

1 Susan Martin (AZ #014226)  
Daniel L. Bonnett (AZ #014127)  
2 Jennifer L. Kroll (AZ #019859)  
MARTIN & BONNETT, PLLC  
3 1850 N. Central Avenue, Suite 2010  
Phoenix, AZ 85004  
4 (602) 240-6900  
smartin@martinbonnett.com  
5 dbonnett@martinbonnett.com  
jkroll@martinbonnett.com

Harold Lichten (*pro hac vice*)  
Peter Delano (*pro hac vice*)  
LICHTEN & LISS-RIORDAN, P.C.  
729 Boylston Street, Suite 2000  
Boston, MA 02116  
(617) 994-5800  
pdelano@llrlawc.com  
hlichten@llrlaw.com

Michael Freedman (*pro hac vice*)  
LICHTEN & LISS-RIORDAN, P.C.  
466 Geary Street, Suite 201  
San Francisco, CA 94102  
(415) 630-2651  
mfreedman@llrlaw.com

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9 *Attorneys for Plaintiffs*

10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12  
13 CHRISTERPHOR ZIGLAR, LEAH  
CANDELARIA, AND MAURICE  
14 MEINTZER, individually and on  
behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 EXPRESS MESSENGER SYSTEMS,  
18 INC., A DELAWARE  
CORPORATION, d/b/a ONTRAC,

19  
20 Defendant.

CASE NO.: 2:16-cv-02726-PHX-SRB

**MOTION FOR CONDITIONAL  
COLLECTIVE ACTION CERTIFICATION  
AND COURT-SUPERVISED NOTICE  
PURSUANT TO 29 U.S.C. § 216(b)**

**(ORAL ARGUMENT REQUESTED)**

1 Plaintiffs Christerphor Ziglar, Leah Candelaria, and Maurice Meintzer (“Plaintiffs”),  
 2 hereby move for Conditional Collective Action Certification and Court-Supervised Notice  
 3 Pursuant to 29 U.S.C. § 216(b) as requested herein. Plaintiffs’ Motion is supported by the  
 4 following Memorandum of Points and Authorities, the Amended Collective and Class  
 5 Action Complaint (Doc. 29), and the declarations of Christerphor Ziglar (“Ziglar Decl.”),  
 6 Leah Candelaria (“Candelaria Decl.”) and Maurice Meintzer (“Meintzer Decl.”) filed  
 7 herewith.

## 8 MEMORANDUM OF POINTS AND AUTHORITIES

### 9 I. INTRODUCTION

10 Plaintiffs Christerphor Ziglar, Leah Candelaria, and Maurice Meintzer, who  
 11 performed delivery services for Defendant Express Messenger Systems, Inc., d/b/a OnTrac  
 12 (“OnTrac”), have brought this collective action on behalf of themselves and other similarly  
 13 situated delivery drivers who have worked for OnTrac seeking to recover unpaid minimum  
 14 wage and overtime compensation under the Fair Labor Standards Act (“FLSA”), 29 U.S.C.  
 15 § 201 *et seq.*<sup>1</sup> Plaintiffs allege that they and other similarly situated individuals performing  
 16 delivery services for OnTrac (“delivery drivers” or “Drivers”) are misclassified as  
 17 independent contractors when they are, in fact, OnTrac’s employees or joint employees as a  
 18 matter of economic reality, and therefore subject to the protections of the FLSA. Pursuant  
 19 to 29 U.S.C. § 216(b), Plaintiffs now seek permission to issue notice to all delivery drivers  
 20 who worked for OnTrac in Arizona during the last three years and request that the Court  
 21  
 22

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23 <sup>1</sup> Plaintiffs have also brought Arizona state law claims for unpaid minimum wage and  
 24 unlawful deductions (Ariz. Rev. Stat. §§ 23-352 and 23-363). *See* Doc. 29, at 14-16. These  
 25 claims are not at issue for purposes of this Motion. Moreover, “numerous district court  
 26 opinions in the Ninth Circuit have permitted FLSA claims and state law claims to proceed  
 27 in the same action.” *Misra v. Dec. One Mortg. Co., LLC*, 673 F. Supp. 2d 987, 994 (C.D.  
 28 Cal. 2008); *see Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1292444 (D. Ariz. Mar.  
 23, 2015) (action involving FLSA and Arizona Wage Act claims); *Bamonte v. City of  
 Mesa*, 2007 WL 2022011, at \*3 (D. Ariz. July 10, 2007) (allowing hybrid action with state  
 law Rule 23 claims and FLSA collective action claims to proceed).

1 conditionally certify the following FLSA collective class<sup>2</sup>:

2 All current or former delivery drivers who have delivered packages for  
3 OnTrac within the State of Arizona and who were or are classified or paid as  
4 independent contractors and/or not classified or paid as employees at any time  
on or after August 11, 2013.<sup>3</sup>

5 Plaintiffs easily satisfy the lenient standard for issuance of notice at the first stage of  
6 the two-step § 216(b) analysis. At this early stage of the litigation, Plaintiffs need only  
7 show that they are similarly situated to the workers to which they seek to send notice by  
8 virtue of being subject to a single decision, policy, or plan that allegedly violates the law.  
9 Plaintiffs have more than met their burden. As is described in more detail below, OnTrac  
10 operates what is referred to as a “fissured employment” scheme,<sup>4</sup> whereby it contracts with  
11 various intermediaries, called Regional Service Providers, or RSPs, that provide delivery  
12 services solely for OnTrac and to which OnTrac assigns approximately 20-30 delivery  
13 routes; the drivers, with whom the RSPs contract, then actually deliver the packages to  
14 customers.

15 Despite OnTrac’s attempts to distance itself from drivers, OnTrac controls virtually  
16 all aspects of how Plaintiffs perform their duties as delivery drivers. OnTrac and the RSPs  
17 uniformly classify drivers as independent contractors. OnTrac controls which drivers  
18 deliver which packages, the time that drivers must start and complete their routes, and the  
19 tools used to complete the deliveries (including the vehicles and special GPS-enabled  
20 scanners that drivers must lease from OnTrac). OnTrac delivery drivers are also subject to

21 <sup>2</sup> Although Plaintiffs’ Amended Collective and Class Action Complaint (Doc. 29) brings  
22 FLSA claims on behalf of drivers who worked for OnTrac in eight states, including  
23 Arizona, because Plaintiffs worked for OnTrac only in Arizona and Plaintiffs have not yet  
conducted discovery, Plaintiffs do not presently seek conditional certification for any  
drivers outside of Arizona.

24 <sup>3</sup> Proposed Notice and Opt-in Forms are attached as Exhibits A and B.

25 <sup>4</sup> Fissured employment occurs when a large company attempts to shirk its role as a direct  
26 employer, claiming to disassociate itself from the workers who perform the services  
27 provided by its business, while in fact maintaining control over their work. *See, e.g.,* David  
Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be  
Done to Improve It* (Harvard Univ. Press, Feb. 3, 2014); David Weil, *Enforcing Labour  
Standards in Fissured Workplaces: The US Experience*, 22 Econ. & Lab. Rel. Rev. 2, at 33-  
54 (July 2011).

the same compensation system, set by OnTrac, where OnTrac pays RSPs a flat rate per route, and RSPs, in turn pay delivery drivers a flat rate for each address at which they make deliveries for the day, regardless of the number of hours the drivers work; under this system, drivers receive no overtime pay and are not guaranteed minimum wages. Drivers are also required to bear the expenses of delivering packages, including the purchase and maintenance of an OnTrac-approved vehicle, gas, and insurance. And most importantly, OnTrac retains the right to hire and fire drivers at will.

Because Plaintiffs have met the lenient standard under § 216(b), this Court should grant Plaintiffs' motion, conditionally certify the class, and order that notice be issued to current and former OnTrac delivery drivers in Arizona.

## **II. FACTUAL BACKGROUND**

OnTrac provides regional same-day and overnight package delivery services within Arizona, California, Nevada, Oregon, Washington, Utah, Colorado and Idaho; according to its website, OnTrac is "the largest regional package delivery company in the United States."<sup>5</sup> OnTrac's customers include such large companies as Amazon. Meintzer Decl, Ex. C, ¶ 21. More than 200 delivery drivers work for OnTrac in Arizona alone. Ex. C, ¶ 15; Ziglar Decl., Ex. D, ¶ 6.

In order to provide these delivery services, OnTrac contracts with Regional Service providers ("RSPs"). Ex. C, ¶ 3; Ex. D, ¶ 3; Candelaria Decl, Ex. E, ¶ 3. RSPs have between 20 and 30 routes, which they receive from OnTrac, and contract with drivers who actually deliver the packages to customers. Ex. C, ¶ 3; Ex. D, ¶ 3. Delivery drivers must sign up with an RSP in order to provide delivery services for OnTrac. Ex. C, ¶ 3; Ex. E, ¶ 3. OnTrac delivery drivers are uniformly classified as independent contractors by OnTrac and the RSPs. Ex. C, ¶ 2; Ex. D, ¶ 2; Ex. E, ¶ 2. During the relevant times, each plaintiff has worked for OnTrac through several RSPs, subject to substantially the same rules and payment structure. Ex. C, ¶ 4; Ex. D, ¶ 3; Ex. E, ¶ 4.

<sup>5</sup> <https://www.ontrac.com/compProfile.asp>

1 Prior to beginning work for OnTrac, delivery drivers are required to undergo a  
2 background check, the results of which are reported to OnTrac, who can refuse to allow a  
3 driver to work for any RSP. Ex. C, ¶¶ 5, 7; Ex. D, ¶¶ 4, 17; Ex. E, ¶ 6. Once they pass the  
4 background check, the delivery drivers are assigned an identification number by OnTrac.  
5 Ex. C, ¶ 5; Ex. E, ¶ 6. Drivers cannot hire another person to do their work without  
6 OnTrac's approval. Ex. C, ¶ 7. Delivery drivers are also required to wear a "uniform"  
7 specified by OnTrac, consisting of a logo shirt and hat, khaki pants and black shoes.<sup>6</sup> Ex.  
8 C, ¶ 9; Ex. D, ¶ 8; Ex. E, ¶ 9. Drivers must also lease a special GPS-enabled scanner from  
9 OnTrac, for which they are charged a bi-monthly fee. Ex. C, ¶ 10; Ex. D, ¶ 9; Ex. E, ¶ 8.

10 Drivers typically work 6-7 days a week from 8 or 9 in the morning, to about 9 at  
11 night. Ex. C, ¶ 11; Ex. D, ¶ 13; Ex. E, ¶¶ 10-11. Each day, Drivers report to the OnTrac  
12 warehouse in Phoenix, Arizona, where an OnTrac employee provides them with a printed  
13 manifest showing their name and OnTrac identification number, and listing the stops on  
14 their delivery route. Ex. C, ¶ 14; Ex. D, ¶ 6. Drivers must scan all of their packages, which  
15 have been presorted for their route by OnTrac employees, using the OnTrac scanner before  
16 loading the packages into their vehicles. Ex. C, ¶ 16; Ex. D, ¶ 6; Ex. E, ¶¶ 8, 10. If a  
17 package is undeliverable, drivers must return to the OnTrac warehouse at the end of the day  
18 to drop it off. Ex. C, ¶ 19. Drivers make deliveries in vans which are either their personal  
19 vehicles or are provided by an RSP. Ex. C, ¶ 8; Ex. E, ¶ 5. Drivers are responsible for  
20 insurance coverage and gas and, if they own or lease the vehicle, for the vehicle's cost and  
21 maintenance. Ex. C, ¶ 8; Ex. D, ¶ 7; Ex. E, ¶ 5.

22 While on the road, drivers regularly receive directions from OnTrac dispatchers,  
23 either thorough phone calls or through messages on their scanner, instructing them to  
24 deliver a package to certain location at an address, or to try redelivering a package to a  
25

26 <sup>6</sup> Although OnTrac purportedly "encourages" delivery drivers to wear uniforms and pays a  
27 \$5 marketing fee to the drivers for wearing these uniforms, delivery drivers are  
28 reprimanded by OnTrac management or not given any work if they do not wear the  
uniform. Ex. C, ¶ 9; Ex. D, ¶ 8.

1 customer who was not present when delivery was initially attempted. Ex. C, ¶ 20; Ex. D, ¶  
2 11; Ex. E, ¶ 14. Plaintiff Ziglar has been reprimanded by OnTrac dispatch and an OnTrac  
3 manager for failing to follow these instructions. Ex. D, ¶ 11. Drivers are also required to  
4 make their deliveries by a certain time – most deliveries must be made by 9PM. Ex. C, ¶  
5 17; Ex. D, ¶ 9; Ex. E, ¶ 11. OnTrac managers or RSP managers reprimand Drivers and  
6 threaten drivers with termination if they miss the 9PM deadline too frequently. Ex. C, ¶ 18;  
7 Ex. E, ¶ 18. OnTrac charges delivery drivers for losing or damaging packages. Ex. D, ¶  
8 12; Ex. E, ¶ 13. OnTrac receives customer feedback on the delivery drivers and can  
9 terminate and has terminated drivers if it receives too many negative reviews. Ex. D, ¶ 11

10 Drivers are paid a flat rate for each address to which they make a delivery on a given  
11 day, sometimes with a daily base pay, sometimes without. Ex. C, ¶ 12; Ex. D, ¶ 14; Ex. E,  
12 ¶ 15. This per-address payment structure is the same across the various RSPs for whom  
13 Plaintiffs and other delivery drivers have worked. Ex. C, ¶ 4; Ex. D, ¶ 3; Ex. E, ¶ 4.  
14 OnTrac pays RSPs a flat daily amount per route, then pay drivers the per-address rate, with  
15 the RSP retaining the remainder. Ex. C, ¶ 3; Ex. D, ¶ 15. Because delivery drivers pay for  
16 their own gas, pay for the scanner lease, and face other deductions from OnTrac, they do  
17 not always make minimum wage for all hours worked. Ex. C, ¶ 12; Ex. D, ¶ 14; Ex. E, ¶ 15.  
18 Further, although delivery drivers almost always work more than 40 hours a week, they are  
19 not paid time and a half for hours worked in excess of 40. Ex. C, ¶ 12; Ex. D, ¶ 14; Ex. E, ¶  
20 16.

21 OnTrac can and does terminate delivery drivers by instructing RSPs not to work  
22 with a particular delivery driver. Ex. D, ¶ 17. Indeed, this happened to Plaintiff Ziglar,  
23 who was terminated from one RSP and tried to find work with several others without  
24 success. Id. An RSP manager explained to Plaintiff Ziglar that OnTrac instructed the RSPs  
25 not to hire him. Id.



### 1 III. ARGUMENT

#### 2 A. The Court May Issue Notice upon a Modest Factual Showing that 3 Similarly Situated Class Members Exist

4 The FLSA allows workers to bring an action either on an individual basis or on a  
5 collective basis for himself or herself “and other employees similarly situated.” 29 U.S.C. §  
6 216(b). To provide other similarly situated employees with the opportunity to join the  
7 lawsuit, “[t]he court may authorize the named FLSA plaintiffs to send notice to all potential  
8 plaintiffs and may set a deadline for those potential plaintiffs to join the suit.” *Adams v.*  
9 *Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 535 (N.D. Cal. 2007) (citing *Hoffmann–La Roche*  
10 *Inc. v. Sperling*, 493 U.S. 165, 169 (1989)). Notice is intended to establish the contours of  
11 the action and to further the broad remedial purpose of the FLSA. *See Hoffman-LaRoche*,  
12 493 U.S. at 171 (discussing importance of early notice in collective actions in order to  
13 “ascertain[] the contours of the action at the outset”).<sup>7</sup>

14 Courts in the Ninth Circuit, including this Court, generally follow a two-step  
15 approach to certification of actions under the FLSA. *See, e.g., Collinge v. Intelliquick*  
16 *Delivery, Inc.*, 2012 WL 3108836, at \*1 (D. Ariz. Jul. 31, 2012); *Rose v. Wildflower Bread*  
17 *Co.*, 2010 WL 1781011 (D. Ariz. May 4, 2010) *vacating dismissal of state claims on*  
18 *reconsideration*, 2011 WL 196842 (D. Ariz. Jan. 20, 2011); *Madrid v. Peak Construction*,  
19 2:09-cv-00311-JWS (D. Ariz. Jul. 23, 2009). “In the first stage, courts determine whether  
20 the potential class should receive notice of the suit.... Conditional certification ‘require[s]  
21 little more than substantial allegations, supported by declarations or discovery, that the  
22 putative class members were together the victims of a single decision, policy, or plan.’”

23 <sup>7</sup> Notice in FLSA litigation is also critical to protect the rights of putative collective  
24 members. Unlike in a class action brought under Rule 23, the statute of limitations in a  
25 collective action brought under the FLSA is not tolled with respect to unnamed collective  
26 members. Rather, each member must affirmatively toll the statute of limitations by “opting  
27 into” the lawsuit. *Villarreal v. Caremark LLC*, 2014 WL 4247730, \*2 (D. Ariz. Aug. 21,  
28 2014); *see also* 29 U.S.C. § 257 (The “statute of limitations [of] such action shall be  
considered to have been commenced as to [an opt-in] when, and only when, his written  
consent to become a party plaintiff to the action is filed in the court in which the action was  
brought”).

1 *Dualan v. Jacob Transp. Services, LLC*, 172 F. Supp. 3d 1138 (D. Nev. 2016) (quoting  
 2 *Benedict v. Hewlett-Packard Co.*, 2014 WL 587135, at \*5 (N.D. Cal. Feb. 13, 2014)). The  
 3 usual result under this lenient standard is conditional class certification. *Collinge*, 2012 WL  
 4 3108836 at \*1; *see also Adams*, 242 F.R.D. at 536. “In the second step, the party opposing  
 5 the certification may move to decertify the class once discovery is complete and the case is  
 6 ready to be tried” and the court may determine whether to “decertify the class and dismiss  
 7 opt-in plaintiffs without prejudice.” *Adams*, 242 F.R.D. at 536. Accordingly, at the first  
 8 stage of this two-step process, “Plaintiffs need not conclusively establish that collective  
 9 resolution is proper, because a defendant will be free to revisit this issue at the close of  
 10 discovery.” *Benedict*, 2014 WL 587135, at \*5. Indeed, “[a]ll that need be shown is that  
 11 some identifiable factual or legal nexus binds together the various claims of the class  
 12 members in a way that hearing the claims together promotes judicial efficiency and  
 13 comports with the broad remedial policies underlying the FLSA.” *Id.* (internal quotation  
 14 omitted); *see also Collinge*, 2012 WL 3108836, at \*2.

15 At the conditional certification stage, then, “[t]he Court uses a fairly lenient standard  
 16 ... because the Court does not have much evidence ....” *Juvera v. Salcido*, 294 F.R.D. 516,  
 17 520 (D. Ariz. 2013) (citing *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th  
 18 Cir. 2001)); *see also Collinge*, 2012 WL 3108836, at \*1; *Leuthold v. Destination Am., Inc.*,  
 19 224 F.R.D. 462, 467 (N.D. Cal. 2004) (“the initial determination is usually made under a  
 20 fairly lenient standard and typically results in conditional class certification”). Importantly,  
 21 “[t]he court . . . does not resolve factual disputes, decide substantive issues on the merits or  
 22 make credibility determinations at the [conditional certification] stage.” *Guy v. Casal Inst.*  
 23 *of Nevada, LLC*, 2014 WL 1899006, at \*4 (D. Nev. May 12, 2014) (citing *Fisher v.*  
 24 *Michigan Bell Telephone Co.*, 665 F. Supp.2d 819, 826 (E.D. Mich. 2009)). In sum,  
 25 ““conditional certification requires only that plaintiffs make substantial allegations that the  
 26 putative class members were subject to a single illegal policy, plan or decision.”” *Juvera*,  
 27 294 F.R.D. at 520 (quoting *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 536 (N.D.  
 28 Cal. 2007)) (internal quotation marks omitted); *see also Collinge*, 2012 WL 3108836, at \*2.



**B. The Court Should Authorize Notice Because Plaintiffs Have Made a Sufficient Showing that OnTrac Drivers in Arizona Are Similarly Situated**

The evidence presented by Plaintiffs at this stage is sufficient for conditional certification. As discussed above, Plaintiffs have submitted declarations<sup>8</sup> describing their personal experiences and their observations of other drivers.<sup>9</sup> This evidence identifies a group of over 200 delivery drivers in Arizona who performed the same job duties, were subject to the same policies regarding pay and job performance, and were uniformly classified as independent contractors. Put simply, Plaintiffs have shown that delivery drivers in Arizona working for OnTrac are subject to the same rules and policies, a showing more than adequate to meet their burden at this stage. *See, e.g., Dualan*, 172 F. Supp. 3d at 1138 (granting conditional certification where plaintiffs had shown that they “were subject to a company-wide pattern, plan, policy, decision, or practice that undergirds their FLSA claims for minimum-wage, overtime, and wage-deduction violations.”); *see also Lewis v.*

<sup>8</sup> “[T]he FLSA does not require plaintiffs to secure fellow class members before moving to certify a class, and district courts in the Ninth Circuit have not imposed such a requirement.” *Foschi v. Pennella*, 2014 WL 6908862, at \*5 (D. Ariz. Dec. 9, 2014) (citing *Kiser v. Pride Commc’ns, Inc.*, 2011 WL 3841021 (D. Nev. Aug. 29, 2011)). Indeed, “[r]equiring Plaintiff to obtain additional employee declarations prior to granting conditional certification would be contrary to the purpose served by conditional certification and court approved notice to potential plaintiffs.” *Lewis v. Nevada Prop. 1, LLC*, 2013 WL 237098, at \*9 (D. Nev. Jan. 22, 2013); *see also Williams v. Omainsky*, 2016 WL 297718, at \*6 (S.D. Ala. Jan. 21, 2016) (requiring plaintiffs to make a showing of interest is an “unreasonable practical obstacle[] to FLSA conditional certification”); *Rossello v. Avon Products, Inc.*, 2015 WL 3890403, at \*12-\*13 (D.P.R. June 24, 2015), *report and recommendation adopted*, 2015 WL 5693018 (D.P.R. Sept. 28, 2015) (“an interest requirement would undermine the FLSA’s broad remedial purpose”); *Heckler v. DK Funding, LLC*, 502 F. Supp. 2d 777, 780 (N.D. Ill. 2007) (finding that “[d]efendants’ proposed rule does not make sense” when talking about the “potential plaintiff interest” prong in the notice stage of conditional class certification under FLSA).

<sup>9</sup> “Given the lenient standard at the notice stage, courts have held that plaintiffs bear a ‘very light burden’ in substantiating the allegations.” *Carter v. XPO Last Mile, Inc.*, 2016 WL 5680464, at \*2 (N.D. Cal. Oct. 3, 2016) (quoting *Prentice v. Fund for Pub. Interest Research, Inc.*, 2007 U.S. Dist. LEXIS 71122, at \*5 (N.D. Cal. Sept. 18, 2007)). In addition, most courts have adopted the view that “evidence submitted in support of a motion for conditional certification does not have to meet the admissibility standard applicable to summary judgment motions.” *See Guy*, 2014 WL 1899006, at \*4 (collecting cases).

1 *Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009) (“Plaintiffs meet their  
 2 burden of showing that all technical support workers are similarly situated with respect to  
 3 their FLSA claim: all technical support workers share a job description, were uniformly  
 4 classified as exempt from overtime pay by Defendant and perform similar job duties.”).  
 5 Any “disparities in the factual employment situations of any plaintiffs who choose to opt in  
 6 should be considered during the court’s second tier analysis,” *Davis v. Westgate Planet*  
 7 *Hollywood Las Vegas, LLC*, 2009 WL 102735, at \*10 (D. Nev. Jan. 12, 2009), since “[a]  
 8 named plaintiff seeking to create a § 216(b) opt-in class need only show that his/her  
 9 position is similar, but not identical, to the positions held by putative class members.” *Guy*,  
 10 2014 WL 1899006, at \*3 (citing *Sperling v. Hoffman–La Roche, Inc.*, 118 F.R.D. 392, 407  
 11 (D.N.J. 1988)).

12 Courts routinely grant conditional certification and issue notice in FLSA collective  
 13 actions brought by delivery drivers alleging misclassification. *See, e.g., Harris v. Express*  
 14 *Courier Intl., Inc.*, 2016 WL 5030371, at \*5 (W.D. Ark. Sept. 19, 2016) (conditionally  
 15 certifying a class of drivers/couriers alleging misclassification); *Hose v. Henry Industries,*  
 16 *Inc.*, 49 F. Supp. 3d 906, 919 (D. Kan. 2014), *order clarified sub nom. Hose v. Henry*  
 17 *Industries*, 2014 WL 5510927 (D. Kan. Oct. 31, 2014) (conditionally certifying class of  
 18 delivery drivers who alleged they were misclassified as independent contractors); *Pena v.*  
 19 *Handy Wash*, 28 F. Supp. 3d 1289, 1300 (S.D. Fla. 2014) (conditionally certifying class of  
 20 drivers working for patient transportation services company who were classified as  
 21 independent contractors); *Holliday v. J S Exp. Inc.*, 2013 WL 2395333, at \*10 (E.D. Mo.  
 22 May 30, 2013) (conditionally certifying class of 1200 fleet drivers/couriers classified as  
 23 independent contractors across 13 states); *Scovil v. FedEx Ground Package System, Inc.*,  
 24 811 F. Supp. 2d 516, 520 (D. Me. 2011) (conditionally certifying class of delivery drivers  
 25 classified as independent contractors); *Spellman v. Am. Eagle Exp., Inc.*, 2011 WL  
 26 4102301, at \*1 (E.D. Pa. May 18, 2011) (same).

27 Because Plaintiffs are similarly situated to OnTrac drivers in Arizona, the Court  
 28 should conditionally certify, and allow notice to issue to, a class of all individuals who

1 worked as delivery drivers for OnTrac in Arizona during the past three years and were  
2 classified as independent contractors.

3 **C. Though Not Required at this Stage, Plaintiffs Have Put Forth Sufficient**  
4 **Evidence to Make a More than Plausible Claim that They and Other**  
5 **Delivery Drivers are Employees of OnTrac**

6 OnTrac may argue that conditional certification should not be granted because the  
7 Plaintiffs are independent contractors, but arguments that go to the merits are irrelevant at  
8 the conditional certification stage. *See, e.g., Britain v. Clark County, Nevada*, 2016 WL  
9 730725, at \*2 (D. Nev. Feb. 23, 2016) (“At this procedural stage, the court does not resolve  
10 factual disputes, decide substantive issues going to the ultimate merits, or make credibility  
11 determinations.”) (quoting *Lynch v. United Servs. Auto. Assn.*, 491 F. Supp. 2d 357, 368  
12 (S.D.N.Y. 2007)); *Davis*, 2009 WL 102735, at \*4 (“Defendants acknowledge that plaintiffs’  
13 employment status as independent contractors or as employees is not dispositive of the  
14 motion to circulate notice of pendency at this stage of the litigation.”). Indeed, what  
15 matters at this stage is that delivery drivers who work for OnTrac are similarly classified as  
16 independent contractors and are subject to the similar working conditions, including the  
17 non-payment of minimum wages and overtime compensation.

18 Nevertheless, Plaintiffs have demonstrated, even at this early stage, that they and  
19 other delivery drivers who worked for OnTrac are, as a matter of economic reality,  
20 OnTrac’s employees. *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th  
21 Cir. 1979) (“Economic realities, not contractual labels, determine employment status for the  
22 remedial purposes of the FLSA.”). Courts applying the FLSA’s economic reality test  
23 examine the following factors: 1) the degree of the alleged employer’s right to control the  
24 manner in which the work is to be performed; 2) the alleged employee’s opportunity for  
25 profit or loss depending on his managerial skill; 3) the alleged employee’s investment in  
26 equipment or materials required for the task, or employment of helpers, 4) whether the  
27 service rendered requires a special skill; 5) the degree of permanence of the working  
28 relationship; and 6) whether the service rendered is an integral part of the alleged  
employer’s business. *Id.* at 754. No one factor is dispositive; instead, the ultimate

determination depends “upon the circumstances of the whole activity.” *Id.* (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

All of the factors support Plaintiffs’ claim that they and other delivery drivers are OnTrac’s employees. Plaintiffs have no right to control their manner of work; they are assigned routes and timeframes for deliveries by OnTrac, which dictate the days and hours they must work. They are required to follow OnTrac’s instructions in the course of making these deliveries, and to provide near-constant status updates to OnTrac via the use of their GPS scanner, which transmits information directly to OnTrac. The delivery drivers are responsible for lost or damaged goods, and can be disciplined or terminated by OnTrac (via the RSPs) for failing to make a delivery on time or follow the delivery instructions. The drivers have no opportunity for profit or loss, since they are assigned to specific routes by OnTrac, receive payments for their deliveries based on rates determined by OnTrac, and rely upon OnTrac to advertise and attract customers. Further, while OnTrac makes significant investments in its warehouse facilities, management and dispatcher staffing, and advertising, the drivers’ sole and comparatively insignificant investment is the vehicle they use to make deliveries. *See, e.g., Holliday*, 2013 WL 2395333, at \*1 (“Fleet Drivers [were required] to provide insurance, fuel, and automobile maintenance and “had to purchase JS Express uniforms and carry JS Express mobile telephones”). The delivery drivers are not required to have special experience in order to make deliveries for OnTrac. *See Handy Wash*, 28 F. Supp. 3d at 1302 (“Although drivers were required to complete certain basic training, the position did not require any special skills.”). The relationship between the drivers and the OnTrac is indefinite in duration; in fact, Plaintiffs made deliveries for OnTrac for stretches of several months to a few years. Finally, the delivery drivers’ work is central to OnTrac’s delivery business; the services the delivery drivers provide are the very services that form the core of OnTrac’s business. *See id.* at 1302 (“Defendants clearly rely on drivers to provide paratransit service to clients in Miami–Dade County.”).

The fact that the delivery drivers sign up through RSPs rather than directly with OnTrac does not impact the employment or conditional certification inquiry. Like the issue

1 of employment status, the inquiry into whether OnTrac is the drivers' employer involves a  
 2 determination on the merits which is not appropriate at the conditional certification stage.  
 3 Nevertheless, OnTrac is the drivers' joint employer. "Regulations promulgated under the  
 4 FLSA recognize[] that an employee may have more than one employer under the FLSA."  
 5 *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997) (citing 29 C.F.R. § 791.2(a)) ("A  
 6 single individual may stand in the relation of an employee to two or more employers at the  
 7 same time...."). Courts in the Ninth Circuit generally consider several factors when  
 8 assessing whether the parties have a joint employment relationship, including whether the  
 9 employer: (1) had the power to hire and fire the employees; (2) supervised and controlled  
 10 employee work schedules or conditions of employment; (3) determined the rate and method  
 11 of payment; and (4) maintained employment records. *Bonnette*, 704 F.2d at 1470.  
 12 Ultimately, "the concept of joint employment should be defined expansively under the  
 13 FLSA" and "[a] court should consider all those factors which are 'relevant to [the]  
 14 particular situation' in evaluating the 'economic reality' of an alleged joint employment  
 15 relationship under the FLSA." *Torres-Lopez*, 111F.3d at 639 (quoting *Bonnette*, 704 F.2d  
 16 at 1470).<sup>10</sup>

17 Plaintiffs have presented evidence that OnTrac is involved in both the hiring and  
 18 termination process for the putative collective members. Plaintiffs have likewise put forth  
 19 evidence that OnTrac sets the delivery deadlines and routes which delivery drivers must  
 20 follow; requires drivers to wear uniforms and use scanners provided by OnTrac; tracks the  
 21 drivers' locations and deliveries using the scanners that OnTrac requires drivers to use; and  
 22 provides regular directions to delivery drivers regarding their deliveries. Finally, OnTrac

23 <sup>10</sup> However, as the Second Circuit has noted, "the broad language of the FLSA ... demands  
 24 that a district court look beyond an entity's formal right to control the physical performance  
 25 of another's work before declaring that the entity is not an employer under the FLSA."  
 26 *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) ("the four-factor test  
 27 cannot be reconciled with the 'suffer or permit' language in the statute, which necessarily  
 28 reaches beyond traditional agency law."); *see also Donovan v. Agnew*, 712 F.2d 1509, 1510  
 (1st Cir. 1983) (citing *Goldberg v. Whitaker*, 366 U.S. 28, 33 (1961)) ("In determining  
 employer status, 'economic reality' prevails over technical common law concepts of  
 agency.").



1 receives background check results for delivery drivers, assigns identification numbers, and  
2 provides daily delivery manifests to drivers.

3 As mentioned above, OnTrac is part of what has been referred to as a “fissured  
4 employment” scheme, attempting to distance itself from the delivery drivers by requiring  
5 them to sign up with RSPs.<sup>11</sup> A number of courts have recently granted conditional  
6 certification to similarly situated workers who are jointly controlled by two different  
7 entities, like the Plaintiffs here. *See, e.g., Arnold v. DirecTV, Inc.*, 2012 WL 4480723, at \*5  
8 (E.D. Mo. Sept. 28, 2012) (granting conditional certification of collective action comprised  
9 of all DirecTV technicians during relevant time period, where the plaintiffs worked  
10 directly for DirecTV subcontractors but alleged a joint employment relationship with  
11 DirecTV); *Lang v. DirecTV*, 735 F. Supp. 2d 421, 433-34 (E.D. La. 2010) (same); *Vasto v.*  
12 *Credico (USA) LLC*, 2016 WL 2658172, at \*10-11 (S.D.N.Y. May 5, 2016) (same); *Perez*  
13 *v. Lantern Light Corp.*, 2015 WL 3451268, at \*17 (W.D. Wash. May 29, 2015) (satellite  
14 television provider was a joint employer of the installers employed by the company with  
15 whom the provider contracted to install its services). Here, the evidence presented by  
16 Plaintiffs at this early stage indicates pervasive control by OnTrac and weighs in favor of  
17 issuing notice to OnTrac’s drivers.

#### 18 **D. Plaintiffs’ Proposed Notice is Proper**

19 Congress’s purpose in authorizing § 216(b) collective actions was to avoid multiple

20 \_\_\_\_\_  
21 <sup>11</sup> Recognizing the increasing prevalence of such schemes, the Department of Labor  
22 recently issued new administrative guidelines aimed at preventing companies like OnTrac  
23 from using this type of scheme to avoid complying with statutory requirements. In these  
24 guidelines, the DOL explains that “Vertical joint employment” exists where the employee  
25 has a relationship with a subcontractor, but is economically dependent upon another entity  
26 involved in the work. *See* U.S. Department of Labor Wage and Hour Division,  
27 Administrator’s Interpretation No. 2016-01, January 20, 2016. The DOL notes that “[t]his  
28 other employer, who typically contracts with the intermediary employer to receive the  
benefit of the employee’s labor, would be the potential joint employer.” *Id.* The DOL  
describes just the type of relationship that OnTrac has set up with the RSPs and the delivery  
drivers. Although the delivery drivers are economically dependent on OnTrac and the  
delivery work it provides, OnTrac has formally hired these delivery drivers through  
subcontractors in an attempt to distance itself from liability for any wage and hour  
violations.



lawsuits where numerous employees have been harmed by a common violation of the FLSA. *See Hoffman-La Roche*, 493 U.S. at 170 (describing benefits of collective action under the analogous Age Discrimination in Employment Act). As the Supreme Court has noted, “[t]hese benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.” *Id.* Court-authorized notice also prevents “misleading communication” to class members about the nature of the pending case. *Id.* at 172.

In the instant case, Plaintiffs’ proposal for court-approved notices to potential opt-in plaintiffs (Exhibit A) meets the timeliness, accuracy and informational requirements established by the Supreme Court in *Hoffman-La Roche*. *Id.*<sup>12</sup> The proposed notice describes the lawsuit, informs individuals who have worked as delivery drivers for OnTrac of their opportunity to “opt-in,” instructs them how to opt-in, and notifies them of the effect of their decision to opt-in. The proposed notice is also appropriate in its scope: a three-year notice period is proper at the conditional certification stage. *See Dualan*, 172 F. Supp. 3d 1138 (“Factual determination of the scope of the collective action can be appropriate at the second-stage analysis, but we are not at that stage.”); *Foschi v. Pennella*, 2014 WL 6908862, at \*6 (D. Ariz. Dec. 9, 2014) (“Because the parties have not yet produced enough discovery for the Court to determine whether Defendants’ alleged violations were willful, Plaintiff’s collective action with respect to his minimum wage claim will be certified for the period beginning three years before Plaintiff filed his Complaint.”); *see also Anderson v. Ziprealty, Inc.*, 2013 WL 1882370, at \*3 (D. Ariz. May 3, 2013) (preliminarily applying three-year statute of limitations at conditional certification stage).

Plaintiffs therefore seek leave to send the attached Notice and Opt-in Forms by first

<sup>12</sup> Plaintiffs have submitted a form of notice that has been approved by a number of federal courts. *See, e.g., Carlone v. Progressive Ins., Inc.*, C.A. No. 3:12-cv-00207, Doc. 91, at 24; and Doc. 101 (D. Conn. 2014) (granting notice identical in form to Plaintiff’s proposed notice); *Rose v. Ruth’s Chris Steak House, Inc.*, Civ. A. No. 07-12166, Doc. 18; minute order dated Sept. 23, 2008 (D. Mass.) (same).

1 class mail, e-mail, and text message to all delivery drivers who worked at OnTrac during  
2 the past three years. This request is consistent with established practice under the FLSA.  
3 *See, e.g., Hoffman-LaRoche*, 493 U.S. at 170. To that end, Plaintiffs request that the Court  
4 order OnTrac to produce the names, last known mailing and email addresses, and telephone  
5 numbers for all class members. Courts granting conditional certification routinely order the  
6 defendant to produce this information to facilitate notice to the class. *See Benedict*, 2014  
7 WL 587135, at \*14 (“Courts routinely approve the production of email addresses and  
8 telephone numbers with other contact information to ensure that notice is effectuated, and  
9 the Court finds that warranted here as well”); *Syed v. M-I, L.L.C.*, 2014 WL 6685966, at \*8  
10 (E.D. Cal. Nov. 26, 2014) (finding that “email is an increasingly important means of  
11 contact” and ordering that notice be sent via hardcopy mail and email to all potential opt-  
12 ins); *Davis*, 2009 WL 102735, at \*13 (authorizing notice by U.S. Mail and e-mail); *see also*  
13 *Curtis v. Scholarship Storage Inc.*, 2015 WL 1241365, at \*5 (D. Me. Mar. 18, 2015)  
14 (granting “Plaintiffs’ request for the names, addresses, telephone numbers, and email  
15 addresses of all potential collective action members.”); *Vaughn v. Rescue Rangers, LLC*,  
16 3:15-cv-0056-JAG, Doc. 30 (Order), at 1 (E.D. Va. Jan. 13, 2016) (ordering Defendants to  
17 produce contact information, including e-mail addresses, for potential plaintiffs).

18 Plaintiffs’ request to send text message notifications to the delivery drivers with a  
19 link to a website containing the Notice form is especially appropriate in light of the  
20 transient nature of delivery drivers, and has been approved by a number of courts. *See, e.g.,*  
21 *Avendano et al. v. Averus, Inc. et al.*, No. 14-cv-01614, (D. Colo. Oct. 25, 2016) (“Given  
22 the undisputed transient nature of the class and Plaintiff’s assertion that text messaging is  
23 the most reliable form of communication, the Court finds that notification by text message  
24 is likely to be a viable and efficient means of notifying many prospective members of this  
25 collective action.”); *Vasto*, 2016 WL 2658172, at \*16 (“[C]ourts ... have permitted email  
26 and text message distribution where, as here, the nature of the employer’s business  
27 facilitated a high turnover rate among employees.”).

28 OnTrac should also be required to post the Notice at its Phoenix warehouse in areas

conspicuous to delivery drivers. *See Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 564 (S.D.N.Y. 2013) (ordering that defendant post notice in its stores because “[a] purpose of notice *is* to start a conversation among employees, so as to ensure that they are notified about potential violations of the FLSA and meaningfully able to vindicate their statutory rights.”); *Whitehorn v. Wolfgang’s Steakhouse, Inc.*, 767 F. Supp. 2d 445, 449 (S.D.N.Y. 2011) (“Courts routinely approve requests to post notice on employee bulletin boards and in other common areas, even where potential members will also be notified by mail.”).

Once OnTrac has produced class members’ names and contact information, and notices have been mailed, Plaintiff requests that class members have the standard 90-day window to return a signed consent form. *See, e.g., Dualan*, 172 F. Supp. 3d 1138 (approving “plaintiffs’ request that the potential plaintiffs be provided a 90-day opt-in period.”); *Cardoza v. Bloomin’ Brands Inc.*, 2014 WL 5454178, at \*4 (D. Nev. Oct. 24, 2014) (“Because of the potential size of the putative class, and to permit recipients of the notice sufficient time to consider it and their options, I find that a 90–day return deadline is reasonable.”); *Lewis*, 2013 WL 237098, at \*16 (approving 90-day notice period).

#### IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order:

- (1) Conditionally certifying this action as a collective action pursuant to 29 U.S.C. § 216(b) for the following Drivers: “All current or former delivery drivers who have delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013”;
- (2) Directing Defendant to identify all current and former delivery drivers who delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2014 and to produce to Plaintiffs

the name, last known address, all known e-mail addresses, all known telephone number(s), dates they made pick-ups and deliveries for Defendant, date of birth, and last four digits of their Social Security Number for each such person within five business days of the Order to be entered on this motion;

(3) Authorizing Plaintiffs to mail, email, and text message the Notice attached hereto as Exhibit A to all persons set forth in (a) above;

(4) Granting all Drivers set forth in (a) above a period of 90 days following receipt of Notice to “opt-in” to this action;

(5) Directing Defendant, beginning on the date Defendant provides the list described in (b) above, to post for a period of 90 days the Notice and opt-in forms attached hereto as Exhibit A in conspicuous places at OnTrac’s Phoenix warehouse and any other such locations where Drivers gather and can see such notices at each location where Defendant employs Drivers; and

(6) For any such other and further relief this Court deems just and proper.

Respectfully submitted this 21st day of November, 2016

**MARTIN & BONNETT, PLLC**

/s/ Daniel L. Bonnett

Susan Martin  
Daniel L. Bonnett  
Jennifer L. Kroll  
1850 N. Central Ave. Suite 2010  
Phoenix, AZ 85004  
(602) 240-6900

Harold Lichten (pro hac vice)  
Peter Delano (pro hac vice)  
LICHTEN & LISS-RIORDAN, P.C.  
729 Boylston Street, Suite 2000  
Boston, MA 02116  
(617) 994-5800

Michael Freedman (pro hac vice)  
LICHTEN & LISS-RIORDAN, P.C.  
466 Geary Street, Suite 201  
San Francisco, CA 94102  
(415) 630-2651

**CERTIFICATE OF SERVICE**

I hereby certify that on November 21, 2016, a true copy of this document was filed via CM/ECF, which will provide notice to all counsel of record.

/s/ Daniel L. Bonnett