IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

THEODUS DAVIS, on behalf of himself and those similarly situated, Plaintiff, *v.* COLONIAL FREIGHT SYSTEMS, INC., PHOENIX LEASING OF TENNESSEE, INC., RUBY MCBRIDE and JOHN DOES 1-10, Defendants.	CASE NO.: 3:16-CV-00674 *Civil Action* **MEMORANDUM OF LAW**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CONDITIONAL AND CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiff Theodus Davis filed the instant action on behalf of himself and all other individuals who either participated in Defendant Colonial Freight's Driver Training Program or who signed vehicle leases with Defendant Phoenix Leasing and operator agreements with Colonial. Plaintiff alleges that Defendants misclassified them as independent contractors and denied them the benefits of federal wage and hour protections. Plaintiff further alleges that Defendants' form lease agreements violated the Truth in Leasing Act ("TILA").

Plaintiff and putative class members performed work as commercial truck drivers for Defendants. Defendants Colonial and Phoenix at all relevant times herein operated a "lease purchase" program wherein applicants are informed they can be their own boss while making lease payments on a truck, provided by Defendant Colonial's sister company, Defendant Phoenix Leasing, wholly owned by Colonial's former CEO and current part-owner. If an applicant is not sufficiently experienced to be offered a position as an independent contractor driving for Colonial, Colonial will offer them a position as an Independent Contractor Trainee, in which they are paid only a reimbursable stipend-advance but must take direction from Colonial's driver-trainers while they drive and deliver Colonial's freight.

With respect to Plaintiff and putative class members' FLSA claims, the underlying dispute is whether Plaintiff, Driver-Trainees, and the Phoenix Lease Drivers were misclassified as independent contractors under FLSA. As set forth below, Plaintiff has presented common evidence showing that he is similarly situated to other Driver Trainees and Phoenix Lease Drivers such that these FLSA claims should be conditionally certified as a collective action, and notice be sent to potential collective action members.

Plaintiff has also alleged that Defendants violated the TILA by failing to include required disclosures in the form leases Defendants enter/entered into with Plaintiff and the Phoenix Lease Drivers. These form agreements are materially identical, and Plaintiff seeks that a Rule 23(b)(3) class be certified with respect to these claims. For the reasons set forth in detail below, Plaintiff requests that the Court grant the instant motion.

II. STATEMENT OF FACTS

1. Defendant Colonial Freight ("Colonial") operates a little over 200 trucks at present, and had more than that in 2012-2013. *See* Excerpts of Ruby McBride 30(b)(6) Deposition, Ex. 1S at 58:03-59:06.

2. Colonial's CEO believes that probably more than 50 percent Colonial's trucks ultimately come from Defendant Phoenix Leasing ("Phoenix Leasing"). *See id.* at 60:02-15.

3. Colonial employs coordinators who work with Colonial's independent contractor truck drivers. *See id.* at 56:13-22.

4. The assistance that Named Plaintiff Davis' ("Davis") coordinator provided him was the same assistance he provides to Colonial's other drivers. *See* Excerpts of Jonathan Roberts' Deposition, Ex. 1U at 46:12-25.

5. Colonial described these coordinators as "dispatch coordinators who assist contractors like Davis in locating freight that they choose to transport." *See* Defendants' Response to Motion to Compel, ECF Doc. 51, at 7, ¶ 1(c).

6. Colonial assigns its truck drivers to the following four divisions: Refrigerated; Dry Van; Container, and ALCO. *See* McBride 30(b)(6) Dep., Ex. 1S at 57:09-24.

7. ALCO exclusively uses employee-drivers. *See id.* at 29:25-30:13.

8. ALCO currently employs less than 10 company drivers. *See id.* at 31:21-32:08.

9. Colonial's qualifications for non-trainee drivers are that they are at least 23 years old, have no DUIs or felonies, have a clean motor vehicle report ("MVR"), have no more than one speeding ticket in the last two years, and have twelve months of experience operating a commercial motor vehicle within the last three years. They must also pass a DOT drug test, physical test, written test, and road test. *See id.* at 32:09-34:02.

10. Colonial's qualifications for a driver trainee are the possession of a valid CDL and attendance at an accredited driver training school with at least 160 hours of training, and fulfilling the DOT's drug test, physical test, written test, and road test. *See id.* at 32:09-34:02.

11. While in the training program, the trainee drives the truck for Colonial under Colonial's DOT operating authority. *See id.* at 175:02-09.

12. The Independent Contractor/Trainee Agreements ("ICTA") that Davis and other Driver-Trainees signed with Colonial are materially identical to each other. *See* Davis' ICTA, Ex. 1Y; Sample Driver-Trainee ICTAs, Ex. 1Z.

13. The Independent Contractor Operating Agreements ("ICOA") that Davis and other drivers who leased vehicles from Phoenix Leasing and then contracted to work for Colonial ("Phoenix Lease Drivers") are materially identical to each other. *See* Davis' ICOA, Ex. 1V; Sample Contracts, Ex. 1A.

14. If a potential driver comes to Colonial without a truck, the driver is told about Phoenix Leasing. *See* McBride 30(b)(6) Dep., Ex. 1S at 166:12-17.

15. The vehicle leases that Davis and the Phoenix Lease Drivers signed with Phoenix Leasing are materially identical to each other. *See* Davis' Phoenix Agreements, Ex. 1W; Sample Contracts, Ex. 1A.

16. Colonial maintains DOT driver logs for up to six months. *See* McBride 30(b)(6) Dep., Ex. 1S at 53:12-54:06.

17. DOT driver logs are not used to calculate drivers' pay. *See id.* at 60:24-61:20.

18. Colonial audits all drivers' DOT logs. *See id.* at 62:08-63:05.

19. Non-Trainee drivers are not paid by the hour or the day. *See id.* at 64:08-15.

20. Colonial considers trainees to be independent contractors. *See id.* at 43:17-44:04.

21. Colonial typically has pre-existing contracts with customers. *See id.* at 77:09-13.

22. Colonial uses an electronic system called Lane Logistics to let customers electronically transmit loads to Colonial. *See id.* at 75:21-76:02.

23. Colonial's employees and commissioned agents negotiate contracts and procure loads. *See id.* at 79:01-81:23.

24. Specifically, Colonial's Executive Vice President Phyllis Keesee and her subordinate, David Carroll, negotiate the long-standing contracts with Colonial's customers. *See id.* at 92:08-19.

25. Employees or commissioned agents operating out of Colonial's terminals may also have negotiate rates with shippers. *See id.* at 92:15-93:14.

26. Terminal managers are responsible for receiving orders for loads from customers and offering such loads to Colonial's drivers. *See id.* at 93:03-94:10; 102:06-103:04.

27. Colonial does not operate a load board, i.e., a list of all available loads which drivers may review before accepting or rejecting loads. *See id.* at 100:25-101:02.

28. When Colonial proposes a load to a driver, the driver is given the pickup, destination, and schedule for the load. *See id.* at 117:10-118:08.

29. While compensation structure varies by division, all drivers within each division are paid via the same compensation structure. *See id.* at 120:11-121:03.

30. All Lease Operators are paid either a percentage of gross freight revenue or mileage pay as their primary compensation. *See* Excerpts from Michael Barnes' Deposition, Ex. 1T at 34:03-18; 37:25-38:08.

31. No Lease Operators for Colonial are on a forced dispatch system. *See id.* at 44:23-45:04.

32. All Lease Operators are assigned a coordinator to work with. *See id.* at 45:05-07.

33. Colonial's corporate designee testified that drivers can increase their compensation through fuel efficiency and managing their hours. *See* McBride 30(b)(6) Dep., Ex. 1S at 153:04-154:05.

34. Colonial has negotiated fuel discounts with the major truck stop companies for its drivers. *See id.* at 154:06-14.

35. All Lease Operators are eligible for Colonial's negotiated fuel discounts. *See* Barnes Dep., Ex. 1T at 45:08-10.

36. All Lease Operators are subject to the same responsibilities for providing information related to the completion of a delivery and subject to the same procedures for getting paid for a load. *See id.* at 47:10-17; 48:10-21; 49:12-22.

37. No Lease Operators are allowed to use a third party brokerage board and accept loads and drive that load for themselves. *See id.* at 48:22-49:06.

38. All of Colonial's drivers are subject to the Federal Motor Carrier Safety Act's ("FMCSA") hours-of-service regulations. *See id.* at 49:07-10.

39. None of Colonial's drivers negotiate the gross freight revenue customers pay. *See id.* at 65:06-08.

40. All of Colonial's drivers driving a refrigerated trailer/container are responsible for maintaining the temperature required. *See id.* at 68:03-05.

41. All of Colonial's drivers are responsible for the cargo while under dispatch. *See id.* at 68:08-24.

42. Colonial operates maintenance facilities in Nashville, Knoxville, and Atlanta, *See* McBride 30(b)(6) Dep., Ex. 1S at 85:25-86:20.

43. The trainee agreement Davis signed in 2014 was the form trainee agreement that was used by Colonial at that time. *See id.* at 180:11-17.

44. Within the relevant time period, Colonial has never designated any driver trainee as an employee. *See id.* at 182:23-12.

45. The 2014 trainee agreement states that the money received by a trainee during orientation is a stipend-advance that must be repaid unless the trainee elects to become an independent contractor and enter into a lease agreement with Colonial and work for Colonial for at least three months. *See id.* at 183:18-184:06.

46. The stipend-advance reimbursement provision remains in effect at present. *See id.* at 184:08-13.

47. Defendants admit that consent is required by Phoenix Leasing before a vehicle leased by it to a Colonial driver may engage in carriage for an individual or entity other than Colonial. Answer, ECF Doc. 25 at 13-14, ¶ 60.

48. Colonial's corporate designee has no recollection of any driver for Colonial asking to complete a trip for another motor carrier while under lease contract to Colonial. *See* McBride 30(b)(6) Dep., Ex. 1S at 194:10-15.

49. Defendants contend that contract drivers are paid in accordance with their contracts. *id.* at 61:9-17, 64:8-19.

50. Paragraph 9 of the ICOAs gives Defendants the right to deduct from drivers' pay for a number of costs associated with the performance of their duties, but does not define the method of calculation of these costs. Davis' ICOA, Ex. 1V at 2; Sample Contracts, Ex. 1A at 3, 18, 44, 80, 96, 111.

51. Paragraph 9 of the ICOAs gives Defendants the right to deduct from drivers' pay "all other costs incurred in the performance of this Agreement," but does not define what these items may be or the method of calculation of any such items. *Id.*

52. Paragraph 9(f) of the ICOAs gives Defendants the right to deduct from drivers' pay "interest on items owing Carrier" without specifying the source, amount or method of calculation of said interest charges. *Id.*

53. Paragraph 11(e) of the ICOAs authorizes Defendants to establish an escrow account on behalf of the drivers, and requires the drivers to agree that charges for all previously listed items may be deducted from the escrow accounts without describing the method of calculation of any such charges. Davis' ICOA, Ex. 1V at 3; Sample Contracts, Ex. 1 at 4, 19, 45, 81, 97, 112.

54. Paragraph 14 of the ICOAs authorizes Defendants to withhold or deduct from drivers' pay "sums sufficient to reimburse [Defendants] when such reimbursement is owed to [Defendants]", but does not specify what items Defendants may be entitled to reimbursement for or the method of calculation of any such deductions. *Id.*

55. Paragraph 26 of the ICOAs authorizes Defendants to establish an escrow account on behalf of the drivers without specifying the method of calculation of any such charges. Davis' ICOA, Ex. 1V at 4; Sample Contracts, Ex. 1A at 5, 20, 46, 82, 98, 113.

56. Paragraphs 5 and 27 of the ICOAs state that drivers are not required to purchase any products or services as a condition of entering into the ICOA. Sample Contracts, Ex. 1 at 3, 5, 18, 20, 44, 46, 80, 82, 96, 98, 111, 113.

57. Paragraph 4 of Schedule A to the Lease Agreements requires the driver to pay various fixed charges on a weekly basis, including a charge for a Global Positioning Satellite ("GPS") system. Davis' Lease Agreements, Ex. 1W at 8, 18; Sample Contracts, Ex. 1A at 3, 18, 44, 80, 96, 111.

58. The GPS systems that Defendants require class members to pay for come equipped on Phoenix Leasing's trucks when they are leased to drivers and come pre-equipped to work with Colonial's computer system. McBride 30(b)(6) Dep., Ex. 1S at 70:15-24.

59. Paragraph 4 of the Lease Agreements requires drivers to enter into an ICOA with a DOT certified motor carrier that is approved by Phoenix Leasing, and to have all repairs and maintenance of the vehicle be performed at a facility approved by Phoenix Leasing and coordinated by the Vice President of Maintenance of the approved carrier. Sample Contracts, Ex. 1A at 13, 28, 54, 91, 106, 121.

60. Drivers who lease trucks from Phoenix Leasing and sublease these trucks to Colonial are required by Defendants to have repairs and maintenance coordinated and, at times, performed by Colonial. *See* Davis' Maintenance Receipts, Ex. 1X; Davis' Lease Agreements Ex. 1W at 1, 13.

61. Colonial's ICOAs do not set forth the method of calculation of charges for repairs and maintenance that are performed by Colonial or at Colonial's behest. Davis' ICOA, Ex. 1V; Sample Contracts, Ex. 1A.

62. On or around July 9, 2015, Davis received a settlement sheet that included a $476.33 chargeback for the replacement of a tire that occurred on July 8, 2015. Davis' Settlement Sheets, Ex. 1AA at 34.

63. Defendants records for this July 8, 2015 tire change indicate that, included in this chargeback, was a $25 "Markup" that Defendants charged to Davis. Davis' Maintenance Receipts, Ex. 1X at 2.

64. At the conclusion of Davis' employment with Defendants, Defendants charged back against Davis' compensation $2,152.84 for the replacement of eight tires. Davis' Settlement Sheets, Ex. 1AA at 5.

65. Defendants records for this transaction indicate that, included in this chargeback, was $123 in labor costs. Davis' Maintenance Receipts, Ex. 1X at 4.

66. On that same settlement sheet, Davis was again charged $214.50 in labor costs for the replacement of eight tires. *See* Davis' Settlement Sheets, Ex. 1AA at 5; Davis' Maintenance Receipts, Ex. 1X at 5.

67. Defendants charge back against contract drivers' compensation amounts for a number of items that are not specified in the lease, including, but not limited to, container insurance, direct deposit fees, TripPak fees and a self-funded container insurance plan. Sample Settlement Sheets, Exs. 2 through 7; McBride 30(b)(6) Dep, Ex. 1S at 132:11 – 133:9; Sample Settlement Sheets, Exhibits 1B through 1G.

68. The ICOAs do not state that Defendants shall assume the risks and costs of fines for overweight or oversized trailers when trailers are preloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the driver's control, and for improperly permitted over-dimension and overweight loads. Sample Contracts, Ex. 1A at 2-6, 17-21, 43-47, 79-83, 95-99, 110-114.

III. LEGAL ARGUMENT

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

The Sixth Circuit uses a two-stage certification process and similarly situated analysis when determining collective action certification under the FLSA. *Monroe v. FTS USA, LLC,* 860 F.3d 389, 397 (6th Cir. 2017) (*citing O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009)). At the first stage, the plaintiff's burden is "fairly lenient" and requires "only a modest factual showing" that he is similarly situated to the other potential plaintiffs whom he seeks to notify of the collective action. *Dillon v. Jackson Home Care Services, LLC,* 2017 U.S. Dist. LEXIS 126718 at *6 (W.D. Tenn. August 10, 2017) (*citing Comer v. Wal-Mart Stores, Inc.,* 454 F.3d 544, 547 (6th Cir. 2006)). Consequently, the "similarly situated" standard for certification of an FLSA collective action is "less stringent" than that typically applicable to a class action brought pursuant to Rule 23. *Pierce v. Wyndham Vacation Resorts Inc.,* 2017 WL 4398656 at *3 (E.D. Tenn. October 3, 2017) (*citing O'Brien*, 575 F.3d at 584).

While neither the FLSA nor its implementing regulations define the term "similarly situated," during the initial stage, "the plaintiff need only prove… that the putative class shares 'common theories of defendant['s] statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Comer,* 454 F.3d at 547. Courts within the Sixth Circuit "do not consider the merits of the plaintiff's claims, resolve factual disputes, make credibility

determinations, or decide substantive issues." *Swigart v. Fifth Third Bank*, 276 F.R.D. 210, 213 (S.D. Ohio 2011), *citing Burdine v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 79807 at 2-4. Instead, the Sixth Circuit is clear that engaging in a merits or predominance analysis during this initial phase is inappropriate, as "***applying criterion of predominance undermines the remedial purpose of the collective action device***." *O'Brien* at 585. (emphasis added).

Showing a unified policy of violations is not required; employees who suffer from a single, FLSA-violating policy, or whose claims are unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct, are similarly situated. *Monroe*, 830 F.3d at 398. Here, two FLSA-violating policies are at issue for the Driver-Trainees: whether Defendants misclassified the Trainees as independent contractors instead of employees, and whether Defendants' payment to Trainees of a stipend-advance/forgiveable loan violated FLSA's requirements that wages be made free and clear.

Likewise, two FLSA-violating policies are the primary issues for the Phoenix Lease Drivers' claims: whether Defendants misclassified the Phoenix Lease Drivers as independent contractors instead of employees; whether Defendants' deductions from the Phoenix Lease Drivers gross settlement payments of business expenses such as the Phoenix truck lease payments, fuel, maintenance costs, and other payments such that Phoenix Lease Drivers were sometimes paid less than the minimum wage for all hours worked resulted in Phoenix Lease Drivers not receiving the minimum wage for all hours worked. Given that this litigation turns on the resolution of these uniform practices and policies of Defendants, conditional collective action certification is warranted for both a Driver-Trainee Collective Action class and a Phoenix Lease Drivers Collective Action class.

1. Courts have regularly conditionally certified independent contractor cases as collective actions under FLSA, where plaintiffs demonstrate they were subject to common practices and policies of the employer.

As set forth above, and explained in detail below, both the Driver-Trainees and the Phoenix Lease Drivers were subject to the common practices and policies of Colonial.

Courts have routinely certified independent contractor misclassification cases as collective actions under the FLSA, where Plaintiffs demonstrate that they were subject to common practices and policies of the employer. *See O'Connor v. Oakhurst Dairy*, 2015 U.S. Dist. LEXIS 67029 (D. Me. May 22, 2015) (conditionally certifying group of commercial truck drivers who provided evidence that they has similar positions, job duties, and pay structures); *Spellman v. American Eagle Express, Inc*., No. 10-764, 2011 U.S. Dist. LEXIS 53521 (E.D. Pa. May 18, 2011) (conditionally certifying a group of delivery drivers over a three state area without analyzing economic reality factors); *Carrera v. UPS Supply Chain Solutions, Inc.*, No. 10-60263, 2011 U.S. Dist. LEXIS 34611, 2011 WL 1303151 (S.D. Fla. March 31, 2011) (conditionally certifying a class of delivery drivers based upon showing that they are similarly situated to other drivers; no economic reality factor analysis); *Coats v. Nashville Limo Bus*, No. 3-10-0759, 2011 U.S. Dist. LEXIS 8104, 2011 WL 308403 (M.D. Tenn. Jan. 27, 2011) (granting conditional certification to truck drivers classified as independent contractors who are in the business of transporting automobiles for car dealerships; no economic reality factor analysis); *Edwards v. Multiband Corp*., No. 10-2826, 2011 U.S. Dist. LEXIS 3460, 2011 WL 117232 (D. Minn. Jan 13, 2011); *In re Penthouse Executive Club Comp. Litig*., No. 10-1145, 2010 U.S. Dist. LEXIS 114743, 2010 WL 4340255 (S.D.N.Y. Oct. 27, 2010); *Labrie v. UPS Supply Chain Solutions*, No. 08-3182, 2009 U.S. Dist. LEXIS 25210, (N.D. Cal. March 18, 2009); *Lewis v. ASAP Land Express*, No. 07-2226, 2008 U.S. Dist. LEXIS 40768, 2008 WL 2152049, at *1 (D. Kan. May 21, 2008); *Lemus v.*

Burnham Painting and Drywall Corp., No. 06-01158, 2007 U.S. Dist. LEXIS 46785, (D. Nev. June 25, 2007).

While Plaintiff contends that the Driver-Trainees and Phoenix Lease Drivers are employees, and Defendants contend that they are independent contractors, neither side contends that ***only some*** of the Driver-Trainees are or are not employees. Accordingly, the Court should conditionally certify a collective action under FLSA for both the Driver-Trainees and the Phoenix Lease Drivers.

2. Plaintiff has made a modest factual showing that the Driver-Trainees are similarly situated to each other and Davis and should be conditionally certified pursuant to §216(b) of the FLSA.

Because Davis and other individuals who served Defendants as "Independent Contractor/Trainees were subjected to materially identical policies, procedures, job duties, independent contractor classification, and a stipend reimbursement policy inconsistent with FLSA, these individuals are similarly situated, and the Court should conditionally certify a collective action class of all driver-trainees who participated in Colonial's Driving Training Program in the three years prior to October 31, 2016 (the date of Defendants' first responsive pleading in this matter).

As Defendants set forth in their Answer, prospective applicants for the position of owner operators or leased operators with Colonial "are required to undergo and satisfy specific pre-qualification screening processes." Answer, ECF Doc. 25, at 9, ¶ 39. "If all of the pre-qualification screening and orientation requirements are satisfactorily met, they are offered the opportunity to enter into a contract." *Id.* "Any inexperienced owner operator or leased operator candidate with Colonial Freight Systems, Inc., must complete, following successful qualification requirements

and orientation, a driving training program subject to the rules and regulations of Colonial Freight Systems, Inc., as specifically and succinctly explained to each applicant." *Id.*

All Driver-Trainees within the relevant time period signed materially identical ICTA agreements with Colonial. *See* Statement of Facts ("SOF"), *supra,* at ¶ 12, 43; *See also* Ex. 1Z Trainee Agreements. While in the driver-trainee program, Driver-Trainees drive for Colonial under Colonial's DOT operating authority. *See* SOF at ¶ 11. Colonial has the same qualifications for all Driver-Trainees. *See* SOF at ¶ 10. Colonial has never designated any Driver-Trainee as an employee. *See* SOF at ¶ 44. Colonial considers Driver-Trainees to be independent contractors of Colonial. *See* SOF at ¶ 20.

Importantly, the trainee agreements state that the stipend received by a trainee during orientation is an advance that must be repaid unless the trainee elects to become an independent contractor and enter into a lease agreement Colonial, and work for Colonial for at least three months. *See* SOF at ¶ 45, 46; *See* Ex. 1Z Trainee Agreements.

The Sixth Circuit has held that the proper approach for determining whether an employment relationship exists under the FLSA in the context of a training situation is to ascertain which party derives the primary benefit from the relationship. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011). Factors related to who incurs the primary benefit of a training program include whether the trainee displaces paid workers, whether the trainees impede the alleged employer's business operations during training, and whether the alleged employer receives an immediate economic advantage from work done by trainees. *Id*. at 526.

In denying Defendants' motion to dismiss Plaintiff's claim for FLSA violations during the Training Program, the Court noted the allegations in Plaintiff's complaint suggested that Defendants were the primary beneficiary of the Driving Training Program, because Colonial

required completion of the Driver Training Program for continued employment; and any compensation received from the Driver Training Program would have to be reimbursed if the trainee did not continue in a contractual relationship with Colonial. *See* Nov. 22 Order, ECF Doc. 56, at 8.

Those two facts are not limited to Plaintiff's unique situation, but were instead common requirements and features of any driver-trainee's relationship with Colonial. *See, e.g.*, Defendants' Answer, ECF Doc. 25, at 9, ¶ 39; *See* SOF at ¶ 45, 46; *see* Ex. 1Z.

Additionally, other facts related to the primary benefit test relevant to **whether** Colonial misclassified Driver-Trainees as independent contractors instead of employees are also uniform for all driver-trainees, such as Colonial securing immediate economic advantage from having the trainees transport freight over-the-road for Colonial and Colonial's customers. *See* SOF at ¶ 11.

As the Court has already noted, "the policy as written violates the FLSA by continuing to hold employees responsible for wages already delivered." November 22, 2017 Order, ECF Doc. No. 56, at 12. Accordingly, if the Driver-Trainees are employees, they were all uniformly subjected to a policy that violates FLSA. Same is sufficient to demonstrate that a collective action class should be conditionally certified.

3. Plaintiff has made a modest factual showing that the Phoenix Lease Drivers are similarly situated to each other and Davis and should be conditionally certified pursuant to §216(b) of the FLSA.

a. Plaintiff and the other Phoenix Lease Drivers are similarly situated to each other with respect to the independent contractor misclassification analysis because all Phoenix Lease Drivers were subject to the same independent contractor classification, lease contracts, policies, job expectations, and payment practices.

Because Davis and other drivers who signed vehicle leases with Phoenix Leasing and who then signed operating agreements to drive for Colonial ("Phoenix Lease Drivers") were subjected to materially identical policies, procedures, job duties, independent contractor classification, and

business expense deductions, these individuals are similarly situated, and the Court should conditionally certify a collective action class of all Phoenix Lease Drivers who drove for Colonial in the three years prior to October 31, 2016.

The Sixth Circuit uses an economic realities test to determine whether a business has misclassified an employee as an independent contractor under FLSA. *See Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015). Pursuant to that test, courts consider: 1) the permanency of the relationship between the parties; 2) the degree of skill required for the rendering of the services; 3) the worker's investment in equipment or materials for the task; 4) the worker's opportunity for profit or loss, depending upon his skill; . . . 5) the degree of the alleged employer's right to control the manner in which the work is performed[; and] . . . [6)] whether the service rendered is an integral part of the alleged employer's business. *Id.*

In the Court's Order denying Defendants' Motion to Dismiss, the Court noted that the daily renewal of the ICOA suggested permanence and continuity of the relationship. 22 Order, ECF Doc. 56 at 7. This daily renewal provision is included in all ICOAs. *See* Ex. 1A at CFS-2178, 2560, 3003, 3435, 3807, and 4148.

The Court also noted that the alleged *de facto* exclusive relationship between Davis and Colonial that resulted from the requirement that Phoenix consent to Davis using his truck to work for another motor carrier suggested the permanence and continuity of the relationship. Here, Defendants have admitted that Phoenix Leasing must consent before a vehicle leased to a Phoenix Lease Driver can be used to deliver freight for any entity other than Colonial. *See* Answer, ECF Doc. 25 at 13-14, ¶ 60. No Phoenix Lease Driver is allowed to use a third party brokerage board to accept non-Colonial loads for themselves. *See* SOF at ¶ 37. Meanwhile, Colonial's CEO and

corporate designee could not recall any driver for Colonial ever asking to complete a trip for another motor carrier while subject to an ICOA with Colonial. *See* SOF at ¶ 58.

Likewise, the Phoenix Lease Drivers are similarly situated with regard to the degree of skill Colonial requires as a prerequisite to hire. Colonial has uniform and standard qualifications for the individuals it hires as Independent Contractor Drivers. *See* SOF at ¶ 9. While Colonial requires some drivers to undergo a driving-training program, the only difference in qualification between those who must first complete the training program and those who do not is having had 12 months experience driving over-the-road in the prior three years. *Id.* Moreover, once the driver-trainee completes the training program, he is no different than any other Lease Operator, suggesting that the driving-training program **or its equivalent** is the real minimum standard qualification for working as a Lease Operator.

The comparative investment in materials and equipment between the drivers and Colonial is also the same for all Phoenix Lease Drivers. If a potential driver comes to Colonial without their own truck, the driver is told about Phoenix Leasing, and Phoenix's truck leasing program. *See* SOF at ¶ 14. The vehicle leases from Phoenix Leasing that Davis and the other Phoenix Lease Drivers signed are all materially identical to each other. *See* SOF at ¶ 15. All Phoenix Lease Drivers had to make truck lease payments. Defendants' discovery for six exemplar independent contractors demonstrates a minimum truck lease payment of $456 and a maximum truck lease payment of $600. *See* Ex. 1A at CFS-2183, 2565, 3008, 3029, 3037, 3440, 3812, and 4153. To the extent that the Court found that, as alleged, Davis' truck lease payment did not demonstrate economic independence because of the *de facto* exclusivity of using the truck with Colonial, the same policies and provisions related to getting written permission to use the truck with another motor carrier apply to all Phoenix Lease Drivers as set forth above.

With respect to Colonial's investments, Colonial also has invested in experienced personnel and agents who negotiate with customers to secure long-standing contracts in order to secure loads which all Phoenix Lease Drivers must use to get their loads. *See* SOF at ¶ 21-25. Colonial uses the same system for communicating/offering loads to all Phoenix Lease Drivers, in which loads—primarily from pre-existing customers—are received at terminals where terminal managers then assign or provide these loads to the Phoenix Lease Drivers. *See* SOF at ¶ 26.

All Phoenix Lease Drivers also face the same opportunities for profit or loss. Colonial's corporate designee and CEO testified that Phoenix Lease Drivers can increase their compensation through managing their fuel efficiency and their hours. *See* SOF at ¶ 33. They can—but need not—use the fuel discounts that Colonial has negotiated with the major truck-stop companies. *See* SOF at ¶ 34. But none of the Phoenix Lease Drivers are able to negotiate the gross freight revenue with Colonial's customers. *See* SOF at ¶ 39. Phoenix Lease Drivers are not given access to a load board where they can pick and choose from all available loads. *See* SOF at ¶ 27. And, as the Court found relevant to the question of profit and loss in denying Defendants' motion to dismiss, like Davis, the fact that Phoenix Lease Drivers cannot functionally use their trucks to work for other motor carriers other than Colonial uniformly limits their ability for profit and loss. *See supra.*

Also, the Phoenix Lease Drivers are subject to similar if not identical job duties, policies, and procedures, relevant to the factor that addresses the business' control over the manner in which the work is performed. All Lease Operators, including all Phoenix Lease Drivers, are assigned coordinators by Colonial who work with them regarding Colonial's loads. *See* SOF at ¶¶ 3, 32. All Phoenix Lease Drivers are subject to the FMCSA's hours-of-service regulations. *See* SOF at ¶ 38. Colonial has access to and routinely audits the Phoenix Lease Drivers' driver logs for DOT compliance. *See* SOF at ¶¶ 16-18. All Phoenix Lease Drivers receive similar information when

they are given or accept loads. *See* SOF at ¶ 28. All of the Phoenix Lease Drivers in the Refrigerated and Container Division must maintain the temperature of the trailer. *See* SOF at ¶ 40. All Phoenix Lease Drivers are responsible for providing security to the freight so that it is not stolen. *See* SOF at ¶ 41. All Phoenix Lease Drivers are responsible for providing the same information to Colonial when they complete a delivery. *See* SOF at ¶ 36.

Accordingly, the above demonstrates that the Davis and the other Phoenix Lease Drivers are similarly situated to each other with respect to their alleged misclassification as independent contractors under FLSA.

b. Plaintiff and the other Phoenix Lease Drivers are similarly situated to each other with respect to Defendants' failure to pay the minimum wage in weeks in which business expense deductions exceed the gross compensation Colonial provides for completing loads.

In addition to all Phoenix Lease Drivers being similarly situated with respect to whether Colonial misclassified them as independent contractors, they are also similarly situated insofar as they were all subject to deductions for business expenses that could and often did bring their wages below the minimum wage.

Defendants assign all Phoenix Lease Drivers to one of three divisions: Refrigerated; Container; or Dry Van. *See* SOF at ¶ 6. While compensation structure varies by division, all drivers within each division are paid via the same compensation structure. *See* SOF at ¶ 29. All Phoenix Lease Drivers are paid either a percentage of gross freight revenue or mileage pay as their primary method of compensation. *See* SOF at ¶ 30. All Phoenix Lease Drivers are subject to deductions from their pay pursuant to the explicit provisions of the ICOA and the Phoenix Leases. *See* SOF at ¶¶ 48, 53.

Plaintiff demonstrated in his complaint how Defendants' practice of deducting for business expenses resulted in him not being paid anything in his December 24, 2014, settlement sheet for

the load he picked up on December 18, 2014 and delivered on December 22, when his settlement sheet showed a negative charge of -$135.41. *See* Nov. 22 Order, ECF Doc. 56, at 13; *see* Davis Settlement Sheets, Ex. 1AA at CFS-41-42. A review of information from Plaintiff's loads demonstrate that Plaintiff drove approximately 631 loaded miles and 142 empty miles for that trip from December 18, 2014, through December 22, 2014. *See id; see also* 30(b)(6) Deposition, Ex. 1S at 126:21-25 (explaining that numbers next to trip on settlement sheet reflect loaded and unloaded miles). For this work, Plaintiff received no pay.

During discovery, the parties conferred and Defendants provided load information and settlement sheets for six Phoenix Lease Drivers to be selected by Defendants. A review of their load information and settlement sheets demonstrate that each of the six example Lease Drivers had weeks in which they were not paid minimum wage (assuming drivers average 50 mph):

Phoenix Lease Driver	Settlement Date	Min. No. of Trips	Min. No. of Mi. Driven	Min. Amt. Owed for Driving (Avg. 50 MPH)	**Amt. Paid in Settlement Sheet**	Minimum FLSA Violation	Citation
IC-1	2/19/2015	1	795	$115.28	**$93.00**	$22.28	Ex. 1B at 2232
IC-1	2/4/2016	2	1019	$147.76	**$0**	$147.76	Ex. 1B at 2326-7
IC-1	7/14/2016	2	899.6	$130.44	**$44.48**	$85.96	Ex. 1B at 2366-7
IC-2	11/13/2014	1	674	$97.73	**-$419.21**	97.73	Ex. 1C at 2597-8
IC-2	2/5/2015	4	2351	$340.90	**$219.25**	$121.65	Ex. 1C at 2621-2
IC-2	4/16/2015	1	934	$135.43	**-$327.54**	$135.43	Ex. 1C at 2641-2
IC-3	11/20/2014	1	934	$134.43	**-$387.40**	$134.43	Ex. 1D at 3053-4
IC-3	6/11/2015	1	1717	$248.96	**-$375.34**	$248.96	Ex. 1D at 3109-10
IC-3	1/19/17	1	418	$60.61	**-$165.60**	$60.61	Ex. 1D at 3275-6
IC-4	12/15/16	2	1594	$231.13	**-$309.05**	$231.13	Ex. 1E at 3459-60
IC-4	12/22/16	2	1335	$193.57	**$42.40**	$151.17	Ex. 1E at 3461-62

IC-4	4/20/17	1	829	$120.20	**-$165.97**	$120.20	Ex. 1E at 3498-99
IC-5	5/18/17	3	1643	$238.35	**-$14.12**	$238.35	Ex. 1F at 2832-3
IC-5	7/27/2017	2	1256	$182.09	**-$168.27**	$182.09	Ex. 1F at 2852-3
IC-5	9/21/2017	2	920	$133.34	**-$218.03**	$133.34	Ex. 1F at 3866-7
IC-6	6/8/2017	2	1671	$242.29	**-$308.58**	$242.29	Ex. 1G at 4180-1
IC-6	7/13/2017	2	3087	$447.61	**$186.40**	$261.21	Ex. 1G at 4188-9
IC-6	8/17/2017	1	1113	$161.38	**-$110.80**	$161.38	Ex. 1G at 4198-9

Additional evidence related to the pickup and delivery times and miles driven for each of the loads contained in the above referenced settlement sheets are set out at Exhibits 1H through Exhibit 1M. Likewise, log data, where provided by Defendant, shows the actual DOT hours-of-service recorded for IC-3, IC-4, IC-5, and IC-6 at Exhibits 1N through IQ.

Notably, the table does not capture **all** minimum wages owed the Exemplar ICs for the example workweeks because it only looks at estimated driving time. Every single driver had time that they would have logged as on-duty/not-driving pursuant to the Department of Transportation's ("DOT") hours-of-service and which Defendants does not dispute constitutes work. Defendants have provided driver logs for some loads for some of the exemplar Lease Drivers. Moreover, Davis contends that as a matter of law, time a driver spends waiting at a shipper's location is work, regardless of how that driver logs his time for DOT purposes. Likewise, Davis contends that as a matter of law, for all truck drivers, short rest breaks of 20 minutes or less, **and** time in the sleeper berth in excess of 8 hours per day constitute compensable work time. But what is clear from the above analysis is that even when Defendants select a six-person sample of Phoenix Lease Drivers for whom they provided example discovery, that sample demonstrates that minimum wage violations occurred multiple times for each driver.

Accordingly, for this reason as well, the Court should conditionally certify a collective action class for all Phoenix Lease Drivers and order that notice be sent to the putative collective action class members.

4. Notice should be sent to the Driver-Trainees and Phoenix Lease Drivers related to the opting-in to the FLSA Collective Action.

Plaintiff requests the Court facilitate notice to Driver-Trainees and Phoenix Lease Drivers to give them an opportunity to opt-in. Plaintiff avers that the best use of judicial and legal resources will be to have the Parties confer regarding notice once the Court issues its order. Accordingly, Plaintiff respectfully requests the Court order the parties to, within two weeks of the Court's order conditionally certifying this matter, provide the Court either (1) an agreed-upon notice; or (2) a proposed notice from Plaintiff should the Parties not be able to reach an agreement (followed by Defendants' responding to said notice with their objections).

B. The Court should conditionally certify a Rule 23(b)(3) class for Davis's TILA Claims

Rule 23 of the F.R.C.P. governs a District Court's consideration of a motion for class certification. A district court must undertake "a rigorous analysis" to ensure that the requirements of Rule 23(a) are met. *Wal-Mart Stores, Inc. v.* Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541 (*quoting* Gen. *Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982)); *see also In re BancorpSouth, Inc.*, 2016 U.S. App. LEXIS 16936, *2-3 (6th Cir. 2016). Once the requirements of Rule 23(a) are met, the court must then determine if the class satisfies one of the conditions of Rule 23(b). *In re BancorpSouth, Inc.*, 2016 U.S. App. LEXIS 16936 at *2-3.

Rule 23(b)(3) sets forth two requirements for class certification: (1) "that the questions of law or fact common to class members predominate over questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc v. Ct. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Motor carriers such as Colonial may perform authorized transportation in equipment they do not own *only* if the equipment is covered by a written lease meeting the requirements set forth in 49 C.F.R. § 376.12, the federal TILA regulations. *See* 49 C.F.R 376.11(a); *see also* 49 U.S.C. § 14102. A person injured by an authorized motor carrier's failure to comply with the federal leasing regulations may bring an action seeking injunctive relief and damages pursuant to 49 U.S.C. § 14704(a)(1) and (2), and may recover attorneys' fees and costs under 49 U.S.C. § 14704(e).

Davis avers that the conditions of Rule 23(a) and 23(b)(3) have been met with respect to his TILA claims.

1. The Class Satisfies Each Pre-Requisite for Certification under Rule 23(a) and 23(b)(3),

a. Members of the Class are ascertainable.

For a class to be certified it must "be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012) (citing 5 James W. Moore et al., *Moore's Federal Practice § 23.21[1]* (Matthew Bender 3d ed. 1997); *See also Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016). The class cannot merely exist, but must be precisely definable, and cannot be maintained if it is "amorphous" or "imprecise"). *Id.*

Davis proposes a class of all individuals who leased tractor trailers from Phoenix Leasing and subleased these vehicles and their driving services to Colonial from September 20, 2012

through the present. Defendants have maintained records of all individuals who entered into Phoenix Leasing's lease purchase program and subleased their vehicles and driving services to Colonial via Defendants' form ICOAs and Lease Agreements. SOF at ¶¶ 12-15, 43.

b. The class is sufficiently numerous that joinder is impracticable.

Rule 23(a) requires "the class be so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). There exists, however, no "strict numerical test", such that "substantial" numbers of affected individuals will satisfy this requirement. *Young*, 693 F.3d at 541 (quoting *In re Whirlpool*, 2012 U.S. App. LEXIS 12560, at *7 (6th Cir. 2012).

Since the beginning of the class period, hundreds of individuals worked for Colonial as "independent contractors", more than fifty percent (50%) of whom leased trucks from Phoenix Leasing before subleasing the trucks and their driving services to Colonial. SOF at ¶¶ 1-2, 13. Given the impracticability and inefficiency of joinder under such circumstances, Davis has met the numerosity requirement of Rule 23(a).

c. Davis' claims share common issues of fact and law with the putative class, are typical of those of the putative class and common issues predominate over individual ones.

For a Rule 23(a) class to be certified, there must be questions of law or fact common to the class and the plaintiff's claims must be typical of the class members' claims. Fed. R. Civ. P. 23(a)(2), (3); *Young*, 693 F.3d at 541. These considerations "tend to merge" because they both help determine whether maintenance of the class is "economical" and whether the class' claims are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Young*, 693 F.3d at 541 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

The commonality prong requires that the class' claims "depend on a common contention" such that class-wide resolution can be achieved through the determination of one central question. *Id.* Likewise, Davis' interests must be aligned with those of the putative class such that he will advance their mutual interests by pursuing his own claims. *Id.* To satisfy the predominance requirement, Davis must show that issues subject to generalized proof predominate over issues that are subject to only individualized proof. *Young*, 693 F.3d 532, 544 (quoting *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352-53 (6th Cir. 2011). The existence of defenses to individual claims does not necessitate a finding that individual issues predominate over common ones. *Young*, 693 F.3d 532 (quoting *Beattie v. CenturyTel, Inc.* F.3d 554, 564 (6th Cir. 2007)). Whereas the Rule 23(a)(2) commonality analysis requires a showing that one common question exists Rules 23(b)(3) requires a showing that common questions *predominate*. *Id.*

Davis presents a number of questions that are common to the class, including:

1) Whether Defendants violated 49 C.F.R. 376.12(d) and (h) by failing to disclose in the ICOAs the existence of or the method of calculation of deductions for a number of items, including direct deposit fees, TripPak fees, markups on maintenance costs, labor related to maintenance completed by Defendants, and for contributions to Defendants' self-funded container insurance plan. SOF at ¶¶ 61, 67.

2) Whether Defendants violated 49 C.F.R. 376.12(d) and (h) by failing to clearly specify what items can be charged back against a drivers' pay – and the method of calculation of same – pursuant to the "catch-all" provisions in paragraphs 9 and 14 of the ICOAs. SOF at ¶¶ 50-52, 54.

3) Whether Defendants violated 49 C.F.R. 376.12(k)(2) and (6) by failing to clearly specify what items can be charged back against a drivers' escrow accounts – and the method of calculation of same – pursuant to paragraphs 11 and 26 of the ICOAs. SOF at ¶¶ 53, 55.

4) Whether Defendants violated 49 C.F.R. 376.12(i) by requiring drivers to purchase a number of items from Defendants, including a weekly "Satellite" charge for the drivers' use of the Qualcomm system that comes equipped with their trucks per Paragraph 4 of

Addendum A to the Lease Agreements. SOF at ¶¶ 57-58.

5) Whether Defendants violated 49 C.F.R. 376.12(i) by requiring the putative class to have repairs and maintenance completed by Colonial and by requiring drivers to pay for container insurance through Defendants' self-funded plan. SOF at ¶¶ 59-60.

6) Whether Defendants violated 49 C.F.R. 376.12(e) by failing to state in the ICOAs that Defendants shall assume the risks and costs of fines for overweight or oversized trailers under the conditions specified by that regulation. SOF at ¶¶ 68.

The TILA regulations were enacted to "espouse a goal of insuring that owner-operators such as [plaintiff] are informed of all potential costs and liabilities that they may incur as a result of entering into an equipment lease." *Jones Express, Inc. v. Watson* 871, F. Supp. 2d 719, 730 (M.D. Tenn. May 15, 2012). The common questions listed above address whether Defendants' form ICOAs were unlawfully vague with regard to the costs associated with working for Defendants.

Courts have found the class action mechanism of Rule 23 to be an appropriate outlet for the resolution of TILA claims. *Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc.,* 2005 U.S. Dist. LEXIS 23350 (N.D. Ill. May 23, 2005) (Finding that the drivers' claims were not so individualized that individual issues predominated, as the common threshold factual issue was the legality of the defendants' lease provisions); *See also James Foster & Stone Logistics, Inc. v. CEVA Freight, LLC*, 272 F.R.D. 171, 175 (W.D.N.C. Aug. 3, 2012). Likewise, the common threshold factual issue in this matter is the legality of Defendants' lease provisions.

Defendants' failure to properly disclose certain fees and chargebacks *did* allow Defendants to take advantage of Davis and the putative class. By way of example only, on Davis' last settlement sheet, he was charged $2,152.84 for the replacement of eight tires. SOF at ¶¶ 64-66. This charge included $123 in labor costs. *Id.*. On this same settlement sheet, Davis was again charged $214.50 in labor costs ***for the same work***. *Id*. Nowhere in the ICOAs is the method of

calculation of these labor costs disclosed, leaving the driver unable to accurately determine what charges he or she may be subject to, or what his or her compensation may be. Likewise, on or around July 9, 2015, Davis was charged a $25 markup by Defendants for work that was completed by a vendor unaffiliated with Defendants. *Id.* at ¶¶ 62-63. Such undisclosed markups have been found improper under the regulations. *See OOIDA v. Swift Transp. Co.* ("Swift II"), 632 F.3d 1111, 1113 (9th Cir. 2011) (citing *OOIDA v. Swift Transp. Co.* ("Swift I"), 367 F.3d 1108, 1110 (9th Cir. 2004)).

As stated above, the ICOAs and Lease Agreements signed by the class members are form in nature and have not materially changed during the class period. SOF at ¶ 12-15, 43. Thus, there are no material differences between Davis' claims and those of the lease purchase drivers. There can be no serious dispute that a decision determining the legality of these provisions would resolve this issue for the entire class, resulting in a mutual benefit to Davis and the class members. Had Defendants charged the drivers different amounts from what was promised, there could arise individual issues that discourage certification. Defendants, however, *failed to disclose these charges at all*, such that the legality of these provisions is a binary matter, most appropriate for class certification.

Davis and the putative class members share: 1) the same factual allegations as to Defendants' alleged unlawful conduct; 2) the same legal claims that Defendants' agreements with them and Defendants' conduct violates TILA; and 3) the same interest in proving Defendants' liability. Thus, Davis' claims typical of the claims of the putative class, share common questions of law with those of the putative class, and common issues predominate over individual issues.

Accordingly, the commonality and typicality prongs of Rule 23(a)(2) and (3) and the predominance prong of Rule 23(b)(3) have been met.

d. The putative class meets the "adequacy" requirement of Fed. R. Civ. P. 23(a)(3).

The adequacy requirement of Rule 23(a)(4) comprises two parts: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re American Medical Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996). Sixth circuit courts also review whether class counsel are "qualified, experienced and generally able to conduct the litigation." *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). Davis' claims are neither antagonistic of nor do they conflict with those of the putative class. Though Defendants were given the opportunity to assert a reason why Davis might be an inadequate representative of the class, Defendants were unable to purport a reason.

Davis' counsel has significant experience and expertise in litigating class labor disputes, especially in the trucking industry, and will adequately serve the interests of the class.

Accordingly, Plaintiff has met the adequacy requirements of Fed. R. Civ. P. 23(a)(4).

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

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

The Sixth Circuit has held that "cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers v. Hamilton County Pub. Defender*

Comm'n, 501 F.3d 592, 619 (6th Cir. 2007). Where there is a threshold issue common to all class members, class litigation is the preferred method. *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006) ("Permitting individual owners and lessees of 1999 or 2000 Villagers to litigate their cases is a vastly inferior method of adjudication when compared to determining threshold issues of contract interpretation that apply equally to the whole class.").

Because so many common questions predominate, the superiority requirement is also met. Additionally, Plaintiff is not aware of any single-plaintiff actions asserting TILA violations concerning Defendants' form ICOAs and Lease Agreements. It is unquestionably desirable to have the claims of more than 200 individuals resolved in a single forum, eliminating the risk of inconsistent verdicts and outcomes.

As such, Davis' TILA claims are appropriate for Rule 23 class certification on behalf of a class of all Phoenix Lease Drivers.

IV. CONCLUSION

For the foregoing reasons, the Court should conditionally certify a collective action class under FLSA of all Driver-Trainees, conditionally certify a collective action class under FLSA of all Phoenix Lease Drivers, and certify a Rule 23(b)(3) class related to Plaintiff's TILA claims on behalf of all Phoenix Lease Drivers.

Respectfully submitted,

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