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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen, et al., Plaintiffs, vs. Swift Transportation Co., Inc., et al., Defendants.	**No. CV 10-899-PHX-JWS** **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MOTION FOR LEAVE TO AMEND COMPLAINT**

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Pursuant to Fed. R. Civ. P. 23, Plaintiffs hereby move to certify as a Rule 23(b)(3) class action on Plaintiffs' Second (Restitution), Third (Declaratory Judgment), Eighth (Forced Labor) Ninth (Arizona Minimum Wage) and Tenth (Arizona Wage Statutes) Causes of Action in the proposed Fourth Amended Complaint.[1] Plaintiffs also move for leave to file a Fourth Amended Complaint to add claims for violations of Arizona's wage statutes, A.R.S. § 23-350 *et. seq*. and minimum wage law, A.R.S. §23-363. Pursuant to LR Civ. 15.1(a), a copy of the proposed Fourth Amended Complaint which shows the differences between the Third Amended Complaint and the proposed Fourth Amended Complaint is attached hereto as Exhibit 1.[2]

This motion is supported by the Declarations of Dan Getman (Getman Decl.), Ex. 2 hereto, and Susan Martin (Martin Decl.), Ex. 3 hereto, the following Memorandum of Points and Authorities and the record before the Court.

INTRODUCTION

Plaintiffs are former Swift "lease operators" -- i.e. truck drivers who signed a combined lease/operating agreement pursuant to which they leased a truck from Swift's affiliate Interstate Equipment Leasing, Inc.("IEL") and, simultaneously, agreed to operate the truck for Swift Transportation Co., Inc. ("Swift"). Plaintiffs seek to certify a Rule 23(b)(3) class of the other Swift lease operators who signed materially similar lease/operating agreements with Swift. There are thousands of current and former drivers

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[1] Plaintiffs are also renewing their Motion for Collective Action Certification under the FLSA and for notice to be issued pursuant to 29 U.S.C. § 216(b). Plaintiffs believe that all class members are subject to Arizona labor law. The New York and California labor law claims continue to be plead in the alternative in the event that the Court determines that Arizona labor law does not apply to all drivers.

[2] As the Court is aware from proceedings to date and from the 663 consents to sue under the FLSA claims filed to date, the FLSA opt-ins, who are all putative class members, work out of or reside in different states. In the event the Court finds that, notwithstanding the parties' contract, not all putative class members can assert claims under the Arizona wage statutes and declines to certify a nationwide class for those claims, Plaintiffs will seek to certify subclasses of New York and California drivers and to further amend the complaint to add additional state law claims and to seek class certification for such claims.

who are members of this proposed class (hereinafter collectively referred to as "Rule 23 Class Members").[3] Doc 177-21 (Swift stating in 2010 that at that time there were nearly 4,700 class members). As the record and the Court's summary judgment ruling finding Plaintiffs are employees for purposes of the FAA demonstrate, there are common questions of law and fact including, *inter alia*: whether Defendants imposed unconscionable contracts upon Plaintiffs; whether Defendants were unjustly enriched by imposition of unconscionable contracts upon Plaintiffs; whether Plaintiffs are entitled to declaratory judgment that Defendants' contracts with Plaintiffs are unconscionable and whether the contracts are void and/or voidable; and whether under Arizona law, Defendants failed to pay minimum wages and made unlawful deductions from Plaintiffs' wages or required that Plaintiffs bear Defendants' business expenses for trucks, other equipment, gas, maintenance, bonds, insurance, tolls, and other costs and expenses of the employer's business. In addition, there are common questions of law and fact regarding the nature and extent of class-wide injury and the appropriate measure of damages for the class; whether Defendants violated wage deduction statutes by continuing to demand lease and other payments after they terminated Plaintiffs' employment; whether Defendants obtained the continuous labor of Plaintiffs by using threats of serious harm; and whether Defendants operated a scheme, plan or pattern intended to cause Plaintiffs to believe that non-performance of labor would result in serious harm.

Rule 23 Class Members are entitled to class-wide relief in the form of: (a) a final judgment and declaration that they are employees of Defendants rather than independent contractors, (b) a declaration that the lease and independent contractor agreement(s) and any successor agreement entered into with any Defendant are contracts of adhesion, unconscionable, entered into under duress and void as a matter of public policy; (c) a judgment against Defendants for money wrongfully deducted from their earnings and (d) a judgment against Defendants for unpaid wages (including minimum wages) together with liquidated damages and interest under the Fair Labor Standards Act and/or under Arizona

[3] All Opt-In Plaintiffs in the FLSA collective action are also Rule 23 Class Members.

wage laws including for treble damages recoverable under Arizona law.

The proposed Rule 23 Class meets the requirements of Rule 23(a) because: (1) the approximate number of current and former drivers is so numerous that joinder is impracticable; (2) commonality is satisfied by the common nucleus of facts and law; (3) typicality is satisfied because Plaintiffs' and Rule 23 Class Members' claims arise from the same practice or course of conduct and are based on the same legal theory; and (4) Plaintiffs are adequate representatives and their attorneys are qualified Class Counsel, all of whom are prepared to represent the Rule 23 Class Drivers. As discussed below, certification is appropriate under Rule 23. The Rule 23 Class meets the requirements set forth in Rule 23(b)(3) as common questions predominate and a class action would be superior to joinder of all class claims, which is impractical due to the large number of such claims.

FACTS

As the Court is fully familiar with the facts of this case, and in the interests of efficiency, Plaintiffs respectfully refer the Court to the facts recited in the Court's Order and Opinion granting Plaintiffs' motion for partial summary judgment (Doc. 862).

ARGUMENT

I. LEGAL STANDARD FOR CLASS CERTIFICATION

"Parties seeking class certification bear the burden of demonstrating that they have met each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b)." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 979-80 (9th Cir. 2011) (*citing Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir.2001)). The decision whether or not to grant class certification rests within the discretion of this Court. *Bateman v. American Multi-Cinema, Inc*., 623 F.3d 708, 712 (9th Cir. 2010).The Rule 23(a) requirements are generally described as numerosity, commonality, typicality and adequacy of representation. Fed.R.Civ. P. 23(a). The proposed Rule 23 Class satisfies each of these prerequisites.

A. DESCRIPTION OF THE CLASS

Plaintiff seeks certification of the following class:

> All lease operators who, prior to January 9, 2017, signed lease/operating agreements by which they leased a truck from Interstate Equipment Leasing, Inc. and agreed to drive for Swift Transportation Co., Inc. ("Swift")

How far back in time the class goes depends on the statute of limitations applicable to each cause of action. The second cause of action, unjust enrichment, carries a four-year statute, A.R.S. §12-550; the third cause of action for declaratory judgment regarding a written contract carries a 6-year statute, A.R.S. §12-548; the eighth cause of action under the federal forced labor statute carries a ten-year statute limitations period, 18 U.S.C. § 1595(c); the ninth cause of action under Arizona's minimum wage statute carries a two year limitations period and three years in the case of a willful violation, A.R.S. § 23-364(H), and the tenth cause of action for violations of Arizona wage statutes carries a one year statute of limitations. A.R.S. § 12-541. The class period ends on January 9, 2017 when Defendants began requiring lease operators to sign a new operating agreement that changes the terms of the previous operating agreements in certain respects (including deleting the arbitration clause).[4]

Plaintiffs request that the law firms of Getman, Sweeney & Dunn, Martin & Bonnett and Edward Tuddenham be appointed class counsel.

B. THE REQUIREMENTS OF RULE 23(a) ARE SATISFIED

1. The Numerosity Requirement Is Met

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs do not have to show that joinder of every class member is impossible nor is there a minimum number of putative class members in order to satisfy the numerosity requirement. *See Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D.Cal.1978) (certifying class with 39 members); *Brink v. First Credit Res.*, 185 F.R.D. 567, 569 (D. Ariz. 1999) (finding as few as 40 class members sufficient to raise presumption

[4] While Plaintiffs believe that, in many respects, this new operating agreement is not materially different from the ones signed in prior years (except for the sections that of the subject of Plaintiff's motion for injunctive relief), they have chosen to limit the class to the prior versions of the agreement in order to avoid the further delay that would be involved in litigating the meaning of that new operating agreement.

of impracticality of joinder); *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 240 (D. Ariz. 2001) (estimate of 87 sufficient). Given the fact that there are many thousands of members of the Rule 23 Class, there can be no serious challenge to numerosity.

2. The Commonality Requirement Is Satisfied

In order to establish commonality, there must be a "common contention…. [t]hat common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that 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 Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Commonality only imposes a "limited burden" upon Plaintiffs given that it "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012).

The Ninth Circuit explained the commonality requirement, post-*Dukes*, in a state law wage and hour case brought by former employees.

> The Supreme Court has recently emphasized that commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. Put another way, the key inquiry is not whether the plaintiffs have raised common questions, even in droves, but rather, whether class treatment will generate common *answers* apt to drive the resolution of the litigation. This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact. (

Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original) (citations and internal quotations omitted).

Not all factual or legal questions raised in the lawsuit need be "common" for the commonality requirement to be met. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) ("Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of class-wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (noting that Rule 23(a)(2) does not require that all questions of fact and law be in common).

Here, the commonality requirement is met because the Plaintiffs and Rule 23 Class

Members all signed materially identical lease/operating agreements and all of the claims asserted arise out of the interpretation of those agreements.[5] Thus, for example, liability for the restitution, declaratory judgment, and the contract claims turns on establishing that the lease/operating agreements are unconscionable and unenforceable. The different causes of action simply offer different remedies once unconscionability is determined. Inasmuch as all class members' lease/operating agreements were materially the same, a finding that the Plaintiffs' agreements are unconscionable will resolve that question for the class. Similarly, liability under the Arizona wage claims, like the FLSA claim, all turn on a finding that the agreements created an employer/employee relationship between the lease operators and Swift. Again, that is a question common to the class since once Plaintiffs are determined to be employees, that ruling will necessarily decide whether the class members, who worked under the same agreements, were employees. Finally, the forced labor claim asserts that the terms of the agreements, particularly the draconian penalties for terminating the lease early, constituted a threat of serious harm that effectively forced drivers to continue driving for Swift in violation of 18 U.S.C §§ 1589 and 1595. If Plaintiffs' agreements violate the forced labor statute, the class members' agreements do as well since they are the same.

These common questions regarding the interpretation of the agreements are more than sufficient to satisfy the requirements of Rule 23(a)(2). *Ruiz v. Affinity Logistics Corp*., 754 F.3d 1093 (9th Cir. 2014) (reversing district court and finding in favor of previously certified class following remand and retrial that trucking company had misclassified delivery drivers as independent contractors when, in fact, under applicable state law, factors established they were employees); *Dalton v. Lee Publications, Inc*., 270 F.R.D. 555 (S.D. Cal. 2010) (certifying class of current and former home delivery newspaper carriers who claimed defendant violated state law by classifying them as independent contractors instead of employees); *Phelps v. 3PD, Inc*., 261 F.R.D. 548 (D. Or. 2009) (certifying class of truck

[5] Exs. 6-10 to Plaintiffs' Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment, Docs. 772-7 through 772-10 and 775 and 775-1, are examples of Swift's form contracts over the period applicable to the class claims in this case. These contracts are for all intents and purposes, identical.

drivers alleging illegal deductions from wages, rescission of agreements, unjust enrichment/quantum meruit, fraud, and seeking declaratory relief, injunctive relief, and penalty wages against former employer); *Breedlove v. Tele-Trip Co. Inc.*, 1993 WL 284327, (N.D. Ill. 1993) (finding commonality and typicality arising from employer's classification of plaintiffs and class members as "independent contractors and general uniform treatment of class members). *See also Juvera v. Salcido*, 294 F.R.D. 516, 521 (D. Ariz. 2013) (commonality and typicality satisfied where named Plaintiffs and employee class were "performing the same basic duties and were subject to the policies at issue in the lawsuit").

3. The Typicality Requirement Is Satisfied

The "typicality" requirement has been explained by the Ninth Circuit as follows:

> To demonstrate typicality, Plaintiffs must show that the named parties' claims are typical of the class. Fed.R.Civ.P. 23(a)(3). 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. Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. (internal citations and quotation marks omitted).

Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011). Rule 23(a)(3) is satisfied if a plaintiff's claims arise from the same event, practice or course of conduct which give rise to the claims of other class members and are based on the same legal theory. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012) ("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.'").

This requirement is easily met. The named plaintiffs' claims arise out of the same "event, practice or course of conduct" as the claims of the class members because, as explained above, all claims arise out of the terms of the common lease/operating agreement. The named plaintiffs assert the same injuries and the same claims and legal theories as the class. Plaintiffs assert that all class members are covered by the Arizona law because all of the lease/operating agreements state that the substantive law of Arizona

applies. Thus, all of the named Plaintiffs' claims are typical of that claim.[6] No claim in this case is based on conduct unique to the named plaintiffs. Rule 23(a)(3) is satisfied.

4. Plaintiffs Are Fair and Adequate Representatives of the Class

Rule 23(a)(4) requires that the named Plaintiffs fairly and adequately represent the interests of the class. The Ninth Circuit employs two criteria for determining adequacy of representation. The named Plaintiffs must show that they (1) do not have any conflicts of interest with other class members and (2) will prosecute the action vigorously on behalf of the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998).

Plaintiffs have no conflicts with the class members as is apparent from the fact that the named Plaintiffs have been prosecuting this case for more than six years without any conflicts having arisen. The long history of this case since it was filed in 2010 also demonstrates clearly that the named Plaintiffs will prosecute this action vigorously on behalf of the class. Plaintiffs have all responded to discovery and have been deposed and pushed the case vigorously. Plaintiffs are proper and adequate representatives of the Rule 23 Class.

5. Proposed Class Counsel Will Fairly and Adequately Represent the Class

Pursuant to Fed. R. Civ. P. 23(g), the Court must also find that class counsel will fairly and adequately represent the interests of the Rule 23 Class. Plaintiffs respectfully submit that their attorneys meet the requirements of Rule 23(g) in all respects and that they will fairly and adequately represent the interests of the Rule 23 Class. As set forth in the Getman Decl. and Martin Decl., class counsel has substantial experience in FLSA, employment and class action litigation. Counsel has undertaken to prosecute this action

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[6] However, in the event the Court were to find that those claims are limited to drivers based in Arizona, Plaintiff Wood was based out of Arizona and thus is typical of that claim even if the scope of the class were to be narrowed. In such case Plaintiffs will seek to certify their New York and California claims which are asserted in the alternative in the event the Court were to find that Arizona law does not apply to all drivers. Plaintiffs Van Dusen and Motolinia were based in New York and are typical of that claim. Plaintiff Sheer was based in California and is typical of that claim. Plaintiffs would also seek to further amend the complaint to add additional state law claims for class certification.

vigorously and is committed to expending the resources necessary to continue to prosecute all aspects of this case. Class Counsel have collectively been litigating this case since 2009. Over that time, they filed the case in New York, obtained co-counsel in Arizona when the case was transferred there, defended the motion to compel arbitration in this Court and litigated four separate appellate/mandamus proceedings in the 9th Circuit, along with Swift's current ,now fifth, proceeding in the Circuit. Class Counsel has actively prosecuted and defended the rights of the class here. Class Counsel will fairly and adequately represent the interests of the Rule 23 Class. *See, e.g., Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001). Based on the foregoing, the adequacy of representation requirements of Rule 23(a)(4) are satisfied.

Because Plaintiffs have demonstrated numerosity, commonality, typicality and adequacy of representation, the prerequisites of Rule 23(a) have been met.

C. CERTIFICATION UNDER RULE 23(B)(3) IS APPROPRIATE.

Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (citation omitted). Rule 23(b)(3) requires that a court to make two determinations: (1) that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

1. The Predominance Requirement Is Met

The Ninth Circuit discussed the concept of predominance in the context of a class action involving state law unpaid wage claims, stating:

> Thus, "[t]he predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case," and tests whether the proposed class is "'sufficiently cohesive to warrant adjudication by representation.'" *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, ——, 08–55483, 2013 WL 4712728 at *5 (9th Cir. Sept. 3, 2013) (quoting *Hanlon*, 150 F.3d at 1022).
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> * * *

> We have concluded that the "nature of the work" defense can, and will, be applied on a class-wide basis in this case. We offer no opinion on whether USSA's "single-guard" staffing model will qualify for the "nature of the work" exception. But "Rule 23(b)(3) requires [only] a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."

Abdullah., 731 F.3d at 964 (footnote omitted) (quoting *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*,133 S.Ct. 1184, 1191 (2013) (emphasis omitted from original) (citing *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL–CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir.2010) (holding that the district court "abused its discretion by declining certification based on the possibility that plaintiffs would not prevail on the merits on their 'on duty' theory," where the plaintiffs' theory was that certain restrictions on their meal breaks made the meals "on duty" under California law).

Classes are often certified where facts demonstrate that an employer's policy or business practice is uniformly implemented and impacts the class in a manner creating liability. *Heffelfinger v. Electronic Data Systems Corp*., 492 Fed. Appx. 710, 714 (9th Cir. 2012) (finding predominance for purposes of Rule 23(b)(3) based on common question of law relating to whether work performed "related to management policies or general business operations"); *see also Busk v. Integrity Staffing Solutions, Inc*., 713 F.3d 525, 530 (9th Cir. 2013) (following other circuits in holding that an FLSA collective action and state law class action wage claims can be maintained in same proceeding even though state class claims employ an opt-out mechanism under Rule 23(b)(3)); *Leyva v. Medline Industries Inc*., 716 F.3d 510, 514 (9th Cir. 2013) (holding that "the presence of individualized damages cannot, by itself, defeat class certification" and properly belong in a Rule 23(b)(3) class).

Uniformity of all facts is not required in order to satisfy the "predominance" prong of Rule 23(b)(3). "[I]ndividualized or secondary facts do not preclude certification if a company policy gives rise to consistent liability for class members. "[I]ndividual issues will likely arise in this case as in all class action cases," so to permit "various secondary issues of plaintiffs' claim[s] to preclude certification of a class would render the rule an impotent

tool for private enforcement of the securities laws." *In re IndyMac Mortgage-Backed Securities Litigation*, 286 F.R.D. 226, 236, fn.73 (S.D.N.Y. 2012) *citing and quoting*, *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981). Likewise, predominance does not involve an analysis of whether all elements of Plaintiffs claims are subject to class-wide proof upon which they will ultimately prevail in order for this Court to certify the proposed Rule 23 Class. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, --- U.S. --- (2013) ("Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class . . . [but] does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to class-wide proof.") (emphasis in original).

"Considering whether questions of law or fact common to the class members predominate begins . . . with the elements of the underlying cause of action" *Erica P. John Fund, Inc., v. Halliburton Co.,* --- U.S. ---, 131 S. Ct. 2179, 2184 (2011); *Stearns v. Ticketmaster Corp*., 655 F.3d 1013, 1020 (9th Cir. 2011).

a. Arizona Wage Act Laws. Common issues predominate over individualized ones with regard to Plaintiffs' state law wage claims. In order to establish liability under these statutes, Plaintiffs must show that they were employees of Swift. That presents a common question because it will be determined based on the terms of the lease/operating agreement and Swift's implementation of those agreements -- evidence that is common to the class. Just as this court was able to determine whether Plaintiffs were employees exempt under §1 of the FAA by looking at the lease/operating agreement and its implementation, the Court can resolve as a common question whether those documents and practices establish that Plaintiffs and the class members were employees for purposes of Arizona wage laws. Once it is determined that Plaintiffs and the class members were employees, all questions with regard to whether Swift's uniform payment practices complied with the requirements of those wage laws are also common to the class since Swift's payment practices were set by the uniform lease/operating agreement and were the same for all class members. If a particular pay practice violated the wage statutes or the FLSA with respect to the named plaintiffs it

necessarily violated the Arizona minimum wage statutes and the other wage statutes with respect to the class members. Thus all the questions of liability under Arizona wage laws are common to the class. Common questions not only predominate, they are the only questions presented.

b. Unjust Enrichment/Restitution. Under Arizona law, an unjust enrichment claim requires proof of five elements:

> (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. In short, unjust enrichment provides a remedy when a party has received a benefit at another's expense and, in good conscience, the benefitted party should compensate the other. The remedy is flexible and available when equity demands compensation for benefits received, even though [the party] has committed no tort and is not contractually obligated to the [other].

Wang Elec., Inc. v. Smoke Tree Resort, LLC, 283 P.3d 45, 49 (Ariz. App. 2012) (citations and internal quotations omitted). Each of the elements of liability presents questions common to the class: Plaintiffs allege that the terms of the lease/operating agreement operated to enrich Swift and impoverish Plaintiffs and the class. Whether it did so or not, need not be decided on class certification. What matters is that because all class members operated under materially identical lease/operating agreements and Defendants are alleged to have benefitted financially from these agreements, the question is common to the class.

Plaintiffs further allege that the terms of the lease/operating agreement were unconscionable and cannot justify Swift's enrichment. Plaintiffs allege that there is no adequate remedy for the unjustified enrichment because, *inter alia*, the FLSA and state wage laws only provide a remedy for an employer's failure to pay the federal or state minimum wage and the making of unlawful deductions. Those remedies do not compensate class members for the other losses they suffered (such as class members' payments of the employer's portion of payroll taxes), nor do they require Defendants to disgorge the profits they realized as the result of their wrongful conduct. In short, even if the wage claims were capable of providing complete restitution, and even if the unlawful deduction claims were successful in full, restitution and/or an accounting and disgorgement would still be appropriate remedies. Whether these state wage laws present an adequate remedy or not

need not be decided now. The point is that this question is common to the class. Thus, here too, common liability questions not only predominate; there are no individual questions. The restitution claims--- returning the excess value of what the class members gave Defendants over what they received-- and/ or the remedy of disgorgement based on the profits reaped by Defendants, can be calculated efficiently for all class members. See *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988–89 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 2410 (2016) (reversing denial of class certification for restitution claims and reiterating the applicability of its holding in *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087, 1094 (9th Cir.2010) that the existence of even numerous variables in the calculation of individual damages does not defeat predominance). *See also Nickel v. Bank of Am. Nat. Trust and Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir. 2002), *as amended on denial of reh'g* (June 19, 2002), (citation omitted) (ordering remedy of disgorgement of profits based on the "elementary rule of restitution" "that if you take my money and make money with it, your profit belongs to me.").

c. <u>Declaratory Judgment and Injunctive Relief</u>. Plaintiffs seek declaratory and injunctive relief that the lease/operating agreements are unconscionable and unenforceable. There are two types of contractual unconscionability: substantive and procedural.

> Procedural unconscionability addresses the fairness of the bargaining process, which is concerned with unfair surprise, fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should. In contrast, substantive unconscionability addresses the fairness of the terms of the contract itself. A contract may be substantively unconscionable when the terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties. (Citations, footnote and internal quotations omitted).

Clark v. Renaissance West, LLC, 307 P.3d 77, 79 (Ariz. App. 2013).

Although a contract may exhibit both forms of unconscionability, "a claim of unconsionability can be established with a showing of substantive unconscionability alone." *Collinge v. Intelliquick Delivery, Inc*, No. 2:12cv824JWS, 2015 WL 1292444 at *13 (D. Ariz. Mar. 23, 2015) (quoting *Coup v. Scottsdale Plaza Resort, LLC*, 823 F.Supp.2d 931, 947 (D. Ariz 2011)). Plaintiffs allege that the lease/operating agreements are substantively

unconscionable. This claim presents a question of law that is common to all class members as all class members signed the same lease/operating agreement. As this Court ruled in certifying a class of delivery drivers alleging unconscionability of another "independent contractor" agreement under Arizona law, "Plaintiffs' substantive unconscionability claim, however, does not present any individualized questions." *Collinge*, 2015 WL 1292444, at *13. Thus, liability under this claim also presents only common questions.

d. Forced Labor. The federal forced labor statute creates a cause of action for damages against anybody who knowingly obtains labor or services from a person by means of "threats of serious harm" or "by means of any scheme, plan or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person...would suffer serious harm.18 U.S.C. §1589. Plaintiffs allege that the terms of the lease/contract under which they and the class members worked, particularly the draconian penalties imposed for early termination, constituted just such a threat of serious harm or plan. Whether the terms of the lease/operating agreement do, in fact, violate the forced labor statute need not be determined at the class certification stage. What matters at this stage is that the question is common to all Plaintiffs and class members as they all worked under identical lease/operating agreements. If the agreement violates the forced labor statute with respect to one Plaintiff, it does so with respect to the class as a whole. Thus, common questions predominate with respect to this claim as well.

e. Damages Questions. Although it is not necessary for class certification, common questions are also likely to predominate in the calculation of damages. As in other wage cases, the wages paid to workers will be determined from Defendants payroll records and will not require individual testimony. The hours Plaintiffs worked can also be calculated for the class as a whole on the basis of a combination of representative testimony, expert testimony, and Defendants' payroll records. Even if individual testimony were necessary to establish damages for some class members, that is not a basis for finding that Rule 23(b)(3)'s predominance criterion has not been met. *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139 (2d Cir.2001), *cert. denied,* 536 U.S. 917 (2002). *See e.g.*,

Alleyne v. Time Moving & Storage Inc., 264 F.R.D. 41, 49 (E.D.N.Y.2010) (holding that "differences among class members as to the number of hours worked, the precise work they did and the amount of pay they received concern the amount of damages to which any individual class member might be entitled, not the amenability of their claims to Rule 23 certification.").[7] Similarly, the fact that the amount of individual damages may vary among Rule 23 Class Members, differences in the amount of damages ultimately recoverable by members of a Rule 23(b)(3) class cannot defeat class action treatment. *See Leyva*, 716 F.3d at 514 (holding in case brought by employees "the presence of individualized damages cannot, by itself, defeat class certification); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d at 1163. *See also Gaspar*, 167 F.R.D. 51 (N.D. Ill. 1996) (certifying ERISA action under Rule 23(b)(3)). The Ninth Circuit has upheld class certification under Rule 23(b)(3) in many cases despite the fact that class members have individual damages. "The amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). There is nothing about the merits of individual money damages that are subordinate to the common claims and common relief sought.

2. A Class Action Is a Superior Method of Adjudicating the Claims

Because common questions not only predominate but are the only liability questions

[7] Plaintiffs expect to prove damages in this case largely through Swift's data sets which record Lease Operators' trips, miles driven, pay tendered, and deductions from pay. Through these data sets of pay and deductions, Plaintiffs expect to prove the hours of their work through representative and expert testimony as allowed by *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (when company fails to keep accurate records of the hours worked, representative testimony of hours may be used as a matter of "just and reasonable inference"). This representative testimony of work hours will also be applicable as a formula to the entire class of drivers. *Id.* Plaintiffs also expect to prove Defendants' unlawful profits for purposes of disgorgement and unjust enrichment through a common formula taking profits per driver and profits per trip, using Defendants' data sets as they have used in other trucking cases involving Swift Transportation, or alternatively tallying the deductions made from drivers' pay as evidenced by Defendants' pay and deductions data. *See* Getman Decl.at ¶¶ 23-24 and Ex. B There will be no need to take individualized testimony or to make proof as to individualized harms to prove drivers' claims here.

presented, a class action is a superior method of adjudicating the non-FLSA claims set forth in the Complaint. The four factors set forth in Rule 23(b)(3) subparagraphs A – D also confirm the superiority of treating Plaintiffs' claims as class claims.

A. Class members have little, if any interest, in filing or litigating separate actions as is evident from the fact that more than 600 drivers have opted-in to the FLSA collective action (First Cause of Action) without a notice ever having been sent and none that Plaintiffs are aware of have filed their own actions. Class members plainly want to be part of this litigation. Moreover, any individual who wishes to proceed separately, if indeed any exist, will have the option to opt-out of any Rule 23(b)(3) class.

B. Plaintiffs' counsel are unaware of any other litigation currently on file concerning the matters at issue in this case.

C. Because there is no other litigation, it makes sense to consolidate the claims of the class members in this case. This action has been pending for several years and significant discovery on major factual and legal issues has been completed. The issue of employee status was briefed under the FAA and the Court held that Plaintiffs were employees that were misclassified as independent contractors. Numerous adjudications on the same issues, especially given the large pool of potential class members, would be time consuming, expensive and a waste of judicial resources. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Local Joint Exec. Bd.*, 244 F.3d at 1163.

D. There are no manageability problems presented by this case. Over the 6 years that it has been litigated, this case has been litigated efficiently on behalf of the putative class without any manageability problems. As a result of Defendants' motion to compel arbitration, one of the central liability issues--Plaintiffs' employee status--has been determined, again without any manageability problems. No manageability problems are anticipated as the case proceeds forward. Accordingly certification under Rule 23(b)(3) is appropriate.

II. LEAVE TO AMEND SHOULD BE GRANTED

Rule 15(a) of the Federal Rules of Civil Procedure states in pertinent part:

> [A] party may amend the party's pleading . . .by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires.

The courts apply Rule 15 with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In determining whether to grant a motion to amend, the district court considers four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility. "Generally, this determination should be performed with all inferences in favor of granting the motion." G*riggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citation omitted). Because Rule15 favors a liberal policy for granting leave to amend, "the nonmoving party bears the burden of demonstrating why leave to amend should not be granted." *Genetech Inc, v. Abbot Lab*, 127 F.R.D. 529, 530-31 (N.D. Cal 1989).[8] Defendants cannot make such a showing here. Plaintiffs are moving to amend promptly after the Court denied Defendants' motion to compel arbitration.

The proposed amendment is also not futile and sets forth valid class claims that Defendants violated Arizona law. The contract specifies that Arizona substantive law applies. *DCD Programs Ltd. v. Leighton*, 833 F.2d 183,188 (9th Cir. 1987).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court certify the class and that Plaintiffs be given leave to file the proposed Fourth Amended Complaint. Plaintiffs further request that the named Plaintiffs be appointed representatives for the class and that the law firms of Getman Sweeney & Dunn, Martin and Bonnett and Edward Tuddenham be appointed class counsel.

Respectfully submitted this 30th day of January, 2017.

Martin & Bonnett, P.L.L.C.

By: s/ Susan Martin

[8] *See also Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1035 (9th Cir. 2008); *Owens v. Kaiser Foundation Health Plan, Inc.* 244 F.3d 708, 712-13 (9th Cir. 2001).

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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