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 IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

Claimants are truck drivers who leased trucks from Respondents (also referred to collectively as "Central") and then leased those trucks back in order to haul freight for Respondents. Claimants move for summary judgment that they were employees of Respondents for purposes of the Fair Labor Standards Act (FLSA) entitled to receive at least the minimum wage mandated by that Act.

STATEMENT OF THE CASE

On June 1, 2012, Claimants Gabriel Cilluffo, Kevin Shire, and Bryan Ratterree (together with all others who have opted in to this case referred to as "Claimants" or " Lease Operators") filed a collective and class action complaint in the federal district court for the Central District of California against Respondents Central Refrigerated Service, Inc.[1] ("CRS"), Central Leasing, Inc. ("CLI"), and two of the owners and operators of those companies, Respondents Jon Isaacson and Jerry Moyes (collectively "Central"). *See* Complaint in Case No. 5:12-cv-00886-VAP-OP. The Lease Operators' federal complaint alleged, *inter alia,* that the drivers were employees of Central entitled to the protections of the Fair Labor Standards Act (FLSA) and that Central violated that Act by failing to pay them at least the minimum wage. S*ee id.*

[1] Respondent Central Refrigerated Service, Inc. was erroneously named as Central Refrigerated Services, Inc. in the federal complaint, but was properly named as Central Refrigerated Service, Inc. in Claimants' arbitration demand.

Central moved to compel arbitration under the Federal Arbitration Act (FAA) and the Utah Uniform Arbitration Act (UUAA) based on the arbitration clauses contained in each Lease Operator's Contractor and Lease Agreements. *See* Docs. 25-28.[2] The Lease Operators opposed the motion arguing that they were exempt from arbitration pursuant to §1 of the FAA which excludes arbitration agreements contained in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA. *See* Doc. 40; 9 U.S.C. §1. In an Order entered on September 24, 2012, the District Court held that, despite the fact that the Agreements labeled the Lease Operators as "independent contractors," the drivers were, in fact, employees of Central. *See id.* Accordingly, the Court concluded that arbitration could not be compelled under the FAA. *See id.* at p. 9. Nevertheless, because the Utah Uniform Arbitration Act contains no similar exclusion for contracts of employment, the Court ordered arbitration pursuant to the UUAA. *See id.* at p. 14.

Shortly thereafter the Lease Operators filed a demand for collective arbitration of their FLSA claims with the AAA. The parties agreed on Arbitrator Patrick Irvine who held that the parties had consented to collective arbitration of the Lease Operators' FLSA claims and that the arbitration would proceed in that manner. Order of Dec. 9, 2013; Order of March 13, 2014. Notice was subsequently

[2] Unless otherwise indicated, all citations to "Doc. #" refer to documents in case No. 5:12-cv-00886-VAP-OP.

issued to Lease Operators and presently 1,344 drivers have consented to join this collective arbitration.

In August of 2013, Swift Transportation[3] acquired Central Refrigerated Service, Inc. and Central Leasing, Inc. though the drivers working for Central on that date continued to drive under Central's operating authority pursuant to the contracts and leases then in effect. Respondents have stipulated that Swift is financially responsible for any liability found against Central Refrigerated and Central Leasing. Order of July 29, 2015, p.1.

Claimants now move for summary judgment that they were employees of Central entitled to the protections of the FLSA.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

An arbitrator, like a court, must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the

[3] Swift Transportation was originally a privately held company founded by Respondent Jerry Moyes. Ex. 4: 11. Mr. Moyes acquired full ownership of the company in 1985. *Id.*: 15-16. In or about 1990, Mr. Moyes took Swift public. *Id.*: 16, 97. In 2007, Mr. Moyes took Swift private again. *Id.*: 17, 97. In 2010, Mr. Moyes took Swift public once again. *Id.*: 97. Central Refrigerated and Central Leasing were companies owned and controlled by Jerry Moyes, through purchase by Moyes of Dick Simon Trucking in approximately 2001. *Id.*: 13, 24-25. In August 2013, Swift acquired the Central corporate respondents from Mr. Moyes. *Id.*: 151.

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law determines which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In addition the dispute must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). There is no issue for trial unless there is sufficient evidence favoring the non-moving party; "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment must be granted." *Anderson*, 477 U.S. at 249-50.

II. SUBSTANTIVE LAW GOVERNING EMPLOYMENT STATUS FOR PURPOSES OF THE FLSA

The FLSA was enacted to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). "[B]ecause the Act is remedial and humanitarian in purpose, it should be broadly

interpreted and applied to effectuate its goals." *Id.* (internal citation and quotation marks omitted); *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 754 (9th Cir. 1979). The Supreme Court "has consistently construed the [FLSA] liberally to apply to the furthest reaches consistent with congressional direction . . . recognizing that broad coverage is essential" to the FLSA's purposes. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)

The FLSA defines an employee as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d). In addition, the Act "defines the verb 'employ' expansively to mean 'suffer or permit to work.'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (quoting 29 U.S.C. § 203(g)). The "suffer or permit to work" standard originated in state child labor laws and was interpreted to mean that business owners were liable whenever underage children performed work in or in connection with the owner's business. *See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 167 N.Y.S. 958, 960 (App. Div. 1917), *aff'd*, 121 N.E. 474 (N.Y. 1918). *See also Purtell v. Philadelphia & Reading Coal & Iron Co.*, 99 N.E. 899, 902 (Ill. 1912). As stated by Judge Cardozo:

> [The employer] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. . . He breaks the

> command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent."

Sheffield Farms, 121 N.E. at 475-76 (internal citations omitted). *See also Daly v. Swift & Co*., 300 P. 265, 268 (Mont. 1931) (holding meatpacker liable for the death of a child employed by an independent contractor at its meatpacking plant); *Vida Lumber Co. v. Courson*, 112 So. 737, 738 (Ala. 1926) (holding that even if the boy was "employed" by his father and not the lumber company, the company violated the child labor law because it "permitted or suffered" him to work). By including this well-established "suffer or permit to work" language in the FLSA, Congress made business owners responsible for compliance with federal minimum wage standards within their businesses. If they suffer or permit individuals to work, they "employ" the workers and are required to afford them statutory protections. Once the prohibited conditions are shown to exist -- here, failing to pay workers' wages – the only question is whether the work was performed as a regular part of the defendant's business and whether the business and the business's owner were in a position to know of the work.

By defining employment as to "suffer or permit" work to occur, the FLSA makes clear that common law definitions of "employee" and "independent contractor" are not applied under the FLSA. *Darden*, 503 U.S. at 326; *Real*, 603 F.2d at 754; *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 n.6 (5th Cir.

1976); *Mednick v. Albert Enterprises*, 508 F.2d 297, 299 (5th Cir. 1975). Rather, "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act). *See Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 33 (1961) (FLSA). A contractual term calling the worker a "contractor" means little or nothing as neither the contractual label placed on the parties' relationship nor the subjective intent of the parties can override the economic realities of their relationship. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Real*, 603 F.2d at 754; *Pilgrim Equipment Co.*, 527 F.2d at 1315; *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974).

Courts have identified a number of factors to be considered in determining whether workers are employees under the FLSA in the sense that they are dependent on the business to which they render service. Those factors include:

> A) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> B) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> C) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> D) whether the service rendered requires a special skill;

E) the degree of permanence of the working relationship; and,

F) whether the service rendered is an integral part of the alleged employer's business.

Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 754 (9th Cir. 1979); ; *Baker v. Flint Engineering & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Sec of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987). These factors are not exhaustive, nor can they be applied mechanically to arrive at a final determination of employee status. The tests "are aids – tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is *dependence* that indicates employee status. Each test must be applied with that ultimate notion in mind." *Pilgrim Equipment*, 527 F.2d at 1311-12 (emphasis in original). The presence or absence of any one factor is not dispositive of whether an employee/employer relationship exists. Such a determination depends "upon the circumstances of the whole activity." *Rutherford Food Corp.*, 331 U.S. at 730; *Real v. Driscoll Strawberry Assoc.*, 603 F.2d at 754-755.

III. CLAIMANTS ARE EMPLOYEES OF RESPONDENTS

Claimants have prepared a separate Statement of Material Undisputed Facts. Claimants do not separately recite these facts here. As explained below, each of the six factors bearing on dependence, as well as the "suffer and permit to work" standard, compel the conclusion that Claimants were employees of Central for

purposes of the Fair Labor Standards Act.

A. Central Exercises Pervasive Control Over The Lease Operators' Work

The control factor looks at control over the overall business operation, not simply control over the particular aspect of the business performed by the worker. *Lauritzen*, 835 F.2d at 1536. The undisputed record shows that Central controlled all meaningful aspects of the trucking business to which the drivers rendered services. Central controlled the customer base, including advertising and recruitment of new shipper customers. Fact ¶ 12[4]. It controlled what shipments it would agree to transport, the prices to be charged for those shipments, the assignment and dispatching of shipments, the billing of shippers and payment of drivers, and it controlled its employee "company drivers."[5] Fact ¶¶ 13-34.

Central also exercised complete control over its Lease Operators. Indeed, it created the Lease Operator program as part of its "career path" for drivers.[6] Fact ¶

[4] All citations to "Fact ¶ X" refer to the corresponding paragraph in Claimants' Statement of Undisputed Facts in Support of Summary Judgment.

[5] Central had two kinds of drivers, company drivers that it acknowledged were employees and Lease Operators. As explained below and in the Statement of Facts, in all significant respects Central treated both kinds of drivers identically. *See, e.g.*, Fact ¶¶ 4, 8, 14, 15, 17-20, 29, 30, 32-37, 48-49, 52-54, 57, 58, 75, 159.

[6] The career path for Drivers was succinctly stated by Central on its website and in other advertising materials. Fact ¶ 9. Prospective drivers were encouraged to attend Central's Truck Driving Academy (for four to six weeks) to obtain a Commercial Drivers' License. Upon acquiring a CDL, Central would hire them as employee or company "trainee" drivers and place them under the supervision of trainers

9. Accordingly, it unilaterally dictated the terms of Lease Operators' Leases and Contractor Agreements.[7] Fact ¶ 6. It determined the policies set forth in the Driver Manual and Owner Operator Manual that all Lease Operators were required to comply with on pain of termination. Fact ¶¶ 53-59; 159-219. It set the mileage rate to be paid to the Lease Operators, prohibited Lease Operators from assigning their Leases and Contracts, and required Lease Operators to work exclusively for Central. Fact ¶¶ 58, 82-85, 102, 118, 158. Central bought or leased the trucks which it would then sublease to Lease Operators. Fact ¶ 6. And Central owned all refrigerated trailers used to haul its customers' freight. Fact ¶ 7.

Central also controlled virtually every meaningful detail of the Lease Operators' schedules and daily activities: It required Lease Operators to check-in with their Driver Managers every morning, seven days a week, except when on scheduled home time, which had to be approved in advance by Central. Fact ¶ 35-

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(generally Lease Operators), who would train them for another four to six weeks. Fact ¶ 86. If they completed training and met Central's qualifications, trainee drivers were allowed to become "solo drivers" for an additional two to three months in company trucks. Fact ¶ 9. Then, if the solo drivers drove 10,000 miles or more per month and had no safety violations, Central encouraged them to become Lease Operators. Fact ¶¶ 9, 60. Lease Operators were then encouraged to become trainers for upcoming trainee employee drivers. Fact ¶¶ 86-87.

[7] The Lease and Contractor Agreement attached as Exs. 19 and 20, respectively, to Claimants' Statement of Undisputed Facts in Support of Summary Judgment are those of Claimant Bryan Ratterree. However, as set forth in Claimants' Statement, all Lease Operators' Leases and Contractor Agreements were identical in all material respects. *See* Fact ¶¶ 94-122 (terms of Lease), ¶¶ 123-158 (terms of Contractor Agreement).

40. Central determined whether a Lease Operator would be assigned a load or sit and wait; it determined which load would be assigned, the time limits within which it had to be picked up and delivered and the maximum speed that could be driven by a Lease Operator to deliver the load. Fact ¶¶ 14-34. Central specified minimum times that Lease Operators had to put in their logs each day for activities such as dropping and hooking trailers, loading and unloading, fueling and post-trip inspections and rated Lease Operators on the neatness of their log books. Fact ¶¶ 56, 175, 176. Central even regulated Lease Operator's bathing habits, Fact ¶ 162 ("regular grooming and bathing is mandatory"), and prohibited all use of alcohol. Fact ¶ 217.

In addition, Central constantly monitored Lease Operators throughout the day. It received automatic GPS reports of a Lease Operator's location every hour and kept track of their available hours of service. Fact ¶¶ 14, 26-28, 37. It also received regular reports of their hours of service so that Central's Driver Manager could see if a Lease Operator was driving, on-duty not driving, or on break and his remaining hours of service. Fact ¶ 26. Central Driver Managers monitored Lease Operators' progress towards their destinations so that they could intervene if it appeared a driver might be late. Fact ¶ 27. Central also received electronic reports of a Lease Operator's average speed, idling time, and fuel consumption. Fact ¶ 28.

Central also exercised near total control over the Lease Operators' trucks by

setting rules governing where trucks and trailers could be parked, Fact ¶ 47, and when trucks could be driven home or used for personal matters. Fact ¶¶ 45-46. It prohibited pets in trucks, Fact ¶ 48, U-turns, Fact ¶ 49, and dictated the communication equipment and permits that a Lease Operator had to carry in his truck. Fact ¶¶ 17, 135, 188. Central required Lease Operators to keep their trucks in "good appearance" as well as in good operating condition, Fact ¶ 148, and insisted that any damage to the tractor be repaired in 30 days on pain of termination. Fact ¶ 44. Central also reserved the right to take possession of a Lease Operator's truck to ensure timely delivery, and if a Lease Operator's truck was being repaired, Central reserved the right to require the driver to drive with a loaner vehicle. Fact ¶ 50.

Central required Lease Operators to comply with safety requirements beyond those imposed by the government. Fact ¶ 55, and required trucks passing through Central's Utah and Georgia terminals to submit to inspection. Fact ¶43. Central dictated the tires that Lease Operators could use, Fact ¶ 42, and prohibited them from making any additions or modifications to their trucks without permission. Fact ¶¶ 105, 135. Central required Lease Operators driving through its terminals in Utah and Georgia to submit to inspections and refused to provide loads to any truck found to be out of compliance with Central's standards. Fact ¶¶ 43, 51, 192.

Central required weekly settlement of accounts with Lease Operators including authorization to deduct the lease charges for the truck, any amounts due to Central for insurance, services, parts and products provided by Central, for loss or damage to cargo from the settlement, as well as any other amounts owed to Central. Fact ¶¶ 102, 218.

These controls strongly support a finding that Lease Operators are employees of Central. For example, in *Pilgrim Equipment*, 527 F.2d at 1312, the Fifth Circuit held that a laundry company that contracted with alleged independent contractors to operate its retail outlets exercised the control of an FLSA employer by controlling advertising, setting prices, requiring workers to work exclusively for Pilgrim, preventing workers from assigning their leases, requiring weekly settlement of accounts, preventing alteration or improvements to work place without permission, and unilaterally imposing the workers' contract terms. *See also Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1371 (5th Cir. 1981) (cleaning company that unilaterally determines contract terms of its allegedly independent "agents," prohibits contract assignment, sets prices and deducts expenses from agent's accounts is FLSA employer).

Perhaps the strongest evidence of Central's pervasive control over the Lease Operators day-to-day activities is the fact that Central retained the right to withhold assignments to a driver and terminate a driver's contract immediately for violation

of "any Company policy," or for no reason at all on ten days' notice. Fact ¶ 155. Upon termination of the Contractor Agreement a Lease Operator was automatically in default of his Lease, Fact ¶¶ 102, 114, giving Central the immediate right to repossess the Lease Operator's truck and accelerate all remaining rent payments through the end of the lease. Fact ¶¶ 113-116. Central was authorized to enforce those terms by seizing the Lease Operator's performance bond, maintenance account, and any settlement amounts that might be owed to the driver. Fact ¶¶ 80, 116; Ex. 5 (WB): 167-168. If those amounts were insufficient to cover the Lease Operator's debts, Central referred the remaining debt to a collection agency, Fact ¶ 81, and reported the "default" to HireRight, a provider of on-demand employment background checks, who would then list the default on the Driver's Drive-A-Check ("DAC") report, the standard work history report used in the trucking industry to make hiring decisions, which could well preclude future employment as a driver. Fact ¶ 81.

In short, Central's unilateral right to terminate a Lease Operator's Contactor Agreement and the devastating financial consequences of that decision gave Central extraordinary leverage to demand compliance, not only with Company policies, but with any request that Central might choose to make of a driver. For example, such leverage gave Central the ability (which it exercised) to make mid-term contractual changes favoring Central. Fact ¶ 92. Indeed, the ability to put

Lease Operators in default of their leases gives Central far more control over the behavior of Lease Operators than it had over its regular employee drivers who, at worst, face unemployment if they failed to please Central.[8] The default provision is a strong indicator of employment status even under the narrower common law definition of employee. *See Time Auto Transportation, Inc. v. NLRB,* 377 F.3d 496 (6th Cir. 2004) (control arising from employer's ability to inflict loss of substantial down payments upon termination of drivers supported finding that drivers were common law employees); *Aetna Freight Lines, Inc. v. NLRB,* 520 F.2d 928, 930 (6th Cir. 1975) (use of lease cancellation as a means of enforcing driver discipline evidences control under common law standard); *Taylor v. Shippers Transport Exp. Inc.*, no. CV-13-02092, 2014 WL 7499046 (C.D. Ca. Sept. 30, 2014) ("perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause because the power of the principle to terminate the services of the agent gives him the means of controlling the agent's activities."). *See also Pilgrim Equipment,* 527 F.2d at 1312 (company right to declare contract void if any covenant is not performed by worker evidences FLSA employment

[8] If Lease Operator owed $100,000 on his lease at the time of termination, CRS would take his performance bond, interest, maintenance account, and any outstanding settlement payments to offset the debt and, if other efforts to mitigate the loss were unsuccessful, the outstanding amounts owed would be turned over to a collection agency. Ex. 5 (WB): 173-174. Drivers were told of the consequences of termination including the fact that a default on their lease would show up on their DAC report which could limit future employment opportunities. Ex. 7 (SP): 119.

relationship).[9]

B. Control Retained By Lease Operators Was Illusory

To be sure, the Contractor Agreement gave Lease Operators control over certain aspects of their work, such as the right to turn down loads, the right to choose the route to take to deliver a load, and where to rest, refuel, and repair their trucks. However, as will be explained in the next section, none of these "controls" had any real bearing on Lease Operators' ability to earn a "profit" or stand as an independent economic entity and thus they are of no significance in determining whether Lease Operators were FLSA employees. *Pilgrim Equipment,* 527 F.2d at 1312-1313 ("Control [exercised by a worker] is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity."). *See also Air Couriers Int'l v. Emp't Dev Dept*, 59 Cal. Rptr.3d 37, 47 (2007) (there is "no inconsistency between employee status and the driver's discretion on when to take breaks or vacation").

Even apart from the fact that the aspects of the job nominally controlled by Lease Operators had no significant bearing on the ability to be economically independent, it is also clear from the "circumstances of the whole activity,"

[9] The draconian effects of termination of the Contractor Agreement benefitted Central by reducing turnover. Turnover for Lease Operators was significantly lower than it was for Company (employee) Drivers who faced far less serious financial consequences from leaving their employment. Fact ¶ 4; Ex. 5 (WB): 88-89. *See also* Ex. 5 (WB): 94 (Lease operators had lower turnover and were more productive and more profitable for Central).

Rutherford Food Corp., 331 U.S. at 730, that those "controls" were largely illusory. For example, while the Contractor Agreement clearly stated that Lease Operators were not required to accept any of the loads assigned by Central, neither did the contract require Central to provide loads. The result of these provisions was that Lease Operators who turned down assignments were routinely made to wait or given even worse loads as punishment. As REDACTED explained, Driver Managers say, "here's your load. Take it. Accept it. Or you know we can just leave you to sit, I don't have to give you another load." Ex. 14 (KV) at 236. Other Lease Operators experienced similar threats. *See* Fact ¶ 23. And Central's driver manual made these threats explicit. *See* Fact ¶ 24.

The right to take time off was similarly difficult to exercise as a practical matter because of the need to earn enough to cover the weekly lease payment – a fact that Central recognized.[10] Even if a Lease Operator could afford to take time off, it was necessary to request permission from Central and Central was under no obligation to grant permission, or to route Lease Operators home at the appropriate time even if they granted permission. [11] Fact ¶¶ 38, 39. Taking time off also ran the

[10] Drivers generally had to drive a minimum of 2200 miles per week to meet their fixed costs and Central expected them to drive more than 2500 miles/week to make a living. Fact ¶ 83, 85, 214. Given those minimums, Central's Owner Operator manual encouraged drivers not to turn down loads or take excessive time off. Fact ¶ 211.

[11] REDACTED testified that when he came down with severe appendicitis he took a load to Denver in an effort to get back to Salt Lake City where he could see his

risk that Central would retaliate by not assigning loads to the driver.[12]

The right to choose where and when to stop while in route to deliver a load and where to have maintenance performed were also largely illusory controls because the Central Comdata cards and Fuel Cards used to pay for fuel, maintenance and other needed items could only be used at locations designated by Central. Fact ¶¶ 30, 51, 192-196. In addition to generally being more expensive, use of non-network fuel stops required a Lease Operator to obtain Central's permission to use the Comdata card or pay out of pocket – something many drivers could not afford to do – and involved other disincentives. Fact ¶¶ 51,192, 194 (paperwork requirements and $3 charge for use of out of network fuel stops). Central would only pay for "reefer"[13] fuel if it was bought at a Central network station – another reason for a driver not to go outside the network to fuel. Fact ¶

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doctor. When no load materialized to get him from Denver to Salt Lake City, his student drove him bobtail (driving without a trailer) to Salt Lake where he was immediately hospitalized and operated upon. Central reprimanded REDACTED saying he should have waited longer in Denver to see if a load materialized. Ex. 12 (JH): 157. *See also* Ex. 15 (BH): 259 (had to get approval for vacation); Ex. 9 (HM): 303, 322; Ex. 13 (GC): 258 (Lease operator could not take time off any time wanted. Had to request time off and get it approved).

[12] Ex. 11 (AS): 46 (if you take time off "dispatcher gets mad at you, and then punishes you. You don't get miles.").

[13] "Reefers" are refrigerated trailers. Reefers have a separate fuel tank which is used to power the refrigeration unit. Under the Contractor Agreement, Central is responsible for the reefer fuel.

192. The right to deviate from Central's proposed delivery route was also meaningless as Central's computer generated route was generally the most economic. The primary reason to deviate from it was weather or congestion and Company Drivers were permitted to deviate for those reasons as well. Fact ¶ 52. Deviating from Central's route also entailed risks.[14]

In sum, Central controlled all meaningful aspects of Lease Operators' daily activities and the trucking business in which they worked and the few aspects of control Central permitted Lease Operators to exercise were largely illusory. Accordingly, the control factor weighs heavily in favor of employee status.

C. Lease Operators Have Little Opportunity For Profit Or Loss Based On Entrepreneurial Skill

"Generally speaking, an independent contractor has the ability to make a profit or sustain a loss due to the ability to bid on projects at a flat rate and to complete projects as it sees fit." *Baker*, 137 F.3d at 1444. Here Lease Operators had no such ability. They could not bid on loads or deliver them as they saw fit. They could not drive the leased truck for other companies or obtain their own customers. To the contrary, all of the entrepreneurial skill involved in deciding which loads to take to or from which locations and at what price was exercised by

[14] Ex. 14 (KV): 30; Ex. 12 (JH) 105. Nevertheless, even departing from the suggested route risked being "blacklisted." Ex. 12 (JH): 84. *See also* Ex. 12 (JH): 86 ("You're being the black sheep. Your [sic] not conforming.. . . you go out of route, you pay a penalty."); Ex. 11 (AS): 96 (if you leave Central's route, you have to tell dispatcher).

Central's sales department. Fact ¶ 13.

By contrast, the major determinants of a Lease Operator's earnings were simply the number of loads assigned to a Lease Operator each week,[15] and the rate per mile Central paid —factors that were entirely within Central's control, not the drivers'-- or their skill in driving a truck. The more loads assigned by Central, the more miles a Lease Operator could drive, and the more money a driver could make. Conversely, the fewer miles assigned the less a Lease Operator would make. Nothing else a Lease Operator might do to improve his earnings – whether increasing fuel efficiency, hiring employee drivers, carefully selecting routes and fueling stops, or properly managing his truck's maintenance – could alter the basic fact that the Lease Operator's income was entirely dependent upon the assignments Central chose to give him. William Baker, head of Central's Human Resources Dept., admitted that Central's control over load assignments not only determined whether a Lease Operator made a living, but determined just what level of living he made, stating, "[w]e . . . try to get them sufficient miles so that they could make

[15] The quality of loads also mattered. For example, long hauls were generally preferable to short hauls because a higher percentage of time was spent on compensated driving rather the uncompensated loading and unloading. Loads that were pre-loaded so they could be picked up without waiting were preferable for the same reason. In the winter, loads to and from warmer climates were often more valuable than loads through Western mountains where weather factors could cause delays. Central maintained complete control over the quality of the loads assigned to a driver just as it maintained complete control over the number of loads assigned. Fact ¶¶ 14-15.

an appropriate living and be successful, whether they're a company guy or an owner operator." Ex. 5 (WB): 101 (emphasis added). As REDACTED, one of Central's highest earning Lease Operators explained, "it all comes down to miles. If you don't have the miles, you don't make money." Ex. 9 (HM): 84. REDACTED, another high earning Lease Operator explained that his success resulted from "the miles that I run that are provided from Central Refrigerated, from the consistent miles that I am assigned to do from Central Refrigerated." Ex. 10 (DW): 116.[16] Success as a Lease Operator thus turned on a driver's ability to keep Central's Planners happy so that they would assign more loads with better miles.

[16] Other Driver's expressed similar thoughts. REDACTED, another high earner, said everything that Lease Operators do to be successful "comes from Central." Ex. 15 (BH): 192-194. REDACTED earnings reflected Central's generosity toward him. Ex. 15 (BH): 162 (stating that he and Planner "worked great together. She would give favorable loads if she could."). REDACTED testified that he was losing money as a Lease Operator because the assignments he was given did "not even cover my truck payment." Ex. 16 (KS): 61. When he complained, Central moved REDACTED to a dedicated route and his miles and income increased. Ex. 16 (KS): 61, 78. REDACTED observed that Central was like a popularity contest. "I knew as well as anybody else there was some drivers there that made really good money. There was some they starved out and they had the control of that. You know, it was almost a running joke there that when they want their truck back, they'll get it because all they got to do is starve you. You'll leave." Ex. 12 (JH): 116. *See also* Ex. 12 (JH): 76-77 (Central intentionally kept his mileage and earnings low to convince him to become a trainer as a way to earn more); 90-96 (explaining how change in his Central dispatcher reduced his mileage and earnings and forced him to terminate his co-driver); Ex. 13 (GC): 293-296 (Qualcomm exchange where Driver Manager tells Lease Operator that if he wants the same miles he received as an employee he has to improve his service record to get back in the "planner's good graces"); Ex. 11 (AS): 132 ("if you cannot get along with your dispatcher, you don't get the miles you need. So you end up making less than the company drivers and you get stuck with the lease for three years.").

This was colorfully described by REDACTED, one of Central's highest earning Lease Operators:

> I've seen it happen where a driver on the road decides he wants to go home this weekend instead of hauling freight and his driver manager is mad, which makes the planner mad, because the planner had a load for him to take and he doesn't want to take it. So when he's ready to go out, now he's got less loads, less miles, less this, less that. It goes back to I'll scratch your back and you'll scratch mine. How far are you willing to scratch? And I was willing to scratch your whole backside to make it work and that's what I did.

Ex. 15 (BH): 193-194. Having to scratch an employer's backside in order to be able to make a living is the essence of dependence and the opposite of making a living through one's own entrepreneurial initiative. *See also*, Ex. 11 (AS): 165 ("if the dispatcher doesn't like you, if he has five loads available, he gives you the worst one. . . . [I]f he likes you, if you're a butt kisser, he'll give you the, probably, best load so you can make money. That's – it's all depends on them. So they control everything, not the owner operator.").

Courts have not hesitated to find such complete control over the central factors affecting a worker's income strongly indicative of an employment relationship. *See Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 308 (4th Cir. 2006) (Security agents paid a set rate per shift had no opportunity for profit because employer determined number of shifts); *Martin v. Selker Bros.*, 949 F.2d 1286, 1294 (3d Cir. 1991) (gas station operators lack opportunity for profit because

volume of business depended on location of station and other factors controlled by employer); *Mr. W. Fireworks*, 814 F.2d at 1050 (operators of fireworks stands had little opportunity for profit because, *inter alia*, the size and location of stands is controlled by Mr. W and "looms large" in determining the earnings of operators); *Pilgrim Equipment*, 527 F.2d at 1313 (finding laundry operators had little opportunity for profit and loss because the major determinant of income was the volume of business done and that primarily depended on price, location of store, and advertising – all of which were controlled by Pilgrim rather than the operators).

To be sure Lease Operators could try to increase their earnings by pleasing their Driver Managers and asking for additional work, but that hardly indicates independence or an ability to earn a profit; it is no different from an employee asking to work more overtime. *See Baker*, 137 F.3d at 1441 (ability to increase wages by "hustling new work is not synonymous with making a profit."). Central still had control over whether such back-scratching was reciprocated and whether such requests for additional work were granted.

The fact that Lease Operators were paid a fixed rate per mile – a kind of piece rate – further supports the conclusion that Lease Operators had little opportunity for profit. Toiling for money on a piecework basis is more like wages than an opportunity for "profit." *Dole v. Snell*, 875 F.2d 802, 809 (10th Cir. 1989).

See also Selker Bros., 949 F.2d at 1294 (workers had no opportunity for profit where their earnings came primarily from fixed commissions set by the employer).

Lease Operators could marginally increase their earnings by making efforts to increase fuel efficiency and controlling other variable expenses, but such efforts hardly qualify as the kind of profit-making indicative of independent contractor status.[17] *See also Rutherford Foods*, 331 U.S. at 724-725, 730 (profits derived from working efficiently "are more like piecework than an enterprise that actually depended for success upon initiative, judgment or foresight of the typical independent contractor."); *Baker*, 137 F.3d at 1444 (the ability to earn more by controlling costs of welding supplies or hustling additional work from the principal does not enable a worker to make a "profit"); *Mr. W. Fireworks*, 814 F.2d at 1050 (minor control over earnings through such things as rapport with customers and providing extra services were insignificant where company controlled primary

[17] A driver had very little control over fuel efficiency in any event. As Central acknowledged, Ex. 7 (SP): 112, load weight was the biggest factor affecting fuel efficiency, a factor controlled by Central, with time of year being the second most important factor. Fuel efficiency was also dictated by terrain, weather, temperature, wind speed, traffic congestion, and speed driven. Ex. 7 (SP): 112-13. Central controlled driver speed through the mechanical speed governor. Fact ¶¶ 41, 104. Most drivers did not view fuel efficiency as a significant factor affecting their income. Ex. 15 (BH): 135-136. Central monitored and tracked each tractor's fuel efficiency. Fact ¶ 28. Central's Company Drivers and Lease Operators had very similar fuel efficiency figures. Fact ¶ 41-a.

determinants of income).[18]

The Lease Operators' right to turn down loads was similarly meaningless in terms of allowing drivers to generate a profit, even apart from the retaliation it could provoke. Central provided drivers with one load at a time. Fact ¶ 18. It did not make load availability public, thereby ensuring that Drivers had no information about what loads were available making it impossible to exercise business judgment regarding what loads to take. Fact ¶ 22. For all a Driver knew, turning down a load was as likely to result in a worse load (or no load at all), as a better one and, likely, would result in sitting for an indeterminate period losing time from their driving Hours of Service, accruing expenses, and making no money. Fact ¶ 22-4. The inability to exercise business judgment in turning down a load coupled with the risk of retaliation meant that Lease Operators rarely exercised the right and when they did it was generally for personal rather than business reasons. *Id.* It was Central, not Lease Operators, that exercised business judgment regarding which loads to take and which to turn down.[19]

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[18] The ability to choose a different route to a destination, even if quicker, had no effect on earnings as drivers were rarely allowed to deliver their loads early. Ex. 14 (KV): 233-234.

[19] In choosing which loads to haul, Central looked at the overall picture and sometimes chose to accept less profitable loads in order to get more profitable ones or get to a place where more profitable loads would be available. Fact ¶ 13. But Lease Operators had no meaningful choice. They had to accept what was assigned to them even if it was a loss leader that in the "overall picture" improved Central's profits rather than their own.

The fact that Lease Operators could, and sometimes did, hire co-drivers to help them did not give them the ability to make a true profit either. Courts have long recognized that a worker's right to hire his own employees does not necessarily indicate economic independence. For example, in *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1321 (5th Cir. 1985), Galan was found to be an employee of the farmer for whom he picked vegetables despite the fact that he hired, supervised, and paid a crew of 45 individuals to assist him with that work. While Galan did increase his earnings by hiring these workers, "this was not based on risk of loss of any capital investment or his entrepreneurial skill but was simply a piece-rate override measured by the difference between the total amount McLeod paid for each bin and the amount paid pickers for the buckets." *Id.* at 1328. The Court in *Mednick v. Albert Enterprises*, 508 F.2d 297, 302 (5th Cir. 1975), reached a similar conclusion noting that a worker who ran a hotel card room for tips and who "was free to hire others to work in his stead, and never to appear personally at all if he so chose," was still an employee because there was "no economic substance behind these various powers." *See also Mr. W. Fireworks*, 814 F.2d 1042, 1049 (5th Cir. 1987) (fact that workers had "sole authority to hire their own employees and to set their wages and hours" did not indicate independence).

As in the cases cited above, a Lease Operator's right to hire an employee to assist with driving added no economic substance to the driver's alleged "business."

Taking on an employee gave a Lease Operator the ability to request additional loads, but the number of loads assigned was still controlled entirely by Central. Simply because a Lease Operator hired a co-driver didn't mean that Central would provide additional loads. Ex. 20 (CA): ¶ 1. And if it chose not to provide them, having an employee driver quickly became unaffordable as Jon Hanks discovered.[20] Fact ¶ 138. Even if a Lease Operator with an employee received more assignments, those extra miles were paid at the Lease Operator's regular per mile piece rate.[21] The Lease Operator could take a cut of the mileage payment earned by his employee, but that is just a form of piece rate override and is not the kind of profit from entrepreneurial skill that is indicative of independent contractor status. *Beliz,* 765 F.2d at 1328. A Lease Operator who splits a fixed mileage rate with another worker is not making a "profit" from the exercise of entrepreneurial judgment any more than the workers found to be employees in *Real*, *Mednick*, *Mr. W. Fireworks* or *Pilgrim Equipment* made a profit from their employees.[22]

Moreover, Central had to approve a Lease Operator's employee driver

[20] *See, e.g.,* Ex. 12 (JH): 90-96 (Hanks hired an employee driver because his manager was giving him substantial mileage, but when his dispatcher changed and assignments fell off, Hanks had to terminate his employee).

[21] Of course, the Central imposed penalty for driving a truck more than 11,000 miles a month reduced the value of the additional miles driven by an employee driver. Fact ¶ 122.

[22] Company Drivers were also allowed to drive as a team and share their earnings, Ex. 5 (WB): 200-202, but that did not change their employee status.

before he or she could be hired. Fact ¶ 141; Ex. 20 (CA): ¶ 7.D. (Central had the right to "bar any of Contractor's employees that it deems unqualified"). Such control further diminished any significance the right to hire employees might have had as an indicator of independent status. *See Ruiz v. Affinity Logistics*, 754 F.3d 1093, 1102 (9th Cir. 2014) (where company "retained ultimate discretion to approve or disapprove of those helpers and additional drivers," even though approval was based on neutral factors, drivers nonetheless did not have an unrestricted right to choose these persons which is an "important right [that] would normally inure to a self-employed contractor"); *Narayan v. EGL, Inc.*, 616 F.3d 895, 902 (9th 2010) (fact that company had to approve any helpers hired by drivers was indicative of control of the details of the drivers' performance under California common law).

The fact that a few Lease Operators became "fleet drivers" by leasing multiple trucks simultaneously is similarly meaningless as an indicator of independence. Fact ¶ 139. In the first place, leasing multiple trucks was not a right; Central had to grant a Lease Operator permission before he would be allowed to lease a second truck, and almost none did so. Fact ¶ 139 (at most 5-10 individuals had multiple trucks). Even if Central granted permission and provided sufficient work to keep two trucks running, the earnings from the truck(s) driven by the Lease Operator's employee(s) would still be nothing more than a piece rate

override. Without the ability to offer services to other companies or negotiate prices with Central, a Lease Operator who leased two or even three trucks was no more able to use skill and initiative to make a business "profit" than a driver of one truck. Like solo drivers, fleet drivers were entirely dependent on Central's load assignments. If Central wanted a multiple-truck Lease Operator to be successful it could easily arrange that by giving him, and his multiple trucks, continuous attractive loads. If it didn't want him to be successful it could crush him by simply withholding assignments.[23]

Not only did Lease Operators lack the opportunity to make a profit based on the exercise of entrepreneurial skill and judgment, they had no real opportunity for loss in a business sense either. The per mile rate they were paid by Central ensured that each load carried by a Lease Operator was compensated, just as a worker who is paid by the hour is assured compensation for all of his hours of work. Even if a shipper failed to pay Central for a load, the Lease Operator who delivered it would still receive his per mile payment. Ex. 20 (CA): ¶ 2. That is not at all like a true independent contractor who may make a profit or experience a loss depending on his ability to bid loads, his skill in determining how to accomplish the job, and his ability to ensure payment from the shipper. *See Baker,* 137 F.3d at 1441 (welders

[23] *See, e.g.,* REDACTED, the highest earning fleet driver who acknowledged that "if it wasn't for Central I'd have no business. They call the shots, they are the ones that gave you your loads, the ones that have done everything." Ex. 15 (BH): 163, 193-194.

paid by hour have no opportunity for loss).

That said, Lease Operators clearly could, and frequently did, lose money. The Lease imposed a substantial weekly payment upon each Lease Operator and the Contractor Agreement required drivers to pay all operating costs of their equipment, and take on the risks of accidents, mechanical problems, traffic delays, and a host of other risks. But those were not the risks of capital investment that could turn a profit or a loss depending on the entrepreneurial skill of the Lease Operator. Skill in driving is different from entrepreneurial skill. Skill in driving makes an experienced driver money whether they are treated as an employee paid by the mile, or a Lease Operator paid by the mile. As explained above, Central controlled Lease Operators' earnings in the same way it controlled the earnings of its Company Drivers – i.e. through the mileage rate and the assignments it chose to give them. The risks imposed on Lease Operators could destroy them, but those risks had nothing to do with increasing their earnings potential; they merely "show [the alleged employer] chose to place this added burden on its operators." *Mr. W. Fireworks*, 814 F.2d at 1050 *quoting Pilgrim Equipment*, 527 F.2d at 1313. *See also Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1369070 (9th Cir. 1981) (risks accepted by operators as part of their contract are simply "burdens that Sureway

chose to place on them.").[24]

Thus, like the employees in *Sureway*, *Mr. W. Fireworks*, and *Pilgrim Equipment*, the Lease Operators lacked any real opportunity for profit and loss. This factor too weighs heavily in favor of employee status.

D. Lease Operators Have Little Or No Investment In Equipment Compared To Central

In considering this factor, the Court must "compare the worker's individual investment to the employer's investment in the overall operation." *Baker*, 137 F.3d at 1442 (finding that welders investment of $35,000 to $40,000 in welding rigs was "not so significant as to indicate they are independent contractors" when compared to the employer's investment in the overall pipeline construction and installation business); *Snell*, 875 F.2d at 810 (comparing workers' relative investment as cake decorators with employer's overall investment in bakery business); *Lauritzen*, 835 F.2d at 1537 (comparing migrant workers' investment with farmer's investment in pickle farming operation). Plainly, Central's investment in the shipping business far outweighed the Lease Operator's investment. Central established and maintained terminals and dispatching infrastructure critical to the Lease Operators'

[24] The Lease default rate was more than 75%. Fact ¶ 4. If Drivers were truly independent and had the ability to bid on jobs, negotiate prices for loads or, at a minimum, shop for profitable loads offered by different companies, then they might have had the opportunity to make a profit or loss in the business sense. But without the ability to do any of those things, they were simply wage laborers hauling the loads that Central chose to give them with the added burden of lease payments and operating expenses.

work. Central provided all of the trailers used by the Lease Operators, the reefer fuel for the trailers, trailer repair costs, and the communications system used for dispatching.[25] Fact ¶¶ 3, 7, 11-19.

To be sure, the Lease Operators leased their tractors from Central's leasing affiliate and then leased them back to Central but that circular arrangement involved no capital investment on the part of the drivers. The trucks were obtained from the manufacturer based on Central's credit, not the Lease Operators'. Fact ¶ 3. The subsequent transaction with the Lease Operator, was wholly financed by Central and paid for by Central through the mileage rate that Central designed to cover the weekly lease expenses and operating costs and provide some income for the Lease Operator. Fact ¶¶ 64-69. Central advanced the costs of operation, provided weekly advances to Lease Operators, Fact ¶ 69d, and set up payment plans for drivers to pay off debts to Central through future settlements. Fact ¶ 69e. In short, as long as Central provided sufficient miles each week, a Lease Operator who avoided accidents and mechanical malfunctions could work for the life of his lease with no more cash outlay than a Company Driver had to make. Of course, if a Lease Operator wasn't given enough miles he faced substantial debt, but not from any real investment on his part.

[25] Central charged the drivers a monthly fee for the communication equipment, but the investment in the system was Central's.

Moreover, Lease Operators do not possess any equity interest in the leased trucks upon signing the lease and they never obtained any equity in their truck by virtue of their weekly lease payments. Ex. 5 (WB): 293. Central retained title to the truck, claimed all tax deductions and depreciation related to the truck, Ex. 19 (Lease): ¶ 16, and retained "exclusive possession, control, and use" of the truck for the duration of the Lease Operator's relationship with Central, Ex. 20 (CA): ¶ 5. The buyout price of a truck was the "fair market value" of the truck at the end of the lease as set by Central.[26] Ex. 19 (Lease): ¶ 18. In short, despite the appearance created by the circular lease arrangement, the economic reality was that Central, not the Lease Operators, provided the capital investment in all of the equipment used by the drivers, including the tractor. [27]

But for Central's financing of the Lease Operator's truck, provision of all of the other capital investments involved in dispatching and terminal facilities, advancing of all expenses subject to later deduction from the settlements, the drivers were nothing but workers who supplied the labor to drive the Equipment and very little else. In that sense this case is indistinguishable from *Max Trucking*

[26] Very few Lease Operators were ever able to buy out their truck. Fact ¶ 121.

[27] The circular lease arrangement here is similar to that in *Sureway Cleaners*, 656 F.2d 1368, 1372, where Sureway charged agents "rent" for their locations that was offset by the payments Sureway made to the agents. In that situation, the Ninth Circuit concluded that it was Sureway, not the agents, that supplied the necessary risk capital.

LLC v. Liberty Mutual Ins. Corp., 802 F.3d 793, 796 (6th Cir. 2015), where the Sixth Circuit found that lease operators were employees under the narrower common law standard. The Court held that the arrangement by which the company acquired trucks and then leased them to its drivers "is essentially a financing vehicle in which a driver acquires a truck on the strength of Max Trucking's credit…." Such drivers "are effectively economically dependent on Max Trucking for their ability to operate as truckers because they would not have otherwise had the credit to purchase the trucks." *See also Affinity*, 754 F.3d at 1101, 1104 (where company leased trucks to drivers through paid leasing arrangements it was "clearly erroneous" to view such arrangements as evidence of drivers' supplying their own equipment); *Mr. W. Fireworks*, 814 F.2d at 1052 (even if title to fireworks inventory passes to operators, the fact that the inventory is provided for little or no money down means the operators have no investment as a matter of economic reality).

This factor too weighs heavily in favor of employee status.

E. Lease Operators Do Not Exercise Special Skill Or Initiative

The FLSA "accords unusual significance to the highly specialized nature of the work to be done as a factor in determining whether one called a contractor is really not an employee." *Mitchell v. John r. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961). Conversely, "[i]f a specific individual regularly performs tasks

essentially of a routine nature and that work is a phase of the normal operations of that particular business, the Act will ordinarily regard him as an employee." *Id.* (finding worker to be employee, *inter alia*, because the work he performed as a 'contractor' "was precisely the same activity which he previously performed as an employee of one of these companies.").

Here, Lease Operators were not called upon to exercise any special skills or initiative beyond those exercised by Company Drivers – i.e. they had to be able to drive and complete Central's paperwork requirements, period. A person actually operating an independent trucking business would need a variety of additional skills to advertise his services and cultivate a customer base, negotiate prices for loads and evaluate delivery schedules. As described by the court in *Baker*,

> [m]ost independent contractors develop a business relationship with many contractors based on their expertise. If they do superior work they are often sought out in the future. Part of the reason is that the contractor comes to trust their skills and depends on their judgment in completing tasks.

137 F.3d at 1443. Lease Operators here were not required to have, let alone utilize, any such skills or initiative and no one, least of all Central, depended upon their judgment. Because of the extensive business support services provided by Central, *see* Fact ¶¶ 69-74, the Lease Operators did not even have to have the skill to perform the basic planning, budgeting and accounting functions typical of an independent business.

In the end, if Central assigned them sufficient mileage, the only skill the Lease Operators needed to turn a "profit" was the ability to drive and submit the necessary trip paperwork – the very same skills that Central's employee drivers brought to their jobs.[28] In these circumstances, this factor weighs heavily in favor of employee status. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 995 (9th Cir. 2014) (fact that only skill required is the ability to drive favors a finding of employee status).

F. The Lease Operators' Working Relationship Is Permanent And Indicates Employee Status

Generally speaking, "'independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration." *Snell,* 875 F.2d at 811. Here, although the Contractor Agreements run through December 31 of the year in which they are signed, they automatically renew for the following year unless terminated by one of the parties. Ex. 20 (CA): ¶ 14A, Ex. 5 (WB): 77. Lease Operators were effectively forced to renew because their leases generally ran for two or more

[28] Even if some Drivers had the skills to operate an independent trucking business, those skills were not used here and are thus irrelevant. *Baker,* 137 F.3d at 1443 (special skills are not indicative of independent status unless skills are used in an independent way); *Martin v. Selker Bros.*, 949 F.2d 1286, 1295 (3d Cir. 1991) (same).

years. In practice this means that as long as drivers performed satisfactorily, they have permanent employment exclusively with Central. Such an arrangement indicates that the Lease Operators were employees rather than independent contractors. *FedEx,* 765 F.3d at 996 (automatic renewal for successive one-year terms on satisfactory performance weighs in favor of employee status); *Sureway Cleaners*, 656 F.2d at 1372 (fact that workers work continuously for long periods and do not switch principals indicates that workers have nothing to transfer but their own labor and are dependent upon the principal for continued employment); *Pilgrim Equipment,* (same).

The fact that the Contractor Agreement gives Central the right to terminate Lease Operators at will on ten days' notice also indicates an employment relationship rather than an independent contractor relationship. *FedEx,* 765 F.3d at 988 ("[t]he right to terminate at will, without cause, is strong evidence in support of an employment relationship.'"); *Narayan v. EGL, Inc.*, 616 F.3d 895, 902-903 (9th Cir. 2010) (same); *Shippers Transport Exp.,* 2014 WL 7499046 at *13 (same). Thus, this factor too indicates that the Lease Operators are employees.

G. The Services Performed By The Lease Operators Are An Integral Part Of Central's Business

This factor asks whether the work performed by the Lease Operators constitutes an "essential part" of the alleged employer's business. *See Sureway*

Cleaners, 656 F.2d at 1372; *Hodgson v. Ellis Transportation Co.*, 456 F.2d 937, 940 (9th Cir. 1972). "In other words, regardless of the amount of work done, workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer." *Donovan v. DialAmerica Marketing, Inc.* 757 F.2d 1376, 1385 (3d Cir. 1985).

The Lease Operators performed the primary work of Central's core business function – transporting goods by truck. The work they performed was, for all intents and purposes, indistinguishable from the work performed by Central's employee drivers as Central's repower procedures demonstrate. Fact ¶¶ 33-34. That Lease Operators were indistinguishable from Central's employee drivers is further evidenced by the fact that Lease Operators and employee drivers were issued the same Driver Manual of policies, Fact ¶ 53, attended the same orientation courses, Fact 35, and the fact that Lease Operators trained Central's employee drivers. Fact ¶¶ 86-89. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Foods*, 331 U.S. at 729.

Central 'suffered and permitted' Lease Operators to carry out its core business in exactly the same way that it suffered and permitted its employee drivers to do.

This factor too weighs in favor of employee status.

H. Lease Operators Are Economically Dependent Upon Central For Continued Employment

As explained above, all six of the *Real* factors weigh in favor of a finding of dependence and employee status. But there are other aspects of the Lease Operators' relationship with Central, not covered by the *Real* factors, which further confirm the drivers' complete dependence on Central for their employment.

First, the Lease Operators and their "independent" businesses were entirely the creation of Central. Central selects individuals from among its employee drivers that Central considers potential Lease Operators. Fact ¶ 9. Central then "blasts" those individuals with Qualcomm messages and other recruiting material advertising the supposed advantages of being a Lease Operator for Central rather than an employee driver. Fact ¶¶ 60-68. Central offered additional incentives such as forgiving driver school tuition and paying bonuses to drivers who signed up to be Lease Operators. Fact ¶ 61.

Second, once a driver was persuaded to become a Lease Operator, Central walked the driver through the process of becoming a Lease Operator without any effort on the part of the driver beyond signing his name. Fact ¶ 68. No credit checks were done, no money needed to be put down, no showing of financial ability to pay was required. Fact ¶¶ 63-64. Central offered to provide and finance all of the necessary equipment, insurance coverages, accounting services, licenses

and performance bond. Fact ¶¶ 64-67. A driver needed only to pick a truck and sign his name a half dozen times and he could drive out of the terminal a fully functioning Lease Operator. And once he drove away, Central continued to take care of his every need: Central agreed to advance the costs of fuel, parts, service and maintenance through the use of the Comcheck system and fuel card. Fact ¶¶ 69-74. It offered Lease Operators an over-the-road maintenance department to assist with mechanical problems, Fact ¶ 69, and filed all necessary legally required reports with respect to fuel, road, and mileage taxes, *id.* It offered Lease Operators advances and payment plans when their weekly settlements weren't sufficient to cover their lease payments and other expenses. Fact ¶ 71. And, in addition to all of these services, Central Driver Managers provided advice to Lease Operators telling them how to run more efficiently and safely. Fact ¶¶ 70, 72, 73.

But for this 'cradle to grave' care provided by Central, most Lease Operators would not have been able to function.[29] The Lease Operators had no independent business that they could offer to customers and were prohibited from doing so in any event. They were wholly dependent upon Central for their continued employment as truck drivers. The moment they ceased working for Central, they lost their truck and their livelihood. Indeed, in this sense they were far more

[29] Without Central, many drivers would never be able to get credit, let alone lease a truck because of bankruptcy filings—filings that Central simply ignored. Ex. 14 (KV): 99; Ex. 12 (JH): 46; Ex. 10 (DW): 14, 217.

dependent on Central than the rig welders found to be employees in *Baker* who at least retained their welding equipment when their relationship with the employer ended. This case is quite similar in this respect to *Max Trucking LLC v. Liberty Mutual Ins. Co.*, 802 F.3d 793 (6th Cir. 2013). In that case, as in this one, Max Trucking leased trucks to its drivers, and deducted the costs of fuel, repairs and insurance (which were initially paid for by the company) from the drivers' weekly settlements. The Sixth Circuit affirmed the district court's finding that such drivers were employees, noting that "[t]he drivers have the means necessary to perform the services for Max Trucking only because Max Trucking provides these things up front, even if the costs are ultimately charged back to the drivers." *Id.* at 804. The Court also noted that the Lease Operators are totally dependent on Max Trucking because "the drivers at issue get their trucks only on the strength of Max Trucking's credit. . . . [T]he drivers lack a credit or asset base sufficient to obtain their trucks independently. They need the balance sheet of Max Trucking to acquire their truck." *Id.* at 805. The drivers are, as a result, "economically dependent on Max Trucking for their ability to operate as truckers." *Id.*

In sum, viewed as a whole, it becomes clear that Central's Lease Operator program had nothing to do with creating independent businesses and everything to do with a labor management strategy instituted by Central to reduce turnover among experienced drivers by giving them the appearance of independence while

saddling them with sufficient debt and contractual impediments to make it financially devastating for them to leave.

CONCLUSION

For all of the foregoing reasons, the Plaintiff Lease Operators are entitled to Summary Judgment that they were employees of Central entitled to the protections of the FLSA.

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Respectfully Submitted,

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