IN IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

WILLIAM BLAKLEY, *et al.* Plaintiffs, v. CELADON GROUP, INC., *et al*, Defendant.	No. 1:16-cv-00351-LJM-TAB

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION PURSUANT TO §216(b) OF THE FLSA AND CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23 FOR VIOLATIONS OF THE TRUTH IN LEASING ACT AND INDIANA STATE LAW

I. INTRODUCTION

The instant action was filed by 3 individuals who performed work for Defendants while enrolled in Defendants' lease-purchase program. Plaintiffs allege that Defendants misclassified them as "independent contractors" and consequently denied them the benefits of federal and state wage and hour protections. Plaintiffs further allege that Defendants' form lease agreements violated the Truth in Leasing Act. Finally, Plaintiffs assert that Defendants issued consumer loans and payday loans to them and other lease purchase drivers which violated state law.

Specifically, Plaintiffs and putative class members performed work as commercial truck drivers for Defendants. Defendants Celadon, Group, Inc. and Celadon Trucking Services, Inc., have at all times relevant herein operated a "lease purchase" program wherein applicants are informed that they can "be their own boss" while making lease payments on a truck, provided via Defendants' wholly-owned subsidiary, Quality Companies, LLC and Quality Equipment Leasing, LLC.

As Plaintiffs demonstrate below, while Defendants have attempted to perform lip service to the state and federal regulations differentiating between employees and business owners, the reality of the relationship between lease purchase drivers and Defendants was one of employment. Additionally, as Plaintiffs show below, Defendants provided loans to lease purchase drivers which exceeded the permissible interest rates permitted under Indiana law and which violated the Indiana Small Loans Act and the Indiana Consumer Loans Act.

Plaintiffs herein seek this Court to certify a class and conditionally certify a collective action under the FLSA on behalf of all individuals who performed work for Celadon as "lease purchase" drivers during the applicable statute of limitations (the putative class will be referred to as "lease purchase drivers" or "alleged contractors"). Plaintiffs further seek certification of a subclass of lease purchase drivers who were issued at least one "payroll advance" or "personal money" loan within the applicable statute of limitations (this putative class will be referred to as "debtor class members").

With respect to Plaintiffs' FLSA claims and Plaintiffs' Indiana Wage Payment Statute, Indiana Wage Assignment, and Indiana Wage Deduction Act claims (referred to collectively as "Misclassification Claims"), the underlying dispute is whether Plaintiffs and lease purchase drivers were misclassified by Defendants as independent contractors exempt from the protections of the FLSA and Indiana employment laws. As Plaintiffs show below, Plaintiffs have presented common evidence, including testimony from Defendants' management and designees, Defendants' own documents, as well as expert analysis completed by Dr. Steve Viscelli, coupled with the testimony from all three Named Plaintiffs, that demonstrate that lease purchase drivers were not running a small business independent from Celadon but were instead treated indistinguishably from Celadon's "Company Drivers," drivers who Defendants correctly

designate as employees by Defendants. Defendants (1) supervised lease purchase drivers; (2) subjected lease purchase drivers to the employee progressive discipline policy; (3) required that lease purchase drivers follow all rules and policies provided in the Employee Handbook; (4) required lease purchase drivers to attend company orientation which trained them on Defendants' policies; (5) required lease purchase drivers utilize a Qualcomm computer in their tractor so that Defendants could monitor and supervise them at all times; (6) assigned all work assignment to lease purchase drivers; (7) required all lease purchase drivers to sign a non-compete agreement restricting their ability to work for other carriers following the end of their employment; (8) regularly referred to lease purchase drivers as "employees" in nearly all literature provided to the drivers; (9) dictated prices to be paid on all work, without permitting negotiation; (10) disallowed lease purchase drivers from trip leasing to other carriers; and (11) disallowed lease purchase drivers from utilizing the tractor for other carriers other than Celadon.

Importantly, Plaintiffs' Misclassification Claims are based upon systemic policies and procedures of Defendants' lease-purchase program, and not individualized circumstances affecting only Named Plaintiffs. Indeed, while Plaintiffs here cite to the testimony of Named Plaintiffs in this brief, such testimony is provided only to give context to the testimony of Defendants' management and designee testimony. The overwhelming weight of the evidence cited herein is to Defendants' testimony and documents which Defendants do not dispute is equally applicable to all lease purchase drivers.

With respect to Plaintiffs' Truth in Leasing Act claims, such claims are premised upon the form lease agreements between Celadon and lease purchase drivers. As Plaintiffs show below, these form agreements have not materially changed during the class period. Thus, class certification of such claims is warranted.

With respect to Plaintiffs' claims under the Indiana Consumer Loans Act and the Small Loans Act ("Plaintiffs' Loan Claims"), here again, this is no dispute that all Named Plaintiffs received "payroll advance" and "personal money" loans from Defendants and that such loans were subject to repayment pursuant to the official policies and practices of Defendants. While Defendants have defended against such claims asserting that such transactions do not constitute loans, such an argument applies equally to all debtor class members. Additionally, while Defendants have argued that the service charge should not be computed as an interest charge, this again applies to all debtor class members equally. Thus, as with the other claims Plaintiffs herein seek to certify, class treatment is appropriate because Plaintiffs' claims are common and typical of class members, and because common issues predominate over any individualized inquiries.

Thus, for the reasons fully briefed below, Plaintiffs respectfully requests the Court enter an Order (1) conditionally certifying this matter as a collective action under the FLSA on behalf of all lease purchase drivers of Defendants who worked as a lease purchase driver from June 21, 2013 to the present and facilitating notice to all such drivers; (2) certifying this matter as a class action for violations of TILA on behalf of all lease purchase drivers who entered into a lease with Defendants from four years prior to the date the instant action was filed through present; (3) certifying this matter as class action for Plaintiffs' Indiana Misclassification Claims on behalf of all lease purchase drivers who worked as a lease purchase driver for Defendants from two years prior to the date the instant action was filed through present; and (4) certifying this matter as a class action for Plaintiffs' Loan Claims on behalf of all debtor class members who took out a "payroll advance" or "personal money" loan from Defendants from one year prior to the date the instant action was filed through present.

II. STATEMENT OF FACTS

Plaintiffs herein incorporate Plaintiffs' Statement of Material Facts, filed herewith.

III. LEGAL ARGUMENT

A. The Court should conditionally certify this matter as a collective pursuant to §216(b) of the FLSA.

Plaintiffs seek conditional certification of this action pursuant to Section 216(b) of the FLSA, and Court-facilitated notice. 29 U.S.C. § 216(b).

Section 16(b) of the FLSA "gives employees the right to bring a private cause of action on their own behalf and on behalf of 'other employees similarly situated' for specified violations of the FLSA. A suit brought on behalf of other employees is known as a 'collective action.'" *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527, (2013) (quoting 29 U.S.C. § 216(b)). Unlike a class action brought pursuant to Federal Rule of Civil Procedure 23, under the FLSA, "plaintiffs who wish to be included in a collective action must affirmatively opt-in to the suit by filing a written consent with the court, while the typical class action includes all potential plaintiffs that meet the class definition and do not opt-out." *Alvarez v. City of Chicago*, 605 F.3d 445, 448 (7th Cir. 2010) (citing 29 U.S.C. § 216(b)).

Neither the FLSA nor its implementing regulations define the term "similarly situated," and neither the Supreme Court nor the Seventh Circuit has specified a procedure courts must employ to decide certification and notice issues under the FLSA. *Allen v. City of Chicago*, No. 10 C 3183, 2013 U.S. Dist. LEXIS 5394, *2 (N.D. Ill. Jan. 14, 2013). However, courts in this district have commonly applied a two-stage test to determine whether an FLSA claim may proceed as a collective action. *See Boltinghouse v. Abbott Labs. Inc*., 2016 U.S. Dist. LEXIS 94945, at *2 (N.D. Ill. July 20, 2016). "At the first stage, the court makes an initial determination

whether notice should be sent to potential opt-in plaintiffs who may be similarly situated to the named plaintiff." *Steger v. Life Time Fitness, Inc.*, No. 14-6056, 2016 U.S. Dist. LEXIS 156079, at *1 (N.D. Ill. Nov. 10, 2016). To demonstrate that potential opt-in plaintiffs are similarly situated at this stage, the named plaintiff "must make a modest factual showing sufficient to demonstrate that she and the potential opt-in plaintiffs were victims of a common policy or plan that violated the FLSA." *Id.* "In the second stage, following the completion of the opt-in process and merits-related discovery, a defendant may move to decertify the conditional class. In that event, a court must reevaluate the conditional certification in a more stringent inquiry." *Allen*, 2013 U.S. Dist. LEXIS 5394, at *3.

The Court's "determination as to whether a collective action may be appropriate at this initial phase of inquiry does not involve adjudication of the merits of the claims." *Betancourt v. Maxim Healthcare Servs., Inc.*, 2011 U.S. Dist. LEXIS 43228, at *14-15 (N.D. Ill. Apr. 21, 2011), *quoting Brabazon v. Aurora Health Care, Inc.*, 2011 U.S. Dist. LEXIS 37057, *3 (E.D. Wis. March 28, 2011). "Rather, the named plaintiff 'must demonstrate only that there is some factual nexus that connects him to other potential plaintiffs as victims of an unlawful practice.'" *Id.* The standard is "lenient" and "typically results in the conditional certification of a representative class." *Betancourt*, 2011 U.S. Dist. LEXIS 43228 at *14, *quoting Rottman v. Old Second Bancorp, Inc.*, 735 F.Supp.2d 988, 990 (N.D. Ill. 2010).

To determine whether plaintiff has made the required modest factual showing, "plaintiffs must provide some evidence in the form of affidavits, declarations, deposition testimony, or other documents to support the allegations that other similarly situated employees were subjected to a common policy that violated the law." *Pieksma v. Bridgeview Bank Mortg. Co., LLC*, 2016 U.S. Dist. LEXIS 177177, at *1 (N.D. Ill. Dec. 22, 2016).

1. Plaintiffs have made a modest factual showing demonstrating that similarly situated individuals were subjected to a common policy and practice of Celadon.

Plaintiffs here assert that they were subject to a common policy and practice of Celadon of being misclassified as independent contractors. Plaintiffs seek certification of behalf of all lease purchase drivers who performed work for Celadon from June 21, 2013 through the present.[1]

There can be little dispute that Plaintiffs have presented "some factual nexus" connecting them to other individuals in the lease purchase program of Defendants. *See Betancourt*, 2011 U.S. Dist. LEXIS 43228 at *14. Plaintiffs have produced evidence that Defendants operated a lease purchase program wherein drivers were provided "form" agreements from Defendants. (Plaintiffs' Statement of Material Facts (PSMF) at ¶ 12). Plaintiffs have shown that they and others were retained by Defendants to perform trucking services for Defendants. (PSMF at ¶¶ 8, 10, 11, 12, 13). Plaintiffs have shown that they were paid in a similar fashion to the other drivers in the program. (PSMF at ¶¶ 12, 13, 93). Plaintiffs have further shown that the types of deductions they had taken from their pay, which reduced their pay below the federal minimum, were the same types of deductions Defendants made from all lease-purchase drivers' pay. (30(b)(6) Isaacs Dep., Ex. 1-Z at 87 (lease purchase drivers have truck payment deducted from pay); 85 (lease purchase drivers have Qualcomm fees and insurance deducted from pay)). There is no dispute that Defendant uniformly designated lease purchase drivers as "independent contractors" who were not entitled to the benefits of minimum wage under the FLSA.

[1] The Parties have agreed to toll the statute of limitations from July 6, 2016 through March 20, 2017, plus an additional 15 days. (*See* CMP, ECF Doc. No. 36 at 5; and Order on Motion to Extend, ECF Doc. No. 56). The tolling thus totals 272 days. The Parties have further agreed that should the Court certify this matter as collective action, the 3-year period (for willful violations under the FLSA) would be utilized for notice purposes. Three years and 272 days prior to the filing of the instant motion is June 21, 2013.

(Plaintiffs' Statement of Material Facts (PSMF) at ¶ 12). There is no dispute that rules and procedures they were subject to, as well as their job duties, were the same as other drivers in the lease-purchase program. (PSMF at ¶¶ 12-13).

Because this is the first stage of the FLSA certification inquiry, the Court at this stage need not delve into the economic realities of the Named Plaintiffs' and others' employment. The dispositive issue on this motion is not whether the facts will ultimately show that Plaintiffs are entitled to verdict, but only that Plaintiffs were subject to common policies and procedures of Defendants, and that other drivers were subject to the same policies and procedures.

Courts have routinely certified independent contractor misclassification cases as collective actions under the FLSA, where Plaintiffs demonstrate that they were subject to common practices and policies of the employer. *See O'Connor v. Oakhurst Dairy,* 2015 U.S. Dist. LEXIS 67029 (D. Me. May 22, 2015) (conditionally certifying group of commercial truck drivers who provided evidence that they has similar positions, job duties, and pay structures); *Spellman v. American Eagle Express, Inc*., No. 10-764, 2011 U.S. Dist. LEXIS 53521 (E.D. Pa. May 18, 2011) (conditionally certifying a group of delivery drivers over a three state area without analyzing economic reality factors); *Carrera v. UPS Supply Chain Solutions, Inc*., No. 10-60263, 2011 U.S. Dist. LEXIS 34611, 2011 WL 1303151 (S.D. Fla. March 31, 2011) (conditionally certifying a class of delivery drivers based upon showing that they are similarly situated to other drivers; no economic reality factor analysis); *Coats v. Nashville Limo Bus*, No. 3-10-0759, 2011 U.S. Dist. LEXIS 8104, 2011 WL 308403 (M.D. Tenn. Jan. 27, 2011) (granting conditional certification to truck drivers classified as independent contractors who are in the business of transporting automobiles for car dealerships; no economic reality factor analysis); *Edwards v. Multiband Corp.,* No. 10-2826, 2011 U.S. Dist. LEXIS 3460, 2011 WL 117232 (D. Minn. Jan 13, 2011) (plaintiffs must establish a "colorable basis for their claim" that they were "victims of a single . . . policy or plan" and that they need not be identical but only similarly situated

to putative class members); *In re Penthouse Executive Club Comp. Litig*., No. 10-1145, 2010 U.S. Dist. LEXIS 114743, 2010 WL 4340255 (S.D. N.Y. Oct. 27, 2010) (given that the plaintiffs have a similar job responsibilities and performed services for the same ownership and are classified as contractors, "if such a group does not merit at least preliminary class treatment, one would expect that class treatment would rarely be granted in FLSA actions"); *Labrie v. UPS Supply Chain Solutions*, No. 08-3182, 2009 U.S. Dist. LEXIS 25210, (N.D. Cal. March 18, 2009) (granting conditional certification to delivery drivers on a national basis, who were classified as independent contractors; no economic reality factor analysis); *Lewis v. ASAP Land Express*, No. 07-2226, 2008 U.S. Dist. LEXIS 40768, 2008 WL 2152049, at *1 (D. Kan. May 21, 2008) ("plaintiffs have satisfied the light burden to provide substantial allegations that they were together the victims of a single policy or plan", where they allege a practice of violating the FLSA; no economic reality factor analysis); *Lemus v. Burnham Painting and Drywall Corp*., No. 06-01158, 2007 U.S. Dist. LEXIS 46785, (D. Nev. June 25, 2007) (rejecting argument that determining employment status versus independent contractor status would require a highly individualize inquiry making conditional certification inappropriate).

Thus, because Plaintiffs have the standard here is "lenient," and because Plaintiffs have provided "some factual nexus" connecting Plaintiffs' allegations to lease purchase drivers of Celadon in general, the Court should grant conditional certification at this time.

2. <u>The Economic Realities Test.</u>

Even though the Court need not at this juncture delve into the economic realities of the relationship between lease purchase drivers and Defendants, an analysis of those factors further supports certification.

Under the FLSA, courts review the "economic realities" Courts reviewing the economic realities look to the following six factors, though none are conclusive and the ultimate question is where the individual is "dependent upon the business to which they render service:" (1) the

degree and nature of control that the employer has over the manner in which the alleged employee performs the work; (2) the chance that the alleged employee has for profit or loss depending on his or her skill; (3) the alleged employee's own investment in the equipment or materials needed to complete the work; (4) whether the service at issue requires special skill; (5) whether the employment relationship is permanent; and (6) the extent to which the alleged employee's service is an 'integral part' of the employer's business.' *Solis v. Int'l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 749 (N.D. Ill. 2011).

Here, none of the factors require significant individual inquiry and are thus well suited for class treatment. As shown above, Defendants retain significant control over lease purchase drivers because Defendants are the sole revenue source a lease purchase driver has and the driver is thus at the whim of Defendants to provide work. And Defendants control the load planning utilizing complex systems that require, for those systems to operate, Plaintiffs cede control of load planning. (Viscelli, Ex. 1-P, at 27-28). Additionally, Defendants subject lease purchase drivers to the identical progressive discipline policy as all employees and subject lease purchase drivers to termination and discipline if they violate Defendants' rules and procedures. (PSMF at ¶¶ 71-79).

With respect to the profit and loss analysis, courts examine "the degree to which the worker's opportunity for profit and loss is determined by the alleged employer." *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998). If a worker's opportunity for profit depends on his or her ability to work more hours or more efficiently rather than on the worker's managerial skill and initiative, the worker is likely an employee under this factor. *See Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, at 1312, ("An individual's ability to earn more by being more technically proficient is unrelated to an individual's ability to earn or

lose profit via his managerial skill, and it does not indicate that he operates his own business."); *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286, 1294 (3d Cir. 1991) (opportunity for profit or loss must depend on managerial skills to indicate independent contractor status). Here, Celadon does not dispute that both Named Plaintiffs' and all lease purchase drivers' ability to profit was premised upon loads Celadon provided, in addition to being technically proficient at driving, so that the driver may maximize fuel efficiency and maximize driving time by decreasing unnecessary breaks. (PSMF at ¶¶ 54-55, 65-66). Indeed, Defendants' rebuttal expert agreed that "the economic distinction between owner-operators and company drivers is not in the **types** of decisions they make…" (Hubbard Report, Ex. 1-EE at ¶41). Hubbard instead argues that due to differing incentives, lease purchase drivers are more likely to drive more efficiently in ways that reduce fuel and maintenance costs. (*Id.* at ¶39).[2] Nevertheless, driving well and efficiently is not the same as using business acumen to operate an independent business.

With respect to the comparative investment factor, an investment in tools and equipment does not automatically qualify as a business investment indicative of an independent contractor relationship. *See Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989). In *Selker Bros.*, gas station operators purchased inventory (i.e. snack foods, soft drinks, auto supplies), equipment and supplies to run their stations. *Selker Bros.*, 949 F.2d at 1294-95. However, because the gasoline distributor required the operators to make the investments in order to perform the work for the distributor, the court held that the investments were not indicative of an independent business. *Id.* An investment must also be significant in nature relative to the alleged employer's investment in its overall business to indicate that the worker is an independent businessperson.

[2] Hubbard's argument further supports certification because Hubbard does not claim that Named Plaintiffs' experiences are uniquie in the lease purchase program but instead argues that Named Plaintiffs' experience were typical of the program, though Hubbard believes that Named Plaintiffs and lease purchase drivers are independent contractors.

Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436 at 1442 (10th Cir. 1998) (comparing the purchase of $35,000 trucks by rig welders to the hundreds of thousands of dollars' worth of equipment owned by the employer at each worksite). Here again, the facts show that Named Plaintiffs are similar to all lease purchase drivers. Defendants will argue that Named Plaintiffs were required to make an "investment" by leasing a truck, although Defendants have admitted that they do not expect any investment from lease purchase drivers, and that Defendants themselves will invest significant amounts per each drier in the program. (PSMF at ¶87). But important for the instant motion is not whether Plaintiffs had such investment but whether they are similar to all lease purchase drivers. Here, Named Plaintiffs signed lease agreements, as did all lease purchase drivers. (PSMF at ¶12). Defendants' investments will also be uniform for all drivers as the analysis will focus on Defendants' investments with respect to its entire lease purchase operation.

The "special skill" factor and related analysis is also the same for all lease purchase drivers. This factor focuses on a worker's business skills, judgment, and initiative, not his technical skills. "[T]he use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way." *Selker Bros.*, 949 F.2d at 1295; *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2nd Cir. 1988) (for skills to be indicative of independent contractor status, they should be used in some independent way, such as demonstrating business-like initiative). In *Superior Care*, the nurses possessed highly specialized skills, which required years of specialized training to acquire, but they did not use their skills in any independent way. "Rather, they depended entirely on referrals to find job assignments, and [their employer] in turn controlled the terms and conditions of the employment relationship." *Superior Care*, 840 F.2d at 1059. Defendants will likely point to the fact that

lease purchase drivers were require to obtain a commercial drivers license, and assert that such license is a "special skill." Plaintiffs will assert that because Defendants controlled all the load assignments (PSMF at ¶¶ 40-41), and because Defendants controlled the prices to be provided on such loads (PSMF at ¶58), and because Plaintiffs were not permitted to broker their own loads (and thus could not build a business in any legitimate way) (PSMG at ¶59), they did not utilize a "special skill" in working for Defendants. Regardless of the merits of such positions, Plaintiffs are similarly situated to other lease purchase drivers in this analysis as well

With respect to the Court's analysis on permanence of the relationship for Named Plaintiffs and lease purchase drivers, there can be no dispute that during the time period when Named Plaintiffs and lease purchase drivers were working for Celadon, they were not able to work for any other carrier or employer. The lease agreement explicitly prohibits lease purchase drivers from utilizing the tractor for any other carrier without written permission from Celadon, and Celadon has admitted it has *never* given such permission. (PSMF at ¶59). Additionally, the non-compete found in each operating agreement effectively precludes any driver from performing driving services for any carrier other than Celadon because the non-compete is broad enough to encompass nearly every major shipper in the United States. (PSMF at ¶61). Thus, this factor also will be similar with respect to all lease purchase drivers and supports certification.,

Finally, with respect to the sixth factor, whether the service provided by lease purchase drivers is integral to Celadon's business as a for-hire motor carrier; clearly it is. Nevertheless, as all lease purchase drivers performed the commercial truck driving services for Celadon, and because Celadon's business as a for-hire motor carrier is that same with respect to all lease

purchase drivers, this factor also results in Plaintiffs' being similarly situated to all lease purchase drivers and warrants certification.

Thus, should the Court choose to delve into the economic realities test during the conditional certification phase, such an analysis supports certification.

3. Notice

Should this Court conditionally certify this matter as a collective action, the Court should thereafter facilitate notice to putative class members to give them an opportunity to opt-in to ths instant litigation. Plaintiffs aver that the best use of judicial and legal resources will be to have the Parties confer regarding notice once the Court issues its order. Accordingly, Plaintiffs respectfully request the Court order them to, within two weeks of the Court's order conditionally certifying this matter, provide the Court either (1) an agreed-upon notice; or (2) a proposed notice from Plaintiffs should the Parties not be able to reach an agreement (followed by Defendants' responding to said notice with their objections).

B. The Truth in Leasing Act

Recognizing that the litigation under the Truth in Leasing Act ("TILA") remains relatively rare, Plaintiffs, prior to showing why such claims are amenable to class treatment, first provide a brief overview of the law and the class allegations made herein.

Motor carriers such as Celadon may perform authorized transportation in equipment they do not own *only* if the equipment is covered by a written lease meeting the requirements set forth in 49 C.F.R. § 376.12, the federal TILA regulations. *See* 49 C.F.R 376.11(a); *see also* 49 U.S.C. § 14102. A person injured by an authorized motor carrier's failure to comply with the federal leasing regulations may bring an action seeking injunctive relief and damages pursuant to 49

U.S.C. § 14704(a)(1) and (2), and may recover attorneys' fees and costs under 49 U.S.C. § 14704(e).

TILA was developed by the Interstate Commerce Commission ("ICC") out of "the Commission's deep concern for the problems faced by the owner-operator in making a decent living in his chosen profession." 42 Fed. Reg. 59,984 (Nov. 23, 1977).

Though the ICC was disbanded by Congress with the enactment of the Interstate Commerce Commission Termination Act ("ICCTA"), the DOT, the agency now charged with administering the regulations, has also expressed concern about "the uneven bargaining power of owner-operators, the small dollar amount of their claims, and the unique nature of their operations." U.S. Dep't of Transp., *Report on the Functions of the Interstate Commerce Commission*, July 1995, at 86.

As such, the regulations were enacted to create *transparency* in the terms of the equipment and driver services leases to help combat illegal practices by motor carriers such as skimming from owner-operator compensation. *Id.* at 29,812. In furtherance of this goal, and with the express intent of alleviating the burden placed on drivers by the significant disparity in bargaining power that largely defines their relationship with motor carriers, TILA was enacted to provide standards of conduct to be incorporated in written leases that govern the contractual relationship between the driver and the motor carrier.

Such is evident from the plain language of 376.12(d) and its related provisions:

> d) Compensation to be specified – The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease.
>
> f) Payment period. The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier.

49 C.F.R. §§ 376.12(d), (f).

These and other provisions within TILA were clearly drafted to effectuate the legislature's goal of creating transparency within the agreements between lease drivers and the carriers with whom they purportedly contract, so as to protect the drivers from the many abuses experienced at the hands of such carriers. In short, the regulation arose "out of attempts to solve serious and longstanding problems facing owner-operators." 46 Fed. Reg. 44,013 (Sept. 2, 1981).

This is further evidenced by the case law stemming from the legislation. In *Owner-Operator Indep. Drivers Ass'n v. Ledar Transp.,* the court found a number of the provisions in the plaintiffs' owner operator agreements to violate TILA. *See e.g. Owner-Operator Indep. Drivers Ass'n v. Ledar Transp.,* 2000 U.S. Dist. LEXIS 16271 (WD Mo Nov. 3, 2000). In granting preliminary injunction to the Plaintiffs, the *Ledar* court did not require a showing of economic damages, finding many contract terms to be illegal and harmful as a result of their failure to allow the plaintiffs to properly calculate their compensation. *Id.; see also Owner-Operator Indep. Drivers Ass'n v. Landstar Sys.*, 622 F.3d 1307, 2010 U.S. App. LEXIS 20434 (11th Cir. Oct. 4, 2010) (finding that it was error to rule that truck drivers' lease with a motor carrier satisfied 49 C.F.R. § 376.12(d), as the carrier failed to disclose that the fees for an electronic billing and payment system required for military loads would be deducted from their compensation).

Plaintiffs have put forth sufficient evidence to show that Celadon provided form contracts to its alleged contractors that Plaintiffs contend (1) contained terms that on their face violated TILA; (2) did not contain terms required by TILA, in violation of the law; and that (3) Defendant's conduct itself violated TILA.

Section 376.12(d) requires that the amount to be paid by the carrier for equipment and driver's services shall be clearly stated on the face of the lease. 49 C.F.R. § 376.12(d); *see also OOIDA v. Ledar Transp.*, 2000 U.S. Dist. LEXIS 16271 at *18 (W.D. Mo. Nov. 3, 2000); *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys.,* 622 F.3d 1307, 1317 (11th Cir. Oct. 4, 2010) (A catch-all phrase is insufficient to satisfy § 376.12(d) because it does not give adequate notice of any specific charges). Likewise, § 376.12(h) precludes a carrier from unexpectedly reducing a driver's compensation through unexplained deductions from their pay by requiring carriers to specify in the lease what fees will be deducted and further explain at the outset of the lease agreement how much any deduction will be, or, if the deduction will vary from time to time, how that deduction will be calculated. 49 C.F.R. § 376.12(h); *see also Fox v. Transam,* 839 F.3d 1209, 1217 (10th Cir. Oct. 18, 2016); *OOIDA v. Ledar Transp.*, 2000 U.S. Dist. LEXIS 16271, at *29-30 (W.D. Mo. Nov. 3, 2000); *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 2007 U.S. Dist. LEXIS 72425 (D. Ariz. Sept. 27, 2007) (§376.12(h) requires that the disclosure specify whether the carrier will deduct the actual cost of the charge, or the cost plus administrative fees); *Owner-Operator Indep. Drivers Assoc. v. Bulkmatic Transp. Co.,* 503 F. Supp. 2d 961 (N.D. Ill. Aug. 3, 2007) (because an amount to be paid by a shipper for an owner-operator's equipment and driver services was not clearly stated on the face of a lease, the lease violated § 376.12(d) and the owner-operators were granted summary judgment on their claim). Celadon's form agreements contain several provisions that violate §§ 376.12(d) and (h) as they do not allow the drivers to sufficiently calculate the amounts that will be deducted from their pay or the compensation that they will receive, by way of example only:

1. Subparagraph 5.02 of the Agreements provides Celadon the unbounded right to deduct or offset from the driver's pay "certain costs and charges." This is an improper "catch-all" phrase that makes it impossible for the driver to

determine what will be deducted from his or her pay, in violation of §§ 376.12 (d) and (h).

2. Subparagraph 5.05(c) of the Agreements state that Celadon may withhold payment for or set off against payment "[a]ny other charges or expenses incurred or paid by [Celadon] on behalf of Contractor." This is an improper "catch-all" phrase that makes it impossible for the driver to determine what will be deducted from his or her pay, in violation of §§ 376.12 (d) and (h).

3. Paragraph 13 of Addendum I of the Agreements state that Celadon may deduct from the driver's Settlement Statements or Escrow Account as provided by Subparagraphs 5.05 and 10.01 of the Agreements. As Subparagraph 5.05(c) contains a catch-all provision entitling Celadon to deduct "[a]ny other charges or expenses incurred or paid by [Celadon] on behalf of Contractor," this provision makes it impossible for the driver to determine what will be deducted from his or her pay and is thus in violation of §§ 376.12 (d) and (h).

4. Paragraph 17 of Addendum I to the Agreements states that Celadon may advance money to the driver and that the driver shall be responsible for the full amount of any such advance, but does not state that a service fee may be charged to the driver under such circumstances. Plaintiffs William Blakley and Kimberly Smith were charged a service fee for each advance that they received from Celadon. William Blakley's Settlement Statements, Attached to Swidler Cert. as Ex. *(CLD000691-CLD000734)*; Kimberly Smith's Settlement Statements, Attached to Swidler Cert. as Ex. **.

(PSMF at ¶¶ 122, 125, 132-133).

Likewise, TILA proscribes rules concerning amounts held in escrow by motor carriers for the drivers they purportedly contract with. Section 376.12(k) concerning escrow accounts implicitly creates a statutory trust for the drivers' benefit, such that the carrier becomes a fiduciary to the driver. 49 C.F.R. § 376.12(k); *Operator Indep. Drivers Ass'n v. Comerica Bank (in re Arctic Express Inc.)*, 636 F.3d 781 (6th Cir. Mar. 3, 2011). While the escrow fund is under the control of the carrier, the carrier shall provide an accounting to the driver of any transaction involving the fund. 49 C.F.R. § 376.12(k)(3); *OOIDA v. Comerica Bank*, 636 F.3d 781 (6th Cir.

Mar. 3, 2011). Further, the carrier is required to pay interest to the escrow fund on a quarterly basis and is required to specify the return of the funds within forty-five days of the date of termination. 49 C.F.R. §§ 376.12(k)(3), (5) and (6); *Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc.*, 87 F. Supp. 2d 820, 2000 U.S. Dist LEXIS 2545 (S.D. Ohio Mar. 3, 2000). If an account is determined to be an escrow account as per § 376.12(l), the lease agreement must specify what the funds held in escrow may be used for, and what items owed to the driver at the termination of the lease may be offset against any escrow funds to be returned to the driver. 49 C.F.R. 376.12(k)(2); *Owner-Operator indep. Drivers Ass'n v. New Prime, Inc.,* 339 F.3d 1001 (8th Cir. Aug. 21, 2003). The agreements between Celadon and its drivers violate these provision of § 376.12(k), as, by way of example:

1. Subparagraph 10.04 of the Agreements give Celadon the right to deduct from the Escrow Accounts any charges or indebtedness provided for in subparagraph 5.05 of the Agreements. As subparagraph 5.05(c) contains a catch-all phrase entitling Celadon to deduct "any charges" from the driver's pay, this provision does not permit the driver to accurately predict what the escrow account will be used for or what items may be deducted from the escrow account, in violation of § 376.12(k)(2).

2. Subparagraph 10.05 of the Agreements give Celadon the right to deduct from the Escrow Accounts any charges or indebtedness provided for in subparagraph 5.05 of the Agreements upon the driver's termination, as well as the right to, withhold any portion of the remaining funds in the driver's escrow accounts after termination until satisfaction of the terms of subparagraph 7.02. As subparagraph 5.05(c) contains a catch-all phrase entitling Celadon to deduct "any charges" from the driver's pay, this provision does not permit the driver to accurately predict what the escrow account will be used for or what items may be deducted from the escrow account, in violation of § 376.12(k)(2). Further, because the return of escrow funds is conditioned upon the driver's fulfillment of the terms of subparagraph 7.02, the lease does not contain an *unqualified* statement that escrow funds will be returned within 45 days of termination, in violation of § 376.12(k)(6).

3. Subparagraph 10.06 of the agreements state that, after application of the aforesaid provisions of Article 10, Celadon will remit to the driver the balance of the Escrow Account within 45 days of termination of the agreement. Because the return of escrow funds is conditioned upon the driver's fulfillment of the terms of Article 10,

the lease does not contain an *unqualified* statement that escrow funds will be returned within 45 days of termination, in violation of § 376.12(k)(6).

4. Paragraph 13 of Addendum I of the Agreements state that Celadon may deduct from the driver's Settlement Statements or Escrow Account as provided by Subparagraphs 5.05 and 10.01 of the Agreements. As subparagraph 5.05(c) contains a catch-all phrase entitling Celadon to deduct "any charges" from the driver's pay, this provision does not permit the driver to accurately predict what the escrow account will be used for or what items may be deducted from the escrow account, in violation of § 376.12(k)(2).

5. The agreements do not state that Celadon will regularly provide the driver with an accounting of the Escrow Account established for the payment of mileage based taxes paid by Celadon on the driver's behalf, that the driver has the right to demand an accounting of transactions related to same, that Celadon will pay interest on Escrow Account quarterly or that the remaining proceeds of the Escrow Account will be returned to the driver within forty-five days of termination of the Agreements, in violation of §§ 376.12(k)(3), (4), (5) and (6), respectively.

(PSMF at ¶¶128-130, 136). Section 376.12(i) further precludes a carrier from requiring a driver to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease agreement. 49 C.F.R. § 376.12(i); *see also Fox v. Transam Leasing, Inc.*, 839 F.3d 1209, 2016 U.S. App. LEXIS 18654 (10th Cir. Oct. 18, 2016). Not only must the carrier specify this in its lease agreement, but must also adhere to and perform this lease provision. *Id.* Though Celadon does specify that the drivers will not be required to purchase any items from or through the company, Celadon's conduct forcefully displays that this is not the case. As an initial matter, Celadon has admitted that of 6,786 alleged contractors who have entered into lease agreements with the company since 2013, 98-99% are "lease purchase" drivers. (PSMF at ¶ 11). **100%** of the lease purchase drivers lease their trucks from Quality. *Id.*

The agreements contain additional violations of 376.12(i), as subparagraph 9.01 of the Agreements state that the driver is required to go through Celadon's safety lanes for inspection of the vehicle upon arrival at any Celadon facility, at the driver's cost. (PSMF at ¶ 126).

Additionally, paragraph 20 of Addendum I to the Agreements state that the driver must either purchase a Qualcomm unit through Celadon or provide a compatible unit, but must have said unit serviced by a vendor approved by Celadon. (PSMF at ¶ 135). Moreover, paragraph 4 of Addendum I of the Agreements state that the driver may receive compensation for unloading a trailer provided that the driver meets Celadon's documentation procedures for evidencing loading and/or unloading. (PSMF at ¶ 131). This provision violates § 376.12(f) of the regulations, which specifies that the only paperwork that may be required by the carrier before the driver can receive payment is limited to log books required by the DOT and "those documents necessary for the authorized carrier to secure payment from the shipper. 49 C.F.R. § 376.12(f).

C. The Court should certify Plaintiffs' state law and TILA claims as a class action pursuant to Rule 23(b)(2) and Rule 23(b)(3)

1. Legal Standard

Rule 23 of the Federal Rules of Civil Procedure governs a District Court's consideration of a motion for class certification. A district court considering a motion for class certification must undertake "a rigorous analysis" to ensure that the requirements of Rule 23(a) are met. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (U.S. 1982); *McCaster v. Darden Rests., Inc*., 845 F.3d 794, 800 (7th Cir. 2017). Once the requirements of Rule 23(a) are met, the court must then determine if the class satisfies one of the conditions of Rule 23(b). *McCaster*, 845 F.3d at 800.

2. The Class and Sub-Classes Satisfy Each Pre-Requisite for Certification under Rule 23(A)

a. Members of the class are ascertainable

A class must be definite enough to be ascertained. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). If the proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable, . . . the plaintiff class cannot be maintained." *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980). Here, the class is clearly defined and ascertainable.

Specifically, Plaintiffs propose as a class definition under the Truth in Leasing Act as any individual who entered into the lease purchase program from February 12, 2012 through the present. For claims under the Indiana Wage Payment Statute, the Indiana Wage Assignment Act, and the Indiana Wage Deduction Statute, the class is defined as all those who entered into the lease purchase program with Defendants during the applicable statute of limitations, which is as follows: all individuals enrolled in Defendants' lease purchase program from two years prior to the filing date of the instant action, February 12, 2014, to the present.

With respect to Plaintiffs' claims under the Indiana Loans Act and the Small Loans Act, the class composed would be a fully subsumed subclass which would be limited to class members who sought at least one "payroll advance" or "personal money" transaction from one year prior to the filing date of the instant action, February 12, 2015, to the present.

There is no dispute that Defendants have maintained clear records of all individuals who entered into the lease purchase program (PSMF at ¶85). Moreover, there is no dispute that Defendants' computerized payroll database will provide the identity of the class members who were provided at least one payroll advance/personal money transaction.

Thus, ascertainability cannot be reasonable disputed.

b. Members of the Classes are sufficiently numerous that joinder is impracticable FRCP 23(a)(1))

The first prerequisite plaintiffs must meet under Rule 23(a) is numerosity. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Rule 23(a) requires "the class be so numerous that joinder of all members is impracticable." See Fed. R. Civ. P. 23(a)(1). However, Plaintiffs are "not required to specify the exact number of persons in the class, but cannot rely on conclusory allegations that joinder is impracticable, or on speculation as to the size of the class in order to prove numerosity." *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989).

Here, Plaintiffs have come forward with evidence demonstrating that since the beginning of the class period, more than 6,000 individuals have been hired by Defendants as "independent contractors." Plaintiffs have further provided evidence that 98-99% of those individuals were hired as "lease purchase" drivers, and that all such drivers leased via Quality. (PSMF at ¶ 11).

Thus, Plaintiffs have clearly met the numerosity requirements of Rule 23.

c. Plaintiffs' claims share common issues of fact and law with the claims of the class members and thus satisfy Fed. R. Civ. P. 23(a)(2).

Rule 23(a) requires that there are questions of law or fact common to the class, referred to as the commonality requirement. Fed. R. Civ. P. 23(a)(2); *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 434 (7th Cir. 2015) ("*Chi. Teachers"*). While a court need only find a single common question of law or fact to satisfy the commonality prerequisite, the mere occurrence of all plaintiffs suffering as a result of a violation of the same provision of law is not enough; rather, the claims must depend upon a common contention that is capable of class-wide resolution. *Id.* Class-wide resolution means that determining the truth or falsity of the common contention will resolve an issue that is central to the validity of each claim. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 374 (7th Cir. 2015).

Here, the common questions under the applicable employment-law claims are whether Defendants are the employer of Plaintiffs. Because commonality is subsumed by the predominance analysis under 23(b)(3), Plaintiffs only briefly address such issues here.

Under Indiana law, Plaintiffs' Misclassification Claims require Plaintiffs to show that they were employees of Defendants. Thus, whether Plaintiffs were employees is a common question which is central to the validity of their claim. That question in turn will require the Court to determine, for instance, whether Defendants had authority to control Plaintiffs' in the completion of their work, whether Defendants had authority to discipline Plaintiffs; whether the lease purchase program offered by Celadon is compatible with the notion of running an independent business; and whether Plaintiffs could use managerial skill to increase profits/decrease losses; whether Plaintiffs were dependent upon Celadon for work. Plaintiffs will prove such claims not through anecdotal testimony of the Named Plaintiffs but instead through Celadons' official policies and procedures which systemically required lease purchase drivers to cede control of their tractor and work to Celadon and require lease purchase drivers accept work assignments and perform work the same as company drivers.

Concerning Claimant's Truth in Leasing Act Claims, Courts have also found the class action mechanism within Rule 23 to be an appropriate outlet for the resolution of TILA claims. *Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc.,* 2005 U.S. Dist. LEXIS 23350 (N.D. Ill. May 23, 2005) (Restitution and disgorgement of sums unlawfully deducted from compensation in violation of 376.12 is a kind of equitable monetary relief, like back pay in the Title VII context, that can properly be a part of FRCP 23(b)(2) consideration, particularly when its computation is mechanical. Where the drivers' claims were not so individualized that individual issues predominated, the common threshold factual issue was the legality of the

defendants' lease provisions). Here, Plaintiffs' claims under TILA are predominantly based on the plain terms of the "form" lease agreements between Celadon and Plaintiffs. Because these agreements during the class period are materially the same with respect to Plaintiffs' assertions, it is clearly that the claims are common.

Concerning Plaintiffs' Loan Claims, such claims are based upon the indisputably official practice and policy of Celadon to provide short-term loans to drivers in exchange for the driver incurring a debt to Celadon equal to the amount of the loan plus a service fee of $3.00 - $7.50. (PSMF at ¶¶ 104-105). Just as with the other claims, while Celadon may present defenses, the claims and defense are premised on entirely common policies and practices to which all debtor class members were subject.

d. Plaintiffs' claims are typical of the claims of the putative classes (FRCP 23(a)(3)).

"Typicality under Rule 23(a) requires that the named plaintiffs' claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members and are based on the same legal theory." *Balderrama-Baca v. Clarence Davids & Co.*, 2017 U.S. Dist. LEXIS 35009, at *19 (N.D. Ill. Mar. 10, 2017), *citing Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998).

Here, Named Plaintiffs' claims class claims are premised upon Defendants' common practices and course of conduct with respect to Defendants' lease purchase drivers. With respect to Plaintiffs' Truth in Leasing Act claims, such claims are premised upon the form agreements prepared by Defendants and which are materially the same for Named Plaintiffs and the putative class. With respect to Plaintiffs' Misclassification Claims, such claims are premised upon whether Defendants' improperly designated such drivers as independent contractors. And with

respect to Plaintiffs' loan claims, such claims are premised upon Defendants' payday advance program, which provided money to drivers in exchange for promised repayments and impermissible loan finance charges.

e. The proposed class meets the "adequacy" requirement of Fed. R. Cvi. P. 23(a)(4).

The adequacy requirement under Rule 23(a)(4) comprises two parts: "the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members." *Retired Chi. Police Ass'n*, 7 F.3d at 598. "[A] class is not . . . adequately represented if class members have antagonistic or conflicting claims." *Id.* (*quoting Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Here, Named Plaintiffs are not have claims which are antagonistic or conflicting with that of fellow class members. (*See* Declarations of Named Plaintiffs, Ex. 2, 3, 4). Defendants have admitted that they have no information to support a claim that Named Plaintiffs are inadequate representatives here.

Further as discussed below in Plaintiffs' counsel's application to be appointed class counsel, Plaintiffs' counsel has significant experience and expertise in litigation class wage and hour disputes, especially in the trucking industry, and is thus adequate to serve as counsel in this matter.

Thus, Plaintiffs have met the adequacy requirements of Fed. R. Civ. P. 23.

3. <u>The Putative Class and Sub-Classes Satisfy Each Pre-Requisite for Certification under Rule 23(b)(3)</u>

Rule 23(b)(3) sets forth two additional requirements to class certification: (1) "that the questions of law or fact common to class members predominate over any questions affecting

only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

"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." *Amgen Inc. v. Ct. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1191, "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 1191. "The Seventh Circuit has been as unequivocally clear as the Supreme Court in *Amgen*, warning that 'In conducting this analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.'" *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 376 (7th Cir. 2015), citations omitted. "[A] court weighing class certification must walk a balance between evaluating evidence to determine whether a common question exists and predominates, without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits." *Id.* at 377.

a. Common issues of law and fact predominate over individual issues with respect to each claim at issue.

In order to be certified under Rule 23(b)(3), Plaintiffs must demonstrate that common issues predominate over individual issues.

With respect to Plaintiffs' Misclassification Claims, Plaintiffs must demonstrate that they qualify as "employees" under the Act. Indiana courts utilize the 10-factor common law test to determine employment status under the applicable employment laws referenced here. *See Snell v. C.J. Jenkins Enters.*, 881 N.E.2d 1088, 1091 (Ind. Ct. App. 2008). Those 10 factors are: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation of business; (c) the kind

of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

These factors do not require individualized analysis but instead require review of the policies and procedures to which all lease purchase drivers were subject. With respect to the factor (a), that alleged contractors were subject to the progressive disciplinary policies of Defendant and were supervised by Defendants and subject to being disciplined and terminated demonstrates that Defendants were able to exercise control over the work. (*See* PSMF at ¶¶ 42, 71-79). With respect to the factors (b) and (h), there is no dispute that the drivers of Celadon were providing work which was integral to Celadon's business as a for-hire motor carrier and that they were dependent upon Celdaon to provide them loads, thus showing they are not engaged in a "distinct occupation or business" and showing that the work they perform is part of the regular business of Celadon. (PSMF at ¶¶ 54-55). With respect to factor (c), whether the kind of occupation is usually done under supervision of the employer; the facts will be common to all class members because the "kind of occupation" is the same for all class members; additionally, because Celadon required all lease purchase drivers to maintain a Qualcomm computer so that it could supervise all drivers and so a driver manager (which Celadon assigns to all lease purchase drivers) could supervise and manage the driver, the work was done under the

direction and supervision of the employer. (*See* PSMF at ¶¶ 42, 50-52). With respect to factor (d), the skill required of a truck driver, the skillset required is the same for all class members. With respect to factor (e), because all lease purchase drivers leased via Quality and were required to use Celadon's Qualcomm computer system, whether the employer provided the instrumentalities, tools, and place of work will also be the same for all class members. With respect to factor (f), while the length of time which the person is employed will vary, the length of employment can be demonstrated by Defendants' electronic data, which provides a single piece of class-wide evidence to show same. With respect to factor (g), the method of payment, this factor will also be the same for all class members, as class members were paid, just like company drivers, on a piece rate system which paid either per mile or per load. (*See* PSMF at ¶¶ 58, 93). Factor (i), the belief of the parties, can be demonstrated by the form agreements and other documents provided to class members, which are uniform in nature. (*See* PSMF at ¶¶ 12-13). Finally, with respect to factor (j), there is no dispute that Defendants are in business and thus, that factor will be uniform for all class members.

With respect to Plaintiffs' loan claims, there can be no dispute that such claims are based upon Defendant's payroll advance policy, which provides drivers with short-term loans in exchange for service charges of $3-$7.50. (PSMF at ¶¶103-105). Plaintiffs assert that such loans violate the Small Loans Act and the Loans Act. Based upon the Rule 12 motion filings, it appears the main dispute will be whether the advances constitute a "loan." But whether the transactions constitute a loan is a class-wide issue. There is no dispute that Named Plaintiffs were issued such loans the same as all other lease purchase drivers of Celadon. (PSMF at ¶ 106 There is no dispute that Celadon was not licensed to give consumer loans in Indiana, nor is there

any dispute regarding the amount(s) of the loan(s) or when such loans were repaid. (PSMF at ¶ 108).

With respect to Plaintiffs' TILA claims, such claims are premised upon form lease agreements between Celadon and the lease purchase drivers. Because these agreements were form in nature and have not materially changed during the class period, there are no material differences between the claims of the Named Plaintiffs and the lease purchase drivers. (*See* PSMF at ¶¶ 13, 123-136).

b. The class action method is superior to alternative available methods of adjudication.

The final prerequisite for class certification is that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The Rule identifies the following factors pertinent to such a finding: (1) the interest of individual class members in individually controlling the prosecution of separate actions; (2) the extent and nature of any previously commenced litigation concerning the controversy; (3) the desirability or undesirability of concentrating the litigation of the claims in a single forum; and (4) the difficulties likely to be encountered in the management of a class action. *Id.*

"The Seventh Circuit has recognized that, like commonality, Rule 23(b)(3)'s superiority requirement is closely related to the requirement of predominance—the more that common questions predominate over other issues in the case, the more likely it is that a class action is the superior method of adjudication." *Balderrama-Baca v. Clarence Davids & Co.*, 2017 U.S. Dist. LEXIS 35009, at *24 (N.D. Ill. Mar. 10, 2017).

Here, because so many common questions predominate, the superiority requirement is also met. Additionally, Plaintiffs are aware of no single-plaintiff actions asserting violations of

any of the statutes for which Plaintiffs here seek certification, demonstrating that there is no desire of class members to individually control the litigation, which makes sense considering that while the damages are not nominal. Furthermore, it is clearly desirable to have the claims of more than 6,000 individuals resolved in a single forum without risk of inconsistent verdicts and outcomes. Finally, the difficulties likely to be encountered in the management of this action, which existent (as any class involving the rights of 6,000 individuals will have difficulties), are relatively straight-forward. The claims are premised upon common policies and practices, and damages can be computed utilizing Defendants' own electronic records.

4. The Putative Class Satisfies Each Pre-Requisite for Certification under Rule 23(B)(2)

Named Plaintiffs also seek injunctive and declaratory relief in this matter, and an injunctive class should be certified for this relief pursuant to Rule 23(b)(2). Rule 23(b)(2) permits class certification if "the party opposing the class has acted or refuses to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 441 (7th Cir. 2015).

With respect to Plaintiffs' Misclassification Claims, Plaintiffs seek the Court issue a declaratory judgment that Defendants' lease purchase program misclassified them as independent contractors under Indiana state law.

With respect to Plaintiffs' TILA claims, Plaintiffs seek the Court order that the form lease agreements violate TILA.

Finally, with respect to Plaintiffs' Loan Claims, Plaintiffs request the Court provide in a declaratory judgment that the "payroll advance" and "personal money" loans issued by

Defendants constitute loans under the Indiana Consumer Loans Act and the Small Loans Act and that such loans were unlawful under those statutes. With respect to the Loan Claims, Plaintiffs further assert that the Court may award damages because the award is mechanical; if the loans are held unlawful, the damages will be the principal of the loan, the service charge, and the statutory penalties provided by statute.

D. The Court should appoint Justin L. Swidler and Swartz Swidler, LLC as class counsel.

Plaintiffs further request the Court appoint Justin L. Swidler, Esq. and his law firm, Swartz Swidler, LLC, as class counsel in this matter. In determining whether the appoint Class Counsel, the Court reviews the factors provided in Fed. R. Civ. P. 23(g).

Pursuant to Fed. R. Civ. P. 23(g)(a)(i), the Court must review the "work counsel has done in identifying or investigating potential claims in this matter." As provided in Mr. Swidler's attached declaration, all the work performed to date in this matter has been completed by Swartz Swidler, LLC. In investigating these claims, Swartz Swidler, LLC has (1) thoroughly researched the applicable law; (2) taken taken five individual depositions as well as a 2-day 30(b)(6) deposition; (3) defended the deposition of all three Named Plaintiffs and Plaintiffs' expert; (4) responded to and filed motions with this Court, including defending a motion to dismiss and proactively filing a motion (which was granted) to dismiss a potential counterclaim which would have drastically chilled participation in the instant action; (5) responded to and issued written discovery, and (6) retained and paid an expert to provide an economic analysis of the Misclassification Claims. (Swidler Cert. at ¶5, Ex. 1). Thus, this factor supports appointment of Justin Swidler and Swartz Swidler, LLC as class counsel.

Pursuant to Fed. R. Civ. P. 23(g)(ii), the Court must consider "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in this action." Since 2010, Plaintiffs' counsel has been involved in 90 putative class and/or collective action lawsuits, including numerous certified class action asserting wage violations against trucking employers. (Swidler Cert. at ¶¶ 6,9 Ex. 1). Thus, this factor supports appointment of Justin Swidler and Swartz Swidler, LLC as class counsel. *See also McGee v. Anne's Choice, Inc.,* 2014 U.S. Dist. LEXIS 75840 (E.D. Pa., June 4, 2014) (Schiller, J.) (finding Mr. Swidler to be "well-versed in FLSA cases and skilled in litigating and settling wage-and-hour litigation"); *Stoneback v. ArtsQuest*, 2013 U.S. Dist. LEXIS 86457 (E.D. Pa. June 19, 2013) (Gardner, J.) (finding that Mr. Swidler has "handled numerous class action lawsuits" and "is qualified to represent the class as class counsel"); *Baouch v. Werner Enters.,* 2014 U.S. Dist. LEXIS 64981 (D. Neb. May 12, 2014) (appointing Swartz Swidler, LLC, Justin Swidler, and Richard Swartz as class counsel in class action against trucking company on behalf of employee drivers in light of their "experience in class actions, knowledge of the law, and committed resources); *Campbell v. C.R. Eng., Inc.*, 2015 U.S. Dist. LEXIS 134235 (D. Utah, Sept. 30, 2015) (appointing Justin Swidler, Richard Swartz, and Swartz Swidler as class counsel and noting that "Plaintiffs' counsel has a reputation in the trucking industry as being one of the prominent firms to engage in FLSA litigation on behalf of truck drivers").

Pursuant to FRCP 23(g)(a)(iii), in appointing class counsel, this Court must consider "counsel's knowledge of the applicable law." Plaintiffs' counsel has extensive experience and knowledge of the applicable law. This is evidenced by their extensive experience (as noted above) in handling state and federal wage and hour actions, the quality of the briefs and other papers submitted to this Court by Plaintiffs. (Swidler Cert. at ¶7, Ex. 1).

Pursuant to FRCP 23(g)(a)(iv), in appointing class counsel, this Court must consider "the resources that counsel will commit to representing the class." As discussed above, Plaintiffs' counsel is fully ready and able to dedicate its full resources to the litigation of this case. Plaintiffs' counsel has already committed several hundred hours in attorney time litigating this matter. Plaintiffs' counsel firm has further already incurred significant costs, including expert costs, travel expenses, and transcript expenses. We are willing and able to continue to commit all the resources and time necessary to represent the class as effectively as possible. (Swidler Cert. at ¶8, Ex. 1).

Thus, Plaintiffs respectfully request the Court appoint Justin L. Swidler, Esq. and Swartz Swidler, LLC as class counsel.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court enter an order: (1) certifying this matter as a collective action pursuant to §216(b) of the FLSA on behalf of all lease purchase drivers of Defendants who performed work for Defendants from June 21, 2013 through present; (2) certifying this matter as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) for Plaintiffs' TILA Claims for all lease purchase drivers who entered into a lease agreement with Defendants from February 12, 2012 through present; (3) certifying this matter as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) for Plaintiffs' Indiana Misclassification Claims for all lease purchase drivers who performed work for Defendants from February 12, 2014 through present; and (4) certifying this matter as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) for Plaintiffs' Loan Claims for all lease purchase drivers who were issued a "payroll advance" or "personal money" loan from February 12, 2015 through present.

Respectfully submitted,

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