor prompt written notice of any defect in or other proper objection to such Item, Lessee shall execute and deliver to Lessor an individual leasing record, in form and substance satisfactory to Lessor covering such Item. Lessee's execution of an individual leasing record covering an Item of Equipment shall conclusively establish, as between Lessor and Lessee, that such Item has been unconditionally accepted by Lessee for all purposes of this Lease.

4. **NET LEASE; NO OFFSET.** THIS IS A NET LEASE, AND ALL RENT AND ALL OTHER SUMS PAYABLE BY LESSEE HEREUNDER SHALL BE PAID UNCONDITIONALLY WHEN DUE, WITHOUT ABATEMENT, DEDUCTION, COUNTERCLAIM OR SETOFF OF ANY NATURE, INCLUDING ANY THEREOF ARISING OUT OF ANY PRESENT OR FUTURE CLAIM LESSEE MAY HAVE AGAINST LESSOR, OR ANY LESSOR'S ASSIGNS OR THE MANUFACTURER OR SUPPLIER OF THE EQUIPMENT. In no event, except as otherwise expressly provided herein, shall this Lease terminate or shall any of Lessee's obligations be affected by reasons of any defect in or damage to or loss or destruction of all or any part of the Equipment, from any cause whatsoever, or any interference with Lessee's use of the Equipment by any person or for any other cause whatsoever.

5. **DISCLAIMER OF WARRANTIES.** LESSOR, NOT BEING THE MANUFACTURER OR THE VENDOR OF THE EQUIPMENT, HEREBY MAKES NO EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY OF ANY KIND OR AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE DESIGN OR CONDITION OF THE EQUIPMENT, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PURPOSE, OR ITS CAPACITY OR DURABILITY, OR THE QUALITY OF THE MATERIAL OR WORKMANSHIP OR CONFORMITY OF THE EQUIPMENT TO THE PROVISIONS AND SPECIFICATIONS OF ANY PURCHASE ORDER RELATING THERETO, OR ANY PATENT INFRINGEMENT OR PATENT OR LATENT DEFECTS, AND LESSEE HEREBY ACKNOWLEDGES THE FORGOING DISCLAIMER BY LESSOR. Provided no Event of Default has occurred and is continuing hereunder, and so long as the Equipment is subject to this Lease and Lessor is legally permitted so to do, Lessor hereby authorizes Lessee at Lessee's expense to assert for Lessor's account, all rights of Lessor under any manufacturer's, vendor's or dealer's warranty on the Equipment of any Item thereof.

6. **USE, MAINTENANCE, INSPECTION AND RETURN OF EQUIPMENT.** Lessee agrees to enter into an Operating Lease Agreement during the term of this Agreement with Central Refrigerated Service, Inc. or another authorized motor carrier approved in writing by Lessor (the "Operating Carrier") for the purpose of providing transportation services in interstate and/or intrastate commerce pursuant to the Federal Motor Carrier Safety Administration's leasing regulations (49 C.F.R. Part 376). In the event that the Operating Lease between Lessee and Operating Carrier is terminated during the term of this Lease, Lessee shall have the option of: (1)making arrangements to enter into a operating lease with another motor carrier specifically authorized by Lessor in its sole discretion within ten (10) days from the date of such termination; or (2) turning in the Equipment to Lessor immediately. Lessee agrees that the Equipment will be used in compliance with all statutes, laws, ordinances, regulations, and insurance

policy conditions. Lessee, at its own cost and expense, will keep, maintain and preserve the Equipment in as good order and condition as when delivered to Lessee hereunder, ordinary wear and tear from proper use thereof only excepted, including causing any Item of Equipment which has been damaged, but not irreparably, to be promptly repaired and placed in such order and condition. Lessee acknowledges and agrees that the engine governor on the Equipment shall be set at 65 MPH, which shall not be altered during the term of the Lease. Without Lessor's prior written consent, Lessee shall make no additions, improvement or modification to any Item of Equipment which will impair the originally intended valued, function, or use of such Item. All additions, attachments, accessions, substitutions and replacements to or for any Item of Equipment shall become a part thereof, the property of Lessor, and included with the term "Equipment." In the event Lessee is required to replace any tires on an Item of Equipment, Lessee agrees to use only tires of the brand, model and size approved by Lessor (e.g. Michelin, Bridgestone or Goodyear). Upon Lessor's request, Lessee will permit Lessor to have access to the Equipment at all reasonable times for the purpose of inspection and examination. Upon the expiration or termination of the lease term of each Item of Equipment (except for any Item purchased by Lessee pursuant to any purchase option), Lessee, at its own expense will return such Item of Equipment to Lessor in as good as condition as set forth in Schedule B, to such location in the continental United States as Lessor may designate in writing, and in the condition required by this Section 6.

7. **TITLE TO AND LOCATION OF EQUIPMENT; QUIET ENJOYMENT.** The Equipment shall at all times be and remain personal property notwithstanding that any Item thereof may now or hereafter be affixed to the Equipment, and title thereto shall at all times during the lease term thereof remain in Lessor. Each Item of Equipment shall be delivered to the location specified in the individual leasing record therefor, and shall not thereafter be removed from such location without Lessor's written consent. On Lessor's request, Lessee agrees, at its cost and expense, to affix a tag, plate or stencil to each Item showing Lessor's title thereto. Provided that no Event of Default has occurred and is continuing hereunder, Lessor agrees that it will not interfere with Lessee's quiet enjoyment and use of the Equipment during the lease term thereof.

8. **EXPENSES, TAXES, CLAIMS, ETC.** Lessee will pay when due, and to the extent paid by Lessor, shall reimburse Lessor for (a) any and all liability, loss, damage, expenses and claims asserted by third parties (including legal costs and fees) arising out of this Lease or the use and operation of the Equipment or any item thereof, (b) any and all taxes, fees, withholdings, levies, imposts, duties, assessments and charges of any kind or nature (together with any interest or penalties thereon), assessed against or imposed upon the Equipment or any Item thereof, Lessor or its assessed against or imposed upon the Equipment or any Item thereof, Lessor or its assigns, by any governmental authority in connection with this Lease, the rents received thereunder, or the operation or use thereof (excluding only federal and state income taxes on Lessor's income from this Lease), and (c) all applicable filing and recording fees incurred by Lessor or any third party in connection with any security interest in the Equipment or any Item thereof as well as any lien searches or costs incurred to release liens or security interests with respect to the Equipment or any Item thereof. Lessee shall also indemnify, defend and hold Lessor and its assigns harmless from and against any claim asserted against Lessor, as the owner of the Equipment, by any third party for personal injury or property damage resulting from the operation and use of the Equipment by Lessee or any of its employees, agents or servants. In the event that any report or return is required to make such report or return, Lessee will promptly furnish to Lessor such data and information in such form as will enable Lessor to make and file such report or return as expeditiously as possible. In the event that Lessor shall be held responsible for state sales tax, Lessee agrees to reimburse Lessor for any sales tax assessment resulting from this transaction. Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease.

9. **LEASE OF ENCUMBERANCES.** Lessee will not directly or indirectly create or permit to exist, and will promptly and at its own expense discharge, any lien, charge or encumbrance on the Equipment, or any Item thereof, except for any lien, charge or encumbrance resulting solely from the acts of Lessor.

10. **LOSS, DAMAGE OR DESTRUCTION.** Lessee shall bear all risks of loss, damage, theft, or destruction of or to any Item of Equipment. If any Item of Equipment becomes lost, stolen, destroyed, irreparably damaged, confiscated, requisitioned or commandeered (herein called a "Loss"), Lessee shall promptly notify Lessor thereof in writing and shall, at Lessor's option, either (a) replace such Item with like equipment which has a market value at least equal to that of the replaced Item immediately prior to such Loss, is in the condition required by Section 6 hereof, and to which clear title will pass to Lessor, or (b) on the Rent Payment Date next following such Loss, pay Lessor an amount equal to the sum of (i) the Casualty Loss Value (hereinafter defined) of such item computed as the Casualty Loss Value Payment Date (hereinafter defined), plus (ii) all accrued and unpaid rents owing for such Item for all Rental Periods commencing prior to such Casualty Loss Value Payment Date, plus (iii) all other amounts then payable by Lessee with respect to such Item, and upon such payment the lease term of such Item will terminate and Lessor will transfer to Lessee, without recourse or warranty, all of Lessor's right, title and interest in and to such Item. The "Casualty Loss Value" of any Item of Equipment as of any Rent Payment Date therefor means an amount obtained by multiplying the Lease Equipment Cost of such Item by the percentage set forth opposite such Rent Payment Date on the Schedule of Casualty Loss Value attached to the Schedule for such Item. The "Casualty Loss Value Payment Date" of any Item of Equipment shall be the Rent Payment Date specified in the Schedule for such Item. Lessee also understands that Lessor will not allow for pets of any kind to be housed in, or to be transported in the vehicle at any time unless specifically granted in writing by Lessor.

11. **INSURANCE.** Lessee will maintain, at its sole expense, at all times during the lease term of the Equipment (a) insurance against all risks of physical loss or damage to the Equipment (including theft and collision for Equipment consisting of motor vehicles) in an amount not less than the Casualty Loss Value of the Equipment or the replacement value of the Equipment, whichever is greater. In the event of physical loss or damage to the Equipment, Lessee agrees to have Equipment repaired or have made repair arrangements within thirty (30) days that the loss or damage occurred. In addition, Lessee will maintain (b) comprehensive public liability and property damage insurance, in the amounts specified in the Schedule for such Equipment. Such insurance policy or policies shall (i) name Lessor and Lessor's Assigns, as loss payees and as additional insureds, (ii) provide that they may be altered or canceled only after 30 days' prior to written notice to Lessor and Lessor's Assigns, and (iii) contain such other provisions as Lessor shall request. Lessee will furnish to Lessor certificates of insurance evidencing such coverage but Lessor shall be under no duty to ascertain the existence of such coverage or to advise Lessee in the event such coverage does not comply with the requirements hereof.

12. **EVENTS OF DEFAULT.** Lessee shall be in default under this lease upon the happening of any of the following events or conditions (herein called "Events of Default"): (a) Lessee shall fail to make any payment of rent or any other payment hereunder within five (5) days after the same is due and payable; or (b) Lessee or any guarantor of Lessee's obligations hereunder ("Guarantor") shall be in default in payment or performance of any other indebtedness or obligations now or hereafter owed by Lessee or by any Guarantor to Lessor, or to any parent, affiliate or subsidiary of Lessor, under any other agreement or instrument; or (c) Lessee shall fail to perform or observe any other covenant or agreement to be performed or observed by it under this Lease, and such failure shall continue for ten (10) days after written notice thereof by Lessor to Lessee; or (d) any representation, warranty, certification or statement made or furnished to Lessor herein or in any other document by or on behalf of Lessee or by any Guarantor proves to have been false in any material respect when made or furnished; or (e) Lessee or any Guarantor shall make an assignment for the benefit of creditors, or bankruptcy, arrangement,

reorganization, liquidation, insolvency, receivership or dissolution proceedings shall be instituted by or against Lessee or any Guarantor, and if instituted against Lessee or any Guarantor, shall be consented to or be pending and not dismissed for a period of 30 days; or (f) the condition of Lessee's or any Guarantor's affairs shall change so, as in the reasonable opinion of Lessor, to impair Lessor's title to the Equipment of increase Lessor's credit risk; or (g) if the Operating Lease Agreement between Lessee and the Operating Carrier is terminated by either party for any reason.

13. **REMEDIES OF LESSOR.** Upon the occurrence of an Event of Default, Lessor, at its option, may exercise any one or more of the following remedies: (a) terminate this Lease as to all or any Item of the Equipment upon written notice to Lessee, without prejudice to any other remedies hereunder; (b) declare the entire amount of unpaid rent then accrued and thereafter payable for all Equipment then leased hereunder to be immediately due and payable, or declare the aggregate Casualty Loss Value of all Equipment then leased hereunder as of the Rent Payment Date coincident with or next preceding the date of the occurrence of such Event of Default to be immediately due and payable, whereupon Lessee shall become obligated to pay to Lessor forthwith, as liquidated damages for the loss of the bargain and not as a penalty, such unpaid rent or such aggregate Casualty Loss Value, as the case may be; (c) cause Lessee, at its expense, to promptly assemble the Equipment or any Item thereof and return the same to Lessor at such place as Lessor may designate in writing; (d) enter upon the premises where any Item of Equipment is located, and without notice to Lessee, and with or without process, take immediate possession of such Item without liability to Lessor by reason of such entry or taking possession, and without such action constituting a termination of this Lease unless Lessor notifies Lessee in writing to such effect; (e) sell, re-lease or otherwise dispose of all or any Item of the Equipment in a public or private sale or lease transaction, and apply the proceeds of such sale or re-leasing, after first deducting all costs and expenses of such sale or re-leasing, to Lessee's obligations hereunder, with Lessee remaining liable for any deficiency and with any excess being retained by Lessor; and (f) proceed by appropriate action either at law or in equity to enforce performance by Lessee of the applicable covenants of this Lease or to recover damages for the breach thereof. In addition to the foregoing, Lessee shall be obligated hereunder for the payment of all other amounts then or thereafter payable by Lessee to Lessor hereunder, including without limitation, amounts owing for indemnification (will include the back charge of the first four weeks of truck payments on leases where the first four weeks are free, but only free with completion of lease, see page 8; rent payment for amount). None of Lessor's remedies under this Lease are intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to herein or otherwise available to Lessor in law or in equity. TO THE EXTENT PERMITTED BY APPLICABLE LAW, LESSEE WAIVES HEARING WITH RESPECT TO THE REPOSSESSION OF THE EQUIPMENT BY LESSOR IN THE EVENT OF A DEFAULT HEREUNDER BY LESSEE.

14. **FURTHER ASSURANCES.** Lessee will promptly execute and deliver to Lessor such further documents and assurances and take such further action as Lessor may from time to time reasonably request in order to more effectively carry out the purpose of this Lease and to protect the rights and remedies of Lessor hereunder, including without limitation, the execution and delivery of financing statements under the Uniform Commercial Code and appropriate consents and waivers from landlords and mortgages.

15. **SUBLEASE AND ASSIGNMENT.** Without Lessor's prior written consent, Lessee will not assign any of Lessee's rights hereunder or sublet or transfer any Item of Equipment. Lessor may, at any time, with or without notice to Lessee, sell, transfer, assign, mortgage and grant a security interest in this Lease, any Schedule, any individual leasing record and the Equipment or any Item of Equipment, in whole or in part, and in such event any such purchaser, transferee, assignee or secured party shall have and may exercise all of Lessor's rights hereunder, including the right to receive payments of rent and other sums payable by Lessee hereunder, solely with respect to the Item or Items of Equipment (and

Schedules and individual leasing records) to which such sale, transfer, assignment, mortgage and grant of security interest related. Any such sale, transfer, assignment, mortgage or security interest shall be subject to Lessee's rights and options, if any hereunder so long as no Event of Default has occurred and is continuing hereunder. Any of Lessor's Assign may reassign such rights and may mortgage and grant a security interest in any such Items of Equipment. All obligations of Lessor to Lessee hereunder shall be enforceable against Lessor and Lessor's Assigns except for any of Lessor's Assigns who is a lender and/or secured party. Lessee agrees that upon written notice to Lessee of any such sale, transfer, assignment, mortgage, or security interest, Lessee will accept and comply with the directions and demands of Lessor's Assigns. THE RIGHTS OF ANY OF LESSOR'S ASSIGNS SHALL NOT BE SUBJECT TO ANY DEFENSE, COUNTERCLAIM OR SETOFF WHICH LESSEE MAY HAVE AGAINST LESSOR.

16. **THIS AGREEMENT AS A LEASE.** Lessor and Lessee hereby agree that this Lease is a lease, that Lessor is the owner of the Equipment and that the relationship between Lessor and Lessee shall always be only that of lessor and lessee. Lessee agrees that Lessor is entitled to and shall have the right to claim the following tax benefits with respect to the Equipment: (a) depreciation deductions for Federal income tax purposes and depreciation or cost recovery deductions for Utah and any other applicable state income tax purposes; and (b) all items of income and deduction relating to this Lease.

17. **NOTICES.** All notices required hereunder shall be in writing and shall be deemed to have been given when delivered personally or when mailed with proper postage, for first class mail prepaid, addressed to Lessor or Lessee, as the case may be, at their respective addresses as set forth herein or at such other address as either of them shall from time to time designate in writing to the other, or in the case of Lessor's Assigns, at the addresses designated by them in writing.

18. **PURCHASE OF THE EQUIPMENT. IF LESSEE IS NOT IN DEFAULT, LESSEE MAY PURCHASE THE EQUIPMENT LEASED ON THE INDIVIDUAL LEASING RECORD AT THE EXPIRATION OF THE LEASE TERM FOR FAIR MARKET VALUE (HEREINAFTER THE "BUYOUT"). LESSEE MAY REQUEST TERMINATION OF THIS LEASE AT ANYTIME DURING THE LEASE TERM, AND, IF LESSOR, IN ITS SOLE DESCRETION, SHOULD GRANT SUCH REQUEST, SUCH TERMINATION SHALL BECOME EFFECTIVE ONLY ON PAYMENT OF THE BUYOUT AMOUNT AS DETERMINED BY LESSOR, PLUS A TERMINATION CHARGE EQUAL TO TEN PERCENT (10%) OF THE LEASE EQUIPMENT COST. LESSOR RESERVES THE RIGHT TO WAIVE THE TERMINATION CHARGE AT ITS SOLE DESCRETION.**

19. **MISCELLANEOUS.** This Lease, all Schedules, individual leasing records, and related riders executed by Lessee and Lessor, constitute the entire agreement between Lessor and Lessee with respect to the leasing of the Equipment and subject matter of this Lease. No term or provision of this Lease may be changed, waived, amended, discharged or terminated except by a written instrument executed by a duly authorized officer of the party against whom enforcement of the change, waiver, amendment, discharge or termination is sought, except that Lessor insert the serial number of any Item of Equipment on any Schedule or individual leasing record. No express or implied waiver by Lessor of an Event of Default hereunder, or of any other matter, shall in any way be construed to be, a waiver of any future or subsequent Event of Default or other matter whether similar in kind or otherwise. If any provision of this Lease is contrary to applicable law, such provision shall be deemed ineffective without invalidating the other provisions hereof. If Lessee fails to perform any of its obligations under the Lease, Lessor may, but shall not be obligated to, perform the same without thereby waiving such default, and any amount paid or expense or liability incurred by Lessor in such performance shall be paid or reimbursed

by Lessee upon Lessor's demand. Upon Lessor's request, Lessee agrees to furnish within 120 days after the last day of each tax or fiscal year of Lessee, a copy of Lessee's balance sheet as of the end of each such tax or fiscal year, prepared by a public accounting firm satisfactory to Lessor, as well as such interim financial statements as Lessor may reasonably request from time to time. The provisions of this Lease shall be binding upon, and shall inure to the benefit of Lessor's Assigns, and successors, and any permitted successors and assigns of Lessee. Time is of the essence of this Lease and all of its provisions.

20. **MILEAGE CHARGE.** Lessee agrees that the monthly lease payment is based upon normal wear and tear, and that Lessee will drive the vehicle 11,000 miles or less per month ("standard mileage"). Lessee agrees to pay an excess mileage charge as follows:

A. $0.05 for all mileage between 11,000 and 11,999 on a monthly basis;
B. $0.06 for all mileage between 12,000 and 12,999 on a monthly basis;
C. $0.07 for all mileage between 13,000 and 13,999 on a monthly basis;
D. $0.08 for all mileage between 14,000 and 14,999 on a monthly basis;
E. $0.09 for all mileage in excess of 15,000 miles.

This mileage charge will be calculated monthly by taking the prior month "satellite" (or actual) mileage total and applying it to above formula. Any such charge will be credited to the lease in addition to the weekly lease payments. Lessee has no right to any refund of amounts paid for excess mileage. Payment of excess mileage charges does not alter the length of the lease.

21. **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 or 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, and will be filed within the time allowed by the applicable statute of limitations. Failure to file the Demand within such statute-of-limitations period will be deemed a full waiver of the claim. The place of the arbitration hearing will be Salt Lake City, Utah. Both parties agree to be fully and finally bound by the arbitration award, and, where allowed by law, judgment may be entered on the award in any court having jurisdiction thereof. Each party will pay its own AAA arbitration filing fees and an equal share of the fees and expenses of the arbitrator, provided that if CONTRACTOR owns, leases (to COMPANY and other motor COMPANYs combined), or controls only one commercial motor vehicle, COMPANY will pay the full fees and expenses of the arbitrator as well as (i) the full arbitration filing fee, if COMPANY is the claimant, or (ii) the portion of the arbitration filing fee that exceeds the filing fee then in effect for civil actions in the United States district court for the district that includes Salt Lake City, Utah, if CONTRACTOR is the claimant. In all other respects, except to the extent otherwise determined by law, the parties will be responsible for their own respective arbitration expenses, including attorneys' fees.

IN WITNESS WHEROF, the parties hereto have executed this Lease as of November 18, 2010 .

Bryan Ratterree

By:_____
(Authorized Signature)
(LESSEE)

Central Leasing, Inc.

By:_____
William J. Baker, Jr.
Assistant Treasurer

Schedule A
INDIVIDUAL LEASING RECORD NO. 1

****

EQUIPMENT LEASED

Qty.	New or Lease Equipment Used	Make/Mfg. and Description	Model #	Serial #	Cost
1	New	2011	Prostar	3HSCWAPR1BN336649	$107,900.00

Less Capital Cost Reduction Payment To Be Received
(Down Payment)

$107,900.00

****

Location of Equipment: 5175 West 2100 South, West Valley City, Salt Lake County, Utah 84126
(Street Address) (City) (County) (State)(Zip)

1. Total Lease Equipment Cost: $107,900.00

2. Lease Term: 34 calendar months or 148 weeks commencing on the date of this Individual Leasing Record and ending on October 3, 2013 .

3. Rent Payment: Shall be in the amount of $610.00 payable on the first day of each week for the first 26 weeks in arrears commencing on November 18, 2010 and $560.00 per week each week thereafter to the fulfillment of the lease term plus the excess mileage charges set forth in Paragraph 20 of the Lease.

4. The undersigned Lessee hereby acknowledges that the Equipment described above (i) was selected by Lessee, (ii) has been delivered to, and inspected by, Lessee, (iii) of a size design, capacity and manufacture acceptable to Lessee and suitable for Lessee's purposes, (iv) is in good working order, repair and condition, and (v) has been installed to Lessee's satisfaction and undersigned Lessee hereby agrees that the Equipment described above is hereby leased from Lessor to Lessee under the Equipment Leasing Agreement between Lessor and Lessee dated as of November 18, 2010 . The Lease is subject to all of the terms, conditions and provisions thereof, as supplemented by the terms, conditions and provisions of the above referenced Schedule and any riders annexed to and made a part of said Schedule, and the terms and conditions hereof, and that this Individual Leasing Record is made a part of, and incorporates by references all of the terms, conditions and provisions of, the Lease.

Dated: November 18, 2010

Bryan Ratterree

By: _____
(Authorized Signature)
(Lessee)

Central Leasing, Inc.

By: _____
William J. Baker, Jr.
Assistant Treasurer

Schedule B - MINIMUM EQUIPMENT GUIDELINES

1. **TIRES:** They shall have a minimum of 50% tread on all tires. Shall have sound, recappable casings. Shall be matched tread design (all grip tread or regular tread). Shall be the original size. Wear beyond 50% will be charged back to Lessee on a pro-rated basis.

2. **BODY:** Shall have no dented or punctured panels (including fuel tanks). Minor scratches and scrapes permissible if repairs will not exceed $200.00 total.

3. **INTERIORS:** Shall be clean, shall have no tears, burns, damage to seats, seat backs, dashes, head liners, door panels or carpeting, original radio and other original equipment to be in place. Gauges, etc. shall be in working order.

4. **ENGINES:** Shall be mechanically sound with no cracked heads or blocks. Transmission and differentials shall have no seal leakage (including wheel seals - steer and driver axels), shall be operable as originally provided to customer, and shall have no excessive gear noise.

5. **DRIVE TRAIN COMPONENTS:** Shall perform to rated horsepower and pass dyno test pressure for oil leaks.

6. **GLASS:** Windshield shall not be pitted, chipped or cracked in such a way that would cause the vehicle to fail a DOT inspection. Windows and mirrors shall not be broken or cracked and all window-operating mechanisms shall be operable.

7. **ELECTRICAL:** Batteries, starters, alternators, etc. shall be operable. Lights and wiring will be operable with no broken sealed beams, lenses, etc. Heaters and air conditioning systems shall be operable.

8. **FACTORY EQUIPMENT & IN SERVICE EQUIPMENT:** Factory installed equipment and any equipment installed in unit prior to lease shall be intact and operable. Includes fifth wheel, mud flaps, airfoils, safety equipment, etc.

9. **CHROME & BRIGHT METAL TRIM:** Bumpers, grab handles, wheel hubcaps, grills, etc. originally on unit at the time of lease shall be free from damage and scrapes.

10. **BRAKES:** Shoes shall have a minimum of 50% wear. Wear beyond that point will be charged on a prorated basis.

Dated: November 18, 2010

Bryan Ratterree

By: _____
(Authorized Signature)
(Lessee)

Central Leasing, Inc.

By: _____
William J. Baker, Jr.
Assistant Treasurer

EXHIBIT G

CONTRACTOR AGREEMENT

Date: 3/8/2011
Truck No.: 17851

Parties:

1. CENTRAL REFRIGERATED SERVICE, INC., a Nebraska Corporation (or any subsidiary thereof), hereinafter referred to as the "COMPANY."

2. Gabriel Cilluffo , 6632 Summertrail Pl, Highland, California 92346, an independent contractor hereinafter referred to as "CONTRACTOR." The CONTRACTOR'S Social Security Number is REDACTED.

Recitals:

A. COMPANY is a contract and a common carrier by motor vehicle, engaged in the interstate transportation of freight pursuant to regulations with the United States Department of Transportation ("DOT") and other regulatory agencies having jurisdiction over COMPANY's operations.

B. CONTRACTOR is engaged in the business of transporting freight by motor vehicle pursuant to contracts with contract, or common carriers or shippers.

C. COMPANY desires to enter into an agreement with CONTRACTOR for the transportation of certain freight provided to CONTRACTOR by COMPANY from time-to-time in accordance with the provisions of 49 C.F.R. Part 376 (the "DOT Leasing Regulations").

Agreements:

The parties mutually agree as follows:

1. **Transportation of Freight.** CONTRACTOR hereby agrees to furnish to COMPANY the equipment which is more particularly described in Exhibit "A" and incorporated herein by this reference (the "Equipment"), and the labor necessary to perform all work necessary for the transportation of the freight furnished by COMPANY to CONTRACTOR from time-to-time. CONTRACTOR represents and warrants that CONTRACTOR has title to or is otherwise authorized to contract the Equipment and driving services to COMPANY. Upon taking possession of the Equipment from CONTRACTOR, COMPANY shall furnish to CONTRACTOR a receipt for equipment, which shall constitute the receipt required by the DOT Leasing Regulations. COMPANY agrees to exercise every reasonable effort to furnish to CONTRACTOR for transportation as much freight as is reasonably possible during the term of this Agreement. This is not to be construed as an agreement by COMPANY to furnish any specific tonnage of freight for transportation by CONTRACTOR at any particular time, or at any particular place nor is this to be construed as an agreement by CONTRACTOR to accept every load tendered by COMPANY.

2. **Compensation.** COMPANY shall provide COMPANY's pre-numbered trip record issued to CONTRACTOR or CONTRACTOR's driver for each trip. CONTRACTOR's compensation under this Agreement shall be determined asset forth below. Such compensation shall constitute the total

compensation to CONTRACTOR for the use of the Equipment and all services furnished, provided or done by CONTRACTOR.

A. Tractor Only and complete Tractor and Trailer: For all loads dispatched, rate per loaded mile and rate per empty mile calculated based on Household Mover's Guide (HHG) dispatch miles shall be paid according to the attached mileage pay **Addendum A**:

B. CONTRACTOR and COMPANY agree that a shipper, from time-to-time, may require loading or unloading and multi-stop pickup or deliveries. In those situations, when CONTRACTOR chooses to transport a shipment which requires loading or unloading, and CONTRACTOR performs such loading or unloading, CONTRACTOR will be compensated as follows:

i. For all loads that require loading and/or unloading where the amount is specified in an agreement between COMPANY and the shipper or CONTRACTOR, CONTRACTOR will be paid 100% of the amount COMPANY collected from shipper or consignee as specified in the agreement between COMPANY and shipper for loading or unloading.

ii. For all loads that require loading and/or unloading where the amount is not specified in an agreement between COMPANY and the shipper or CONTRACTOR, CONTRACTOR will be compensated as follows:

a. Loading and unloading will be paid at $30.00 per hour up to a maximum of four hours; or

b. CONTRACTOR assist (Driver Assist) $30.00 per load; or

c. Shrink wrap $20.00 per load.

iii. In order to be compensated by COMPANY for loading or unloading, CONTRACTOR must provide to COMPANY a bill of lading signed by the party incurring the charge acknowledging that the loading or unloading service was performed by CONTRACTOR.

iv. In the event that CONTRACTOR made more than one pickup and/or more than one delivery for one shipment, CONTRACTOR shall be paid $50.00 for the first additional pickup or delivery and $75.00 for the second and each subsequent pickup or delivery in excess of the original pickup and final destination.

v. In the event the customer requires CONTRACTOR to perform work other than as specified in Section 2 of this Agreement, CONTRACTOR will be an paid hourly rate of $18.00 per hour and this will be noted as local work.

vi. CONTRACTOR will not be paid for layovers.

vii. COMPANY will pay detention to CONTRACTOR at a rate of $30.00 per hour paid in quarter hour increments ($7.50 per full 15 minutes) up to a maximum of 8 hours or $240.00 if CONTRACTOR meets all of the following criteria:

a. CONTRACTOR must arrive at pickup or delivery location on-time and remain continuously at such location to be eligible for detention;

b. Detention begins 2 hours after the scheduled arrival time;

c. Bills of lading must be stamped or signed by Shipper or Consignee with arrival and departure times;

d. Accurate and timely arrival and departure QUALCOMM macros must be transmitted to COMPANY by CONTRACTOR.

e. Detention and Loading or Unloading fees will not be paid concurrently.

C. Fuel Surcharge: To the extent that the national average weekly fuel price published by the National Department of Energy differs from a base fuel price of $1.075 per gallon, COMPANY will compute a weekly target charge ("TARGET CHARGE") equal to 0.50% for each incremental change of $0.025 from the base fuel price. COMPANY will adjust CONTRACTOR's compensation for each loaded mile paid on CONTRACTOR's weekly settlement by a per mile amount calculated as follows: Average of two most recent TARGET CHARGES multiplied by 40% of COMPANY's estimated billed rate per loaded mile without fuel surcharge as of the Monday morning preceding the weekly settlement.

D. Any accessorial charges provided for in COMPANY's tariffs or rate schedules shall be retained by COMPANY.

E. CONTRACTOR has the right to examine copies of COMPANY's tariffs and documents from which rates and charges are computed (subject to limitations on disclosed information in accordance with the DOT Leasing Regulations) at COMPANY's home office during ordinary business hours.

F. COMPANY is hereby authorized to deduct from any of CONTRACTOR's settlements, CONTRACTOR's operating reserve or the Bond, the following, all of which shall be at COMPANY's actual cost unless otherwise specified below, or in any appendix, supplement, or addendum hereto, or any separate agreement between COMPANY and CONTRACTOR:

i. Settlement advances together with the COMPANY's cost of transferring funds for making such advances, plus an administrative fee of 10% of the advance up to a maximum of $20.00 to cover the cost of COMPANY employees processing the advance request. (COMPANY may, in its sole and absolute discretion, agree from time to time to advance a portion of an anticipated settlement at the request of CONTRACTOR; provided, however, CONTRACTOR acknowledges and agrees that COMPANY has no expressed or implied obligation to do so.)

ii. Amounts due COMPANY for vehicle licenses pursuant to Section 12 of this Agreement.

iii. Amounts due COMPANY for insurance or coverage obtained from or through COMPANY pursuant to this Agreement, any appendix, addendum, or supplement hereto, or any other agreement between COMPANY and CONTRACTOR.

iv. Amounts due COMPANY for loss or damage to cargo, or for personal injury or property damage pursuant to Sections 8.A., 8.B., 8.C., and 8.D. of this Agreement.

v. Amounts COMPANY is authorized to deduct pursuant to Sections 4.C., 4.D., 5.B., 5.C., 6, 7.D., 7.E., 11.A., 11.C., 13, and 14.B. of this Agreement.

vi. Amounts for parts or service at COMPANY-owned shop facility pursuant to the terms of a written estimate to be signed by CONTRACTOR or its drivers in advance of the work being performed. In the event that a written estimate is not prepared for any reason, the deduction will be based on the amounts for parts at COMPANY cost plus a mark-up of 15% on such parts and the labor at a rate of $67 per hour for the repairs, maintenance or service requested by CONTRACTOR or its drivers.

vii. Amount equal to the lesser of 10% of the total cost or $20 for each over-the-road maintenance support action to cover the administrative costs of such assistance. (COMPANY may, in its sole and absolute discretion, agree from time to time to forward funds as requested by CONTRACTOR from CONTRACTOR's operating reserve account for over-the-road maintenance; provided, however, CONTRACTOR acknowledges and agrees that COMPANY has no expressed or implied obligation to do so.)

viii. Amount of $2.31 per week, which includes COMPANY's actual cost and administrative fee and/or profit, in the event CONTRACTOR chooses to use a PrePass Plus provided by COMPANY.

ix. Amount of $10.00 per month in the event CONTRACTOR elects to become a member of APTDA.

x. Federal Highway Use Tax. COMPANY will file and advance payment for annual Federal Highway Use Tax associated with equipment provided by CONTRACTOR. The annual cost of $550 for Federal Highway Use Tax will be deducted from CONTRACTOR's settlement at a rate of $10.58 per week.

xi. Any other amount owing to COMPANY or which COMPANY is authorized to deduct pursuant to this Agreement, any appendix, addendum, or supplement hereto, or any other Agreement between CONTRACTOR and COMPANY. The parties agree that all such appendices, addendums, supplements and separate agreements are incorporated as part of this Agreement.

xii. Changes in Costs. If the cost to CONTRACTOR for any of the chargeback items listed herein shall change during the term of this Agreement, CONTRACTOR will be so notified by personal delivery, fax, satellite communication, or other written notice. In any event, CONTRACTOR shall not be subject to any such change until ten (10) calendar days after such notice or such later time as set forth in the notice. **CONTRACTOR's failure, by the end of ten (10) calendar days after such notice, to notify COMPANY of any objection of the change shall constitute CONTRACTOR's express consent and authorization to COMPANY to implement the change and modify accordingly the deductions from CONTRACTOR's settlement compensation, beginning immediately after the 10-day period. Such modified amount shall replace and supersede those shown in the Agreement.** If CONTRACTOR fails

to notify COMPANY of any objection within the 10-day period, or if CONTRACTOR notifies COMPANY of its objections within the 10 day period and CONTRACTOR and COMPANY are then unable to resolve the matter to their mutual satisfaction, then CONTRACTOR and COMPANY shall each have the right to terminate this Agreement effective immediately upon the change becoming effective (although CONTRACTOR shall remain subject to the change until CONTRACTOR's termination's effective date and time).

G. Upon request, COMPANY will furnish CONTRACTOR copies of those documents which are necessary to determine the validity of any charge for items initially paid for by COMPANY but ultimately deducted from CONTRACTOR's settlement. Before deducting any cargo or property damage claim from CONTRACTOR's compensation, COMPANY shall first provide CONTRACTOR with a written explanation and itemization for each such claim.

H. CONTRACTOR agrees that all settlements will be final and that CONTRACTOR will not make any claim or bring any action against COMPANY in connection with any settlement unless CONTRACTOR notifies COMPANY in writing, within sixty (60) days of the date of the settlement, of any claimed discrepancy or the basis for any claim of additional compensation in connection with the settlement.

I. CONTRACTOR may be eligible for incentives offered by COMPANY. Such incentives shall be offered at COMPANY'S discretion and will be identified in a separate written Exhibit to this contract. CONTRACTOR shall not be eligible for any incentives unless specifically included in a written and signed Exhibit.

3. **Required Documentation, Payment.** Upon completion of each trip made by CONTRACTOR under this Agreement, CONTRACTOR shall submit to COMPANY, by mail, hand delivery, or as otherwise authorized by COMPANY, all appropriate documents reflecting the full performance of such trip, including, but not limited to, all daily logs required by DOT regulations and all documentation required for COMPANY to bill and secure payment from the shipper. COMPANY shall pay CONTRACTOR within fifteen (15) calendar days of COMPANY's receipt of all required documentation. COMPANY may also require CONTRACTOR to submit trip envelopes, as required by the state taxing authorities, delivery receipts, bills of lading, pallet control sheets, and such other evidence of proper delivery, but not as a condition of payment.

4. **Company-Furnished Services or Equipment.**

A. CONTRACTOR is not required to purchase or rent any products, equipment, or services from COMPANY. In the event that CONTRACTOR elects to purchase or rent products, equipment, or services from COMPANY, the parties will enter into an addendum to this Agreement specifying the scope and nature of the equipment or services to be rented or purchased.

B. CONTRACTOR shall have the option to establish a voluntary operating reserve account with COMPANY to aid CONTRACTOR in establishing a reserve for the maintenance, repair, and upkeep of the Equipment. COMPANY shall not pay interest on such account. If such an account is established, then CONTRACTOR shall have the right to receive ComChek© advances for parts, service, repairs, and maintenance expenses up to the amount of the operating reserve. The funds will be available for the first five working days of each quarter for personal use other than Equipment-related expenses.

C. COMPANY agrees to allow CONTRACTOR to use trailers owned or leased by COMPANY (the "COMPANY Trailers") for the sole purpose of permitting CONTRACTOR to transport freight accepted by CONTRACTOR pursuant to this Agreement. CONTRACTOR agrees to assume complete responsibility for the COMPANY Trailers and to use them only for the purpose of transporting freight hereunder or while deadheading at COMPANY's request. In the event CONTRACTOR uses the COMPANY Trailers for any other purpose, COMPANY shall, in addition to any other remedies, be entitled to the amount of twenty cents ($0.20) per mile of unauthorized use plus One Hundred Fifty Dollars ($150.00) for each day, or portion of a day, of such unauthorized use. COMPANY may deduct such costs from CONTRACTOR's settlements or the Bond (as defined in Section 6). Unauthorized use of the COMPANY Trailers constitutes a material breach of this Agreement.

D. CONTRACTOR agrees to relinquish possession of each COMPANY Trailer in accordance with COMPANY's instructions following delivery of the shipment transported in such COMPANY Trailer, or upon demand by COMPANY. Upon termination of this Agreement, CONTRACTOR agrees to immediately return possession of all of the COMPANY Trailers in CONTRACTOR's custody to COMPANY at COMPANY's nearest terminal location or such other location as COMPANY may reasonably designate. In the event of breach or default by CONTRACTOR of its obligation to surrender possession of any COMPANY Trailer, CONTRACTOR shall be liable to COMPANY for all expenses and damages including, but not limited to, attorneys' fees, court costs, and loss of use incurred by COMPANY in reacquiring possession of the COMPANY Trailer. CONTRACTOR agrees that in the event it is necessary for COMPANY to enter upon private property or to remove private property in order to recover its Trailers, CONTRACTOR does hereby irrevocably grant COMPANY or its duly authorized agents, permission to do so and further agrees to hold harmless COMPANY, or its duly authorized agents, from any form of liability whatsoever in connection with such repossession. In the event CONTRACTOR retains custody of a COMPANY Trailer or otherwise fails or refuses to deliver possession thereof to COMPANY following delivery of a shipment, upon demand, or upon termination of this Agreement, in addition to any other remedies available to COMPANY, CONTRACTOR shall be liable to COMPANY in the amount of Fifty Dollars ($50.00) per day, per COMPANY Trailer, for each day or portion thereof that the COMPANY Trailer is not returned to the actual or constructive possession of the COMPANY, not as a penalty, but as rent to COMPANY of the loss of use of the COMPANY Trailer. COMPANY has the right to deduct any amounts to which it is entitled under this section from CONTRACTOR's settlements or the Bond.

E. Subject to the provisions of Section 4.C., COMPANY is responsible for and will pay for all normal maintenance, lubrication, brake repair, and required periodic safety inspections of the COMPANY Trailers. If CONTRACTOR incurs any costs for these items, COMPANY will reimburse CONTRACTOR provided CONTRACTOR complies with COMPANY's reimbursement policies and procedures. Before making any repairs to a COMPANY Trailer, other than minor adjustments as may be needed on the road, CONTRACTOR must first obtain prior authorization from COMPANY. CONTRACTOR further agrees to have COMPANY's Trailers repaired or maintained at a facility specifically authorized by COMPANY.

F. CONTRACTOR agrees to surrender possession of the COMPANY Trailers to COMPANY in as good condition as they were when CONTRACTOR received them, normal wear and tear from ordinary use excepted.

5. **Control of Equipment.**

A. The parties acknowledge that CONTRACTOR will be operating under the operating authority granted to COMPANY by the Federal Motor COMPANY Safety Administration ("FMCSA"). As required by the DOT Leasing Regulations, the Equipment shall be for COMPANY's exclusive possession, control and use for the duration of the Agreement, and COMPANY shall assume complete responsibility for the operation of the Equipment during such time. The 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. While CONTRACTOR is operating under COMPANY's operating authority, CONTRACTOR may not haul goods for any third party and while operating the Equipment, CONTRACTOR must comply with all rules and regulations of the FMCSA, DOT, and any and all applicable state laws. CONTRACTOR agrees not to exceed a driving speed of sixty-five (65) miles per hour or any applicable lower speed limit.

B. CONTRACTOR acknowledges that COMPANY may be liable to shippers pursuant to certain provisions of the federal laws governing motor carriers. If CONTRACTOR fails to properly and timely deliver any shipment of freight, CONTRACTOR agrees that in the event COMPANY determines, in its sole discretion, that CONTRACTOR has failed to deliver any goods consigned to COMPANY for delivery by a shipper, CONTRACTOR agrees that COMPANY shall have the right to temporarily take possession of the Equipment and complete the transportation of such freight and CONTRACTOR hereby waives any recourse against COMPANY for such action and agrees to reimburse COMPANY for any costs and expenses incurred by COMPANY in order to complete the shipment. CONTRACTOR further agrees to indemnify, defend, and hold COMPANY harmless from any liability to a shipper arising out of CONTRACTOR's failure to properly and timely deliver freight consigned to CONTRACTOR for delivery by COMPANY. In the event that COMPANY is required to take possession of the Equipment in order to complete the delivery of a shipment, the Equipment shall be returned to CONTRACTOR upon completion of such shipment at one of COMPANY's terminals. COMPANY may deduct any amounts to which it is entitled under this section from CONTRACTOR's settlements, CONTRACTOR's operating reserve or the Bond.

C. CONTRACTOR shall be required to equip each tractor listed on Exhibit "A" with a QUALCOMM satellite communications system prior to transporting cargo pursuant to this Agreement. CONTRACTOR, at its option, may acquire a QUALCOMM satellite communications system from COMPANY at such costs and terms as COMPANY may make available from time-to-time pursuant to a separate lease agreement, or CONTRACTOR may acquire the QUALCOMM satellite communications system from any third party if and only if it meets the standard requirements for compatibility with COMPANY's system. In the event CONTRACTOR acquires the QUALCOMM satellite communications system from COMPANY, COMPANY is authorized to deduct the lease payments as specified in the separate lease agreement from CONTRACTOR's settlements, CONTRACTOR's operating reserve or the Bond. Unless CONTRACTOR has an established account with Qualcomm that allows for communication between the parties, CONTRACTOR agrees to a weekly deduction from CONTRACTOR's settlement of $22.78 for messaging charges and monthly service fees assessed by COMPANY. CONTRACTOR authorizes COMPANY to deduct from its weekly settlement any and all separately arranged charges between CONTRACTOR and Qualcomm for in-cab communication services.

6. **Bond.** CONTRACTOR shall deposit with COMPANY a bond (the "Bond"), in cash, in the amount of TWO THOUSAND TWO HUNDRED DOLLARS ($2,200.00) for each tractor or trailer,

which amount is to be deducted from CONTRACTOR's compensation at $55.00 per week for 40 consecutive weeks. The Bond, less any appropriate deductions, shall be returned to CONTRACTOR by COMPANY, with a final accounting of the Bond, within forty-five (45) days of termination of this Agreement. The Bond amount, less any deductions authorized under this Agreement, will be returned within 45 days provided that CONTRACTOR has returned all door signs, licenses, permits, and other property belonging to COMPANY. The amount of the Bond amount may be reduced to reflect expenses incurred by COMPANY with respect to any efforts undertaken by COMPANY to seek return of such items. All or any portion of the Bond may be applied by COMPANY to satisfy any indebtedness incurred by the CONTRACTOR in connection with the performance of this Agreement and such deductions shall be described in CONTRACTOR's settlement statements. COMPANY may deduct from CONTRACTOR's settlements such amounts as may be necessary from time to time to maintain the required balance of the Bond. COMPANY, from time-to-time or upon the written request of CONTRACTOR, shall provide CONTRACTOR with an accounting of the balance of the Bond. COMPANY agrees to pay CONTRACTOR interest on the Bond as follows:

A. Interest shall accrue on a quarterly basis from the date COMPANY receives the Bond at a rate equal to the average yield on 91-day, 13-week Treasury bills as established in the weekly auction by the U.S. Treasury Department (the "Short-term Treasury Bill Yield") and such interest rate shall be subject to change on the first day of each calendar quarter according to the changes in the Short-term Treasury Bill Yield. Interest shall be paid in arrears and all accrued interest shall be credited to the Bond on the first day of each calendar quarter.

B. The principal amount on which interest shall be accrued shall be the amount of the Bond.

7. Workers' Compensation or Occupational Accident Insurance Coverage Requirements And Contractor Employee Requirements.

A. Prior to transporting cargo under this Agreement, and throughout the duration of this Agreement, CONTRACTOR agrees to obtain and maintain workers' compensation insurance (all states coverage) covering all drivers and other personnel furnished by CONTRACTOR hereunder in a form and manner as set forth in Exhibit B.

B. From time to time, CONTRACTOR may employ, at its own expense, third parties such as drivers, driver helpers, and laborers to carry out CONTRACTOR's obligations under this Agreement. CONTRACTOR shall retain sole and complete responsibility for hiring, setting the wages, hours, working conditions, resolution grievances, and the supervision, training, discipline, and discharge of all drivers and other personnel necessary for the performance of CONTRACTOR's obligations under this Agreement, it being specifically agreed and understood that such drivers and other personnel are under no circumstances to be considered employees of COMPANY.

C. CONTRACTOR agrees that neither CONTRACTOR nor its employees are entitled to workers' compensation benefits from COMPANY.

D. CONTRACTOR shall ensure that all of its drivers are properly licensed and meet all FMCSA and DOT requirements, as well as the requirements of all applicable state department of transportation pronouncements, rules, and regulations, and COMPANY policies and requirements. COMPANY reserves the right to ensure that all of CONTRACTOR's employees meet any and all applicable state and federal requirements in addition to all COMPANY policies and requirements. Any expenses incurred by COMPANY to ensure that CONTRACTOR's employees are qualified may be

charged to CONTRACTOR by COMPANY. COMPANY may deduct any amounts to which it is entitled under this section from CONTRACTOR's settlement, CONTRACTOR's operating reserve or the Bond. During the term of this Agreement and while CONTRACTOR is operating the Equipment under COMPANY's operating authority, COMPANY shall have authority to bar any of CONTRACTOR's employees, which it deems unqualified, from the Equipment.

E. CONTRACTOR shall be solely responsible for the payment of all payroll taxes for its employees. CONTRACTOR agrees to indemnify, defend, and hold COMPANY harmless from any liability arising from injuries to CONTRACTOR's employees, including, but not limited to rights of such employees under the workers' compensation laws. CONTRACTOR further agrees to indemnify and hold COMPANY harmless for any liability assessed against COMPANY for Federal Insurance Contributions Act taxes, unemployment, payroll or any other taxes, insurance, or penalties assessed against COMPANY relating to CONTRACTOR's employees. COMPANY may deduct any amounts to which it is entitled under this section from CONTRACTOR's settlements or the Bond.

F. CONTRACTOR, by the execution of this Agreement, consents to periodic drug and alcohol testing. CONTRACTOR understands that any and all employees he engages shall also be subject to periodic drug and alcohol testing in keeping with COMPANY policies and any and all applicable laws or regulations.

8. Insurance and Liability for Damages.

A. The respective insurance obligations of the parties shall be as set forth in Exhibit B. COMPANY shall maintain insurance coverage for the protection of the public pursuant to the requirements of 49 U.S.C. § 13906. However, COMPANY's possession of the legally required insurance shall in no way restrict COMPANY's right of indemnification from CONTRACTOR provided under this Agreement.

B. Except as set forth in Exhibit B, CONTRACTOR shall be liable for, and CONTRACTOR shall indemnify and hold COMPANY harmless against, the entire amount of any cargo damage or loss in the event that any claim is made against COMPANY by a third party related to any shipment handled by CONTRACTOR or its drivers. All such claims may be deducted, at COMPANY's discretion, from CONTRACTOR's settlements or the Bond; provided, however, that COMPANY shall provide CONTRACTOR with a written explanation and description of any such deduction prior to deducting the amounts from CONTRACTOR's settlements, CONTRACTOR's operating reserve or Bond.

C. CONTRACTOR shall be liable to COMPANY, and CONTRACTOR shall indemnify and hold COMPANY harmless, for any damage or loss to any COMPANY Trailer owned by COMPANY or its equipment leasing affiliate and in CONTRACTOR's possession in connection with the performance of this Agreement. COMPANY may deduct any amounts to which it is entitled hereunder from CONTRACTOR's settlements or the Bond; provided, however, that COMPANY shall provide CONTRACTOR with a written explanation and description of such deductions prior to making the deduction from CONTRACTOR's settlement, CONTRACTOR'S operating reserve or the Bond.

D. Except as set forth in Exhibit B, CONTRACTOR, at its own expense, shall maintain continuous non-trucking liability insurance coverage of at least $1,000,000.00. CONTRACTOR shall provide COMPANY with a certificate of insurance evidencing such coverage. Alternatively, CONTRACTOR may purchase non-trucking liability insurance from COMPANY at such cost, terms, and

conditions as COMPANY may establish from time to time. In the event that CONTRACTOR elects to purchase non-trucking liability insurance from COMPANY, COMPANY shall provide CONTRACTOR with a certificate of insurance specifying such coverage, and, if requested by CONTRACTOR, a copy of the insurance policy. In addition, COMPANY is authorized to deduct the cost of such insurance from CONTRACTOR's settlements.

9. **Display of Identification.** The parties acknowledge that while CONTRACTOR is operating under COMPANY's operating authority, CONTRACTOR shall be required to display all information required by federal and state law, such as COMPANY's name and operating authority on the Equipment. COMPANY shall furnish CONTRACTOR with all necessary identification required by the FMCSA and any other applicable federal or state statutes, rules, or regulations. Upon the termination of this Agreement, all such identification shall be immediately removed from the Equipment by CONTRACTOR and returned to COMPANY as specified in Section 14 below.

10. **Maintenance of Equipment.** CONTRACTOR shall be responsible for maintaining the Equipment in good repair, in a safe operating condition, and a good appearance. CONTRACTOR further agrees to maintain the Equipment in accordance with all specifications and regulations promulgated by any applicable state or federal agency, including but not limited to, the FMCSA and the DOT. In order to ensure the Equipment's compliance with all DOT regulations, CONTRACTOR shall, at its sole cost and expense, make the Equipment available for inspection by COMPANY upon COMPANY's reasonable request. Furthermore, as required by 49 C.F.R. § 396.17, CONTRACTOR shall forward to COMPANY all inspection and maintenance records for the Equipment using the Maintenance Interval Tracking Form (Exhibit C).

11. Payment of Certain Expenses.

A. CONTRACTOR shall be responsible for all operating expenses, including expenses for fuel, oil, and repairs to the Equipment, fuel taxes, federal highway use tax, mileage taxes, tolls, ferries, permits, licenses, and all other similar expenses incurred in the operation of the Equipment in connection with this Agreement, except as provided in Paragraph 12 of this Agreement. Any fines for parking, over-dimension, moving vehicle, weight violations, or any other fines, penalties, or assessments based upon operation of the Equipment shall be the sole responsibility of CONTRACTOR. COMPANY shall be permitted to charge CONTRACTOR for any such fines or penalties which it pays or deduct said amounts from any compensation due to CONTRACTOR hereunder by deducting such amounts from CONTRACTOR's settlements, CONTRACTOR's operating reserve or the Bond; provided, however, COMPANY shall be obligated to pay any fine or assessment for overweight trailers when the trailers are preloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside CONTRACTOR's control.

B. COMPANY will provide at its own cost, without back-charge to CONTRACTOR:

i. Reefer Fuel (CONTRACTOR shall indemnify, defend, and hold COMPANY harmless from any and all claims against CONTRACTOR as a result of CONTRACTOR's misuse or illegal use of "dyed" fuel--fuel that is not subject to road and fuel tax);

ii. Trailer Washouts; or

iii. Pre-authorized COMPANY Trailer repair.

C. In the event CONTRACTOR purchases or leases the Equipment from COMPANY OR Central Leasing, Inc., the COMPANY is authorized to deduct weekly lease payments from CONTRACTOR's settlements and to make payments to such lessor for the benefit of CONTRACTOR. COMPANY will not make any lease payment on behalf of CONTRACTOR if there is not compensation due to CONTRACTOR by COMPANY in an amount sufficient to equal such lease payments.

D. In the event CONTRACTOR enters into an agreement with a third-party tax preparation service and such agreement authorizes such tax preparation service to deduct the fees for such service from CONTRACTOR's settlement, COMPANY is authorized to deduct the fees for such service from CONTRACTOR's settlements and to make payments to such tax preparation service for the benefit of CONTRACTOR. COMPANY will not make any payment with respect to such tax preparation service on behalf of CONTRACTOR if there is not compensation due to CONTRACTOR by COMPANY in an amount sufficient to equal payments for such service after all other authorized deductions have been made from CONTRACTOR's settlement.

E. In the event CONTRACTOR enters into an agreement with a third-party legal service and such agreement authorizes such legal service to deduct the fees for such service from CONTRACTOR's settlement, COMPANY is authorized to deduct the fees for such service from CONTRACTOR's settlements and to make payments to such legal service for the benefit of CONTRACTOR. COMPANY will not make any payment with respect to such legal service on behalf of CONTRACTOR if there is not compensation due to CONTRACTOR by COMPANY in an amount sufficient to equal payments for such service after all other authorized deductions have been made from CONTRACTOR's settlement.

F. Unless CONTRACTOR elects to obtain its own International Fuel Tax Agreement ("IFTA") fuel tax permit, COMPANY shall prepare and file all reports required by IFTA or other applicable state laws with respect to the fuel, road and mileage taxes incurred by the Equipment during the term of this Agreement. For the purposes of computing and paying all such taxes, COMPANY shall issue CONTRACTOR a fuel card to be used for all fuel purchases. All fuel charges, including any transaction fees charged by the fuel card provider, and $5.00 for any replacement card(s), will be charged back to CONTRACTOR by COMPANY. By using COMPANY's fuel card, CONTRACTOR further authorizes COMPANY to deduct any charges made by CONTRACTOR or its drivers for fuel and other ancillary items, including but not limited to, oil and coolants. In the event CONTRACTOR or its drivers fail to use COMPANY's fuel card, CONTRACTOR shall be responsible for providing COMPANY with an accurate accounting of all fuel purchases and miles treated for the purposes of computing state fuel tax liability, and CONTRACTOR shall provide COMPANY with all original fuel receipts. COMPANY is authorized to deduct 1.1¢ per mile from CONTRACTOR's compensation to cover COMPANY's cost in calculating, reporting and paying all fuel taxes for the operation of CONTRACTOR's equipment. Such charges will not be assessed to CONTRACTOR in the event CONTRACTOR elects to maintain its own IFTA fuel tax permit, in which case CONTRACTOR must provide COMPANY with a valid copy of such permit, and CONTRACTOR shall be solely responsible for calculating, reporting and paying all fuel, road and mileage taxes owed for the operation of the Equipment, and CONTRACTOR further agrees to indemnify, defend and hold COMPANY harmless related to such taxes

12. Base Plates and Refunds. COMPANY shall pay the cost of any international registration plan base plate issued to CONTRACTOR; provided, however, if this Agreement is terminated for any reason, CONTRACTOR shall be responsible for payment of a prorata portion of the cost of such base plate. In the event that COMPANY receives a refund or credit for base plates issued to CONTRACTOR, issued in the name of COMPANY or any of its subsidiaries, or if the base plates are authorized to be sold by COMPANY to a third party, COMPANY shall refund to CONTRACTOR a prorata share of such refund as COMPANY determines to be appropriate.

13. COMPANY Items. CONTRACTOR shall reimburse COMPANY for any COMPANY items such as binders, chains or other parts which are used by CONTRACTOR, or COMPANY may deduct the fair market value of such items from CONTRACTOR's settlements, CONTRACTOR's operating reserve or the Bond.

14. Term of Agreement.

A. This Agreement shall become effective upon the execution of the Agreement and the receipt for the Equipment described in Exhibit "A" and shall remain in full force and effect until December 31 of the year in which this Agreement is executed. If not terminated, this Agreement shall automatically renew for a term of one (1) year upon the same terms and conditions hereof. In the event any party violates any material provision of this Agreement or any COMPANY policy, the other party shall have the right to immediately terminate the Agreement. This Agreement may be terminated by either party upon ten (10) days' prior written notice to the other party. In the event that CONTRACTOR does not desire to renew this Agreement, CONTRACTOR shall be obligated to notify COMPANY in writing on or before each November 1 of each year of its intent not to renew, prior to COMPANY applying for all applicable prorates and permits. In the event that CONTRACTOR fails to so notify Company, and ultimately terminates this Agreement, CONTRACTOR shall be responsible for the costs of all such proration and permits and such proration and permits shall remain the property of COMPANY upon termination of this Agreement. Written notification of termination of this Agreement may be given

at COMPANY's headquarters located at 5175 West 2100 South, West Valley City, Utah between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday.

B. When possession of the Equipment is surrendered by COMPANY to CONTRACTOR upon termination, CONTRACTOR shall furnish a receipt for the Equipment to COMPANY and shall return all tabs, licenses and permits to COMPANY. In the event that CONTRACTOR fails to provide such receipt, CONTRACTOR shall indemnify, defend, and hold COMPANY harmless from any and all claims asserted against COMPANY as a result of CONTRACTOR's display of COMPANY's tabs, licenses, or permits after the termination of this Agreement. COMPANY may withhold final payment to CONTRACTOR pending the removal and return of all identification devices (except in the case of identification painted directly on the Equipment), including all signs, tabs, licenses, and permits and COMPANY-provided items described in Paragraph 13 above.

15. Independent Contractor. CONTRACTOR shall be considered an independent contractor and not an employee of COMPANY. CONTRACTOR shall direct the operation of the Equipment and the manner and performance of its compliance with this Agreement and shall be solely responsible for the direction and control of its employees. CONTRACTOR's performance of services pursuant to this Agreement shall be subject to compliance with the rules and regulations of the FMCSA, DOT, all applicable state agencies, and COMPANY's safety policies and procedures. CONTRACTOR shall determine the method, means, and manner of performing services under this Agreement.

16. Entire Agreement. This Agreement, and any other document specifically referred to or contemplated by this Agreement, constitutes the entire Agreement and understanding between the parties. This Agreement shall not be modified or amended in any respect except by a written instrument, signed by the parties hereto.

17. Contractor Not Agent. Unless specifically provided herein, CONTRACTOR is not the agent of COMPANY and shall not have the right to bind COMPANY. CONTRACTOR shall indemnify, defend, and hold COMPANY harmless from any claim asserted against COMPANY as a result of CONTRACTOR's breach of this paragraph.

18. 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 or 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, and will be filed within the time allowed by the applicable statute of limitations. Failure to file the Demand within such statute-of-limitations period will be deemed a full waiver of the claim. The place of the arbitration hearing will be Salt Lake City, Utah. Both parties agree to be fully and finally bound by the arbitration award, and, where allowed by law, judgment may be entered on the award in any

court having jurisdiction thereof. Each party will pay its own AAA arbitration filing fees and an equal share of the fees and expenses of the arbitrator, provided that if CONTRACTOR owns, leases (to COMPANY and other motor COMPANYs combined), or controls only one commercial motor vehicle, COMPANY will pay the full fees and expenses of the arbitrator as well as (i) the full arbitration filing fee, if COMPANY is the claimant, or (ii) the portion of the arbitration filing fee that exceeds the filing fee then in effect for civil actions in the United States district court for the district that includes Salt Lake City, Utah, if CONTRACTOR is the claimant. In all other respects, except to the extent otherwise determined by law, the parties will be responsible for their own respective arbitration expenses, including attorneys' fees.

19. **Invalidity of Provision.** In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

20. **Waiver of Breach**. The waiver of any breach of any term, condition, or provision of this Agreement, by either party, shall not be deemed a waiver of such term, condition, or provision with respect to future breaches or violations of this Agreement.

21. **Assignment**. This Agreement shall not be assigned by CONTRACTOR without the prior written consent of COMPANY. COMPANY may assign this Agreement to any of its subsidiaries or successors-in-interest without prior consent of CONTRACTOR.

22. **Binding Effect**. This Agreement shall be binding upon and endure to the benefit of COMPANY and its successors and assigns and CONTRACTOR and its successors, assigns, heirs, or personal representatives.

23. **Attorneys' Fees.** In the event either party hereto brings an action to enforce any provisions hereof, to secure specific performance hereof, or to collect damages of any kind for any breach of this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees.

24. **Copies.** An original and two copies of this Agreement shall be executed by the parties. COMPANY shall keep the original and shall place a copy of this Agreement in the Equipment, such copy to remain in the Equipment at all time during the term of this Agreement. CONTRACTOR shall keep the other copy of this Agreement.

IN WITNESS WHEREOF, the parties hereby set forth their hands by their duly authorized representatives as of the date first above written.

CENTRAL REFRIGERATED SERVICE, INC.
a Nebraska corporation

By:_____
Its: COMPANY REPRESENTATIVE

CONTRACTOR

By:_____
Gabriel Cilluffo

EXHIBIT "A"
EQUIPMENT

DESCRIPTION OF THE EQUIPMENT

UNIT #:	17851
MAKE:	Freightliner
YEAR:	2011
SERIAL#:	1FUJGLDRXBSAW8982
BASE LICENSE:	State of Utah
Owned By:	Gabriel Cilluffo 6632 Summertrail Pl, Highland, California, 92346
Financed By:	Central Leasing, Inc., P.O. Box 26297, Salt Lake City, Utah, 84126

is being operated by Central Refrigerated Service, Inc. (COMPANY) under a CONTRACTOR AGREEMENT dated 3/8/2011 for a period of time beginning on this date and continuing thereafter, until said Agreement of 3/8/2011 shall be terminated. The original Agreement of 3/8/2011 is kept at the offices of Central Refrigerated Service, Inc., 5175 West 2100 South, West Valley City, Utah 84120.

RECEIPT OF POSSESSION BY COMPANY

Possession of the equipment was taken on the 8 day of March, 2011, at 2 o'clock, P .M.

CENTRAL REFRIGERATED SERVICE, INC.

By: _____
COMPANY REPRESENTATIVE

RECEIPT OF POSSESSION BY CONTRACTOR UPON TERMINATION

Possession of the equipment was taken on the _____ day of _____, 20____, at _____ o'clock, _____.M.

By: _____
Gabriel Cilluffo

EXHIBIT B

INSURANCE AND ALLOCATION OF LIABILITY

1. **COMPANY'S INSURANCE OBLIGATIONS.** It shall be COMPANY's responsibility, pursuant to DOT regulations promulgated under 49 U.S.C. § 13906 and pursuant to applicable state laws, to provide public liability, property damage, and cargo liability insurance for the Equipment at all times while the Equipment is being operated on behalf of COMPANY. However, COMPANY's possession of such insurance shall in no way affect COMPANY's rights of indemnification against CONTRACTOR as provided for in this Agreement.

2. **CONTRACTOR'S INSURANCE OBLIGATIONS.** CONTRACTOR shall maintain, at its sole cost and expense, the following minimum insurance coverages during this Agreement:

(a) NON-TRUCKING LIABILITY - CONTRACTOR shall procure, carry, and maintain public liability and property damage insurance which shall provide coverage to CONTRACTOR whenever the Equipment is not being operated on behalf of COMPANY in a combined single limit of not less than One Million Dollars ($1,000,000) for injury or death to any person or for damages to property in any one occurrence. Such coverage shall be no less comprehensive than the coverage COMPANY will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 2(g) below. In addition, such coverage shall be primary to any other insurance that may be available from COMPANY. CONTRACTOR shall be responsible for all deductible amounts and for any loss or damage in excess of the policy limit.

(b) WORKERS' COMPENSATION/OCCUPATIONAL ACCIDENT INSURANCE. CONTRACTOR shall provide workers' compensation insurance coverage for CONTRACTOR (if a natural person), all of its employees and agents, anyone driving the Equipment, and any other persons required to be covered under the worker's compensation law of any state that is reasonably likely to have jurisdiction over CONTRACTOR's business operations and in amounts not less than the statutory limits required by such applicable state law. The worker's compensation insurance policy shall provide principal coverage in Utah and the state in which the work is principally localized if different and shall provide "other states coverage" that excludes only North Dakota, Ohio, Washington, West Virginia, and Wyoming. As evidence of such coverage, CONTRACTOR shall provide COMPANY with a copy of the insurance policy declarations page for COMPANY's verification before operating the Equipment under this Agreement. Such coverage shall be no less comprehensive than the coverage COMPANY will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 2(g) below. If (a) CONTRACTOR is the sole owner and the sole and exclusive operator of the Equipment and (b) the state in which the work is principally localized is not Nevada, New Jersey, New York, or North Carolina, then CONTRACTOR may, as an alternative to obtaining workers' compensation coverage, obtain occupational accident insurance policy that includes either an endorsement or a separate policy provision whereby the insurer provides, or agrees to provide, workers' compensation coverage that becomes effective for a claim by CONTRACTOR alleging employee status. Such occupational accident insurance coverage shall be no less comprehensive than the coverage COMPANY will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses, as provided in Section 2(g) below.

(c) **RIDER INSURANCE**. CONTRACTOR shall procure, carry and maintain passenger/rider liability insurance that shall provide coverage to CONTRACTOR whenever the Equipment is being operated (whether or not on behalf of CARRIER) in a combined single limit of not less than $300,000 for injury or death to any person riding as a passenger in the Equipment or for damages to that person's property in any one occurrence. Such coverage shall be no less comprehensive than the coverage COMPANY will facilitate on CONTRACTOR's behalf if CONTRACTOR so chooses as provided in Section 2(g) below of this Exhibit. CONTRACTOR shall be responsible for all deductible amounts and for any loss or damage in excess of the rider insurance policy limits.

(d) **OTHER INSURANCE**. In addition to the insurance coverages required under this Agreement, it is CONTRACTOR'S responsibility to procure, carry and maintain any fire, theft, uninsured and/or underinsured motorist, and physical damage (collision), or other insurance coverage that CONTRACTOR may desire for the Equipment or for CONTRACTOR's health care or other needs. As provided in this Agreement, CONTRACTOR holds COMPANY harmless with respect to loss of or damage to CONTRACTOR's Equipment, trailer, or other property, and COMPANY has no responsibility to procure, carry, or maintain any insurance covering loss of or damage to CONTRACTOR's Equipment, trailer, or other property. CONTRACTOR acknowledges that COMPANY may, and CONTRACTOR hereby authorizes COMPANY to, waive and reject no-fault, uninsured, and underinsured motorist coverage from COMPANY's insurance policies to the extent allowed under Utah law (or such other state law where the Equipment is principally garaged), and CONTRACTOR shall cooperate in the completion of all necessary documentation for such waiver, election, or rejection.

(e) **REQUIREMENTS APPLICABLE TO ALL OF CONTRACTOR'S INSURANCE COVERAGES.** CONTRACTOR shall procure insurance policies providing the above-described coverages solely from insurance carriers that are A.M. Best "A"-rated, and CONTRACTOR shall not operate the Equipment under this Agreement unless and until COMPANY has determined that the policies are acceptable (COMPANY's approval shall not be unreasonably withheld). CONTRACTOR shall furnish to COMPANY written certificates obtained from CONTRACTOR'S insurance carriers showing that all insurance coverages required above have been procured from A.M. Best "A" rated insurance carriers, that the coverages are being properly maintained, and that the premiums thereof are paid. Each insurance certificate shall specify the name of the insurance carrier, the policy number, and the expiration date; list COMPANY as an additional insured with primary coverage; and show that written notice of cancellation or modification of the policy shall be given to COMPANY at least thirty (30) days prior to such cancellation or modification.

(f) **CONTRACTOR'S LIABILITY IF REQUIRED COVERAGES ARE NOT MAINTAINED.** In addition to CONTRACTOR's hold harmless/indemnity obligations to COMPANY under the Agreement, CONTRACTOR agrees to defend, indemnify, and hold COMPANY harmless from any direct, indirect, or consequential loss, damage, fine, expense, including reasonable attorney fees, actions, claim for injury to persons, including death, and damage to property that COMPANY may incur arising out of or in connection with CONTRACTOR'S failure to maintain the insurance coverages required by this Agreement. In addition, CONTRACTOR, on behalf of its insurer, expressly waives all subrogation rights against COMPANY, and, in the event of a subrogation

action brought by CONTRACTOR's insurer, CONTRACTOR agrees to defend, indemnify, and hold COMPANY harmless from such claim.

(g) AVAILABILITY OF INSURANCE FACILITATED BY COMPANY. CONTRACTOR may, if it so chooses by initialing one or more boxes in the right-hand column of the attached "CERTIFICATE OF INSURANCE," authorize COMPANY to facilitate, on CONTRACTOR'S behalf, the insurance coverages required or made optional by this Agreement. In any such case, COMPANY shall deduct, from CONTRACTOR settlement compensation, amounts reflecting all of COMPANY's expense and cost in obtaining and administering such coverage. In addition, if CONTRACTOR fails to provide proper evidence of the purchase or maintenance of the insurance required above, then COMPANY is authorized but not required to obtain such insurance at CONTRACTOR's expense and deduct, from CONTRACTOR's settlement compensation, amounts reflecting all of COMPANY's expense in obtaining and administering such coverage. CONTRACTOR recognizes that COMPANY is not in the business of selling insurance, and any insurance coverage requested by CONTRACTOR from COMPANY is subject to all of the terms, conditions, and exclusions of the actual policy issued by the insurance underwriter. COMPANY shall ensure that CONTRACTOR is provided with a certificate of insurance (as required by 49 C.F.R. § 376.12(j)(2)) for each insurance policy under which the CONTRACTOR has authorized COMPANY to facilitate insurance coverage from the insurance underwriter (each such certificate to include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to CONTRACTOR for each type of coverage, and the deductible amount for each type of coverage for which CONTRACTOR may be liable), and COMPANY shall provide CONTRACTOR with a copy of each policy upon request.

(h) CHANGES IN COST OR OTHER DETAILS OF COVERAGES. If COMPANY is facilitating any insurance coverages for CONTRACTOR pursuant to Section 2(f) below and the cost to CONTRACTOR for, or other details of, a coverage changes from the information listed in the attached "CERTIFICATE OF INSURANCE", CONTRACTOR will be so notified by personal delivery, fax, satellite communication or other written notice. In any event, CONTRACTOR shall not be subject to any such change until ten (10) calendar days after such notice or such later time as is set forth in the notice. **CONTRACTOR's failure, by the end of ten (10) calendar days after such notice, to notify COMPANY of any objection to the change shall constitute CONTRACTOR's express consent and authorization to COMPANY to implement the change and modify accordingly the deductions from CONTRACTOR's settlement compensation, beginning immediately after the 10-day period. Such modified amounts shall replace and supersede those shown in the Certificate of Insurance and COMPANY shall not have an obligation to also provide a revised Certificate of Insurance.** If CONTRACTOR fails to notify COMPANY of any objection within the 10-day period -- or if CONTRACTOR notifies COMPANY of its objection within the 10-day period and CONTRACTOR and COMPANY are then unable to resolve the matter to our mutual satisfaction -- CONTRACTOR and COMPANY shall each have the right to terminate this Agreement effective immediately upon the change becoming effective (although CONTRACTOR shall remain subject to the change until CONTRACTOR's termination's effective date and time).

THIS EXHIBIT is agreed to by the undersigned parties as of the latest date set forth below.

COMPANY:

By: _____
Central Refrigerated Service, Inc.

Dated: 2011-03-08 00:00:00

CONTRACTOR:

By: _____
Gabriel Cilluffo

Dated: 2011-03-08 00:00:00

EXHIBIT B

INSURANCE & LIABILITY LIMITER CHECKLIST

CONTRACTOR hereby requests COMPANY, through its insurer, to facilitate on CONTRACTOR's behalf (if they are available) the insurance coverages CONTRACTOR has selected by placing CONTRACTOR's initials in the right-hand column below:

I) **INSURANCE COVERAGE**

TYPE OF COVERAGE	INITIAL "YES" TO REQUEST COVERAGE
1. **Non-Trucking Liability Insurance:** *Name of Insurer: ACE American Insurance Company* *Policy No: SCAH08232283* *Effective Date(s) of Coverage: Effective 2011-03-08 00:00:00 continued until cancelled with a rate review on 06/01/08.* *Amount of Coverage:* $1,000,000 combined single limit *Current Cost to CONTRACTOR:* $5.77 per unit of Equipment per week *Deductible for Which CONTRACTOR Is Liable:* NONE	M YES ____ NO
2. **Physical Damage Insurance on Tractor:** *Name of Insurer: Protective Insurance Company* *Policy No: IL000046* *Effective Date(s) of Coverage: Effective 2011-03-08 00:00:00 continued until cancelled with a rate review on 06/01/08.* *Amount of Coverage: Insured Value as specified by CONTRACTOR* $114,500.00 at 3.1% of the value per year *(based on model year of unit of Equipment covered)* *Current Cost to CONTRACTOR* $ 68.26 per week **[COVERAGE IS AVAILABLE ONLY TO A SOLE-PROPRIETOR CONTRACTOR WHO IS EXCLUSIVE DRIVER OF THE EQUIPMENT.]** *Deductible for Which CONTRACTOR Is Liable: $1000.00 per occurance*	M YES ____ NO

TYPE OF COVERAGE	INITIAL "YES" TO REQUEST COVERAGE
3. **Occupational Accident Insurance:** *Name of Insurer: ACE American Insurance Company* *Policy No: TOCN01303569* *Effective Date(s) of Coverage: Effective 2011-03-08 00:00:00 continued until cancelled with a rate review on 06/01/08.* *Amount of Coverage:* $1,000,000.00 combined single limit *Current Cost to CONTRACTOR: $32.31 per week per contractor* *Deductible for Which CONTRACTOR Is Liable:* 7-day non-retro waiting period	YES ____ NO

THIS EXHIBIT is agreed to by the undersigned parties as of the latest date set forth below.

COMPANY:

By: _____
Central Refrigerated Service, Inc.

Dated: 2011-03-08 00:00:00

CONTRACTOR:

By: _____
Gabriel Cilluffo

Dated: 2011-03-08 00:00:00

CONTRACTOR EXHIBIT D

Contractor Incentive Program

(Subject to change or Discontinuation at Discretion of Company)

1. Must run a minimum of 10,500 miles per month to qualify for an incentive.
2. All earned incentives are paid to the owner of the tractor.

Attend a Monthly Professional Driver Education Meeting **$25.00/Month**
(*Bonus is accrued monthly, but only paid upon completion of the entire quarter)

Quarterly Safe Driver Bonus **$500.00/Quarter**
** Zero Preventable accidents/incidents
** Zero Preventable cargo claims
** For trainers, any accident or claim by the student will disqualify both drivers from the bonus.

CENTRAL REFRIGERATED SERVICE, INC.
a Nebraska corporation

By:_____
Its: COMPANY REPRESENTATIVE

CONTRACTOR

By:_____
Gabriel Cilluffo

CONTRACTOR AGREEMENT: MILEAGE PAY ADDENDUM A

Standard Owner Operator Pay Plan O11

This addendum is the attachment for CONTRACTOR's Contractor Agreement, Page 2, Section 2-Compensation, sub-section A.

COMPANY shall provide COMPANY's pre-numbered trip record issued to CONTRACTOR or CONTRACTOR's driver for each trip. CONTRACTOR's compensation under this Agreement shall be determined asset forth below. Such compensation shall constitute the total compensation to CONTRACTOR for the use of the Equipment and all services furnished, provided or done by CONTRACTOR.

Tractor Only and complete Tractor and Trailer: For all loads dispatched, rate per loaded mile and rate per empty mile calculated based on Household Mover's Guide (HHG) dispatch miles shall be paid according to the schedule below effective April 1st, 2011:

CONTINUOUS Experience as CONTRACTOR with COMPANY	**Rate Per Mile (based on HHG miles)**
Less than 3 months	0.880
Greater than 3 months, less than 6 months	0.885
Greater than 6 months, less than 12 months	0.890
Greater than 12 months, less than 18 months	0.895
Greater than 18 months, less than 24 months	0.900
Greater than 24 months, less than 36 months	0.905
Greater than 36 months, less than 48 months	0.910
Greater than 48 months, less than 60 months	0.915
Greater than 60 months, less than 72 months	0.920
Greater than 72 months, less than 84 months	0.925
Greater than 84 months, less than 96 months	0.930
Greater than 96 months, less than 108 months	0.935
Greater than 108 months, less than 120 months	0.940
Greater than 120 months	0.945

Compensation shall be reduced by $0.04 per loaded and empty mile calculated based on HHG dispatch miles for all miles that CONTRACTOR has a COMPANY trainee in the vehicle. No mileage compensation shall be payable to CONTRACTOR for either loaded or empty miles that are not specifically authorized or dispatched by COMPANY, including but not limited to, deadhead miles incurred by CONTRACTOR after declining a load offered by COMPANY. Providing that the CONTRACTOR is the upgrading trainer, Upgrading Trainer will receive a .01 per mile bonus for each authorized mile Upgrading Trainer was dispatched while Upgrading Trainee was seated on his/her tractor. Upgrading trainee MUST complete upgrade successfully and also be seated on a company truck for CONTRACTOR to be eligible for the additional $0.01 per mile rebate.

CENTRAL REFRIGERATED SERVICE, INC. a Nebraska corporation

Date: 3-9-11

Truck # 18807

By: _____

Its: COMPANY REPRESENTATIVE

CONTRACTOR

By: Gabriel U. Cilluffo _____

Print Name Signature

LIMITED POWER OF ATTORNEY

I, Gabriel U Cilloffo, of San Bernardino County, State of CA, designate and appoint Central Refrigerated Service, Inc., as my attorney in fact and agent (subsequently called "Agent") to act in my name and for my benefit for the limited purposes set forth herein. This limited power is granted in conjunction with my entering into the lease of a commercial tractor. This power is granted to allow my Agent to conduct or conclude certain acts on my behalf in the event said lease agreement is terminated or the leased equipment is abandoned.

1. Specific Powers. In the event or upon the condition that the commercial vehicle lease agreement between me and Central Refrigerated Service, Inc. or any of its affiliates is terminated, for whatever cause or reason, or in the event said leased equipment is abandoned my Agent shall have and may exercise each of the following specific powers:

(a) Power to Repossess, Re-Lease and/or Sell. To take possession of, whether by repossession or otherwise, said leased equipment and sell, assign, re-lease, convey, mortgage, hypothecate, lease, or otherwise use or dispose of said equipment upon such terms, conditions, and covenants as my Agent shall deem proper and to sign, execute and deliver and acknowledge such titles, leases, contracts, assignments, agreements, bills of sale, security agreements and related documents or forms, receipts, releases and such other instruments in writing as shall be proper.

(b) Powers of Collection, Enforcement and Payment. To enforce any rights that I may have with respect to damage to the leased equipment, including the right to demand, sue for, recover, collect, receive and apply all amounts relating to claims, losses or damage to said equipment, including, specifically, insurance and other contractual benefits and proceeds; to have, use and take all lawful means and equitable and legal remedies and proceedings in my name and for the collection and recovery thereof, including the enforcement of any such claim or cause of action; and the right to adjust, sell, compromise and agree to the same, and to execute and deliver for me, on my behalf, and in my name, all endorsements, releases, receipts, or other sufficient discharges for the same. To pay and discharge all debts and demands due and payable or that may hereafter become due and payable by me to any person or entity whomsoever.

3. Revocability. This power of attorney is revocable; provided, however, that insofar as any third party, insurance company or other person shall rely upon this power, this power may by revoked only by a notice in writing executed by me or my Agent and delivered to such person or institution.

4. Third-Party Reliance. Third parties may rely upon the representations of my Agent as to all matters relating to any power granted to my Agent, and no person who may act in reliance upon the representations of my Agent or the authority granted to my Agent hereunder shall incur any liability to me or my estate as a result of permitting my agent to exercise any power.

5. Expiration. Unless sooner revoked in the manner above provided, this General Power of Attorney shall expire at midnight on 10-25-13.

6. Governing Law. This Limited Power of Attorney is executed and delivered in the State of Utah and the laws of the State of Utah shall govern all questions as to the validity of this power and as to the construction of its provisions.

IN WITNESS WHEREOF, I have executed this General Power of Attorney this 8 Day of March, 20 11.

Principal

STATE OF Utah)
: ss.
COUNTY OF SLC)

On this 8 day of March 20 11, Gabriel Cilluffo, known to me to be the person whose name is subscribed to the within Power of Attorney and acknowledged to me that he executed the same.

IN WITNESS WHERE, I have witnessed He/She Execute this document, on the day and year in this certificate first above written.

Witness

WOODS & ERICKSON LLP, Attorneys At Law
2920 N. Green Valley Parkway, Suite 424
Henderson, NV 89014 (702) 433-9696