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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

SALVADOR CANAVA, individually and on behalf of others similarly situated,

Plaintiffs,

v.

RAIL DELIVERY SERVICES, INCORPORATED AND GREG P. STEFFLRE, JUDI GIRARD STEFFLRE,

Defendants.

Case No. 5:19-cv-00401-JGB (KKx)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO CONDITIONALLY CERTIFY COUNT 1 (FLSA) AS A COLLECTIVE ACTION PURSUANT TO 29 U.S.C. § 216(B) AND TO CERTIFY COUNTS 2, 3, 6, 7, 8, 9, AND 10 AS RULE 23(B)(3) CLASS ACTION

Hearing Date: November 25, 2019
Time: 9:00 a.m.
Judge: Honorable Jesus G. Bernal

Location: U.S. Courthouse
3470 Twelfth Street
Riverside, CA 92501
Courtroom: 1
Complaint filed: March 4, 2019

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INTRODUCTION

Named Plaintiff Canava, along with the other opt-in Plaintiffs, move this Court to conditionally certify Plaintiff's Fair Labor Standards Act (FLSA) claim as a collective action pursuant to 29 U.S.C. § 216(b), and to certify his state law causes of action as Rule 23(b)(3) class actions. An FLSA collective action and Rule 23(b)(3) class actions may properly be maintained in the same proceeding. *Busk v. Integrity Staffing Solutions,* 713 F.3d 525, 528-30 (9th Cir. 2013) *rev'd on other grounds* 574 U.S. 27 (2014). Plaintiff requests that the Rule 23 classes be defined as: 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 contractor agreement.[1] (Hereafter referred to as "Drivers"). This class definition necessarily excludes drivers who owned or leased more than one vehicle at a time as a driver could not personally drive two trucks concurrently. Plaintiff also seeks to exclude from the class the work of Drivers during any pay period in which they (a) hired other individuals to drive their truck for Rail Delivery Services ('RDS") or (b) in which they used their truck to haul freight for another person or entity unrelated to RDS while contracted to RDS. The FLSA collective action is defined the same way except that it is limited to Drivers who drove for RDS at any time after March

[1] The class would include individuals who operated under a business name as long as the other elements of the class membership were met. *See Ruiz v. Affinity,* 754 F.3d 1094, 1103-4 (9th Cir. 2014) (discounting significance of forming a business entity in determining employee status). Count 7, failure to pay compensation timely upon termination or severance in violation of Cal. Lab. Code §203 applies to a sub-class of Drivers whose hauling agreements with RDS were terminated or severed during the class period. This definition of the class is slightly different from that in the amended complaint based on information Plaintiff has received since the amended complaint was filed. Plaintiff will seek to conform the complaint to this definition of the class.

3, 2016 (three years preceding the filing of the initial complaint) through the date of final judgment herein.

This case arises out of Defendants' attempts to evade state and federal labor laws designed to protect employees by misclassifying Plaintiff and other Drivers as "independent contractors." Thus, the principal issue presented by both the FLSA and state law claims is whether, as a matter of law, Plaintiff and other Drivers operating under RDS' independent contractor agreements were employees of Defendants entitled to the protections of federal and state labor laws.[2] If that common question is answered in the affirmative, the remaining liability questions in the case are also common to the class as they focus on whether Defendants' uniform employment policies, violated the federal and state statutes alleged in the complaint.

STATEMENT OF THE CASE AND RELEVANT FACTS

Defendant RDS is a motor carrier engaged in the interstate shipment of freight pursuant to 49 U.S.C. §§ 13901, 13902. Doc 41 at 6. The principal business of RDS is hauling containerized cargo from rail yards in Southern California to points throughout California, Nevada, and Arizona. Doc 41 at 4. Stefflre Decl. ¶ 2; Doc 31 (Am. Compl.) ¶¶ 27, 31. Defendant Greg Stefflre is an attorney, co-founder, Vice Chairman, and CEO of RDS. *Id.* ¶ 28; Doc 42 at 39 (Canava Lease) (signed for RDS by "Greg. P. Stefflre, Vice Chairman/Co-founder"). Defendant Judi Girard Stefflre is co-founder, Chairman, and COO of RDS. Am. Compl. ¶ 29.

RDS contracts with more than 100 drivers at a time. *See* Declaration of Jesus Dominguez in Support of Plaintiffs' Motion ("Dominguez Decl.") at ¶21 (150 drivers); Doc 64 at 17 (FAQ rev. 9/2016) ("Our fleet has grown to over 100 trucks

[2] The sole non-statutory claim is Count Two which asserts that the "independent contractor" contracts Drivers entered into with RDS were unconscionable. That claim also presents common questions because all Drivers signed materially similar agreements.

and we are continuing to add contractors."). RDS considers all of these drivers to be "independent contractors" and refers to them as "owner operators" although most lease their trucks. *Id.* at 17-18.

To haul for RDS, Drivers executed an independent contractor agreement with RDS titled "Interstate Transportation Agreement Between Rail Delivery Services, Inc. and Independent Contractor" ("ICA"), which were materially the same for all class members.[3] Most, if not all, Drivers also executed a truck lease with RDS or Crossroads Equipment and Leasing, LLC.[4] The ICA and the truck lease reference each other and form a single contractual agreement.[5] Both the ICA and the lease documents were pre-printed forms presented by RDS to class members on a take-it-or-leave-it basis.[6] *See* Doc 53 ¶11 (Canava Decl.); Doc 54 ¶10 (Dominguez Decl);

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[3] *See,* Doc 64 at 2 ¶¶6-9 (Dec. of G. Stefflre indicating that new drivers sign ICA); Doc 65 at 2 ¶4 ("I spend about 3-5 hours going through the Independent Contractor Agreement (ICA) and all attachments paragraph by paragraph with all new drivers."). *See, e.g.,* Doc 53 at 8-48 (9/2017 ICA of S. Canava); Doc 64 at 28-74 (5/2017 ICA of Omar Rivera); Doc 64 at 76-124 (3/2016 ICA of Jesus Dominguez). *See also* Dominguez Decl. at ¶21; Rivera Decl. at ¶19. Because all Agreements are materially the same, Plaintiffs will generally reference only the Agreements (ICA and Truck Lease) of Named Plaintiff Salvador Canava.

[4] *See* Doc 31 ¶¶ 36, 39 (Amended Compl.); Doc 64 (Decl. G. Stefflre); Doc 65 (Decl. A. Saavedra). *See, e.g.,* Doc 42 at 33-39 (S. Canava Rental Agreement).

[5] *See,e.g.,* Doc 42 at 34 (Rental Agreement) ("You are party to a Transportation Agreement with us which said agreement is incorporated herein by this reference.") at 35 ("Failure to perform services under the Transportation Agreement constitutes a breach [of the Rental Agreement]); Doc 64 at 8-9 (Representations and Agreements).

[6] Although RDS has disputed the Plaintiffs' contentions that it fails to explain its contracts to Drivers, RDS does not dispute that workers must sign the contracts as RDS writes them. RDS has not supplied any individually negotiated or rewritten ICA which varies from the form it drafts for all Drivers to sign.

Doc 55 ¶8 (O. Rivera Decl).

The ICA outlines the terms of a Driver's employment relationship with RDS and states that Drivers are independent contractors. Am. Compl. ¶36; Doc 53 at 9 ¶I (Canava ICA). However, Plaintiff alleges that the ICA, and Defendants policies implementing the agreement, allow RDS to exert nearly complete control over Drivers' work. Doc 31 at ¶ 43 (Am. Compl.). It gives RDS the right to seize a Driver's vehicle and use it if it believes that a delivery may be late. Doc 53 at 23 ¶VIIIb. It also gives RDS the unilateral right to assign the Driver and his truck to another carrier. *Id.* at 31 ¶XVII. Most importantly, the ICA allows RDS to terminate the agreement at-will on 24-hour's notice. Doc 53 at 28 ¶¶X, XI. This provision gives RDS power to negate all of the controls the ICA purports to give drivers simply by threatening to terminate the ICA if a driver does not conform to RDS' directions. Thus, for example, while the ICA provides that Drivers may turn down offered loads or drive for other carriers, they cannot realistically exercise these rights for fear of retaliation or termination by RDS. Mow Decl. Ex.1 (Canava Decl. ¶7); Dominguez Decl. ¶¶7, 11; Declaration of Omar Rivera in Support of Plaintiffs' Motion ("Rivera Decl.") ¶ ¶7, 10. The termination provision also gives RDS the power to change the contract at will. Doc 53 at 5 ¶14 (Canava Decl.) The ICA specifies the flat dollar amounts RDS will pay per load depending on the pick-up and delivery point, but gives RDS the right to change those rates at will. Doc 53 at 12 ¶III (ICA); Doc 64 at 117-118 (Appendix D to ICA). ("This schedule is subject to amendment upon prior notice by Carrier and remains effective until the effective date of such amendment."). RDS required Drivers to buy and/or rent equipment from RDS, including a communications tablet, GPS tracking device, speed tracking device, all of which RDS used to control Drivers' work. Dominguez Decl. ¶¶8-9.

In 2009 the California Air Resources Board enacted regulations limiting emissions from diesel trucks and, effective December 31, 2013, trucks with 2006

and older engines were no longer compliant. Doc 64 at 17 (FAQ). RDS recognized that class members generally had "insufficient funds and/or credit rating to be able to affordably purchase or lease a CAB compliant vehicle." Doc 64 at 17 (FAQ). Accordingly, RDS helped class members obtain a truck by leasing trucks directly to Drivers and/or by using its credit and guarantees to assist Drivers to obtain a leased vehicle through Crossroads Equipment and Leasing, LLC, a subsidiary of Velocity Vehicle Group. Doc 64 at 17-18 (FAQ). In providing this assistance, RDS made clear that, if a driver stopped driving for RDS, the beneficial lease terms negotiated by RDS would be withdrawn and the Driver would have to negotiate a new market-rate lease based on his own credit rating. Doc 42 at 34 (Canava Lease). The lease also made clear that "[f]ailure to provide services under the Transportation Agreement constitutes a breach [of the truck lease]." Doc 42 at 35 ¶4.[7]

In September 2017, Plaintiff Canava signed a "Crossroads Program" lease agreement to rent a Freightliner truck from RDS and an ICA by which he agreed to use that truck to provide hauling services for RDA. Doc 42 at 33-39. Plaintiff worked for RDA for approximately 8 months until April 2018. Doc 53. He did not earn federal or state minimum wage during each workweek. Declaration of Carolyn Mow filed herewith ("Mow Decl.") at Ex. 1 ¶16). Doc 53 ¶17; Doc 52 ¶6; Getman Decl., Doc. 52 ¶6-10.

Other Drivers also failed to earn the federal and state minimum wage for all

[7] RDS also uses a second leasing program, the "Leasing Loop Program," by which RDS offered a $5000 discount on the price of a truck leased directly from Crossroads as well as a $2500 advance for the deposit for the lease. *See* Ex. A to Getman Decl, ¶5. Here too, RDS made clear that if the driver did not continue to work for RDS until the deposit advance was paid back (a minimum of 25 weeks), the driver would be liable to RDS for the full $2500 deposit. *Id.*

hours worked in a workweek. *See, e.g.*, Dominguez Decl. ¶15-16; Rivera Decl. ¶15. Moreover, the flat rates paid by RDS did not compensate Drivers for non-productive work such as pre-and post-trip inspections, time spent waiting to load or unload, etc. Mow Decl. Ex 1 at ¶15; Dominguez Decl. at ¶14; Rivera Decl. at ¶14. Plaintiff alleges that the weekly settlements issued by RDS failed to comply with the requirements of Cal Lab. Code §226 because, *inter* alia, they did not properly record his hours of work, *see* Ex. 1 to Mow Decl. at Ex. A thereto (sample Canava wage statement); that RDS improperly shifted its business expenses on to Drivers by requiring them to bear all of the expenses of operating their trucks. *See* Doc 53 at 18 ¶V.d (Canava ICA); Doc 64 at 9 (Representations and Agreement) ("You will pay from your gross earnings all of your operating expenses including the lease on your truck").

Plaintiff brought suit to redress these violations on behalf of himself and other similarly situated drivers. His amended complaint alleges 10 counts:

(1) failure to pay the federal minimum wage, 29 U.S.C. §206.

(2) unconscionability of the ICA;

(3) failure to pay California minimum wage in violation of Cal. Lab. Code §§ 1194 and 1182.12 and IWC Wage Order 9, Section 4.

(4) failure to provide meal breaks or compensation in violation of Cal. Lab. Code § 226.7;

(5) failure to authorize or permit rest periods in violation of Cal. Lab. Code §226.7;

(6) failure to timely pay wages upon termination in violation of Cal. Lab. Code §203;

(7) failure to provide accurate wage statements in violation of Cal. Lab. Code §226;

(8) imposition of Defendants' business expenses on Drivers and coercing or

compelling Drivers to purchase things of value from Defendants in violation of Cal. Lab. Code §§221, 450, and 2802;

(9) violation of California's Unfair Competition Law, Cal. Bus. and Prof. Code §17200; and,

(10) civil penalties for violation of Cal. Private Attorney General Act (PAGA) §2699 *et seq.* based on the above violations of the Cal. Labor Code.

Doc. 31. To date 24 individuals have filed consent to sue forms joining Plaintiff's FLSA claim as party plaintiffs. Declaration of Dan Getman in Support of Plaintiffs' Motion ("Getman Decl.") ¶4. Defendants have moved to compel arbitration of counts 2, 6, 7, and 8 and to strike the class and collective action allegations with respect to all counts except Count 10 (PAGA). Doc 41. Defendants also moved to dismiss Counts 4 and 5. Doc 40. Plaintiff opposes the motion to compel arbitration and to strike the class and collective action allegations but agrees that Counts 4 and 5 should be stayed pending the Ninth Circuit's decision in *Lab. Commissioner of Cal. v. FMCSA,* No. 19-70329 (9th Cir. filed Feb 6, 2019). Doc 50. Plaintiff now moves for conditional certification of Count 1 as an FLSA collective action and for Rule 23(b)(3) class certification of Counts 2, 3, 6, 7, 8, 9, and 10.[8]

ARGUMENT

I. THE COURT SHOULD GRANT CONDITIONAL CERTIFICATION

A. Legal Standard

The FLSA allows employees to bring a collective action on behalf of other "similarly situated" employees based on alleged statutory violations. 29 U.S.C. § 216(b). A "collective action" differs from a class action in that each plaintiff must

[8] Because Plaintiff agrees that Counts 4 and 5 should be stayed pending the outcome of Ninth Circuit Case No. 18-73488, he does not seek class certification of Counts 4 and 5 at this time.

opt into the suit by giving her consent in writing. *McElmurry v. U.S. Bank Nat'l Ass''n.*, 495 F.3d 1136, 1139 (9th Cir. 2007). "[U]nlike a class action, only those plaintiffs who expressly join the collective action are bound by its results." *Id.* (citing 29 U.S.C. § 256). Every plaintiff who opts into a collective action has party status. *Campbell v. City of Los Angeles,* 903 F.3d 1090, 1104-05 (9th Cir. 2018).

Collective actions afford plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources," and "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). "Importantly, the theoretical alternative to collective litigation is the possible proliferation of individual actions—in [some cases], *thousands* of individual actions—litigated" one after another. *Campbell*, 903 F. 3d at 1116.

1. The Two Stage Certification Process

Courts "evaluate the propriety of the collective mechanism—in particular, plaintiffs' satisfaction of the 'similarly situated' requirement—by way of a two-step 'certification' process." *Campbell,*, 903 F.3d 1090, 1100 (9th Cir. 2018) (listing cases) (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)); *see also Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1115 (C.D. Cal. 2011) (stating that most courts, including those in this District and this Circuit, "follow a two-tiered approach to certification of FLSA collective actions").

The first stage typically occurs "at or around the pleading stage." *Campbell,* 903 F.3d at 1109. At this stage the court makes a preliminary determination whether the collective appears to be sufficiently "similarly situated" to authorize dissemination of a court-approved notice to the potential collective members advising them that they have a right to opt-into the action. *Campbell,* 903 F.3d at 1109; *Mitchell*, 841 F. Supp. 2d at 1115. "At this early stage of the litigation, the district court's analysis is typically focused on a review of the pleadings but may

sometimes be supplemented by declarations or limited other evidence." *Campbell,* 903 F.3d at 1109. Courts "tend to require 'nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Mitchell,* 841 F. Supp. 2d at 1115 (quoting *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006)).; *Sarviss v. Gen. Dynamics Information Tech., Inc.,* 663 F.Supp.2d 883, 903 (C.D. Cal.2009)). This is a "fairly lenient standard" which "typically results in conditional class certification." *Mitchell*, 841 F. Supp. 2d at 1115.

The second step is generally precipitated by a motion to decertify filed by the defendant after discovery is complete and after the notice period has closed. *Misra v. Decision One Mortg. Co., LLC*, 673 F. Supp. 2d 987, 993 (C.D. Cal. 2008). At that time, the Court has the benefit of the factual record to evaluate whether the plaintiffs who have joined the case are similarly situated under "a more stringent" summary judgment analysis. *Campbell,* 903 F.3d at 1109-1110; *Leuthold v. Destination Am. Inc.,* 224 F.R.D. 462, 467 (N.D. Cal. 2004).

The reason for this two-step process and the "fairly lenient standard" at the first stage is that, unlike in a Rule 23 class action, the statute of limitations is not tolled for putative members of an FLSA collective until they affirmatively opt into the action. *See Misra,* 673 F.Supp.2d at 993 ("Since this first determination is generally made . . . based on a limited amount of evidence, the court applies a fairly lenient standard and typically grants conditional class certification."). Thus, it is critical that notice of the right to opt-in issue promptly after the filing of the case if there is a colorable basis for believing the class members may be similarly situated. "The sole consequence' of a successful motion for preliminary certification is 'the sending of court-approved written notice' to workers who may wish to join the litigation as individuals." *Campbell*, 903 F. 3d at 1101.

By design, this two-stage procedure protects workers' interest in ensuring

they receive prompt notice of their right to vindicate their FLSA rights as a collective, while also allowing courts to decertify the class should the full factual record reveal that the opt-in class members are not actually "similarly situated." *See Leuthold*, 224 F.R.D. at 468 (granting conditional certification and noting "defendants will be free to move for decertification once the factual record has been finalized and the time period for opting in has expired").

2. The Similarly Situated Standard

Although the FLSA does not define "similarly situated," the Ninth Circuit recently clarified that, "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Campbell,* 903 F.3d at 1117. '"Plaintiff need not show that his position is or was identical to the putative class members' positions; a class may be certified under the FLSA if the named plaintiff can show that his position was or is similar to those of the absent class members.'" *Mitchell*, 841 F. Supp. 2d at 1115. "If the party plaintiffs' factual or legal similarities are material to the resolution of their case, dissimilarities in other respects should not defeat collective treatment." *Campbell*, 903 F.3d at 1114. This standard is usually met by showing that the plaintiff and the collective action members were victims of a common policy or plan of the defendant that allegedly violated the law. *See Ortega v. Spearmint Rhino Companies Worldwide, Inc.*, No. EDCV17206 JGB(KKx), 2019 WL 2871156 (C.D. Cal. May 15, 2019) at *2-3 (granting preliminary certification in misclassification case); *Misra,* 673 F. Supp. 2d at 993("To satisfy the initial step, a plaintiff need only make 'a modest factual showing sufficient to demonstrate that [he] and potential plaintiffs together were victims of a common policy or plan that violated the law.") (quoting *Roebuck v. Hudson Valley Farms, Inc.*, 239 F. Supp. 2d 234, 238 (N.D.N.Y. 2002)).

As the above makes clear, the FLSA "not only imposes a lower bar [to

proceed collectively] than Rule 23, it imposes a bar lower in some sense even than Rules 20 and 42, which set forth the relatively loose requirements for permissive joinder and consolidation at trial." *Campbell*, 903 F. 3d at 1112. Because 29 U.S.C. §216(b) makes no mention of "'class' proceedings, one can surmise . . . an affirmative congressional choice 'not to have Rule 23 standards apply to [collective] actions.'" *Campbell,* 903 F.3d at 1113 (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F3d 1095, 1105 (10th Cir. 2011)). "Importantly, the FLSA "declares a right to proceed collectively on satisfaction of certain conditions," and thus "does not give district courts discretion to reject collectives that meet the statute's few, enumerated requirements." *Campbell*, 903 F. 3d at 1112.

B. Plaintiff and the Collective Are Similarly Situated

Here, the allegations in the Amended Complaint, along with the evidence in support of this motion, more than satisfy Plaintiff's modest burden of showing that the Drivers "share[s] a similar issue of law or fact material to the disposition of their FLSA claims." *Campbell,* 903 F.3d at 1117. The Drivers share material facts because they all signed materially similar ICA contracts. As a result, the central legal issue presented by Plaintiff's FLSA claim —whether the working arrangement created by the ICA and RDS' policies and procedures implementing that contract created an FLSA employer/employee relationship – is also shared by all Drivers. Put another way, Plaintiff has shown that the collective action members were all victims of Defendants' allegedly unlawful policy of treating ICA Drivers as FLSA exempt. Of course, whether the working relationship was, in fact, one of employer/employee entitling Drivers to the FLSA minimum wage is a question for the merits that need not be addressed as part of this motion for preliminary certification. What matters is that all Drivers share issues of fact and law material to the disposition of the FLSA minimum wage claim. *Campbell,* 903 F.3d at 1117.

Courts in the Ninth Circuit have often found FLSA certification to be

appropriate in cases, like this one, where drivers working under materially similar contracts, allege that their contracts illegally characterized them as independent contractors, thereby depriving them of the protections of the FLSA. *See, e.g.*, *Carter v. XPO Last Mile, Inc.*, 16cv1231-WH0, 2016 WL 5680464 at *3-6 (N.D. Cal. Oct. 3, 2016) (certifying collective of delivery drivers working under 5 different versions of delivery service agreements who allege that all agreements misclassified them as independent contractors); *Villalpando v. Exel Direct, Inc.*, 12cv4137-JCS, 2016 WL 1598663 (N.D. Cal. Apr. 21, 2016) (refusing to decertify collective action alleging that work contract signed by collective members improperly were misclassified them as independent contractors); *Collinge v. Intelliquick Delivery Inc.*, No. 2:12cv824 JWS, 2015 WL 1292444 at *1-10 (D. Az. 2015) (same); *Flores v. Velocity Exp., Inc*., 12-CV-05790-JST, 2013 WL 2468362 (N.D. Cal. June 7, 2013) ("Plaintiffs have alleged, and Defendants do not dispute, that each individual delivery driver signed an independent contractor agreement, subjecting them to a uniform company policy of treating them as exempt workers under FLSA."). *See also, Doe v. Swift Transportation Co.*, No. 2:10-CV-00899 JWS, 2017 WL 67521, at *15 (D. Ariz. Jan. 6, 2017) (granting summary judgment that hauling agreements between drivers and carrier were "contracts of employment" despite the fact they characterized drivers as independent-contractors); *Ortega,* 2019 WL 2871156 at *7-9 (granting conditional certification where all collective members worked pursuant to the same form contract which classified them as independent contractors).

II. RULE 23(b)(3) CERTIFICATION SHOULD BE GRANTED

A. Legal Standard

Rule 23 requires a plaintiff to show that the class satisfies the four requirements of Rule 23(a) and that the class falls within one of the three categories of set forth in Rule 23(b), in this case Rule 23(b)(3). "'Courts typically proceed

claim-by-claim in determining whether the Rule 23 requirements have been met, particularly as to Rule 23(a)(2) and (b)(3) requirements of common questions and predominance.'" *Moreno v. JCT Logistics, Inc.*, EDCV 17-2489 JGB (KKx), 2019 WL 3858999 at *3 (C.D. Cal. May 29, 2019), quoting *Allen v. Verizon California, Inc.*, 2010 WL 11583099 at *2 (C.D. Cal. Aug. 12, 2010).[9]

B. Plaintiff Satisfies Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of individual class members is impracticable. *See* FRCP 23(a)(1). While there is no particular number cut-off for numerosity, *Ballard v. Equifax Check Servs. Inc.*, 186 F.R.D. 589, 594 (E.D. Cal. 1999), a class consisting of forty or more members is generally deemed large enough to make joinder impracticable. *Moreno,* 2019 WL 3858999 at *6, citing *Keegan v, American Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012). Here, Plaintiff has submitted evidence that Defendant has 100 to 200 ICA drivers at a time. Driver turnover during the relevant time frame would only increase the number of Drivers. This is enough to satisfy numerosity. *See Moreno,* 2019 WL 3858999 at *6 (certifying class of 75 single truck operators)

2. 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

[9] *Moreno* is a truck driver case similar in many respects to this case and it is cited throughout the following discussion of Rule 23. However, the *Moreno* case is different in one critical respect: The defendant in *Moreno,* in addition to hiring drivers directly the way RDS did, also entered into brokerage contracts with different motor carriers, each of which hired its own drivers under its own terms of work. The fact that these drivers did not contract directly with the *Moreno* defendant created problems for class certification that do not exist in this case.

to the validity of each one of the claims in one stroke.'" *Moreno,* 2019 WL 3858999 at *6 quoting ." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). The common questions must also be "apt to drive the resolution of the litigation," which turns on the nature of the underlying legal claims in the case. *Jimenez,* 765 F.3d at 1165 (quoting *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 962 (9th Cir. 2013). 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." *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 1165 (9th Cir. 2014).

As discussed above, the predicate element of all of Plaintiff's state statutory claims—i.e. the primary issue that is "apt to drive the resolution of the litigation" — is whether Plaintiff and putative class members were employees or independent contractors exempt from the protections of the statutes at issue. That common question applies to all class members and satisfies the requirements of Rule 23(a)(2). To be sure, the test of employee status depends upon the claim asserted: Count 3, the California minimum wage claim, which arises out of an Industrial Workforce Commission (IWC) wage order, utilizes the "ABC test" adopted by the California Supreme Court in *Dynamex Operations W. v. Superior Court,* 4 Cal.5th 903, 956-57 (2018). *Moreno,* 2019 WL 3858999 at *12. Plaintiffs' other statutory claims (Counts 6, 7, 8), are controlled by the "statutory purpose" test of employee status set forth in *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations,* 48 Cal.3d 341 (1989). *See Moreno,* 2019 WL 3858999 at *12. Count 9 (Unfair Competition Law) and Count 10 (PAGA), are based on the violations set forth in the other counts and so utilize the same employee tests as the predicate claims. *Moreno,* 2019 WL 3858999 at *17 (certifying UCL claim to the extent the predicate claims meet Rule 23 standards).

The fact that different tests of employment status apply to different claims

does not defeat commonality, because the test for each particular claim, whatever it may be, will be the same for all class members. As this Court noted in *Moreno*, which also involved claims utilizing different tests of employee status, "[t]he Court sees no reason why the applicability of different tests to different claims would defeat commonality, as long as those tests apply equally to all members." *Id.* at *8. This case is indistinguishable from *Moreno* in this respect and the commonality is therefore satisfied with respect to the state law statutory claims.

Count 2 (unconscionabiliy) also presents common questions of law and fact as that claim turns on a legal analysis of the terms of the ICA and Defendants policies and procedures implementing that agreement. All class members signed materially similar ICAs so that the legal analysis will be common to the class.

3. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover North Am., LLC,* 617 F.3d 1168, 1175 (9th Cir. 2010). "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.'" *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970 (9th Cir. 2011) at 984 (quoting *Hanon,* 976 F.2d at 508). Typicality is generally satisfied if the plaintiff's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998).

Here typicality is satisfied because the Plaintiff and the class members all assert the same claims arising out of the same contractual arrangement with RDS, and all rely on the same legal theories. *Moreno,* 2019 WL 3858999 at *8-9 (finding drivers Cal. Lab. Code claims for failure to pay minimum wage, furnish accurate

pay statements, pay all wages owed, reimburse business expenses to met the typicality requirement because "the action is based on conduct which is not unique to the named Plaintiff."). At this stage of the proceeding, Ninth Circuit cases do "not require proof of injury to establish typicality; rather, they have found typicality to be met on the basis of the plaintiff's allegations." *Id.* at 9 (citing *Just Film,* 847 F.3d at 1117). Plaintiff is part of the class and is not subject to defenses unique to him. *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 984 (9th Cir. 2011) ("[A]s a general matter, individualized defenses do not defeat typicality.")

4. Adequacy

Under Rule 23(a)(4), the named plaintiff must be capable of adequately representing the interests of the entire class, including absent class members. *See* Fed. R. Civ. P. 23 (a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). The adequacy inquiry turns on: (1) whether the plaintiff and class counsel have any conflicts of interest with other class members and (2) whether the representative plaintiff and class counsel can vigorously prosecute the action on behalf of the class. *See Ellis,* 657 F.3d at 985.

Here the named Plaintiff presents the same claims and seeks the same relief as the rest of the class and has no conflict with the class members. He has demonstrated his commitment to this case by filing this lawsuit and providing information and documents in pursuit of the case. As set forth in the declaration of Dan Getman, class counsel have substantial experience handling large employment related class actions and have been found to be qualified class counsel in prior actions. *See* Getman Decl. Indeed, RDS cited Plaintiff's counsel's recent $100M settlement of a truck driver misclassification class action achieved after nearly ten years of litigation and numerous Ninth Circuit reviews. *VanDusen v. Swift Transportation Co, Inc.,* No. CV10-899-PHX-JWS (D.Ariz.) (pending final

fairness review), Doc 66-2 at 25-108. Plaintiff's counsel also recently resolved a complex FLSA litigation on behalf of misclassified truck drivers in *Cilluffo v. Central Refrigerated Services, Inc.*, 5:12-cv-00886-VAP-OP (CDCA)(undisclosed class settlement for several thousand interstate truck drivers classified as contractors). Thus, Canava is an adequate representative to pursue this action on behalf of the class. Plaintiff's counsel are experienced and capable of litigating the action and should be appointed class counsel pursuant to Rule 23(g).

C. **Rule 23(b)(3)**

Plaintiff seeks certification of his state law claims under Rule 23(b)(3) which requires that "the questions of law or fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FRCP 23(b)(3).

1. Predominance

"Rule 23(b)(3) focuses on the relationship between the common and individual issues." *Hanlon,* 150 F.3d at 1022. Class certification under Rule 23(b)(3) is proper when common questions present a significant portion of the case and can be resolved for all members of the class in a single adjudication. *Id.* That is, predominance is established where "the common, aggregation-enabling, issues are more prevalent or important than the non-common, aggregation defeating individual issues." *Tyson Foods, Inc. v. Bouaphakeo,* 136 S.Ct. 1036, 1045 (2016). "[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)," *Leyva v. Medline Industries, Inc.,* 716 F.3d 510, 514 (9th Cir. 2013), but "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987-988 (9th Cir. 2013). In assessing whether common issues predominate, courts look to the elements of each claim as defined

by state law. *Moreno,* 2019 WL 3858889 at *11.

a. Count 3 (Minimum Wage)

Plaintiff's minimum wage claim requires him to show (1) that he was an employee entitled to minimum wage and (2) that he did not receive at least the California minimum wage for each hour worked. As noted above, the first question, misclassification, is controlled by the ABC test of *Dynamex.* Under that test, the burden is on the employer to demonstrate that workers are not employees by proving each of the following three factors:

> (A) that the worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of 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. at 957. Thus, the class can prevail on the employee issue simply by negating any one of these three elements. For example, Plaintiff can establish the class members' employee status by showing that that the work they performed was in the usual course of Defendants' business. Because all class members were performing the freight hauling work described in the ICA, that question can be determined on a class wide basis. *Moreno,* 2019 WL 3858999 at *13 (finding classification question common because whether drivers performed work in the usual course of defendant's business was a common question.)

As for the second element, Plaintiffs intend to show that the class members did not earn the minimum wage for each hour worked in two alternative ways. First, Plaintiff asserts that Defendants per load pay structure was a piece rate that did not

compensate for specific hours of work, including, *inter alia,* waiting time prior to loading, loading time, and time spent on pre- and post-trip inspections. California law entitles Plaintiff to receive minimum wage for each of these tasks even if the per-load rate is sufficient to ensure that the driver averages minimum wage for all hours worked, including the uncompensated hours. *See Moreno,* 2019 WL 3858889 at *14; *Cardenas v. McClean Food Services, Inc.,* 796 F.Supp.2d 1246, 1249-1253 (C.D. Cal. 2011). Alternatively, if the per-load rate is determined to compensate for those non-productive hours, then Plaintiff seeks minimum wage damages to the extent the per-load rate failed to ensure that Plaintiff received an average of the minimum wage for all of the hours worked each week. These elements of the minimum wage claim present common questions because the question of whether the per-load rate is a piece rate and what tasks it compensates for will be determined based on an assessment of the ICA and RDS' pay policies implementing the ICA – policies that are the same for all class members. *Moreno,* 2019 WL 3858889 at *14 (in determining whether pay system was a piece rate and whether it compensated for non-productive time present common questions, court "need only determine that the same policies bearing on these questions applied to all class members.") Moreover, because all class members contracted directly with RDS, and not some third party, whatever minimum wage damages they suffered will be directly traceable to the unlawful policies of RDS. Thus, common questions predominate for the minimum wage claim for the same reason that this Court found common questions predominated with respect to the minimum wage claims of drivers in *Moreno* who "contracted directly with Defendants" *Id.*

b. Count 6 (failure to pay timely upon termination in violation of Cal.Lab.Code §203)

Cal. Lab. Code § 203 provides that "[i]f an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5 any wages of an employee who is discharged or who quits, the wages of

the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced." § 203(a). The elements of this claim require the class members to show that (1) they were employees entitled to the protection of Cal. Lab. Code §203, (2) that Defendants did not pay within the time limits for pay upon termination; and (3) that Defendants did not do so "willfully."

The first question, employee status, is controlled by the *Borello* test. 48 Cal.3d 341. That test requires the Court to analyze whether the alleged employer "has the right to control the manner and means of accomplishing the result desired," *id.* at 350, as well as secondary factors such as: (a) whether the one performing services is engaged in a distinct occupation or business; (b) whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work; (e) the length of time for which the services are to be performed; (f) the method of payment; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating an employer-employee relationship. Id. at 351. This test is "somewhat comparable to" the FLSA "economic reality" test of employee status, *Dynamex,* 4 Cal.5th at 954. It presents common questions because the evidence relevant to each of these factors can be adduced for the class based on the terms in the ICA and RDS' policies and procedures implementing that agreement. The situation here is very different from that in *Moreno* where the *Borello* test did not present common questions because the class members had different contractual arrangements with their Contract Carriers and had no contractual arrangement directly with the defendant. *Moreno,* 2019 WL 3858889 at *13. Here each class member's contract was directly with RDS and it is that common contract and the policies implementing it that will provide common

answers to the *Borello* factors. Numerous courts have determined employee status on a class wide basis using the *Borello* standard or similar standards where the class members worked under similar contracts. *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (finding delivery drivers to be employees under *Borello*); *Ruiz v. Affinity*, 754 F.3d 1093 (9th Cir. 2014)(same); *Soto v. Diakon Logistics (Del.), Inc.*, No. 08cv33 L(WMC), 2013 WL 4500693 (S.D.Cal. Aug. 21, 2013) (same); *Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588 (N.D. Cal. 2014) (same).

The second element of Count 6 also presents issues which can be proven on a class wide basis without resort to individual testimony. The dates of any class members' termination will appear in Defendant's records as will the date of any payments post-termination. Thus, the violation and damages will be provable from Defendants records. *Morales v Leggett & Platt, Inc.*, 2018 WL 1638887 at *9 (E.D. Cal. Apr. 5, 2018)(because court finds that it can use defendants payroll records to determine violation, common questions predominate).

Finally, the question of willfulness turns on whether Defendants intentionally failed or refused to pay the wages due. *See Yuckming Chiu v. Citrix Sys., Inc.*, 2011 WL 6018278 at *5 (C.D.Cal. Nov.23, 2011) citing *Barnhill v. Saunders & Co.*, Cal.App.3d 1, 10 (1981) ("to be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud [an employee] ... [a]s used in section 203, willful merely means that the employer intentionally failed or refused to perform"). Defendants' reasons for misclassifying Plaintiffs and not paying minimum wage and other wages due within the time limits set by §203 will necessarily be the same for the whole class and thus this aspect of the §203 claim presents a common question as well.

c. Count 7 (failure to provide accurate wage statements in violation of Cal. Lab. Code §226)

The elements of this claim require class members to show that (1) they were

employees entitled to the protections of §226 and (2) that the wage statements they received did not contain all of the information required by §226 and (3) that Defendants' failure to comply with §226 was "knowing and intentional." The first element is controlled by the *Borello* test and presents common questions for the reasons set forth above.

The second element can be established on a class wide basis without the necessity of individual testimony based on the wage statements themselves. *See Lopez v. Aerotek,* 2017 WL 10434395 at *4 (C.D. Cal. Aug. 3, 2017) (common questions predominates because defendants' records will show whether wage receipts were compliant). The third element, turns on Defendants' knowledge and policies and thus the evidence of that element will be common to the class. *See* §226(3) (in determining knowing and intentional requirement court should consider employer's policies, procedures and practices).

d. Count 8 (imposition of Defendants' business expenses on Drivers and coercing or compelling Drivers to purchase things of value from Defendants in violation of Cal. Lab. Code §§221, 450, and 2802)

The elements of the business expense claim in Count 8 requires Plaintiff to show (1) employee status and (2) that Defendants failed to indemnify the class members "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." Cal. Lab. Code §2802(a).

The first element, employee status, involves the application of the *Borello* standard which, as explained above presents a class-wide common question. The alleged business expenses at issue in this claim are the operating expenses for the vehicles used by the Drivers which the ICA explicitly imposes on all class members. Whether those expenses are properly characterized as business expenses of the Defendants is a legal question common to the class. Proof of the amount of the expenses can also be established on a class-wide basis without the need for

individualized testimony based on Defendants records as, in most if not all cases, the Defendants paid the expenses and then deducted them from Drivers' pay settlements creating a written record of the expenses at issue. *See e.g.* Mow Decl. Ex. 1 to Ex. A (Canava wage statements); Doc 53 at 13 (Canava ICA ¶III.d.) (giving RDS right to deduct expenses advanced by RDS).

e. Count 9 (violation of California's Unfair Competition Law, Cal. Business and Professions Code § 17200; and Count 10 (civil penalties for violation of Cal. Private Attorney General Act (PAGA) §2699 *et seq.* based on the above violations of the Cal. Labor Code)

As noted above these claims are derivative of the other substantive claims above and thus are certifiable as class claims for the same reasons and to the same extent as the underlying claims.

f. Count 2 (Unconscionability)

This claim alleges that the ICA as implemented by Defendants is unconscionable – principally insofar as the ICA and Defendants unconscionably classify drivers as independent contractors. As a result, the claim turns on a legal assessment of the ICA and Defendants' policies, not on any individual facts pertaining to different class members, and thus presents common claims.

2. Superiority

A class action must be superior to other methods of adjudication for resolving the controversy. FRCP 23(b)(3). To determine superiority, a court's inquiry is guided by the following pertinent factors: (A) the class members' interests in individually controlling their claims; (B) the extent and nature of any litigation already begun by class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and,(D) the likely difficulties in managing a class action. FRCP 23(b)(3)(A)-(D). The superiority requirement tests whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.,*

97 F.3d 1227, 1234 (9th Cir. 1996).

Plaintiff is unaware of any similar claims having been filed by members of the class. The limited damages suffered by each class member coupled with the fact that "class members may fear reprisal in pursuing individual claims against their employer," and the fact that "individual litigation against a well-funded defendant would be cost prohibitive," suggests that few, if any, members are likely to want to proceed individually. *Campbell v. PricewaterhouseCoopers, LLP,* 253 F.R.D. 586, 605 (E.D. Cal. 2008), *adhered to* 287 F.R.D. 615 (E.D. Cal. 2012). The class involves individuals working in California for California Defendants making this forum appropriate. Manageability issues are unlikely to arise given the extent to which the relevant employment arrangement and claims are controlled by a written contract common to the class. Even damages present manageable common questions because they can be proven through RDS's records, and expert testimony, as well as representative class member testimony. *See Moreno,* 2019 WL 3858999 at *17 fn 24.

A class action is the superior method of resolving the class members' claims because it will "achieve economies of time, effort, and expense ... without sacrificing procedural fairness or bringing about other undesirable results," *Boyd v. Bank of Am. Corp.,* 2014 WL 2925098 at *13 (C.D. Cal. June 27, 2014), and because the alternative to a class case in the employment context is often no case at all because of workers' fear of retaliation. This Court has found class treatment to be superior in a number of similar California labor law claims. *Moreno,* 2019 WL 3858889 at *18 (finding class treatment superior method of adjudicating certain labor claims by truck drivers); *Metrow v. Liberty Mutual Managed Care LLC,* EDCV 16-1133 JGB (KKx), 2017 WL 4786093 at *15 (C.D. Cal. May 1, 2017) (finding class action superior method of adjudicating California labor law claims of workers allegedly misclassified as exempt); *Brown v. Abercrombie & Fitch Co.,*

No. CV14-1242 JGB (VBKx), 2015 WL 9690357 at *21 (C.D. Cal. July 16, 2015) (finding class treatment superior for adjudicating California labor law claims of retail employees); *Dombrosky v. Arthur J. Gallagher Service Co., Inc.*, EDCV 13-0646 JGB (SPx), 2014 WL 10988092 at *15 (C.D. Cal. July 30, 2014) (finding class treatment superior method in claims arising from misclassification).

CONCLUSION

For all of the foregoing reasons, Plaintiff and the collective action members are similarly situated with respect to Plaintiff's FLSA claim and his California law claims satisfy the requirements of Rule 23(b)(3). Accordingly, this Court should:

(1) conditionally certify Count 1 as an FLSA collective action and authorize notice to the FLSA collective action class members of their right to opt-in to the collective action claims; and

(2) certify Counts 2, 3, 6, 7, 8, 9, and 10 as Rule 23(b)(3) class actions and authorize Rule 23(c) notice to the class members.

Respectfully submitted this 23rd day of September, 2019.

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