UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 19-401 (JGB) (KKx)**	Date	February 27, 2020
Title	***Salvador Canava v. Rail Delivery Service Inc., et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) DENYING Defendants' Motion to Dismiss (Dkt. No. 40); (2) DENYING Defendants' Motion to Strike and Compel Arbitration (Dkt. No. 41); (3) GRANTING Plaintiff's Motion for Conditional Collective Action and Class Certification (Dkt. No. 71); and (4) DENYING Plaintiff's Motion for Order Approving Class Notice (Dkt. No. 79) IN CHAMBERS)

Before the Court are four motions: (1) Defendants' Motion to Dismiss the Fourth and Fifth Causes of Action of First Amended Complaint ("Motion to Dismiss," Dkt. No. 40); (2) Defendants' Motion to Strike Class Allegations and Compel Arbitration ("Motion to Strike" or "Motion to Compel," Dkt. No. 41); (3) Plaintiff's Motion to Conditionally Certify Count One as a Collective Class Action ("Motion for Certification," Dkt. No. 71); and (4) Plaintiff's Motion to Approve Notice to the Class and collective Action Members ("Notice Motion," Dkt. No. 79). The Court held a hearing on the Motions on January 27, 2020. After considering all papers filed in support of and in opposition to the Motion and oral argument presented by counsel, the Court DENIES-IN-PART and GRANTS-IN-PART the Motions.

I. BACKGROUND

On March 4, 2019, Plaintiff Salvador Canava filed a complaint against Defendants Rail Delivery Services Inc., Greg P. Stefflre, and Judi Girard Stefflre. ("Complaint," Dkt. No. 1.) Plaintiff amended his Complaint as of right, filing a First Amended Complaint on May 22, 2019. ("FAC," Dkt. No. 31.) The FAC alleges ten causes of action: (1) Violation of the Fair Labor Standards Act, (2) Relief for Unconscionable Agreements, (3) Failure to Pay the California Minimum Wage, (4) Failure to Provide Meal Periods or Compensation in Lieu Thereof, (5)

Failure to Authorize and Permit Rest Periods or Compensation Lieu Thereof, (6) Failure to Pay Compensation Timely Upon Severance of Employment, (7) Failure to Comply with Itemized Employee Wage Statement Provisions, (8)Violation of Labor Code Sections 221 and 2802, (9)Violation of Business and Professions Code Section 17200 et seq., and (10) Labor Code Private Attorneys General Act of 2004 ("PAGA"). (See FAC.)

On June 28, 2019, Defendants filed the Motion to Dismiss and the Motion to Compel Arbitration and Strike Plaintiff's Class Allegations. (See Motion to Dismiss; Motion to Compel Arbitration.) In support of these Motions, Defendants filed the Declaration of Greg P. Stefflre. ("Stefflre Declaration," Dkt. No. 42.) Plaintiff filed his Oppositions on August 9, 2019. ("MTD Opposition," Dkt. No. 50; "MTC Opposition" or "MTS Opposition," Dkt. No. 51.) Plaintiff also filed four declarations in support of the MTC Opposition: Declaration of Dan Getman, Declaration of Salvador Canava, Declaration of Jesus Dominguez, and Declaration of Omar Rivera. ("Getman Declaration," Dkt. No 52; "Canava Declaration," Dkt. No. 53; "Dominguez Declaration," Dkt. No. 54; "Rivera Declaration," Dkt. No. 55.) Defendants replied on August 30, 2019. ("MTD Reply," Dkt. No. 63; "MTC Reply" or "MTS Reply," Dkt. No. 62.) Plaintiffs also filed a second Declaration of Greg P. Stefflre and a declaration of Antonio Saavedra. ("Stefflre Reply Declaration," Dkt. No. 64; "Saavedra Declaration," Dkt. No. 65.) Defendants also filed a Request for Judicial Notice.[1] Plaintiff filed a sur-reply on September 27, 2019. ("MTC Sur-Reply," Dkt. No. 81.)

On September 23, 2019, Plaintiff filed a Motion for Class and Collective Action Certification. (See Motion for Certification.) In support of the Motion for Certification, Plaintiff also filed the Declaration of Dan Getman, the Declaration of Omar Rivera, the Declaration of Jesus Dominguez, the Declaration of Carolyn Mow, and the Declaration of Salvador Canava. ("Getman MCC Declaration," Dkt. No. 73; "Rivera MCC Declaration," Dkt. No. 74; "Dominguez MCC Declaration," Dkt. No. 75; "Mow Declaration," Dkt. No. 76, "Canava MCC Declaration," Dkt. No. 77.) Defendants opposed the Motion for Certification on October 22, 2019. ("MCC Opposition," Dkt. No. 87.) In support of the MCC Opposition, they filed eight declarations. Plaintiff replied on November 11, 2019. ("MCC Reply, Dkt. No. 93.)

Plaintiff filed a Motion to Approve Class Notice on September 24, 2019. (See Notice Motion.) Defendants opposed the Notice Motion on November 4, 2019. ("Notice Opposition," Dkt. No. 92.) Plaintiff replied on November 11, 2019. ("Notice Reply," Dkt. No. 94.)

II. RELEVANT FACTS

Plaintiff worked for Defendant Rail Delivery Services, Inc. ("RDSI"), a motor carrier engaged in the interstate shipment of freight. Like many other drivers that work with RDSI, Plaintiff signed an agreement with RDSI titled "Interstate Transportation Agreement Between

[1] The Court did not rely on any of the documents submitted. Accordingly, the RJN is DENIED AS MOOT.

Rail Delivery Services, Inc. and Independent Contractor" ("Contract"). (Stefflre Reply Declaration ¶¶ 6-9.) The Contract contains a class action waiver:

> Contractor and Carrier expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Agreement. Contractor and Carrier agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and each of Contractor and Carrier shall only submit their own, individual claims in arbitration and will not seek to represent the Interests of any other person

("Waiver," Stefflre Declaration at Ex. 1, p. 22, ¶ XIII.) It also contains an arbitration provision which states: "contractor and carrier agree that any disputes arising under or in connection with this Agreement or services rendered in connection with same shall be arbitrated pursuant to this arbitration agreement and any proceedings thereunder shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16." ("Arbitration Agreement"). (Id.)

III. MOTION TO DISMISS

Defendants move to dismiss Claims Four and Five, which allege violations of California's meal and rest break hours, pursuant to a decision issued by the Federal Motor Carrier Safety Administration ("FMCSA") that determined these laws were preempted by federal regulations when applied to interstate drivers of commercial vehicles. (Motion to Dismiss at 7-8;) see also California's Meal and Res Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed Reg. 67470 (Dec. 28, 2018). Plaintiff does not dispute that under the FMCSA Order, his rest and meal break claims are preempted. (MTD Opposition at 1-2.) But he requests that rather than dismiss the claims, the Court stay them pending the outcome of Ninth Circuit review of the FMCSA Order. (Id.;) see also Int'l Brotherhood of Teamsters, et al. v. FMCSA, Case No. 18-73488 (filed December 27, 2018.)

The Court agrees that a stay is appropriate. At this point, where several claims against Defendants remain, staying the claims creates neither a tax on judicial resources nor prejudice to Defendants. And should the Ninth Circuit overturn the FMCSA, a stay will allow Plaintiff to resume litigation of these claims. Defendants argue that a "dismissal rather than a stay is [] consistent with the approach taken by both the FMCSA and the Ninth Circuit" when they declined to stay enforcement of the FCSA Order. (Dismiss Reply at 3-4.) But that argument misunderstands the effect of a stay, which, like dismissal will prevent Plaintiff from litigating these claims. By staying Plaintiff's meal and rest break claims, the Court enforces the FMSCA Order's holding that interstate commercial drivers lack standing to prosecute such claims. Accordingly, the Motion to Dismiss is DENIED and Counts Four and Five are STAYED until May 1, 2020. Plaintiff is ORDERED to submit an update regarding Int'l Brotherhood of Teamsters, et al. v. FMCSA, Case No. 18-73488 before that date.

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IV. MOTION TO COMPEL ARBITRATION

A. Legal Standard

The Federal Arbitration Act (the "FAA") provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA establishes a general policy favoring arbitration agreements. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008) ("Section 2 of the FAA creates a policy favoring enforcement of agreements to arbitrate.") Its principal purpose is to "ensure that private arbitration agreements are enforced according to their terms." Concepcion, 563 U.S. at 334 (citing Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989) (internal quotation marks omitted)). "Arbitration is a matter of contract, and the [FAA] requires courts to honor parties' expectations." Id. at 351.

Under the FAA, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such an arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. Id. If such a showing is made, the district court shall also stay the proceedings pending resolution of the arbitration at the request of one of the parties bound to arbitrate. Id. § 3.

To determine whether to compel arbitration, a district court's involvement is limited to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Cox, 533 F.3d at 1119 (quoting Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)). A party seeking to compel arbitration under the FAA has the burden in this regard. Id. However, "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

B. Discussion

Defendants move to compel arbitration of Claims Two, Six, Seven, and Eight pursuant to an arbitration agreement signed by the Plaintiff and RDSI, which states: "contractor and carrier agree that any disputes arising under or in connection with this Agreement or services rendered in connection with same shall be arbitrated pursuant to this arbitration agreement and any proceedings thereunder shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16." (Stefflre Declaration at Ex. 1, p. 22, ¶ XIII.)

By its express terms, the FAA does not permit federal courts to compel the arbitration of employment contracts of interstate commercial carrier drivers: "nothing herein [] shall apply to

contracts of employment of . . . any [] class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. § 1. The Supreme Court recently held that this exclusion "capture[s] any contract for the performance of *work* by *workers*" and therefore embraces contracts requiring independent contractors to preform work. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019) (emphasis in original). Accordingly, the Contract falls within the purview of section 1's exclusion of "employment contracts" and the FAA does not permit the Court to compel arbitration of it.

Defendants do not dispute that the FAA excludes the Contract from its purview. Instead, they cryptically assert, without citation to any caselaw, that the law applicable to the Contract's arbitration provision is the California Arbitration Act. (Motion to Compel at 8-9.) This theory ignores both basic principles of choice-of-law and the plain language of the Contract. The FAA presumptively applies to any contract, such as this one, "evidencing a transaction involving commerce." 9 U.S.C. § 2. Parties can only opt-out of the FAA if they include language in their agreement that manifests a clear intent to do so. See Brennan v. Opus Bank, 796 F.3d 1125, 1129 (9th Cir. 2015) ("[F]ederal law governs the arbitrability question by default [where] the Agreement is covered by the FAA . . . and the parties have not clearly and unmistakably designated that nonfederal arbitrability law applies."). "[S]ilence or ambiguity concerning the applicable arbitrability law" is reason to apply federal arbitrability law. Cape Flattery Ltd. v. Titan Mar., LLC, 647 F.3d 914, 921 (9th Cir. 2011).

Here, the parties did not indicate any intent to opt-into the CAA. In fact, they affirmatively manifested clear intent to opt-into the FAA by agreeing that "any proceedings [] shall be governed by the Federal Arbitration Act ("FAA")." (See Arbitration Agreement.) Defendants appeal to the California contract law principle that the clear language of a contract must govern that contract's interpretation. (Motion to Compel at 9.) But they simultaneously argue that the Court ought to ignore the plain language of the contract and apply the CAA rather than the FAA—which would be a direct violation of that principle. (See id.) Defendants also emphasize that the arbitration agreement establishes "an intent to arbitrate disputes." (Id.) But as explained above, the parties must demonstrate "a clear and unmistakable" intent to opt out of the FAA and into the CAA, an "intent to arbitrate" is not enough.

Both the law and the Contract language are clear: the FAA applies. In a final attempt to avoid that conclusion, Defendants argue that because the Contract was drafted and signed before New Prime Inc. was decided, the Court should apply the CAA. RDSI drafted the Contract. RDSI chose the FAA language—presumably because it believed the FAA to be more favorable. That RDSI misinterpreted the FAA when it drafted the Contract is certainly no reason to ignore the language that it included therein. Parties are bound by the contracts they sign—even when they don't fully understand the ramifications of each provision.

Therefore, the Court applies the FAA to interpret the Contract. Pursuant to the FAA, the Court cannot compel the arbitration of contracts, such as this one, requiring a worker to perform work as an interstate commercial driver. Accordingly, the Motion to Compel Arbitration is DENIED.

V. MOTION FOR CLASS CERTIFICATION

Plaintiff moves to conditionally certify Claim One as a Collective Action Pursuant to 29 U.S.C. section 216(B). (Motion for Certification.) He also moves to certify Claims Two, Three, Six, Seven, Eight, Nine, and Ten as Class Actions Pursuant to Rule 23(b)(3). (Id.) The Rule 23 class is defined to include "all truck drivers who, at any time after March 3, 2015, owned or leased a truck that they personally drove for Rail Delivery Services, Inc. under an independent contract agreement" ("Drivers"). (Id. at 1-2.) The FLSA Class is similar, but it is limited to Drivers who drove for RDSI anytime after March 3, 2016. (Id.)

A. Waiver

In the Motion to Strike, Defendants argue that Plaintiff cannot pursue his class claims because he waived the right to do so when he signed the Contract, which contained the following collective action waiver:

> Contractor and Carrier expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Agreement. Contractor and Carrier agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and each of Contractor and Carrier shall only submit their own, individual claims in arbitration and will not seek to represent the Interests of any other person

("Wavier," Stefflre Declaration at Ex. 1, p. 22, ¶ XIII.) Plaintiff responds that this waiver is unenforceable because it is contrary to public policy and unconscionable.

In Gentry v. Superior Court,[2] the California Supreme Court identified four factors to determine whether a class waiver is contrary to public policy and thereby unenforceable: (1) "the modest size of the potential individual recovery," (2) "the potential for retaliation against members of the class," (3) "the fact that absent members of the class may be ill informed about their rights," and (4) "other real world obstacles to the vindication of class members' rights . . . through individual arbitration." 42 Cal. 4th 443, 463-64. The Court finds that each of these factors weigh in favor of a finding that the Waiver is against public policy.

First, Plaintiff's potential recovery is less than $27,000. (Getman Declaration ¶ 10.) Courts have found sums as high as $37,000 are "modest" within the meaning of Gentry. See Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 745 (2004) (holding "claims are as large as

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[2] The Supreme Court has held that the FAA preempts state law regarding class action waivers, including Gentry. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011). But because section 1 of the FAA excludes the Contract from its mandates regarding class waiver, Gentry remains good law to determine whether Plaintiff waived his right to pursue a class action. See Garrido v. Air Liquide Indus. U.S. LP, 241 Cal. App. 4th 833, 845 (2015).

$37,000" were not enough to incentivize individual litigation where the would be a range of recovery amount potential class members); see also Muro v. Cornerstone Staffing Sols., Inc., 20 Cal. App. 5th 784, 793 (2018) (holding the potential recovery was modest where "maximum individual recovery would be less than $26,000."). Defendants cite no case law to the contrary. Instead, they cite a settlement from a case in the District Court of Arizona, which they argue is evidence that class treatment here would diminish the value of potential plaintiffs' claims. (MTS Reply at 9.) This argument misunderstands the law: the first Gentry factor does not ask a court to determine whether individual litigation would result in a larger recovery, it asks only whether the potential recovery would be modest. Moreover, there is no reason for the Court to conclude that any settlement in this case would look anything like the cited settlement from the District of Arizona—which was based on different operative facts and applied Arizona labor law, not California labor law.

Defendants also argue that $27,000 is not modest because "claims in this range are routinely asserted against employers." But they cite no case law or examples in support of this claim. And even assuming labor claims of this size are sometimes vindicated on an individual basis, the Court can infer that it would be difficult for the average potential plaintiff to find counsel willing to represent them for this potential recover, where a contingent award would be small compared to the necessary time and effort investment required to prevail.[3] (See Getman Declaration 8-10.) Plaintiff has provided evidence and cited to case law demonstrating that the potential recovery here is "modest" within the meaning of Gentry. Defendants have failed to provide evidence or case law to the contrary. Accordingly, the Court finds that the first Gentry factor weighs against enforcing the Waiver.

Second, Plaintiff and two other RDSI employees have declared that they fear retaliation. (Canava Declaration ¶ 18, Dominquez Declaration ¶ 13; Rivera Declaration ¶ 13.) Courts have found similar declarations sufficient to meet the second prong of the Gentry test. Defendants argue that the Court ought to ignore these statements because the declarants are no longer employed by RDSI. (MTS Reply at 10.) But that fact only underscores Plaintiff's assertion that the fear of retribution forced him to wait until he was no longer employed to bring a lawsuit. (Canava Declaration ¶ 18.) The former employees' "expression of [their] own concerns about retaliation provide[s] a sufficient basis . . . to draw the reasonable inference that other similarly situated [current] drivers shared those same concerns." See Muro, 20 Cal. App. 5th at 794; Franco v. Athens Disposal Co., 171 Cal. App. 4th 1277, 1296 (2009) (finding the second Gentry factor met with an affidavit submitted by the lead plaintiff who was a former employee because "it is reasonably presumed potential class members still employed by the employer might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.") This second factor, therefore, weighs against enforcing the Waiver.

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[3] Defendants argue that Cal. Labor Code section 1194 awards attorneys' fees to the prevailing party. (MTS Reply at 9.) That provision, however, will only apply if the plaintiff prevails—it will not apply in a settlement. Where a case is complex, like here, an attorney would likely be unwilling to take on a case where his adequate compensation required him to fully prevail. (See Getman Declaration 8-10.)

Third, Plaintiff has submitted evidence that many putative class members are minimally educated and speak limited English. (Canava Declaration ¶¶ 2, 3; Dominguez Declaration ¶ 5; Rivera Declaration ¶ 6.) California employment law is complex, and many well-educated, English-speaking individuals do not fully understand their rights. The nuanced distinction between an employee and independent contractor—which involves choosing the appropriate multi-part test—is even more difficult for a lay person to understand. Plaintiff's declaration states that he did not understand "the difference [] between a contractor and an employee." (Canava Declaration ¶ 8.) Based on that testimony, the lower level of education and English ability among the drivers, and the complexity of the applicable law, the Court infers that like Plaintiff, many other drivers did not understand that there was a possibility that they had been misclassified.

Defendants contend that "drivers[] had extensive conversations with bilingual RDSI staff where the differences between contractors and employees were explained in detail." (Reply at 10.) While that may be the case, it is improbable that the RDSI staff explained that there was a possibility that RDSI had misclassified the individuals as independent contractors when in fact they were employees. Moreover, during those meeting, RDSI drivers signed "Employee/Independent Contactor Conversion" form contracts which state "applicant is . . . interested in ceasing being an employee driver and becoming an independent business person." (Stefflre Reply Declaration, Exhibits 1-3.) And RDSI told the drivers that they were independent contractors. (Canava Declaration ¶ 8.) Given the strong "independent contractor" message from RDSI, it is unlikely that communications from the company did anything to inform potential plaintiffs about the possibility of misclassification. Instead, those communications likely led drivers to erroneously believe that there was no possibility that they had employee rights. Accordingly, the third <u>Gentry</u> factor weighs against enforcing the Waiver.

Fourth, individual resolution of these claims would be wholly inefficient. Each potential plaintiff signed the Contract or a substantially similar agreement. (Stefflre Reply Declaration ¶¶ 6-9.) If these potential plaintiffs are forced to litigate individually, each will need to spend substantial time and expense (retaining and paying a lawyer, paying court fees, defending and taking depositions, propounding and responding to discovery, preparing for trial, etc.) to answer the same question: whether the Contract creates an employment or independent contractor relationship. Given that many of the drivers have lower levels of education, it is unlikely that the majority would have the ability to navigate the legal landscape to effectively vindicate their rights. <u>See</u> <u>Garrido v. Air Liquide Indus. U.S. LP</u>, 241 Cal. App. 4th 833, 847 (2015). The fourth <u>Gentry</u> factor weighs against enforcing the Wavier.

Based on the above, the Court concludes that enforcement of the Waiver "would undermine the vindication of the [drivers] unwaivable statutory rights and would pose a serious obstacle to the enforcement of [California's labor] laws." <u>See</u> <u>Gentry v. Superior Court</u>, 42 Cal. 4th 443, 450 (2007). Because the Waiver is contrary to public policy, it is unenforceable. The Court need not assess whether it is also unconscionable. Defendants' Motion to Strike is DENIED.

B. FLSA Collective Action: Claim One

Plaintiff moves to conditionally certify Claim One as an FLSA collective action. (Motion for Certification.) The FLSA was enacted to "protect all covered workers from substandard wages and oppressive working hours, 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)). To achieve that end, the FLSA permits an employee to bring an action individually, or collectively, on behalf of himself and other "similarly situated" employees. 29 U.S.C. § 216(b)

Certification of FLSA collective actions generally flows from a two-step approach.[4] Edwards, 467 F. Supp. 2d at 990. In the first step, the court determines "whether the potential class should be given notice of the action." Leuthold, 224 F.R.D. at 467. The plaintiff bears the burden of showing that the lead plaintiff and the proposed class are similarly situated. Ambrosia v. Cogent Communications, Inc., 312 F.R.D. 544, 550 (N.D. Cal. 2016). However, the plaintiff need not establish that her position is or was identical to those of the proposed class; rather, a plaintiff need only show that her position is or was similar to that of the absent employees. Edwards, 467 F. Supp. 2d at 990 (internal citation omitted). "Given the limited amount of evidence generally available to the court at this stage in the proceedings, this determination is usually made 'under a fairly lenient standard and typically results in conditional class certification.'" Edwards, 467 F. Supp. 2d at 990 (quoting Leuthold, 224 F.R.D. at 467).

Plaintiff argues that he is "similarly situated" the Drivers because they all signed the Contract or materially similar agreements purporting to create an independent contractor relationship. (Motion for Certification at 11-12.) He argues that the central issue for all Drivers with respect to Claim One is whether they are in fact employees entitled to minimum wage. (Id.)

The employment test applicable to FLSA claims is the "economic realities test," which assesses several factors including:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business

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[4] A FLSA collective action need not be certified by the court; however, certification is an effective case management tool whereby the court controls the notice procedure, definition of the class, opt-in deadline, and orderly joinder of the parties. See Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170-172 (1989). Therefore, certification lies within the discretion of the court. Leuthold, 224 F.R.D. at 466.

Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979). Defendants argue that Plaintiff is not "similarly situated" to the Drivers because there are several factual differences between Plaintiff and other Drivers that would result in different outcomes pursuant to the "economic realities test." (MCC Opposition at 12-15.)

The Court disagrees. First, the "similarly situated" standard of the FLSA is much lower than the rigorous Rule 23 analysis. See Edwards, 467 F. Supp. 2d at 990. Accordingly, Plaintiff need not show that every factor is likely to be resolved by common proof. His assertion that the Drivers all signed the Contract or a materially similar agreement—which Defendants do not contest[5] —is sufficent to establish the Drivers are "similarly situated." Second, only one of the factual discrepancies raised by Defendants, that some drivers leased a truck directly from RDSI while others utilized their own, is relevant to the economic relates test. The other discrepancies are not.

Defendants argue that there is a discrepancy between those declarations stating that RDSI exercised considerable control and those declarations stating that RDSI exercised minimal control. This is irrelevant to the economic realities test, which looks at "the alleged employer's *right* to control," which would be reflected in the Contract, rather than the exercise of that right. Likewise, that some Drivers were free to accept and reject loads and others were not is immaterial if RDSI retained the right to determine the loads—which would dictate the Drivers' "*opportunity* for profit or loss." Defendants point out that some drivers were more skilled then others, but because the test assess the "whether the service rendered *requires* a special skill" the fact that some drivers may have skills beyond what was required is irrelevant. Finally, Defendants' argument that some drivers have worked at RDSI for years while others have worked for shorter periods misses the point that the Contract establishes at-will employment for all the Drivers, making the "degree of *permanence*" of the working relationship the same for all Drivers, even where the actual length of employment is different.

Plaintiff has established that the Drivers are "substantially similar" for the purpose of establishing whether or not they are independent contractors, and thereby they "share a similar issue of law or fact material to the disposition of their FLSA claims." See Campbell, 903 F. 3d at 11. Therefore, Plaintiff need not—as Defendants assert—also show that the FLSA Drivers are not "similarly situated" for the underlying FLSA claim. Nevertheless, Defendants' argument that the Drivers are not similarly situated because there is variability in the per hour pay misunderstand the law. Differences in damages—and even the existence of class members without damages—is not reason to deny Rule 23 certification. Torres v. Mercer Canyons Inc.,

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[5] Defendants assert that RDSI "renegotiated its owner-operator contracts and drivers are now subject to different contractual terms . . . [which] include restructuring of how compensation is paid." (MCC Opposition at 3; Stefflre MCC Declaration ¶ 31.) But Defendants have neither submitted that contract nor provided information regarding the substance of the changes. Without any evidence proving that the changes were relevant to the issues discussed in the Motions, the Court assumes that all provisions relevant to Plaintiff's claims remained consistent.

835 F.3d 1125, 1137 (9th Cir. 2016) ("[F]ortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation.") It therefore is likewise not evidence that the Drivers are not "similarly situated" for the purpose of conditional FLSA certification, which, as explained above, is a much lower standard than that of Rule 23. The Court finds that Plaintiff has demonstrated that he is "similarly situated" to the Drivers. Accordingly, Plaintiff's Motion to Conditionally Certify Count One as an FLSA Collective Action is GRANTED.

C. Rule 23 Class Action: Claims Two, Three, Six, Seven, Eight, Nine and Ten

Federal Rule of Civil Procedure 23 ("Rule 23") governs the litigation of class actions. A party seeking class certification must establish the following prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Because Plaintiff moves to certify a class pursuant to Rule 23(b), he must additionally prove that common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. See Fed. R. Civ. P. 23(b)(1)-(3).

Defendants concede that the proposed class satisfies the numerosity and adequacy requirements but dispute commonality and typicality. (MCC Opposition at 18.) They also dispute that the proposed class meets the additional Rule 23(b) requirements. (Id.at 20-24.)

1. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart, 564 U.S. at 350; see also id. ("What matters to class certification . . . is not the raising of common questions . . . but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (internal quotation marks and citations omitted). Differences among putative class members can impede the generation of such common answers. Id. In the Ninth Circuit, "Rule 23(a)(2) has been construed permissively. . . . The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003).

The Parties dispute which California employee relationship test governs Claim Three.[6] Defendants argue that the general common law test articulated in S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations applies. See 48 Cal. 3d 341 (1989). Under Borello, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired[.]" Id. at 350. Plaintiff argues that the test from Dynamex Operations W. v. Superior Court applies instead. Under that test, the hiring entity bears the burden of establishing that a worker is an independent contractor rather than an employee. Id. at 957. In order to meet that burden, it must establish each of the test's three factors:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

Id. Thus, if the putative employer fails to establish any one of the three prongs with regard to a worker, the worker is properly classified as an employee for the purposes of IWC wage orders. The Parties agree that Borello applies to Claims Six, Seven, and Eight. And for the purposes of this analysis, the Court assumes without deciding that the more exacting Borello standard applies to Claim Three as well.

Defendants argue that Plaintiff failed to establish commonality because the Borello test "requires individualized consideration of whether the worker was controlled by Defendants." (MCC Opposition at 19.) They cite several declarations that describe the varying ways in which RDSI exercises control over the Drivers. (See Stefflre Declaration ¶¶ 7-8; Chaviar Declaration ¶¶ 4-15; Brooks Declaration ¶¶ 2-5.) Borello, however, does not require an individual determination how an employer exercises individual control but rather "how much control the hirer retains the *right* to exercise." Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 533 (2014). As explained above, the Contract establishes the bounds of RDSI's right to control the Drivers—even if it does not always exercise that full right. Because the Drivers signed the Contract or materially similar agreements, the question of whether the Drivers are employees under the Borello test is one capable of class-wide resolution. Accordingly, Plaintiff has established commonality.

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[6] The crux of the Parties' dispute is whether Prong B of Dynamex's ABC test is preempted by the FAAAA. (Compare MCC Opposition at 6-7 with MCC Reply at 8.) If it is, Borello applies instead. Courts within this Circuit are split on the issue of FAAAA preemption. Compare Alvarez v. XPO Logistics Cartage LLC, 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018) ("Court agrees . . . finds that the ABC test . . . is [] preempted by the FAAAA") with W. States Trucking Ass'n v. Schoorl, 377 F. Supp. 3d 1056, 1072 (E.D. Cal. 2019) ("the FAAAA does not preempt Dynamex' interpretation of California wage orders").

2. Typicality

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). The typicality inquiry focuses on the claims, not the specific facts underlying them. Just Film, Inc. v. Buono, 847 F.3d 1108, 1116 (9th Cir. 2017). Plaintiff asserts that his claims are typical because "Plaintiff and the class members all assert the same claims arising out of the same contractual arrangement with RDSA, and all rely on the same legal theories." (Motion for Certification at 15.) Defendants argue that Plaintiff is not typical of the class because he worked "15-16 hours per day, in violation of HOS rules." (MCC Opposition at 22.) While working so many hours may be uncommon, Defendants fail to explain how the number of hours Plaintiff worked is relevant to his misclassification and denial of benefits claims. As with any wage and hour class action, it is likely that some drivers worked more than others. And the Court does see how the fact that Plaintiff worked so many hours that he violated HOS rules is any different than the standard variation in hours worked.[7]

Defendants further argue that Plaintiff is atypical because he experienced a greater degree of control over his work by RDSI. (MCC Opposition at 20.) But as explained above, RDSI's right to control is the relevant inquiry and therefore this factual distinction is irrelevant. Finally, Defendants explain that Plaintiff is atypical because he "only signed a short-term truck rental and then walked away from the agreement while most RDS drivers used other programs with other terms and conditions and did in fact take ownership of their trucks." (Id.) Once again, Defendants fail to explain why this factual difference in Plaintiff's experience renders his claims atypical from potential class members.

All Drivers, including Plaintiff, signed the Contract or substantially similar agreements that allegedly misclassified them as independent contractors and, on that basis, bring wage and hour claims. Plaintiff's claims, therefore, are "reasonably co-extensive with those of absent class members." Hanlon v. Chrysler Corp., 150 F. 3d 1011, 1020 (9th Cir. 1998).

3. Rule 23(b) Factors

To qualify for certification under Rule 23(b)(3), a plaintiff must show (1) common questions "predominate over any questions affecting only individual members," and (2) class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

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[7] If, for example, Plaintiff's violation of the HOS Rules provided Defendants with some sort of affirmative defense to their failure to follow applicable wage and hour laws, that may make Plaintiff's claims atypical in a way that would defeat class certification. But Defendants have failed to articulate any reason why the violation of HOS Rules would change the Court's analysis in any material way.

a. Predominance

"The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." Torres, 835 F.3d at 1134. In arguing lack of predominance, Defendants again point to the contradicting declarations regarding the amount of control experienced by individual workers. But because the relevant inquiry is "right to control," variations in experiences are irrelevant and therefore do not constitute individual issues that need to be determined. Defendants also point to the new 2019 contracts—which they have failed to produce or explain in a meaningful way. (MCC Opposition at 22.) If the provisions in the new contracts establishing RDSI's right to control are the same as the provisions in the old contracts, there are no individualized issues raised by the new contracts. Because Defendants have failed to provide any information regarding the provisions in new contracts, the Court assumes they are materially similar to the Contract.

Finally, Defendants suggest that the practical realities of the Drivers' varying experiences of RDSI's control means that RDSI's right to control also varied. (Id.) A contract is not dispositive in determining the right to control "if other evidence demonstrates a practical allocation of rights at odds with the written terms." Ayala, 59 Cal. 4th at 535. In the declarations submitted by Defendants, Drivers describe setting their own hours and picking and choosing which loads they wanted to take. This evidence suggests that there might be variations in RDSI's exercise of control over these individuals, but it still retained the same rights to control their work pursuant to the contract. The conduct, therefore, is not "at odds" with the Contract. Accordingly, the common issue of the right to control created by the Contract predominates any individual issues.

b. Superiority

Defendants argue that class treatment is not superior because putative class members "disagree with the claims . . . that they are RDS[I] employees." (MCC Opposition at 24.) Defendants cite no law suggesting that declarations of putative class members who "disagree" with a claim is grounds to find that class adjudication is not superior. Moreover, California employee rights are nonwaivable. And therefore, whether individuals agree with a determination that they are employees has no effect on whether that determination is legally correct.

Because Plaintiff has established both Rule 23(a)'s requirements and Rule 23(b)'s, Plaintiff's Motion for Class Certification is GRANTED.

D. Class Notice

Plaintiff moves the Court to approve the Notice at Exhibit 1 of the Notice Motion. Additionally, he moves the Court to approve the proposed notice plan:

- That Defendants be ordered to provide in an electronic spreadsheet format such as Excel, the following information, each contained in a separate column: names,

addresses, email addresses, an employee identification number or unique identifier, and dates of employment of collective and class action members;

- That Notice be issued in English and Spanish via first class mail and email;
- That the opt-out/opt-out period is to last 120 days;
- That Defendants be requires to send an email to class and collective members currently working for Defendants informing them about the case and directing them to where they may find the Notice;
- That Defendants be required to provide the phone number and the last four digits of the social security number for any class member whose notice is returned as undeliverable or collective action member who does not opt-in within 30 days and authorizing Plaintiff to use that information to obtain a current address/email address to which the Notice may be re-mailed;
- That Plaintiff's counsel be authorized to mail and email reminder postcards and emails 21 days before the expiration of the opt-in period to those putative collective action members who have not opted into the collective action at that point.

(Notice Motion.) Defendant raises several objections to the Notice and Proposed Notice Plan, including that the Motion for Notice Approval is premature considering Defendants' right to an interlocutory appeal pursuant to Rule 23(f). (Notice Opposition.) The Court agrees the Notice Motion is premature and therefore it is DENIED.[8]

The Court ORDERS the Parties to meet and confer regarding notice and submit a Joint Statement with a proposed notice and notice plan. If the parties are unable to reach agreement on all issues, they should indicate those areas where they were able to agree and those areas where they were not, briefly outlining their respective positions for areas of disagreement. The Parties should also submit a redline version clearly indicating the differences in any proposed notices. The Court further ORDERS the Parties to meet and confer regarding any necessary protective order, which is to be submitted for approval.

If Defendants do not file a Rule 23(f) Petition to the Ninth Circuit, the Joint Statement shall be submitted no later than February 28, 2020. If the Defendants file a Rule 23(f) Petition to the Ninth Circuit, the Joint Statement is due no later than seven days after the decision on the

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[8] Because the Court has not yet set the notice period, Plaintiffs' Motion to Toll the Statute of Limitations is also DENIED AS MOOT. Plaintiff is free to move the Court for tolling at a later time.

petition.[9] If the Ninth Circuit grants the petition, Defendants may move to stay this case at that time.

IV. CONCLUSION

For the reasons above, the Court:

1. DENIES the Motion to Dismiss;

2. STAYS Claims Two and Four until May 1, 2020;

3. ORDERS Plaintiff to submit a status update regarding Int'l Brotherhood of Teamsters, et al. v. FMCSA, Case No. 18-73488 before May 1, 2020;

4. DENIES the Motion to Compel Arbitration;

5. DENIES the Motion to Strike;

6. GRANTS the Motion for Certification;

7. DENIES the Notice Motion; and

8. ORDERS the Parties to meet and confer and submit a Joint Statement pursuant to the instructions above.

IT IS SO ORDERED.

[9] If the Plaintiff petitions for interlocutory appeal pursuant to Rule 23(f), the Parties are also free to submit two Joint Notices, one for the FLSA Collective Action to be submitted by February 28, 2020 and the second for the Rule 23 Class to be submitted after the Rule 23(f) partition is decided.