**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF WISCONSIN**

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| ERIC R. BRANT, THOMAS CAMPBELL, and BRIAN MINOR, individually and on behalf of all other similarly situated persons,<br><br>Plaintiffs,<br><br>v.<br><br>SCHNEIDER NATIONAL INC., SCHNEIDER NATIONAL CARRIERS INC., SCHNEIDER FINANCE INC., SCHNEIDER NATIONAL BULK CARRIERS INC., and DOE DEFENDANTS 1-10,<br><br>Defendants. | Case No. 1:20-cv-01049-WCG<br><br>Judge William C. Griesbach |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' SECOND AMENDED MOTION FOR SUMMARY JUDGMENT**

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Defendants' motion for summary judgment should be denied. With respect to the question of employee status under the Fair Labor Standards Act ("FLSA"), the Seventh Circuit opinion in *Brant v. Schneider Nat'l., Inc.*, 43 F.4th 656 (7th Cir. 2022) controls the analysis of Defendants' motion. Defendants largely ignore that ruling and rely on disputed facts, improper inferences from facts, and citations to out-of-circuit cases.[1] Rather than waste time with those cases, Plaintiffs urge the Court to follow *Brant v. Schneider*, the one case whose analysis actually controls this Court's decision. In *Brant* the Seventh Circuit cited thirty-six specific factual allegations in the First Amended Complaint (FAC) that, if proven at trial, would make Plaintiffs[2] "employee[s] as a matter of economic reality." *Id.* at 762. *See* Plaintiffs' Statement of Supplemental Undisputed Facts ("PSF") #1-36. As set forth below, Plaintiffs have offered evidence from which a jury could reasonably find each of those allegations to be true which would justify a verdict that Plaintiffs were employees. Even if some of those facts are disputed, only a jury can resolve the conflicts, precluding summary judgment.

With respect to Plaintiffs' Wisconsin Minimum Wage Law ("WMWL") claims, the facts regarding Plaintiffs' employee status are disputed and cannot be determined on summary

[1] Many of Defendants' cases do not involve FLSA analysis at all, but instead apply the far narrower common law definition of employee status. *See, e.g.*, Doc. 181 at 24. Defendants also rely on a California case that was reversed by the 9th Circuit on the very point for which Defendants cite the case. *See* Doc. 181 at 24, citing *Ruiz v. Affinity Logistics Corp.*, 697 F.Supp.2d 1199, 1210 (S.D. Cal. Mar. 22, 2010), which Defendants cite to support their argument that they did not control the Drivers' work; that case was reversed on the merits in *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-1103 (9th Cir. 2014) (reversing district court and holding that delivery company controlled the details of the drivers work as a matter of law).

[2] At the time the Seventh Circuit made its ruling in *Brant*, Eric Brant was the single Named Plaintiff. On May 1, 2023, Plaintiffs filed a Second Amended Complaint (Doc. 134) adding Brian Minor and Thomas Campbell as Named Plaintiffs. Where the references to the Seventh Circuit decision refer only to Brant, Plaintiffs are applying that statement to all three Named Plaintiffs.

judgment. The WMWL can be applied extraterritorially to Plaintiffs, and even if it cannot, Defendants have contractually promised to abide by the WMWL.

## ARGUMENT

### I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON FLSA EMPLOYEE STATUS MUST BE DENIED

#### A. The Allegations That Led the Seventh Circuit to Conclude That the Control Factor Favors Employee Status Are Supported by Evidence Precluding Summary Judgment

The Seventh Circuit found that the control factor weighed in favor of employee status based on its analysis of Plaintiffs' allegations regarding five aspects of control: (i) control over conduct; (ii) monitoring; (iii) hiring helpers; (iv) supplying equipment; and (v) routes and schedules. Because Plaintiffs have submitted admissible evidence from which a jury could find each of these allegations to be true, the control factor cannot be decided on summary judgment.

##### 1. Schneider's Control Over Driver Conduct

The Seventh Circuit began its discussion of the control factor by noting Plaintiffs' allegation that "Schneider controlled advertising, billing, and negotiation with customers over the terms of shipment contracts." 43 F.4th at 666. That allegation is supported by summary judgment evidence, PSF ¶¶ 1 and 85, and indicates employer control by Schneider. *See Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1536 (7th Cir. 1987) (noting that "defendants right to control applies to control over the entire pickle-farming operation, not just the details of harvesting. The defendants exercise pervasive control over the operation as a whole. We therefore agree with the district court that the defendants did not effectively relinquish control of the harvesting to the migrants.").

The Seventh Circuit next cited Plaintiffs' allegation that Schneider controlled the minutiae of how Drivers[3] worked by requiring them to comply with "the same operational standards and policies as employee-drivers for Schneider, including requirements for 'personal appearance and demeanor,' 'how to pick up and deliver loads,' and 'how to hire extra help to assist with loading and unloading,'" as indicative of employee status. 43 F.4th at 666. Those allegations are also supported by competent summary judgment evidence. PSF ¶¶ 2, 31, and 38.

Schneider tries to refute Plaintiffs' evidence in this regard by arguing that Brant's deposition contradicts his declaration, but the alleged "contradictions" Schneider cites are simply inferences that Schneider attempts, improperly, to draw in its own favor. *See Parker v. Brooks Life Sci., Inc.*, 39 F.4th 931, 936 (7th Cir. 2022) (reasonable inferences are to be drawn in the non-moving party's favor). Schneider first attempts to infer that it did not require compliance with operational standards and policies based on the fact that Brant did not mention such controls in his deposition. However, Brant was never asked whether he had to comply with Schneider's operational policies and procedures, or what those policies were, making any such inference improper. *See Amsel v. Tex. Water Dev. Board*, 2010 WL 11519190 at *8 fn 2 (W.D. Tex. Nov. 22, 2010) (finding inference from absence of testimony unwarranted where witness was not asked the question); *Young v. Co. of Cork*, 616 F.Supp.2d 834, 842 fn 5 (N.D. Ill. 2009) (noting the absence of testimony regarding certain allegations does not prove anything, "rather it reflects only that defendants' counsel did not ask questions about them during the depositions."). Moreover, Schneider makes no effort to refute Plaintiffs' evidence regarding the need to comply with

[3] "Drivers" or "Lease Operators" refers to Schneider lease operator truck drivers who lease their truck from Schneider Finance only to lease it back to Schneider National Carriers or Schneider National Bulk Carriers. This does not include drivers who lease multiple trucks at a time, also called fleet drivers.

Schneider policies and procedures. PSF ¶¶ 2 and 31; Doc. 105-11, Campbell Decl. ¶ 24 ("The work rules and procedures were the same work rules and procedures that I had to follow as an employee driver."); Doc. 105-14, Minor Decl. ¶ 19 (substantially the same); Doc. 105-10, Brant Decl. ¶ 21 (same). Schneider also tries to infer that it did not control Brant's appearance and demeanor because Brant could not remember what the specific appearance requirements were. But the fact that Brant could not remember specific items off the top of his head four years after he quit working for Schneider does not prove, as a matter of law, that there were no such requirements, particularly since Brant did remember at least one such requirement—i.e. that Schneider required him to wear steel-toed shoes. PSF ¶ 2; P. App. A:22 and 64, Brant Depo. Tr. at 253:7-15, 82:13-83:14; P. App. A:583, Bethea 30(b)(6) Depo. Tr at 70:12-71:6. Again, Schneider makes no effort to refute the other evidence of its control over appearance and demeanor. PSF ¶ 2. Finally, Schneider argues that it did not require compliance with other operational standards and policies (including how to pick-up and deliver loads), based on Brant's statement that he did not need training in safety standards.

Whether or not he needed training has nothing to do with whether Schneider *required* him to comply with its operating standards and policies. Even with respect to the safety policies, which were the only policies he was asked about during his deposition, Brant's testimony was consistent with his declaration: "Each company has their own different safety rules; so you had to learn it. Schneider way is what they called it." P. App. A:22, Brant Depo. at 82:13-18.[4]

[4] Schneider claims that Brant had the right to park wherever he wanted but cites no evidence to support that fact. The only testimony in Brant's deposition about parking is consistent with his declaration statement that he had to comply with Schneider's rules. P. App. A:41, Brant Depo. Tr. at 160:2-12 (Schneider required drivers going off duty to take their trailer home with them); Doc.

Thus, all of the allegations that led the Seventh Circuit to find that Defendants exercised control over the minutiae of Driver conduct are supported by evidence that a trier of fact could accept, thereby precluding summary judgment on that aspect of control.

**2. Schneider's Monitoring of Drivers**

The next aspect of control addressed by the Seventh Circuit was monitoring. The Court stated:

> Schneider also retained the right to gather remotely and to monitor huge quantities of data about how drivers conducted their work, including (i) "Owner-operator's speed, hard braking incidents, collisions, and critical driving events;" (ii) "hours of service;" (iii) "engine operational data;" and (iv) "any other telematics data which may be captured." The Agreement required Brant to consent to allow Schneider to use this data "for any reason [Schneider] deems advisable," and Schneider had the right to terminate the Agreement immediately for any traffic law violation identified. Brant alleges that Schneider did not permit him to drive over 70 miles per hour even when the posted speed limit was higher and that he was subject to discipline if he failed to comply. This allegedly high degree of scrutiny into the fine details of driver's operations, along with the constant threat of termination for non-compliance, weighs in favor of status as an employee rather than as an independent contractor.

*Brant*, 43 F.4th at 666-667. These facts are undisputed as they are drawn directly from the Owner Operator Operating Agreement[5] ("OOOA"), with the sole exception of Brant's allegation regarding the 70-mile-an-hour policy. PSF ¶¶ 3-6, 25, 39, 81, and 84. As for that policy, Schneider quibbles that Brant did not hear about that policy directly from Schneider, but regardless,

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105-10, Brant Decl. at ¶ 22 (Brant required to follow Schneider operational policies including where to park). Besides, Schneider makes no effort to show how the freedom to park, even if it had existed, made Brant less economically dependent on Schneider.

[5] "OOOA" or "OOOAs" collectively refers to Brant's 2018 OOOA (Doc. 182-1 at pp. 153-232), Brant's 2019 OOOA (Doc. 182-1 at pp. 223-312), Campbell's 2018 OOOA (Doc. 182-3 at pp. 134-205), Campbell's Jan. 2019 OOOA (Doc. 182-3 at pp. 206-288), Campbell's Dec. 2019 OOOA (Doc. 182-3 at pp. 698-777), and Minor's 2018 OOOA (Doc. 182-4 at pp. 141-222).

Schneider offers no evidence denying the policy and there is competent summary judgment evidence from which a jury could conclude that Schneider did, in fact, control Driver speed. PSF ¶ 6 (citing Plaintiffs' declarations). Thus, the Seventh Circuit's conclusion that Schneider's monitoring of Drivers indicates employer control is supported by evidence and must be submitted to a jury.

Despite the existence of evidence supporting the Seventh Circuit's conclusion regarding Schneider's monitoring, Schneider asks this Court to overrule the Seventh Circuit and hold that its monitoring practices do not indicate control because, according to Schneider, the data was collected to ensure compliance with DOT safety requirements. The OOOA itself contradicts that claim. PSF ¶ 4. As the Seventh Circuit noted, the OOOA clearly states that Schneider reserves the right to use the information "for any reason Carrier deems advisable." *Id*. Moreover, the Seventh Circuit was obviously aware that the collection of data regarding driver speed, braking and collisions had to do with safety, as did the threat to "terminate the Agreement immediately for any traffic violation" which it also cited. *Brant*, 43 F.4th at 667; PSF ¶¶ 3 and 5. Nevertheless, the Circuit Court did not hesitate to find that that kind of monitoring indicated employee status and that ruling is now law of the case. *Id.*

Consistent with the Seventh Circuit's ruling, many courts have found that the reasons an alleged employer imposes controls on workers are irrelevant; all that matters is whether the controls limit the worker's ability to operate as an independent economic entity. *Affinity Logistics*, 754 F.3d 1102 (background checks imposed by Affinity pursuant to federal regulations still limit drivers unrestricted right to choose their helpers); *Scantland v. Jeffry Knight*, 721 F.3d 1308, 1316 (11th Cir. 2013) ("The economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control . . . If the

nature of a business requires a company to exert control over workers . . . then the company must hire employees, not independent contractors.); *Merchants Home Delivery Services, Inc v. NLRB*, 580 F.2d 966, 974 (9th Cir. 1978) (controls imposed by federal regulation "may be considered in conjunction with other elements of the relationship in determining the status of an individual worker" under federal common law standard); *Ace Doran Hauling and Rigging Co. v. NLRB*, 462 F.2d 190, 194 (6th Cir. 1972) (finding truck drivers to be employees under the federal common law standard based on, *inter alia*, "the control and supervision exercised pursuant to ICC requirements."); *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 147 (2d Cir. 2008) (finding employer's supervision of nurses indicated control even if it was motivated by the requirements of federal and New York law). *See also Narayan v. EGL, Inc.*, 616 F.3d 895, 902 (9th Cir. 2010) (controls imposed as a result of company's contracts with its customers are still evidence of an employee/employer relationship). Moreover, Schneider's monitoring of Plaintiffs' driving behavior goes far beyond anything mandated by DOT regulations. For example, Schneider cites nothing in DOT regulations that require it to monitor hard-braking, driver speed, engine data or other telemetrics, nor anything that requires it to use that information for "any reason [Schneider] deems advisable." PSF ¶ 4 (Doc. 182-1, OOOAs at ¶¶ 2(d), 5(f)), ¶ 3 (examples of Schneider's monitoring of Drivers), and ¶ 39; P. App. C:956-67, Contractor 101 presentation ("[redacted]"). Similarly, DOT regulations do not require Schneider to insist that periodic inspections of driver equipment be performed by Schneider-approved entities. PSF ¶¶ 11, 39 and 40.

Schneider's arguments based on 49 C.F.R. § 376.12(c)(4) are similarly without merit. That regulation was intended to preclude litigants from arguing that the "exclusive possession and control" provision of the DOT regulations creates a statutory employment relationship. *See, e.g.*,

*Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F.Supp.2d 374, 382-383 (D. Conn. 2003) (rejecting claim that 376.12(c)(1) creates a statutory employment relationship based on the provisions of § 376.12(c)(4)). But Plaintiffs are relying on the FLSA economic reality test of employee status; they are not arguing that Plaintiffs are statutory employees. Section 376.12(c)(4) cannot preempt application of the normal FLSA "totality of the circumstances" and "economic reality" tests as the Secretary of Transportation, who promulgated 49 C.F.R. § 376.12(c)(4), has no authority to interpret the FLSA. *See, e.g.*, *Montoya v. CRST Expedited, Inc.*, 88 F.4th 309, 318–19 (1st Cir. 2023) (DOT definitions of on- and off-duty time do not control work time for purposes of the FLSA).

**3. <u>The Right to Hire Helpers</u>**

The Seventh Circuit next held that the right to hire helpers did not indicate control in light of Plaintiffs' allegations that, as a matter of economic reality, Brant could not take advantage of that right. As the Court noted,

> Schneider maintained total control over the number, nature, and profitability of the shipments offered. The Operating Agreement also authorized Schneider to charge a variety of fees for each new driver hired by Brant. Fixed costs were high and margins tight for drivers under the Operating Agreement and Lease with Schneider, and Brant alleges that "few, if any, other Drivers hired substitutes" for this reason. If Brant wanted to take the financial risk of hiring help, Schneider reserved "the right to arrange, *at Owner-Operator's expense*, to have a qualified third-party vendor monitor" the new driver's compliance with federal safety standards. (Emphasis added).

*Brant*, 43 F.4th at 667-668. Plaintiffs have offered ample evidence to support these allegations. PSF ¶¶ 7-9. The OOOA itself says that Schneider does not "guarantee to Owner-Operator any specific number of miles or Shipments, any specific amount of freight or any specific times, dates, or routes." Doc. 182-1, OOOAs ¶ 1; PSF ¶ 7 (*see* Doc. 105-10, Brant Decl. at ¶¶ 37-41 (attesting to Schneider's control over the loads offered to Drivers and Drivers' inability to obtain loads elsewhere), Doc. 105-11, Campbell Decl. at ¶¶ 41-45 (same), Doc. 105-14, Minor Decl., at ¶¶ 35-

39 (same). The charges Schneider imposed for hiring a helper are also specified in the OOOA. PSF ¶¶ 8 and 93 (*see* Doc. 182-1, OOOAs, (¶ 5(d) (medical exams), ¶ 7(b)(ii) (worker comp insurance), and ¶ 18(b)(i)(5) (third party monitoring)). The allegation that fixed costs were high and margins tight for Drivers under the OOOA is supported by evidence. PSF ¶¶ 7 (Campbell never attempted to hire any helpers because "there just wasn't enough money"), and 12, 15, 16, 18, 22, 26-29 (detailing high costs and that Plaintiffs relied on Schneider's credit); Doc. 105-10, Brant Decl. ¶¶ 14-15 (Brant was dependent on Schneider's credit to operate); Doc. 105-11, Campbell Decl. ¶¶ 17-17 (same for Campbell); Doc. 105-14, Minor Decl. at ¶¶ 12-13 (same for Minor). As is the allegation that few, if any, Drivers hired helpers. PSF ¶ 8 (citing fact that Schneider's 1,942 lease operators employed only 65 employee drivers and all, or the vast majority, who hired drivers were fleet drivers who owned multiple trucks). A jury could reasonably conclude from this evidence, as the Seventh Circuit did, that the theoretical ability to hire helpers afforded Drivers no control or opportunity to act as independent economic entities. With or without a helper or substitute driver, Drivers remained dependent on Schneider to offer sufficient loads to cover their fixed costs and make a living. PSF ¶¶ 16, 18, 21, 22, and 53.

Nevertheless, Schneider argues that the Seventh Circuit's holding should be rejected as a matter of law because Brant did not state during his deposition that he requested to have someone else drive his truck. Of course, that proves nothing since Brant was never asked why he did not make such a request. *See Brooks Life Science*, 39 F.4th at 936 (reasonable inferences are to be drawn in the non-moving party's favor); *Amsel*, 2010 WL 11519190 at *8 fn 2 (inference from absence of testimony unwarranted where witness was not asked the question); *Young*, 616

F.Supp.2d at 842 fn 5 (absence of testimony regarding a topic proves nothing other than that defense counsel failed to ask about the topic).

Finally, Schneider cites *DeRolf* for the proposition that it is "unaware of any traditional employer-employee relationship . . . where an employee can contract with a third party to perform the actual work of the employer." *DeRolf v. Risinger Bro. Transfer, Inc.*, 259 F.Supp.3d 876, 880-881 (C.D. Ill. April 21, 2017). Defendants cited *Derolf* for this proposition when it urged dismissal of Plaintiffs' complaint. The Seventh Circuit did not find *Derolf* persuasive noting that the "theoretical ability to hire help can bear little weight if it was not consistent with the economic reality of control over his work." *Brant*, 43 F.4th at 667. It is no more persuasive in the summary judgment context. Even if Plaintiffs could have hired helpers, cases abound where workers who hire other workers to perform their work are, nevertheless, found to be employees because their ability to hire others added nothing to the economic reality of their control. *See Rutherford v. McComb*, 331 U.S. 722, 726 (1947) (chief boner and the crew of employees he hired were all employees of the slaughterhouse in which they worked); *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1049 (5th Cir. 1987) (firework stand operators who hired and set the hours and wages of their own employees were themselves employees of the firework company); *Castillo v. Givens*, 704 F.2d 181, 188-193 (5th Cir. 1983) (worker and those whom he hired to help him hoe cotton fields were all employees of the cotton farmer); *Mednick v. Albert Enterp., Inc.*, 508 F.2d 297, 301 (5th Cir. 1975) (hotel worker was an employee of the hotel that hired him despite the fact that he could hire worker to perform his job for him when he wanted); *Walling v. Am. Needlecrafts*, 139 F.2d 60, 62 (6th Cir. 1943) (needleworkers who hired friends and relatives to assist them in performing their work were, nevertheless, employees). Here, a jury could reasonably conclude that economic reality was that Schneider's exclusive control over the number and pay for the shipments

Plaintiffs had access to, together with the fees Scheider had the ability to assess, coupled with the Drivers fixed costs made it economically infeasible to hire others. PSF ¶¶ 7-9, 16, 21, 22, 26-29, 42, 44, 53, 55, 58, 60, 61, 64-68, 72, and 78. Even if Plaintiffs could have afforded to hire helpers, the above cases make clear that the right to hire others is of no relevance where, as here, there is no evidence that doing so would have contributed to the workers' economic independence.

**4. Schneider Supplied Equipment to Drivers**

The Seventh Circuit held that "the requirement that Brant supply his own truck, or 'Equipment,' does little to establish [Brant's] control over the conduct of the work because Brant leased his truck from Schneider itself . . . . and the Operating Agreement required Brant to lease his truck back to Schneider in a grant of 'exclusive possession, control, and use of the equipment' in compliance with 49 C.F.R. § 376.12(c)(1)." *Brant*, 43 F.4th at 668. The Seventh Circuit also noted that, according to Plaintiffs' allegations, "Schneider even controlled Brant's maintenance schedule and which mechanics he could use." *Id.* Plaintiffs have provided evidence to support those allegations.[6] PSF ¶¶ 10-11, and 40; *See* Doc. 182-1, OOOAs, ¶¶ 3(b) (driver's truck shall be under "the exclusive possession, control, and use [of Schneider] for the duration of this Agreement."); 5(c) (setting forth required maintenance). *See also* Doc. 105-10, Brant Decl. ¶ 28 ("As an owner operator, I had to call Schneider for approval for any maintenance required for my truck, and I had to use a Schneider approved maintenance facility if Schneider was advancing the cost of the maintenance. Because of my financial situation I was dependent on Schneider

[6] The maintenance controls imposed by Schneider go far beyond anything required by DOT regulations. For example, nothing in DOT regulations requires Schneider's mandate regarding who can perform periodic inspections, OOOAs ¶ 5(c), only that such inspections occur. 49 C.F.R. § 396.

advancing maintenance costs."); Doc. 105-11, Campbell Decl. ¶ 31 (same); Doc. 105-14, Minor Decl. ¶ 25 (same).

Schneider does not address these facts and, instead, asks this Court to reject the Seventh Circuit's holding because (1) Plaintiffs could have leased from someone else, and (2) the Lease's maintenance requirements are in the Lease, a separate document from the OOOA that Defendants claim should not be considered in determining whether Plaintiffs were employees. Neither of those arguments has any merit.

First, regarding Schneider's claim that Plaintiffs could have leased from someone else, Schneider offers no competent evidence to support that fact. Defendants cite to their Facts ¶¶ 26 and 41 (Doc. 182, Defendants' Statement of Undisputed Material Facts ("SUF")), but those facts and the evidence supporting them only establish that Plaintiffs knew of their theoretical right to lease from someone else. *See* Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts ("PSUF") ¶¶ 26 and 41. Neither Brant nor Minor was asked whether, as a matter of economic reality, they could have afforded to lease from someone else, and their declarations make clear that they could not. PSF ¶¶ 26 and 28; *see also,* Doc. 105-10, Brant Decl. at ¶¶ 5 and 18 ("At the time [of leasing] I did not have the funds to make a down payment on a truck lease or to obtain the insurance for a truck. James Partica, the Schneider Account Administrator who handled my account, told me that I would not have to pay any money down and that Schneider would advance all of the funds necessary for me to lease a truck and to begin driving."); Doc. 105-14, Minor Decl. ¶ 5 ("Jennifer Petzold, who was employed by Schneider as a Owner Operator Recruiter, told me that I would not have to pay any money down and that Schneider would advance all of the funds necessary for me to lease a truck and to begin driving."); Doc. 105-11, Campbell Decl. ¶ 8 ("I was told by the recruiter that I would not have to pay any money down and that Schneider would

advance all funds necessary for me to lease a truck from Schneider and to begin driving."). The Seventh Circuit was aware that Plaintiffs could "in theory" lease from someone else, *Brant*, 43 F.4th at 670, but that fact did not affect the Circuit Court's conclusion that by leasing a truck to a driver and then having the driver lease the truck back to Schneider, and controlling maintenance schedules, Schneider exercised employer-like control over the driver.

Second, regarding Schneider's claim that the maintenance provisions of the Lease cannot be construed with those of the Operating Agreement, the law is to the contrary: Where, as here, two contracts are signed simultaneously and entering into one is contingent on entering into the other, Doc. 105-10, Brant Decl. at ¶¶ 8-11, the two must be construed together. *See Helvering v. Le Gierse*, 312 U.S. 531, 540-541 (1941) (citing 3 Williston, Contracts § 628 ("And where the execution of one contract depends upon the execution of other contracts, the contracts must be construed collectively.")); *Dakota Gasification Co. v. Natural Gas Pipeline of America*, 964 F.2d 732, 735 (8th Cir. 1992) (hinging one contract on another heightens the need for interpreting them together). Besides, the issue of employee status is to be decided on the basis of the economic reality of their relationship with Schneider, and the terms under which they leased their trucks from Schneider were part of that economic reality.

**5. Schneider Controlled Drivers' Routes and Schedules**

The Seventh Circuit noted Plaintiffs' allegations that "as a practical matter Drivers had no choice as to route" because of Schneider's requirements of timely delivery and the need to fuel where they could use Schneider's fuel card. *Brant*, 43 F.4th at 668. Those allegations are supported by evidence. PSF ¶¶ 13-15; Doc. 105-10, Brant Decl. ¶ 14 ("The fuel card allowed me to purchase fuel on Schneider's credit. I did not have to pay cash for fuel; the bill was sent to Schneider and Schneider would then deduct the fuel cost from my earnings. Schneider handled the fuel tax payments for me. I would not have been capable of paying those without Schneider's assistance.")

Doc. 105-11, Campbell Decl. ¶ 17 (same); Doc. 105-14, Minor Decl. ¶ 12 (same). Even apart from that evidence, the Seventh Circuit "agree[d] with the Ninth Circuit that 'the ability to determine a driving route is simply a freedom inherent in the nature of the work and not determinative of the employment relation.'" *Brant*, 43 F.3d at 668 (quoting *Narayan v. EGL, Inc.*, 616 F.3d 895, 904 (9th Cir. 2010) (internal quotation marks omitted)). That legal conclusion is the law of the case and precludes this Court from giving any consideration to Plaintiffs' ability, *vel non*, to choose their routes in determining whether they were employees.

Despite the Seventh Circuit's ruling, Schneider attempts to undermine Plaintiffs' declaration evidence that Schneider's pick-up and delivery times constrained their route choice by citing Brant's deposition to the effect that he sometimes used an app to determine his route and planned his rest and fuel stops. PSF ¶ 14; Doc. 181 at 27, citing Doc. 182, SUF ¶¶ 68 and 69. That a driver used an app to find the shortest timely route to a destination does not prove that Drivers had a *choice* as to route. Nor does it change the fact that the Seventh Circuit has ruled that choosing a route is "not determinative of the employment relation." *Brant*, 43 F.4th at 668.

**6. <u>Other Disputed Aspects of Control That Preclude Summary Judgment</u>**

In addition to the above aspects of control that the Seventh Circuit found indicative of employee status, there is additional evidence from which a jury could conclude that Schneider exercised employer-like control over Plaintiffs, including the fact that Schneider:

1) Controlled all infrastructure necessary to carry out Plaintiffs' work such as dispatching, communications with customers, choosing loads to be assigned, and trailers. PSF ¶¶ 1, 11, 27, 34, 63, 79-82, and 86.
2) Exercised plenary control over the terms and conditions of Plaintiffs' work by offering the OOOA and Lease on a take-it-or-leave it basis, and prohibiting Plaintiffs from negotiating any of the terms of those documents. PSF ¶ 41.

3) Controlled how Plaintiffs spent their money by requiring Drivers to fund a maintenance reserve account, Lease[7] ¶ 12, and an escrow account, OOOA ¶ 10, in amounts set by Schneider. PSF ¶ 42 (citing Doc. 182-1, OOOAs, ¶ 10 and Doc. 182-1, Leases, ¶ 12).

4) Controlled Plaintiffs' maintenance of their vehicles by insisting that inspections and maintenance be performed by a Schneider approved provider. PSF ¶ 11.

5) Controlled Plaintiffs by retaining the right to terminate them at will. PSF ¶ 5 (citing Doc. 182-1, OOOAs, ¶ 21 ("either party may terminate this Agreement at any time during the term for any reason")), and ¶ 84. This provision of the OOOA was a particularly effective means of controlling Drivers because at-will termination automatically placed a Driver in default of his lease thereby accelerating all remaining lease payments -- a significant financial penalty for failing to conform to Schneider's direction and control. PSF ¶¶ 12 and 17 (Doc. 182-1, Leases, ¶¶ 19-20). *See Doe v Swift Transp. Inc*, 2017 WL 67521 at *8 (D. Ariz. Jan. 6, 2017) (A company's ability to accelerate all lease payments at will gives the company "full control over the terms of the relationship.").

6) Controlled Driver hours of work indirectly by imposing rules about how Drivers could go "out of service," and by imposing weekly lease payments and operating costs on Drivers that made it difficult for Drivers to afford to take time off. PSF ¶¶ 43 and 44.

7) Controlled the loads that Drivers could haul by manipulating what loads would be listed on the load board, manipulating the prices paid for those loads, and by prohibiting Drivers from driving for other carriers. PSF ¶¶ 23-24, 52-70, and 72.

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[7] "Lease" or "Leases" collectively refers to Brant's 2018 Lease (Doc. 182-1 at pp. 123-152), Campbell's 2018 Lease (Doc. 182-3 at pp. 93-122), and Minor's 2018 Lease (Doc. 182-4 at pp. 110-139).

### 7. Schneider's Additional Arguments Regarding the Control Factor Are Disputed

Ignoring the Seventh Circuit's opinion regarding control, Schneider urges this Court to rely on statements in the OOOA to find that the control factor favors independent status as a matter of law. *See* Doc. 181 at 25. The Seventh Circuit squarely rejected reliance on the statements in the OOOA noting that "[i]t is well established . . . that the terms of a contract do not control the employer-employee issue under the Act. We look instead to the 'economic reality of the working relationship' to determine who is an employee covered by the FLSA." *Brant*, 43 F.4th at 665. Schneider's argument boils down to an attempted inference that because certain controls are recited in the OOOA, the Drivers must have exercised those controls. The evidence supporting such an inference is either non-existent or contradicted by Plaintiffs' evidence cited above, rendering the inference improper as a basis for summary judgment.

Schneider next cites Brant's testimony that no two working days were ever the same and that he "ran his own truck" as evidence that Schneider did not control Plaintiffs. Doc. 181 at 26. But that testimony establishes nothing. Read in context, Brant was speaking of his understanding before he actually started working for Schneider, not his understanding once he started. *See* P. App. A:11, Brant Depo. Tr. at 41:23-42:19. Moreover, it is inherent in the nature of truck driving that drivers, both lease operators and company drivers, have wide discretion to "run their own trucks." *See* PSF ¶ 45; *Brant*, 43 F.4th at 668 ("The ability to determine a driving route is simply a freedom inherent in the nature of the work and not determinative of the employment relation."). It is simply impractical for supervisors to be physically present to control how a driver, whether a lease operator or a company driver, carries out his or her daily duties of loading, unloading, and driving; and only the driver herself knows when she needs to fuel, eat, or rest. PSF ¶ 45. Trucking is not the only job like that. Many jobs allow, or even require, workers to exercise a high degree

of unsupervised "control" over the daily details of their work without affecting their employee status, which is why, no doubt, the *Lauritzen* factor focuses on the "alleged employer's control," not the worker's control. *Lauritzen*, 835 F.2d at 1535. For example, in *Lauritzen* the court found that the harvest workers were employees despite the fact that the company let them set their own hours of work and "left the when and how to pick to the [migrant] families." *Lauritzen*, 835 F.2d at 1537; *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1384 (3d Cir. 1985) (researchers who worked at home to find needed phone numbers for DialAmerica are employees despite fact that they "could generally choose the times during which they would work and were subject to little direct supervision inheres in the very nature of homework."). Where day-to-day control or supervision of a worker is not practical, the lack of supervision indicates nothing about independent status. In such jobs, employers frequently use a piece rate system of pay, rather than direct supervision, as a means of controlling worker productivity. That is what was done in each of the cases cited above. Schneider also used its per load piece rate system of pay to ensure Driver productivity. PSF ¶ 46. It could also depend upon the weekly expenses it imposed on Drivers as a further incentive for Drivers to work long hours and operate efficiently. PSF ¶¶ 16, 22, and 44.

Finally, Schneider asks the Court to infer that it did not control Drivers based on Brant's testimony that he could go months without talking to his contact at Schneider. Such an inference is unwarranted. The evidence shows that all necessary communications with Plaintiffs (and company drivers) were carried out electronically: Plaintiffs and company drivers were dispatched using an electronic communication system; their location, speed, breaking, and myriad other bits of data about their truck and driving were electronically communicated to Schneider constantly throughout the day. PSF ¶¶ 3 and 47. Plaintiffs and company drivers were required to report electronically when they picked up a load, when they dropped one off and when they were ready

to accept another load. PSF ¶ 47. As a result of this electronic monitoring, Schneider generally had no need for oral communications with any of its drivers, lease operators and company drivers alike. PSF ¶ 48. Of course, whenever Schneider's electronic monitoring caused concerns, Schneider did not hesitate to intervene with phone calls. PSF ¶ 49. Similarly, when problems arose that could not be resolved through electronic communications, drivers, both lease operators and company drivers, communicated with Schneider by phone. PSF ¶¶ 47 and 49.

Schneider raises two other considerations with respect to the control factor, the Plaintiffs' right to choose loads from the load board and their alleged right to drive for other carriers. Both of those matters were analyzed by the Seventh Circuit in the context of the "opportunity for profit" factor and Plaintiffs will follow that lead.

**8. Conclusion as to the Control Factor**

As shown above, summary judgment is precluded because all of the allegations that led the Seventh Circuit to reject as illusory the OOOA provision giving Drivers control over "the manner, means and methods of performance," Doc. 182, SUF at ¶ 47, and to find instead that the control factor favored employee status, are supported by competent evidence pursuant to which the finder of fact could conclude that the control factor favors employee status.

**B. Plaintiffs' Opportunity for Profit Presents Disputed Facts**

The Seventh Circuit summarized its holding regarding the "opportunity for profit" factor as follows:

> Brant alleges that as a practical matter, he could not exercise his managerial skill to increase profits by selecting more profitable loads or by driving for other carriers when Schneider offered shipments with unfavorable terms. The complaint describes a relationship under which drivers like Brant had no realistic option other than to take the shipments that Schneider offered, even when they were unprofitable. He could not haul for other carriers and relied on Schneider to receive enough favorable shipments to make a profit. In other words, he was dependent on

> Schneider to make a profit or loss. This factor also weighs in favor of considering Brant to have been an employee of Schneider.

*Brant*, 43 F.4th at 670. In reaching this conclusion the Seventh Circuit focused on Plaintiffs' allegations regarding (i) the right to haul for other carriers, and (ii) the right to choose shipments.

**1. <u>Hauling for Other Carriers:</u>**

The Seventh Circuit found that Plaintiffs could not drive for other carriers based on the allegation that Schneider told Brant he could not do so. *Brant*, 43 F.4d at 669. That allegation is fully supported by the summary judgment record. PSF ¶ 23; Plaintiffs' declarations Doc. 105-10, Brant Decl. at ¶ 19, 105-11, Campbell Decl. at ¶ 22, and 105-14, Minor Decl. at ¶ 17 ("I and other owner operators could not work for anyone other than Schneider while under contract with Schneider. We were told that by Schneider during our orientation class prior to becoming owner-operators."); PSF ¶¶ 21, 24, 53, and 55; Plaintiffs' declarations Doc. 105-10, Brant Decl. at ¶ 38, Doc. 105-11, Campbell Decl. at ¶ 42, and Doc. 105-14, Minor Decl. at ¶ 36 ("While working for Schneider as an owner-operator I was only allowed to carry Schneider loads"), and Doc. 105-10, Brant Decl. at ¶ 41, Doc. 105-11, Campbell Decl. at ¶ 45, and Doc. 105-14, Minor Decl. at ¶ 39 ("Schneider offered me only Schneider loads to carry and I had to choose from what Schneider offered. I was not able to use other methods of picking loads."). In addition to that evidence, the Seventh Circuit found the language of OOOA sufficient to plausibly support Brant's allegation that the conditions imposed on driving for other carriers were so onerous that he could not exercise the right, even if Schneider changed its mind and allowed him to drive for others. PSF ¶¶ 23 and 24; *Brant*, 43 F.4th at 669-670. That view of the OOOA is supported by evidence that very few Drivers ever worked for other carriers. PSF ¶¶ 23, and 50-51 (less than five drivers a year drove for other companies). Given the above evidence, the question of whether Plaintiffs could, as a

matter of economic reality, drive for other carriers presents a fact question that only a jury can resolve.

Schneider tries to refute this evidence by asserting that "Brant did not testify [during his deposition] that SNC told him [he could not drive for others]; rather he testified he was aware of his right but never requested to drive for another carrier . . ." Doc. 181 at 30. However, Brant was never asked during his deposition what Schneider told him about driving for other carriers and his awareness that the OOOA purported to give him that right (subject to numerous conditions) is not inconsistent with his testimony that Schneider told him during orientation that he could not do so, nor is it inconsistent with the fact that the OOOA's conditions made it impossible to drive for other carriers as a matter of economic reality. In sum, the question of whether Plaintiffs could drive for other carriers remains a highly disputed fact that only a jury can resolve.

Ignoring these disputed facts, Schneider claims that Plaintiffs could drive for other carriers because it (briefly) allowed Brant to use his leased truck to work for a company called F2F *after he quit working for Schneider*. That fact proves nothing. The relevant question is not whether Plaintiffs could drive for other carriers after terminating their OOOAs with Schneider; rather the question is whether Plaintiffs could drive for other carriers while *under contract with Schneider*—i.e. whether they could turn down unprofitable Schneider loads and look for better paying loads from other carriers without giving up their right to receive loads from Schneider. As the above evidence indicates, that is a disputed fact issue. That Brant drove for F2F *after he quit Schneider* has nothing to do with that issue.[8]

[8] That Schneider allowed Brant to use his leased truck to enter into an employment relationship with a different carrier says nothing about his employment relationship with Schneider and Schneider's argument in that regard contradicts its assertion that the Lease should not even be considered in determining employee status.

**2. Choosing Shipments:**

The Seventh Circuit noted Plaintiffs' allegation that they could not actually exercise the right to turn down loads in order to select more profitable ones as further support for its conclusion that the "opportunity for profit" factor weighs in favor of employee status. *Brant*, 43 F.4d at 669. Summary judgment evidence supports that allegation. PSF ¶¶ 16, 18, 21, and 22. *See also* Doc. 105-10, Brant Decl. at ¶ 49 ("I could not regularly refuse loads because I did not know if a better or worse load would follow."); Doc. 105-11, Campbell Decl. ¶ 53 (same); Doc. 105-14, Minor Decl. at ¶ 45 (same).

The Circuit Court also noted Plaintiffs' allegation that "[a]s a matter of actual practice . . . he simply had to take the loads that Schneider gave him as often as possible in the hopes of staying ahead of the pay deductions, rent, and costs." *Brant*, 43 F.4th at 669. That allegation is also supported by evidence in the record. PSF ¶¶ 16, 17, 18, and 22; Doc. 105-10, Brant Decl. at ¶ 45 ("As an owner operator, I incur weekly expenses even when I am not driving. So not taking loads is not an option even when the load is unprofitable because not driving at all is even more unprofitable"); Doc. 105-11, Campbell Decl. ¶ 49 (same); Doc. 105-14, Minor Decl. ¶ 45 (same); PSF ¶¶ 54 and 69 (Plaintiffs drove to where a Schneider load was available or sit and wait for a load to become available); Doc. 105-10, Brant Decl. ¶ 42 ("If there were no Schneider loads available where I was located, I had to drive to where a Schneider load was available or sit and wait for a load to become available where I was."); Doc. 105-11, Campbell Decl. ¶ 46 (same); Doc. 105-14, Minor Decl. ¶ 40 (same).

Finally, the Seventh Circuit noted Plaintiffs' allegation that "Schneider 'regularly required that Drivers, including Plaintiff, move empty trailers from one location to another at rates that did not even cover the costs of fuel to accomplish the task,'" and that Schneider threatened to "terminate his contract if he refused to take these assignments." *Brant*, 43 F.4d at 669. This

allegation too is supported by substantial evidence. PSF ¶¶ 19 and 20; Doc. 105-10, Brant Decl. at ¶ 46 ("Schneider regularly required me to move empty trailers from location to location for $25, a rate that did not even cover the fuel required for the task. Lana, a Schneider assistant business operating associate, and other Schneider agents told me that Schneider could terminate my contract or deny me access to the load board if I refused to take the trailer."); Doc. 105-11, Campbell Decl. ¶ 50 ("Schneider regularly required me to move empty trailers from location to location for a rate that did not even cover the fuel required for the task").

That Plaintiffs could not freely choose the loads they carried is further supported by evidence that Schneider had to approve any selection Drivers made from the load board. PSF ¶¶ 55 and 78. Evidence also indicates that the information about loads provided by the load board was not accurate. PSF ¶ 72. In addition, Schneider manipulated Driver choices using its unilateral control over which loads to offer to Drivers and what price to set for hauling those loads. PSF ¶¶ 53-68. Schneider admitted that it would not let Drivers "see"—i.e. access—loads that were particularly profitable for Schneider, PSF ¶¶ 58 and 67, and that it manipulated load prices offered to Drivers to encourage them to take the loads Schneider wanted them to take and ensure that they did not take loads that Schneider did not want them to take. PSF ¶¶ 55-68 (pricing manipulation). There is also evidence from which a jury could conclude that Schneider manipulated prices in other ways as well. *See* PSF ¶ 66; P. App. A:314-315, Campbell Depo. Tr. at 200:4-201:13 (Campbell testified that the loads he saw on his load board were different from that of other Drivers, even when they put in the same inputs at the same time). Schneider did all this to increase its own profits without regard to the ability of Drivers to profit. PSF ¶¶ 67 and 68. There is also evidence indicating that choosing loads was not a matter of "managerial skill" but simply an ability that Drivers learned through on-the-job experience with Schneider's help. PSF ¶¶ 21 and 71.

Finally, Schneider not only controlled what loads Drivers could select, it went further and retained the power to take loads away from Drivers after they had selected a load. PSF ¶¶ 55, 72, and 78; *see also* 105-10, Brant Decl. at ¶ 32 ("Schneider could and did take loads away from me after I had agreed to take them and I would receive no compensation.").

In short, there is ample evidence from which a jury could conclude that Drivers had little meaningful choice with respect to the loads they were offered. They could avoid selecting obviously unprofitable loads but for the most part they had to choose whatever was available to make their lease payments and avoid being stuck with no load at all. PSF ¶¶ 54 and 69. And their choice was not a free one, but was intentionally "influenced" by Schneider through its control over which loads to offer and the prices it paid for those loads. PSF ¶¶ 52-68. A reasonable jury could conclude from this evidence that "the single biggest determinant of [Plaintiffs'] profit for a workweek was not [their] managerial skill but Schneider's choice of loads to offer [them]—or to require [them]—to haul" as well as the prices that Schneider chose to pay for those loads. *Brant*, 43 F.4th at 669; PSF ¶ 21. Those decisions were all entirely within *Schneider's* control. Only Schneider could generate the business that would ensure that Drivers had reasonable profit-making loads to choose from, and only Schneider could make the decisions by which it manipulated the choices Drivers made. PSF ¶ 70. If Plaintiffs had been free to drive for other companies, they could have expanded their choices when Schneider offered none and they could have avoided, to some degree, Schneider's manipulation of their choices. PSF ¶¶ 23-24, and 52-69. But as soon as Schneider prohibited them from hauling for anyone else, Plaintiffs lost control and became entirely dependent on Schneider's ability to generate profitable loads for them to haul and the manner in which Schneider manipulated those choices. *See, e.g.*, *Real v. Driscoll Strawberry*, 603 F.2d 748, 755 (9th Cir. 1979) (where the opportunity for profit of strawberry grower plaintiffs depended

"more upon the managerial skill of [their alleged employer] in developing fruitful varieties of strawberries, in analyzing soil and pest conditions, and in marketing than it does upon the [growers] own judgment and industry in weeding, dusting, pruning and picking," the opportunity for profit factor favors employee status); *Davis v. Colonial Freight Sys., Inc.*, 2017 WL 11572196, at *5 (E.D. Tenn. Nov. 22, 2017) (inability to work for others and inability to negotiate rates indicates driver had "minimal opportunity to affect his own profitability"); *Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1299369 at *4 (D. Ariz. Mar. 23, 2015) (where delivery drivers could only work for IntelliQuick, the "drivers' opportunity for profit or loss depends more upon the jobs which IntelliQuick assigns them than on their own judgment and industry.").

Despite the evidence supporting the allegations that led the Seventh Circuit to find that the opportunity to profit factor favored employee status, Schneider asks this Court to reject the Court of Appeals' conclusion, *as a matter of law*, based on misstatements of the evidence and improper inferences. First, Schneider asserts that "[Brant] did not testify that he felt bound to take unprofitable shipments due to his lease obligations or that Schneider ever limited or manipulated the freight available to him." Doc. 181 at 21. Once again, Brant was never asked those questions; thus, the fact that he did not say those things during his deposition has no significance whatsoever. Moreover, Campbell testified that Schneider manipulated his loads, PSF ¶ 66, and Minor testified that he felt bound to take the loads that Schneider offered him, because it wouldn't be "financially intelligent" to not pick a load." PSF ¶ 16.

Second, Schneider cites Plaintiff Brant's testimony that there were probably thousands of loads on the load board from which he could select. While literally true, that fact does not contradict any of Plaintiffs' evidence that they had limited choices and lacked the ability to profit through the exercise of managerial skill. PSUF ¶ 65. As Schneider's own description of its load

board makes clear, the load board contained all of the loads that Schneider allowed a Driver to view. PSF ¶ 100. But given the costs of deadheading to pick up a load, Driver choice was limited to loads available within a reasonable number of miles of the Driver's location. PSF ¶¶ 54 and 69; P. App. I:1542-45 (Schneider's training materials for use of the load board used a 50-mile radius). If no profitable loads were available within that radius, the driver was put to the choice of expending inordinate amounts on deadheading to find a load, or waiting in the hope that, at some unknown point in future, a profitable load within a reasonable radius would appear on the load board—itself a risky proposition since operating costs continue to mount while a Driver waited for a profitable load. PSF ¶¶ 8, 9, 12, 17, 19, 22, 54, and 69. Thus, Brant's testimony that there were probably thousands of loads listed on the load board, while true, is entirely consistent with Plaintiffs' evidence that were times that Schneider offered him no profitable loads and other times when he could not earn enough from Schneider loads to cover his weekly lease payment. PSF ¶¶ 52-72; Doc. 105-10, Brant Decl. at ¶¶ 20, 34, 37, 48-49; Doc. 105-11, Campbell Decl. at ¶¶ 23, 37, 38, 40, and 52-53; Doc. 105-14, Minor Decl. at ¶¶ 31, 32, 33, 34, and 43-45.

Third, Schneider cites a number of out-of-circuit cases for the proposition that "drivers who select their own freight and choose how to deliver it enjoy an independent contractor relationship." Doc. 181 at 33. But the ability choose the work a worker will do does not, by itself, indicate independent status. *See, e.g.*, *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989) (cake decorators who could choose which cakes they wanted to decorate (each of which paid a different amount) were employees dependent on the company for whom they worked); *Silent Woman, Ltd. v. Donovan*, 585 F. Supp. 447, 449 (E.D. Wis. 1984) (fact that seamstresses could choose which garments they wanted to work on did not show independence). More importantly, the Seventh Circuit has already weighed in on this issue and found that the mere ability to choose from among

offered loads does not necessarily indicate independent status. Where, as here, there is evidence that a driver is limited to the loads offered by Schneider and cannot take available loads from other carriers, a jury could reasonably conclude that "the single biggest determinant of his profit for a workweek is not his managerial skill, but Schneider's choice of loads to offer him—or to require him—to haul," *Brant*, 43 F.4th at 669; PSF ¶ 21.

Fourth, Schneider tries to bolster its claim that Drivers had the opportunity to profit by citing evidence of Plaintiffs' earnings. Doc. 181 at 35. But the fact that some Plaintiffs did well in certain quarters is entirely consistent with Plaintiffs' view that their earnings were primarily a function of the number, quality and price of the loads that Schneider chose to offer rather than any exercise of business skill on the part of Plaintiffs. PSF ¶¶ 7, and 52-68. A jury could reasonably conclude from Schneider's evidence of earnings that if Schneider offered a sufficient number of well-paying loads in a quarter, Plaintiffs were able to make money. If it did not, their earnings would fall. PSF ¶ 44. Of course, Driver earnings were also a function of the number of hours a Driver worked each week - the more hours worked, the more a Driver could earn. PSF ¶¶ 44 and 83. But increasing earnings by working more hours is indicative of employee status, not independent status. *Baker v. Flint Engineering & Const. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) ("Plaintiffs' ability to maximize their wages by 'hustling' new work is not synonymous with making a profit."); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1316–17 (11th Cir. 2013) ("Plaintiffs' opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces. 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."); *Collinge*, 2015 WL

1299369 at *5 (driver's ability to earn more by working more hours or driving more efficiently is irrelevant to question of employee status).

In fact, if lease operator earnings show anything, they show how completely Schneider controlled driver earnings and how little impact driver "choice" had on their income. As Schneider made clear, lease operators paid by the all-in system have more loads to choose from than those paid by the 65% line haul rate system, yet according to Schneider, lease operators tend to earn the same amount regardless of what pay system they are on; there is no particular advantage to having more loads to choose from. PSF ¶¶ 74-76. Indeed, Schneider sets its pay rates to achieve a certain earnings level—something it could not do if driver choice, rather than Schneider control of loads and prices, were the primary determinant of driver income. PSF ¶¶ 67, 75, and 77 (prices for loads in any given lane are likely to be the same).

Finally, Schneider claims that "when [Brant] fell behind on his Lease obligations due to his decisions not to drive, SFI 'bent over backwards' to help him." Doc. 181 at 35. Not only did Schneider misinterpret Brant's message (he was actually referring to the way in which F2F Transport, the company he transferred his lease to after terminating his OOOA, bent over backwards to help him), but also contrary to Schneider's argument, that fact would be consistent with Brant's claim that he had no independent business. PSUF ¶ 106. Instead, he was entirely dependent on Schneider and its credit in order to operate. PSF ¶¶ 12, 15, 16, 18, 22, and 26-29. It also supports his testimony that he could not afford to turn down loads because he would fall behind in his lease payments if he did. PSF ¶¶ 16, 18, 21, and 22.

### C. The "Investment in Equipment" Factor Presents Disputed Facts

Although Plaintiffs leased their trucks and paid for their operating costs, the Seventh Circuit found that Plaintiffs' allegation that they were "totally dependent on Schneider's credit to operate," both for their truck and for their operating expenses, indicates that "[t]he investment

factor also weighs in favor of employee status." *Brant*, 43 F.4th at 670-71. Plaintiffs' evidence provides ample support for that allegation. PSF ¶¶ 12, 15, 16, 18, 22, and 26-29; *see also* Doc. 105-10, Brant Decl. ¶¶ 5, 14, 15, and 18; Doc. 105-11, Cambell Decl. ¶¶ 8, 9, 17, 18, and 21; Doc. 105-14, Minor Decl. ¶¶ 5, 12, 13, and 16. Schneider offers nothing to contradict that evidence.

Nevertheless, Schneider argues, as it did to the Seventh Circuit, that Plaintiffs knew they were not required by Schneider to lease from Schneider or rely on Schneider's credit. *See*, Response Brief of Defendants-Appellees, *Brant v. Schneider National, Inc.*, 21 Civ. 2122, Dkt. 29 at 22-23 (filed with the Seventh Circuit on Nov. 18, 2021)**.** The Seventh Circuit rejected that argument out-of-hand: "In theory, perhaps, Brant could have obtained his own truck, computer, and other necessary equipment with no involvement of Schneider, but he did not do so." *Brant*, 43 F.3d at 670. As the Seventh Circuit recognized, it is economic reality, not speculation as to what might have been done, that controls employee status. Given the *uncontradicted* evidence that Plaintiffs were dependent on Schneider's credit for their ability to operate, the Seventh Circuit's conclusion stands: Because Plaintiffs "had the means to engage in the freight-hauling business only because Schneider advanced a truck, equipment, and many other resources up front on Schneider's own credit[,] . . . [t]he investment factor also weighs in favor of employee status." *Brant*, 43 F.4th at 671.

The only other evidence Schneider offers on this point is evidence that Plaintiffs drove as "independent contractors" after terminating their contracts with Schneider. But Schneider offers no evidence that the label applied to that work was any more accurate than the "independent contractor" label that Schneider imposed on Plaintiffs. Plaintiffs may have been just as dependent on those subsequent employers as they were on Schneider. Regardless, the issue before this Court is whether Plaintiffs were dependent on Schneider's credit to operate while they were working for

Schneider. That their circumstances may, or may not, have changed subsequently is entirely irrelevant to that question.

**D. The Skill Factor Is at Best Neutral**

Schneider argues, as it did on appeal, that Plaintiffs' ability to drive a truck is a "special skill" weighing in favor of independent status. Doc. 181 at 39-40. The Seventh Circuit found that skill does not "set Brant apart from the many other commercial truck drivers whom Schneider treated as employees." *Brant*, 43 F.4th at 671. Accordingly, the Seventh Circuit concluded that this factor "is neutral *at best* for Schneider's position." *Id.* (emphasis added).

Schneider asks this Court to ignore the Seventh Circuit's conclusion and find that the skill factor weighs in favor of independent status as a matter of law because Brant, Campbell and Minor were "highly experienced." Doc. 181 at 39. But their experience does not set them apart from employee drivers any more than CDLs did. There is competent summary judgment evidence showing that some employee drivers had far more experience than Plaintiffs. PSF ¶ 37; *See* Doc. 112-15 (Decl. of Clarence Blackburn stating he was hired as an employee driver in 2018 after 28 years of experience as a truck driver). Defendants made this same argument regarding experience on appeal, *see* Response Brief of Defendants-Appellees in *Brant v. Schneider National, Inc.*, 21 Civ. 2122, Dkt. 29 at 6 (filed with the Seventh Circuit on Nov. 18, 2021), and the Seventh Circuit rejected it out of hand. *Brant*, 43 F.4th at 671.

Schneider also notes that the Plaintiffs "were responsible for overseeing their own operations," and attempts to infer from that fact that they must have had the skills to operate a business. Doc. 181 at 39-40. But there is no evidence to support such an inference. The fact that the OOOA imposed certain responsibilities on Drivers does not prove that they, in fact, had any business skill. The testimony of Plaintiffs cited by Defendants that they selected loads, used their applications to find routes, and decided how far and how long to drive each day proves nothing.

Those things are skills learned on the job, "no different from what any good employee in any line of work must do." *Brant*, 43 F.4th at 671 (*quoting Lauritzen*, 835 F.2d at 157). *See* PSF ¶ 71. On the other hand, there is evidence from which a jury could conclude that Schneider handled all of the business aspects of the lease operator job. PSF ¶¶ 86 and 86. A trier of fact could reasonably infer from those facts that the job Plaintiffs performed did not require any business skill whatsoever, only the ability to drive loads from point A to point B, just like any other employee driver. PSF ¶¶ 30 and 36; P. App. C:956-67, Contractor 101 presentation [redacted] ").  Accordingly, there must be a trial to determine whether the skill factor indicates employee or independent status.

### E. The Seventh Circuit Has Already Found That the Duration of Plaintiffs' Relationships With Schneider Weighs in Favor of Employee Status

The Seventh Circuit held that "[a]utomatic renewal [of the operating agreement] would weigh more heavily in favor of employee status but it is not required. As a matter of practice, Brant pleads, Schneider did renew its contract with him in January 2019. This indicates a relationship with enough duration to weigh in favor of employee status." *Brant*, 43 F.4th 672. That Schneider renewed the Plaintiffs' contracts is uncontested, PSF ¶¶ 32 and 35, as is the allegation that Schneider routinely renewed contracts by sending Drivers new contracts every year, along with reminders, until the contracts were signed and returned on the threat that if the new contract were not signed before the old one expired no more loads would be assigned. PSF ¶¶ 32 and 33. In light of this evidence, the Seventh Circuit's holding means that the permanency factor weighs in favor of employee status *as a matter of law*.

Schneider ignores the holding in *Brant* and urges this Court to find that this factor weighs in favor of independent status simply because the OOOA had a fixed one-year term, citing *Derolf*

and out-of-circuit cases. Those cases are distinguishable, but it isn't necessary to distinguish them as the Seventh Circuit's decision is controlling.

### F. The Seventh Circuit Has Already Found that Brant's Work Was Integral to Schneider's Operation and Indicates Employee Status

With respect to the last *Lauritzen* factor, the degree to which Plaintiffs' service was integral to Schneider's business, the Seventh Circuit noted that "Schneider is a freight hauling company, and Brant alleges that he hauled shipments for Schneider in the same way as the company's employee drivers." *Brant*, 43 F.4th at 672. Based on those allegations, the Seventh Circuit held that this factor weighs in favor of employee status. *Id*. Plaintiffs' allegations are supported by ample evidence establishing that this factor weighs in favor of employee status as a matter of law. PSF ¶¶ 1, 30, and 36. Indeed it is clear that as a matter of economic reality Plaintiffs had no independent business; they did not sell on-time delivery services to Schneider because they have none of the necessary infrastructure and resources to accomplish that purpose. PSF ¶ 82. To the contrary, it is Schneider that is in the business of selling on-time trucking services to its customers. PSF ¶ 79. Schneider is the entity that brings together the myriad necessary inputs to ensure that loads are picked up and delivered on time. PSF ¶¶ 47 and 81. Among other things, it accomplishes that through its constant monitoring of all its drivers, both company drivers and lease operators, through its infrastructure of customer service, dispatchers and BOAs that solve the problems that inevitably arise during delivery, and through its ability to balance its network and ensure that it has drivers and loads where and when needed -- something it accomplishes by, *inter alia*, manipulating the choices made by lease operators when they make "choices" from the load board.

PSF ¶¶ 47, 73, and 79-82. Plaintiffs and other lease operators merely provide the labor to accomplish Schneider's business purpose, just like Schneider's company drivers. PSF ¶ 82.

Schneider asks this Court to overrule the Seventh Circuit finding with respect to this factor based on the reasoning of two Eastern District of New York cases. Those cases are an aberration; they have never been followed by courts in any other Circuit and are directly contrary to the Supreme Court's holding in *Rutherford Foods.* Most importantly, they are contrary to the Seventh Circuit's holding in *Brant.*

### G. Conclusion Regarding FLSA Claims

As the above discussion makes clear, uncontested evidence in this case viewed in light of the *Brant* decision establishes that the "permanency" and "integral part of the operations" factors weigh in favor of employee status as a matter of law and that the skill factor "is neutral at best." *Brant*, 43 F.4th at 671. The other three *Lauritzen* factors present disputed facts that only a jury can resolve. Accordingly, Defendants' motion for summary judgment on FLSA employee status must be denied.

## II. MULTIPLE GROUNDS PRECLUDE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' WISCONSIN MINIMUM WAGE CLAIMS

### A. Whether Plaintiffs were Employees Under Wisconsin Law Presents Disputed Facts

Defendants argue that in order for a worker to hold an entity responsible as an employer under the Wisconsin minimum wage law, the worker must show that the entity "has control or direction" of the worker, citing the definition of "employer" in Wis. Stat. § 104.01(3)(a).While Plaintiffs have amply demonstrated sufficient evidence regarding control to preclude summary

judgment, the definition of employer in the minimum wage statute is not limited to control and requires denial as a matter of law. The full definition states:

> The term "employer" shall mean and include every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal, or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wages of another.

Wis. Stat. § 104.01. The second part of the definition was obviously added to expand the definition of employer beyond those who exercise control or direction of a worker, and it cannot be written out of the statute. What does it mean to be "responsible directly or indirectly for the wages of another"? The statute defines "wage" as "any compensation for labor measured in time, piece, or otherwise." Wis. Stat § 104.01(8). With that broad definition it is apparent that the authors of the Wisconsin Statute, which pre-dates the FLSA, intended to hold liable any "person, firm or corporation" who is responsible "directly or indirectly" for "any compensation paid for labor." There can be no question that Defendants were directly or indirectly responsible for the compensation paid to Drivers for their labor: The compensation Plaintiffs received was derived directly from the loads and prices that Schneider offered to Plaintiffs. PSF ¶ 22. Plaintiffs did not solicit any business and did not negotiate the prices for their labor; Schneider and Schneider alone was directly responsible for their compensation. PSF ¶¶ 1 and 85. Defendants motion for summary judgment must be denied for this reason alone.

Even if the control part of the definition was the only operative part, Defendants' motion for summary judgment would still have to be denied. As set forth above, the evidence is, at best, disputed with respect to the question of control.

**B. Wisconsin Minimum Wage Law ("WMWL") Applies to This Case**

Contrary to Defendants' argument, the Wisconsin Minimum Wage Law applies to Plaintiffs' work for two independent reasons: (1) The WMWL can be applied to Wisconsin

employers whose employees work out-of-state where, as here, Wisconsin choice of law rules show that Wisconsin has the most significant contacts with the controversy, and (2) even if the WMWL would not apply under choice of law rules, Defendants contractually promised that Wisconsin law would apply entitling Plaintiffs to enforce that promise.

### 1. Choice of Law Rules Require Application of the Wisconsin Minimum Wage Law

Defendants argue that they are entitled to summary judgment on Plaintiffs' Wisconsin Minimum Wage Law claim because Plaintiffs, for the most part, worked outside of Wisconsin. According to Defendants, that constitutes a prohibited extraterritorial application of the WMWL. That argument fails for two independent reasons. First, applying the WMWL to Schneider, a Wisconsin employer, does not constitute an "extraterritorial" application of the law simply because Plaintiffs performed the bulk of their work outside of Wisconsin. That was made clear in *State v. Talyansky*, 995 N.W.2d 277, 284 (Wis. Appl. 2023), where the court held that a Wisconsin company could be held liable under the Wisconsin Deceptive Trade Practices Act ("WDTPA") for false advertisements that were only disseminated to out-of-state consumers and that that would not constitute an extraterritorial application of the law. The company, as a Wisconsin company, had a duty to abide by the WDTPA regardless of where its advertisements were posted. WMWL presents an identical situation: The statute governs the conduct of in-state employers with respect to the wages they pay or agree to pay; that regulated conduct does not become extraterritorial simply because the employees who receive the minimum wage work out-of-state. *See also Simonton v. Dept. of Indus. Labor and Human Rel.*, 214 N.W.2d 302 (1974) (holding that employee of Wisconsin employer who primarily worked in Minnesota and only incidentally in Wisconsin was entitled to protection of Wisconsin worker compensation law). As discussed below, the fact that Plaintiffs worked out of state raises choice of law issues because other states may have an interest

in regulating Plaintiffs wages, but the fact that choice of law issues are implicated does not make the application of the WMWL "extraterritorial."

Even assuming, *arguendo*, that applying the WMWL to employers whose employees work out-of-state constitutes an extraterritorial application of the law, Defendants' claim that Wisconsin does not permit such application is false. Defendants begin by quoting *Wis. Indus. Energy Grp. v. PSC of Wis*., 819 N.W.2d 240 (Wis. 2012), for the proposition Wisconsin "lack[s] authority to regulate a person's activities in another state." *Id.* at 252-53. Defendants have taken that quote out of context and grossly misrepresented the court's actual holding, which was that Wisconsin law regulating utilities *could be applied to a utility's activity outside the state*. Be that as it may, application of the WMWL in this case does not involve regulating Schneider's "activities in another state" it involves regulating Schneider's payment obligations as a domestic Wisconsin employer. Defendants also cite *State v. Mueller*, 171 N.W.2d 414, 416 (1969), for the proposition that "[t]he general rule, unquestionably, is that laws of a state have no extraterritorial effect." Again, Defendants distort the quote by conveniently leaving off the end of the sentence. The full sentence reads: "The general rule, unquestionably, is that laws of a state have no extraterritorial effect; *equally well settled is the qualification that there are exceptions to the general rule*." *Id.* at 416 (emphasis added). Once again, the actual holding of the *Meuller* case was that the statute at issue could legally have extraterritorial application. *Id.* at 418. The Wisconsin Supreme Court concluded that "[i]n determining whether a given legislative enactment can have extraterritorial effect, we believe the legitimate protectible interests of the state should be balanced against inconvenience to the accused and invasion, if any, upon the sovereignty of sister states." *Id.* *Mueller* involved the extraterritorial application of a Wisconsin criminal statute, but in a footnote the Court cited *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965), as an example of the application

of its balancing test "in the civil context." *Meuller*, 171 N.W. at 418 fn 1. In *Wilcox* the Court adopted the "most significant contacts" standard, as embodied in the Restatement of Conflicts of Law, to determine whether Wisconsin or Nebraska tort law should be applied to an auto accident that occurred in Nebraska. *Wilcox*, 133 N.W.2d at 415-416. Thus, contrary to Defendants' argument, Wisconsin does not bar applications of its laws whenever out-of-state activity is involved. Instead, like most states, it applies the Restatement's choice of law balancing test to determine whether Wisconsin law applies. *Id. See Dow v. Casale*, 83 Mass. App. Ct. 751, 756–57 (2013) ("In accordance with choice-of-law doctrine, so long as the requisite criteria are met, the application by a State of its local law is not an impermissible 'extraterritorial' assertion of its authority. The overarching limiting principle, as set forth in the Restatement (Second) Conflict of Laws § 9 (1971), is that '[a] court may not apply the local law of its own [S]tate to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the [S]tate and of other [S]tates to the person, thing or occurrence involved.'").

Unable to make its case based on Wisconsin law, Defendants cite a number of out-of-state cases that they claim reject application of wage hour laws to out-of-state work. *Glass v. Kemper Corp.*, 133 F.3d 999, 1001 (7th Cir. 1998), is easily distinguishable because the Illinois Wage Payment Act at issue expressly stated that it applied only to "employers and employees in this state," a limitation that does not appear in the WMWL. *Compare* 829 ILCA 115/1 *with* Wis. Stat. § 104 *et seq*. *Glass* is also distinguishable because the work at issue was performed in Spain and international application of state law presents a very different situation from interstate application because it intrudes on "the delicate field of international relations." *Taylor v. Eastern Connection Operating Inc.*, 998 N.E.2d 408, 413 fn 9 (Mass. 2013). Defendants also cite a number of cases that reject application of wage statutes to out-of-state work based on the dormant Commerce

Clause, including *Handmaker v. CertusBank, N.A.*, 2015 WL 1365662 (W.D. Ky. July 7, 2015); *Mitchell v. Abercrombie & Fitch*, C2-04-306, 2005 WL 1159412 at *3-4 (S.D. Ohio May, 17, 2005), and an Illinois case *Hirst v. SkyWest, Inc*, 283 F.Supp.3d 684 (N.D. Ill. May 24, 2016). Here again, Defendants are misleading the Court: Whether *Abercrombie* and *Handmaker* are still good law in Ohio and Kentucky, *Hirst* is decidedly not good law in the Seventh Circuit. The *Hirst* case was reversed on appeal by the Seventh Circuit with the comment that "States possess authority to regulate the labor of their own citizens and companies, so we apply [the dormant Commerce Clause] sparingly to wage regulations. The dormant Commerce Clause does not preclude state regulation of flight attendant wages in this case, particularly when the FLSA itself reserves that authority to states and localities." *Hirst v. SkyWest, Inc.*, 910 F.3d 961, 963 (7th Cir. 2018). *Talyansky*, the Wisconsin Court Appeals case that held that applying the Wisconsin DTPA to a domestic company's out-of-state advertisements, similarly held that regulating domestic companies' activities directed at out-of-state parties posed no dormant Commerce Clause issue. 995 N.W.2d at 284. *Hirst* and *Talyansky* control this case and preclude Defendants' dormant Commerce Clause argument.

Indeed, contrary to Defendants' argument, many states recognize that choice of law rules allow their employment laws to be applied to out-of-state workers, including over-the-road truck drivers, in circumstances identical to those presented here. *See, e.g.*, *Huddleston v. John Christner Trucking, LLC*, 2020 WL 6375163 at * (N.D. Okla. Oct. 26, 2020) (applying choice of law analysis to hold that Oklahoma employment law applies to claims of truck drivers working in California for an Oklahoma trucking company); *Perez v. CRST Int'l Inc.*, 355 F.Supp.3d 765 (N.D. Iowa 2018) (using choice of law analysis to determine that Iowa employment law applies to truck driver domiciled and working in California for an Iowa trucking company); *Portillo v. National Freight,*

*Inc.*, 323 F.Supp.3d 646, 658-663 (D.N.J. 2018) (applying choice of law principles to hold that New Jersey wage statutes apply to work of truck drivers domiciled in Pennsylvania and Rhode Island who principally worked in Pennsylvania); *Taylor v. Eastern Connection Operating, Inc.*, 988 N.E.2d 408 (Mass. 2013) (holding that Massachusetts employment law applied to package couriers residing and working in New York for a Massachusetts company based on Massachusetts' materially greater relationship to the transaction at issue); *Woods v. Mitchell Bros. Truck Line, Inc.*, 2008 WL 496803 (Wash. App. Feb. 26, 2008) (Washington wage statutes apply to work of truck driver domiciled in Oregon including work outside the state of Washington and rejecting dormant commerce clause argument). *See also, Wilson v. Recorded Future, Inc.*, 669 F.Supp.3d 53, 57 (D. Mass. 2023) (the Massachusetts Wage Act "affords protections to out-of-state employees—so long as Massachusetts has the most significant relationship to the plaintiff's employment."); *Harlow v. Sprint Nextel Corp.*, 574 F.Supp.2d 1224 (D. Kan. 2008) (applying choice of law principles to hold that Kansas Wage Payment Act applies to Sprint employees living and working outside of Kansas).

Each of the above cases turns on a careful choice-of-law analysis. Defendants' failure to make such an analysis here is fatal to their motion for summary judgment. That said, the Court need look no further than the choice of law provision in the OOOA to conclude that, under Wisconsin choice of law rules, the WMWL applies to Defendants' employment of Plaintiffs. "Under Wisconsin law, the parties to a contract may expressly agree that the law of a particular jurisdiction shall control their contractual relations. The question of choice of law governing the validity and interpretation of a contract is, absent fraud, basically a question of the intention of the parties." *First Wisconsin Nat. Bank of Madison v. Nicolaou*, 270 N.W.2d 582, 585 (Ct. App. 1978) (citations omitted). *See also State Farm Life Ins. Co. v. Pyare Square Corp.*, 331 N.W.2d 656, 658

(Wis. App. 1983) ("Wisconsin allows the parties to determine the law applicable to their contracts in accordance with sec. 187, Restatement (2d) Conflict of Laws."). Here the OOOA contained the following choice of law provision:

> This Agreement, any documents and instruments relating hereto, and/or the relationship created thereby will be governed by, and will be construed and enforced in accordance with, the substantive laws of the State of Wisconsin, without regard to principles of conflicts of laws as applied to contracts entered into and to be performed entirely within that state by its residents (the "State Laws") and any applicable federal laws.

PSF ¶ 89; Doc. 182-1, OOOAs ¶ 34(a). This is an exceedingly broad provision. On its face it not only ensures that Wisconsin law will apply to the interpretation of the contract, but by stating that the "relationship created" by the OOOA will be "governed by, and will be construed and enforced in accordance with, the *substantive* laws of the State of Wisconsin" it makes clear that if that "relationship" is found to be one of employer/employee, Wisconsin substantive laws applicable to such a relationship, like the WMWL, will be enforced. Given Wisconsin's strong policy in favor of enforcing choice of law provisions as embodied in Restatement 2d § 187(1), that should be the end of the discussion.

Even if Section 187(2) were held to apply rather that 187(1), the choice of law provision in the contract would still control unless either:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement § 187(2). Subsection (2)(a) does not apply because the fact that Schneider is domiciled in Wisconsin is more than sufficient to ensure that Wisconsin has a substantial relationship to the parties and the transaction. Subsection (2)(b) does not apply because no other

state has a "materially greater interest than [Wisconsin] in the determination of the [minimum wage applicable to the employment]"-- a conclusion supported by all of the cases cited in the preceding paragraph.

Finally, even if the choice of law provision in the OOOA did not mandate the application of WMWL to this case, standard choice of law analysis leads to the same result. Statutory wage claims are generally construed as tort claims. *See Perez*, 355 F.Supp.3d at 769 (applying tort "most significant relationship" test to statutory wage claims); *Portillo*, 323 F.Supp.3d at 658 (same); *Melia v. Zenhire, Inc.*, 462 Mass. 164, 176-177 (2012)|(same). The factors that must be considered in determining the "most significant relationship" regarding such claims are set forth in Restatement of Conflicts of Law § 145. *See Perez*, 355 F.Supp. 3d at 769. They are:

1) The Place of Injury: Because the injury is pecuniary this would generally be the domicile of the truck drivers. *See Perez*, at 773; *Portillo*, 323 F.Supp. 3d at 661.
2) The Place of Conduct Causing Injury: "The decision to classify Plaintiffs as independent contractors, being an employment and/or legal decision, would have been made at defendant's corporate headquarters." *Perez* at 773; *Portillo*, at 659.
3) Domicile, Residence, Place of Incorporation, and Place of Business: Plaintiffs are domiciled outside of Wisconsin while Defendants are domiciled in Wisconsin. PSF ¶¶ 89-99. Accordingly, this factor is neutral, although the mobile nature of Plaintiffs' work does not give any other state a more significant interest than Wisconsin. *Perez*, at 774; *Portillo*, at 659, 663.
4) Place Where the Relationship Was Centered: This factor "carries more weight than the other factors" and clearly favors application of Wisconsin law. *Perez*, at 778; *Huddleston*, 2020 WL 6375163 at *3. The relationship arises from the OOOA drafted by Defendants in

Wisconsin and all parties understood that Schneider was a Wisconsin entity that wished to apply Wisconsin law to the relationship. *See Portillo*, at 659-660; PSF ¶¶ 90-92. The original copy of that document was stored in Wisconsin. PSF ¶ 92. It required the "relationship" created by the OOOA to be controlled by Wisconsin law and also required any suit arising out of the "relationship" to be filed in Wisconsin courts. PSF ¶¶ 90 and 91; Doc. 182-1, OOOAs ¶ 34(a). The lease also required application of Wisconsin law and specified that claims could only be brought in Wisconsin. PSF ¶ 91; Doc. 182-1, Leases ¶ 31. The financial benefits of Plaintiffs' work accrued to Defendants in Wisconsin; Plaintiffs' compensation rate was set by Defendants in Wisconsin, PSF ¶ 96; their pay and deductions are calculated in, and transmitted from, Wisconsin, PSF ¶ 97; and all documents from which Driver pay is calculated are stored in Wisconsin and Defendants required Drivers who wished to review the documents from which their pay and deductions were calculated in order to determine their accuracy to travel to Wisconsin to examine the documents, PSF ¶ 98, Doc. 182-1, OOOAs ¶ 4(e). Defendants required Plaintiffs to have a worker compensation insurance policy which "provide[s] principal coverage in Wisconsin," PSF ¶ 93, Doc. 182-1, OOOAs ¶7(b)(ii)(1); Defendants required Plaintiffs to agree to allow Defendants to waive certain insurance coverages but only "to the extent allowed under the law of the State of Wisconsin," PSF ¶ 94, Doc. 182-1, OOOAs ¶ 7(b)(iv); Defendants required Plaintiffs to return Defendants' equipment, including trailers, parts, supplies and other equipment owned (or leased) by Defendants to Green Bay, Wisconsin "within three (3) days either upon written notice to the Owner-Operator at any time" or upon termination of the OOOA, PSF ¶ 95, Doc. 182-1, OOOAs ¶13(b), and to return their leased truck to Wisconsin upon termination of the Lease. PSF ¶ 99, Doc. 182-1, Lease ¶

18. These ties to Wisconsin clearly indicate that the relationship was centered in Wisconsin and nowhere else. *Perez*, at 774-776.

Other factors to be considered are those set forth in the Restatement (2d) of Conflict of Laws § 6. *Perez,* 355 F.Supp.3d at 769:

5) Needs of Interstate Systems § 6(2)(a): The *Perez* court held that,

> Respect for interstate and international systems is maintained when the forum state, when choosing to apply its own law, has a substantial connection with the issue. The primary issue presented in this case is whether defendants misclassified plaintiff as an independent contractor instead of as an employee. Defendants are both headquartered in Iowa and all decisions regarding such classifications are made in Iowa. As such Iowa has a substantial connection with the issue of misclassification.

*Perez,* 355 F.Supp.3d at 776-777. The same statement applies with equal force here to establish that this factor favors application of Wisconsin law.

6) Relevant policies of the forum and other States § 6(2)(b) & (c): This factor is in equipoise because, while Wisconsin has an interest in ensuring that all businesses headquartered there comply with its employment laws, the states where Plaintiffs are domiciled have some interest in enforcing their own wage laws, although the interest of those states is considerably attenuated given the interstate nature of their work. *Perez*, at 777; *Portillo*, at 662.

7) The protection of justified expectations § 6(2)(d): This factor clearly weighs in favor of Wisconsin law given the choice of law provision in the OOOA. All parties accepted that provision and Defendants should not be permitted to disclaim that choice. *See Taylor*, 988 N.E.2d at 195, n8 ("inequitable" and "unjust" for the stronger party "to forsake [its] own choice of law clause simply because it benefits the opposing parties.") (quoting *Am. Ins. Co. v. Frischkorn*, 173 F.Supp.2d 514, 519 (S.D.W.Va. 2001)). As *Portillo* noted, over-

the-road truckers should not have to hire talented attorneys to figure out what law governs fundamental wage-and-hour issues, particularly where, as here, the contract states that Wisconsin law governs. *Portillo*, at 663.

8) Other Factors, Restatement § 6(2)(e), (f), and (g): While both Wisconsin and the states where Plaintiffs are domiciled have equal interests in the fair payment of wages, certainty, predictability and uniformity of result "suggest that, where feasible and just, the law should direct workers and their employers to a single source whereby employees can be treated equally . . . again pointing to [Wisconsin] law rather than multiple states' laws based upon distinctions not essential to the actual work being done." *Portillo*, at 662-663. Ease of determination of law points to Wisconsin in light of the parties contractual and forum selection clauses. *Portillo*, at 663.

In sum, even if the choice of law provision in the OOOA were not controlling, all of the relevant choice-of-law factors weighing on what wage-hour law should be applied to this controversy are either neutral or strongly favor of application of Wisconsin wage hour law to this controversy. Accordingly, Defendants' motion for summary judgement that the WMWL cannot be applied must be denied.

### C. Even If the Wisconsin Minimum Wage Statute Does Not Apply Extraterritorially, Plaintiffs Are Entitled To Its Protections As A Matter of Contract

Regardless of whether WMWL would apply extraterritorially to Plaintiffs' claims, they are contractually entitled to the protections of that law. An employer may, by contract, agree to abide by the minimum wage laws of a particular state. *See*, *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1059, 1066 (N.D. Cal. 2014) (noting employer could offer contractual provision agreeing to pay California minimum wage). *See also, Albee v. Village of Barlett, Ill.*, 861 F.Supp. 680, 691 (N.D. Ill. 1994) (policy statement that City would adhere to DOL FLSA policies was contractually enforceable);

*Hasken v. City of Louisville*, 173 F.Supp.2d 654, 663 (W.D. Ky. 2001) (employer may agree by contract to abide by the FLSA).

The OOOA provides that "the *relationship created* thereby [the OOOA] will be governed by, and will be construed and enforced in accordance with, the *substantive laws* of the State of Wisconsin." PSF ¶ 89; Doc. 182-1, OOOAs ¶ 34(a) (emphasis added). That provision can only be read as a contractual promise to abide by WMWL. If Plaintiffs are successful at trial in establishing that the "relationship created" by the OOOA was one of employer/employee, the WMWL is a Wisconsin substantive law that "governs" that relationship and makes Schneider liable when wages fall below the level mandated by that law and that Plaintiffs can "enforce in accordance with" Wisconsin law. *Id*. There is no other reasonable way to read that provision of the contract. Accordingly, even if the WMWL does not itself apply extraterritorially, Defendants have promised to comply with it and promised that Plaintiffs may enforce its requirements.

## CONCLUSION

For all of the foregoing reasons, Defendants' motion for summary judgment should be denied.

Respectfully submitted: July 22, 2024

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