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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAVID COLLINGE, *et al.* Plaintiffs, vs. INTELLIQUICK DELIVERY, INC., *et al*, Defendants.	CASE NO.: CV12-00824-PHX-JWS **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON CLASS CLAIMS, DECLARATORY AND INJUNCTIVE RELIEF, AND DAMAGES** **(Oral Argument Requested)**

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Pursuant to Fed. R. Civ. P. 56, Plaintiffs move for summary judgment on the Class claims, Counts I, II, & IV of the Second Amended Complaint (Doc. 187). This motion is supported by Plaintiffs' Phase IIB Statement of Facts ("PSOF") filed herewith and exhibits thereto, the Declaration of Daniel Bonnett dated July 24, 2017 (hereinafter, "Bonnett Decl.") along with the exhibits attached thereto, and the record currently before this Court.

II. INTRODUCTION & PROCEDURAL HISTORY

Plaintiffs are current and former delivery drivers ("Plaintiffs" or "Drivers") who are or have provided courier and delivery services on behalf of Defendant Intelliquick Deliveries, Inc., ("IntelliQuick" or "IQ") and Transportation Authority, LLC ("TA"). The Court has certified Count I of the Second Amended Complaint (Doc. 187) as a collective action pursuant to Section 16(b) of the Fair Labor Standard Act (hereinafter, "FLSA"), 29 U.S.C. § 201 *et seq*. (March 23, 2015 Order (Doc. 342)). To date, 107 Drivers have opted into the collective action to recover unpaid minimum wages and/or overtime due under the FLSA by filing their respective Consent to Sue forms (the "FLSA Class"). PSOF ¶ 21. The Court also certified a Rule 23 class for purposes of Plaintiffs' claims under the Arizona Wage Law ("AWL"), Ariz. Rev. Stat. § 23-350 *et seq*., seeking unpaid wages and reimbursement of all standardized deductions withheld from Drivers' pay (Count II) and for declaratory judgment (Count IV) that the Independent Contractor Owner/Operator Agreements (hereinafter "ICOA") Drivers were forced to sign in order to work for IQ are substantively unconscionable and unenforceable as a matter of law (hereinafter, the "Rule 23 Class"). (Doc. 342). *See* PSOF ¶¶ 20-24. The Rule 23 Class consists of over 950 members who seek both legal and equitable relief under Counts II and IV of the Second Amended Complaint. *Id*. at ¶ 21.

The Court has already found, as a matter of law, that the Drivers were misclassified as independent contractors when in fact, they were and are IQ employees. (March 23, 2015 Order (Doc. 343)). There are no genuine issues of material fact in dispute as to Counts I, II, or IV and Plaintiffs are entitled to judgment as a matter of law. Accordingly,

Plaintiffs seek entry of judgment in favor of the FLSA Class and Rule 23 Class on Counts I, II, and IV, and against Defendants IntelliQuick and Spizzirri, jointly and severally, for damages along with other legal and equitable relief as requested.[1]

III. RELEVANT FACTUAL BACKGROUND

IQ is owned and controlled by Defendant Keith Spizzirri and promotes itself as one of the largest delivery courier services in the Southwest. *See* PSOF ¶¶ 1, 2, 5-9, 11-12. The Drivers are an integral part of IQ's business model and are used throughout the delivery cycle for IQ to meet its pickup and delivery obligations to its customers. *Id.* at ¶¶ 32-87. In order to actually be able to perform delivery services, however, Drivers are required to sign certain non-negotiable agreements including, the ICOA. *Id.* at ¶ 99. Under the guise of the ICOA and a professed "independent contractor" model, IQ fails to pay its Drivers minimum and overtime wages due under the FLSA and AWL, and has made unauthorized and unlawful deductions from Drivers' pay.

It is undisputed and the Court has already determined that IQ deducts standardized fees from the Drivers' pay, including a weekly scanning device fee; a weekly secondary insurance fee; a weekly uniform fee; and paycheck processing fees. (Doc. 342 at 39). *See* PSOF ¶¶ 88-98. There is evidence that IQ turns a profit on the fees it charges its Drivers (as opposed to merely covering its business costs). *Id*. at ¶ 94.

There are three main types of Drivers employed by IQ: Route Drivers, Freight Drivers, and On-Demand Drivers. The Court has identified Drivers in these positions as subclasses within the larger Rule 23 Class. (Doc. 342 at 42); PSOF ¶¶ 21-24. "Route Drivers deliver parcels that are assigned to them by IntelliQuick. Freight Drivers provide similar services, except they deliver larger items that are generally moved on pallets. On-Demand Drivers perform delivery services on an on-call basis." (Doc. 343 at 2).

More specifically, Route Drivers' work days begin based on the time their deliveries need to be made. PSOF ¶¶ 37-42. Route Drivers service geographic areas in the

[1] Plaintiffs also seek judgment against Defendants, Transportation Authority, LLC and its owner, Robert Lorgeree, who have been defaulted. (Doc. 36).

morning and afternoon, making pick-ups and deliveries, coming back to the IQ facility around midday so that items picked-up along their routes can be sorted and redistributed for afternoon deliveries. *Id*. at ¶¶ 36, 43, 49, 50. Route Drivers then make deliveries and pick-ups in the afternoon and return to the IQ facility with the items they picked up on their afternoon routes. *Id*. The Court previously found that IntelliQuick dispatchers have the discretion to unilaterally assign unscheduled pick-ups to Route and Freight Drivers. (Doc. 343 at 9). *See* PSOF ¶¶ 43-45. Route Drivers are paid a flat rate per day and are not paid any additional money for making unscheduled pickups and deliveries, no matter how many additional stops or how long it may take. *Id*. at ¶ 35. Route Drivers spend time at the IQ facility before and after driving their Routes in order to sort, scan, and load or unload their vehicles, create manifests, and to check-in picked up items. *Id*. at ¶¶ 51, 53-57.

Like Route Drivers, Freight Drivers' work day begins based on the time that their pickups and deliveries need to be completed. *Id*. at ¶ 59. Freight Drivers also make unscheduled pickups. *Id*. at ¶ 71. Freight Drivers are also paid on a per day basis. *Id*. at ¶ 61. Freight Drivers also spend time at the IQ facility before driving their route to complete various tasks, including, *inter alia*, loading their vehicles, creating manifests by scanning parcels, doing pre-trip vehicle inspections, and retrieving certain types of parcels from secured storage. *Id*. at ¶¶ 64, 66-67. The time required for a Driver to complete a pick-up or delivery varies based on a variety of factors. In one example, a Driver was required to wait 20 minutes before he was able to unload his vehicle, and then it took the Driver another 50 minutes to unload the 50 totes he was delivering. *Id*. at ¶ 73. After driving their route, Freight Drivers return to IQ and unload their picked up items, turn in paperwork, and complete post-trip vehicle inspections and fueling. *Id*. at ¶ 74.

On-Demand Drivers begin their work day by checking in with IQ and identifying themselves as available to make pickups and deliveries. *Id*. at ¶ 76. The Court has found that on-demand work begins once Drivers alert IQ that they are available. (Doc. 343 at 10). On-Demand Drivers do not check in for any specific amount of time. As long as they are checked-in, IQ expects them to be in uniform and considers them to be on duty and

immediately available to drive for IQ until they check out with the IQ dispatcher. *Id*. at ¶¶ 79-80. On-Demand Drivers receive orders through their mobile devices and are paid a fixed rate per delivery that is set by IQ based on a percentage of what IQ charges its customer. *Id*. at ¶¶ 77, 82. The number of orders sent to an On-Demand Driver are left to the discretion of dispatchers. *Id*. at ¶ 85.[2] When an On-Demand Driver checks-in, whether or not the Driver receives 1 or 20 pickups throughout the day is entirely up to the dispatcher. *Id*. The time between receiving orders from dispatchers varies. Sometimes On-Demand Drivers receive an order immediately after checking-in or completing a delivery and sometimes Drivers have to wait up to an hour or more. *Id*. at ¶ 83.

All Drivers have time-sensitive deliveries that require that certain deliveries or pickups be made by specific times. *Id*. at ¶¶ 37, 39-41, 59, 65, 81. All Drivers face possible penalties if they do not deliver the parcel by the required time. *Id*. at ¶ 48, 72, 82. And all Drivers use IQ's CXT tracking system. *Id*. at ¶¶ 111-12, 116-17.

The CXT system, designed and developed by Connexion Technology, LLC, is used by IQ as its delivery tracking software and is an integral part of its delivery service. *Id*. at ¶ 111. Each Driver uses a laser scanner that functions with the CXT system. *Id*. at ¶ 115. Before going out on deliveries, Drivers are responsible for scanning all of the parcels to be delivered. The scan by the Driver signifies the parcel is in the Driver's custody. *Id*. at ¶ 116. When a Driver delivers a parcel, the parcel is scanned again, which signifies that it is in the customer's possession. If a Driver picks up a parcel while on a route or making deliveries, the Driver scans it into the CXT system. When the Driver returns to IQ, the Driver unloads the parcels he or she picked up, and checks them in with another Intelliquick employee who scans and takes possession of the parcels while the Driver is at the IQ facility. *Id*. The process is essentially the same for all Route, Freight, and On-Demand Drivers. *Id*. The primary function of the CXT system is to monitor Driver activity and the movement of items, parcels, or packages from the inception of the

[2] If Drivers refuse an order, then dispatchers may penalize them. PSOF ¶ 86.

delivery cycle (the time an order is placed) to completion of the delivery cycle. *Id*. at ¶ 113. At the various points in the delivery cycle, a time stamp entry is created within the CXT system noting the date and time of various events, including Driver activity in relation to a parcel moving through the delivery cycle. *Id*. at ¶¶ 112-113.

The CXT system—and the data IQ produced from it during discovery—are important here because IQ ***still*** does not track and record the hours actually worked by Drivers nor has it ever tracked hours worked during the time frame relevant to the case. *Id*. at ¶ 105. IQ claims it is not aware of any way in which it can determine the actual hours worked by its Drivers. *Id*. at ¶ 108. In the absence of accurate time records that IQ was legally required to maintain (but did not), the CXT data provides a reasonable means to estimate the hours worked by Drivers. PSOF ¶¶ 112-113, 116-117, 132-134. For instance, CXT's 30(b)(6) representative confirmed that the most reliable data for determining Driver activity is the first and last entries relating to Driver activity in any given day, but also conceded that these data points would underestimate hours actually worked as they do not reflect all work done before and after the routes. *Id*. at ¶ 133.

Since IQ has failed to comply with 29 U.S.C. § 215(a)(5), 29 C.F.R. § 516.2, and A.R.S. § 23-364(D) as to required time records, the CXT data produced by Defendants (along with other relevant evidence) was used by Plaintiffs' expert witness, David Breshears, to establish a reasonable approximation of hours worked by the Drivers. PSOF ¶¶ 135-143. As discussed below, Mr. Breshears is highly qualified and has provided a reliable calculation of unpaid minimum wages and overtime due for members of the FLSA Class and the Rule 23 Class using the estimate of hours worked. He has determined that IQ failed to pay Drivers $3,262,321.97 in overtime wages; $113,589.05 in minimum wages; and $9,378.79 in overtime premiums on minimum wages. *Id*. at ¶¶ 141-142.[3] In

[3] This amount was as of Sept. 30, 2016. IQ has made no attempt to alter its business model and still does not track hours worked or pay Drivers overtime (PSOF ¶¶ 105-06, 143), and the damages continue to accrue. Plaintiffs intend to seek supplemental damages upon a judgment by the Court that Defendants are liable for unpaid wages and overtime under the FLSA and AWL.

addition, Plaintiffs' expert has reviewed settlement statement data produced by IQ to calculate the amount of standardized deductions IQ unlawfully charged the Drivers and determined that those deductions total $2,997,591.72. *Id*. at ¶ 141. *See* Dec. 2, 2016 Report of David Breshears (Ex. 1 to the Bonnett Decl.). These amounts were calculated as of September 30, 2016 and do not include liquidated damages, treble damages, or prejudgment interest, which Plaintiffs are also entitled to (as set forth below).

IV. ARGUMENT

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See* Doc. 343 at 2. "[I]f the nonmoving party bears the burden of proof at trial, the moving party's summary judgment motion need only highlight the absence of evidence supporting the non-moving party's claims." *E.E.O.C. v. Love's Travel Stops & Country Stores, Inc.*, 677 F. Supp. 2d 1176, 1178 (D. Ariz. 2009).

A. IntelliQuick Violated the FLSA. [Count I].

1. Requirements of the FLSA.

The FLSA requires employers to pay covered, non-exempt employees a minimum hourly wage and overtime pay. 29 U.S.C. §§ 206, 207. "Employers are 'generally require[d] ... to pay overtime to [non-exempt] employees who work more than 40 hours per week.'" *Letrich v. Ariz. Wholesale Cleaners LLC*, No. 13-01639, 2015 WL 12669892, at *3 (D. Ariz. Aug. 13, 2015) (quoting *East v. Bullock's Inc.*, 34 F. Supp. 2d 1176, 1180 (D. Ariz. 1998)) (citing 29 U.S.C. § 207).[4] The FLSA "also mandates that '[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages" that are "not less than" specified statutory rates. *Foschi v. Pennella*, No. 14-01253, 2014 WL 6908862,

[4] Since Drivers are paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked (PSOF at ¶¶ 35, 61, 77), the applicable overtime rate is extra "half-time pay." *See* 29 C.F.R. § 778.112. *See also* 29 C.F.R. § 778.111.

at *2 (D. Ariz. Dec. 9, 2014) (citing 29 U.S.C. § 206).[5]

The FLSA also mandates that employers "make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment[.]" 29 U.S.C. §211(c).[6] Failure to "make, keep, and preserve" such records is a violation of § 215(a)(5). Recordkeeping is "fundamental" to the FLSA's remedial objective because "[f]ailure to keep accurate records can obscure a multitude of minimum wage and overtime violations." *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 607 (5th Cir. 1966). *See*, e.g., *Amaya v. Superior Tile & Granite Corp.*, No. 10-4525, 2012 WL 130425, at *6 (S.D.N.Y. Jan. 17, 2012) (recordkeeping requirements are "not mere technicalities, but substantive obligations"). Without accurate records, there is no clear way of ensuring that workers are compensated for all hours worked. And as a practical matter, without accurate records, determining the precise hours worked at a later date is difficult. Accordingly, the Supreme Court has established an inference crediting workers' recollection of hours worked and pay received when an employer has kept inaccurate or incomplete records. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

2. Plaintiffs Have Established All Elements of their FLSA Claim.

"The elements of an FLSA claim are: (1) plaintiff was employed by defendant during the relevant period; (2) plaintiff was [a covered employee]; and (3) the defendant failed to pay plaintiff [minimum wage and/or] overtime pay." *Perez v. Huang Jackie Jie*, No. C13-877RSL, 2013 WL 6571861, at *2 (W.D. Wash. Dec. 12, 2013) (quoting

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[5] "Because 29 U.S.C. § 218 provides that 'no provision of this chapter ... shall justify noncompliance with any ... State law or municipal ordinance establishing a higher standard than the standard established' under the FLSA, *see* 29 U.S.C. § 218(a), an employer is required to pay the greater of the applicable state or federal minimum wage." *Alabado v. French Concepts, Inc.*, No. 152830, 2016 WL 5929247, at *8 (C.D. Cal. May 2, 2016). *See also Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 759 (9th Cir. 2010) (vacated on other grounds) ("FLSA sets a floor rather than a ceiling on protective legislation"); *Rana v. Islam*, 210 F. Supp. 3d 508, 514 (S.D.N.Y. 2016) ("The FLSA also permits an employee to recover any higher minimum wage to which he may be entitled under state law.").

[6] 29 C.F.R. § 516.2 requires employers to keep detailed records of all hours worked.

Quinonez v. Reliable Auto Glass, No. 12-000452, 2012 WL 2848426, at *2 (D. Ariz. July 11, 2012)); *see also Acho v. Cort*, No. 09-00157, 2009 WL 3562472, at *2 (N.D. Cal. Oct. 27, 2009) ("For an alleged FLSA violation, the requirements are simple and straightforward. The elements that must be shown are a failure to pay overtime compensation and/or minimum wages to covered employees and/or failure to keep payroll records in accordance with the FLSA."). "The FLSA is construed liberally in favor of employees[.]" *Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005) (citing *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) (FLSA "is to be liberally construed to apply to the furthest reaches consistent with Congressional direction") (quotation and citation omitted)).

Here, there is no genuine dispute as to any of the elements of Plaintiffs' FLSA claim. Accordingly, summary judgment should be granted. As to the first element, the Court has determined that Plaintiffs are employees under the FLSA. Doc. 343 at 17. As to the second element, an employee may qualify as a covered employee through their employer, if they are "employed in an enterprise engaged in commerce or in the production of goods for commerce." *Zorich v. Long Beach Fire Dept. & Ambulance Serv., Inc.*, 118 F.3d 682, 684 (9th Cir. 1997). An employee is covered "through 'enterprise coverage' if an employer '(1) has at least two employees engaged in interstate commerce or the production of goods for interstate commerce, or who handle, sell, or otherwise work on goods or materials that had once moved or been produced for in interstate commerce, and (2) has gross sales of at least $500,000 in sales annually.'" *Quinonez*, 2012 WL 2848426, at *2 (quoting *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1317 (11th Cir. 2011)). *See Zorich*, 118 F.3d at 684 (same). Here, there is enterprise coverage under the FLSA because IQ has gross sales exceeding $500,000 annually and at least two employees engaged in interstate commerce and who also handle goods that once moved or have been produced for interstate commerce. *See* PSOF ¶¶ 2-4.

As to the third element, "FLSA Plaintiffs do not have the burden of proving the precise extent of their unpaid work." *Singleton v. Adick*, No. 09-0486, 2011 WL 1103001,

at *6 (D. Ariz. Mar. 25, 2011) (citing *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988)). If the employer has maintained accurate records, as required by 29 C.F.R. §516.2, an employee's hours of work during a workweek may be taken from those records. But where, as here, the evidence shows that the employer failed to maintain accurate records, an employee carries her burden of proof if she produces some evidence to show the amount and extent of her work "as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence the Court may award damages to the employee even though the result be only approximate." *Id.* at 687-88. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the FLSA." *Id*. Therefore, "[u]nless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.*

"Consistent with *Anderson*, an employee's burden in this regard is not high. It is well settled…that it is possible for a plaintiff to meet this burden through estimates based on his own recollection." *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 362 (2d Cir. 2011). "The Court can award unpaid wages under the FLSA to non-testifying employees based on the representative testimony of testifying employees." *Singleton*, 2011 WL 1103001, at *6 (citing *McLaughlin*, 850 F.2d at 589). *See Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir. 1986) (finding the district court erred in excluding testimony on hearsay grounds about back wage computations that were based in part on employees' statements to the testifying witness about their unpaid wages)).

Recollection of testifying employees is not the only way to prove hours of work. Expert testimony regarding hours of work is common. *See*, e.g., *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1306 (2016) (affirming damages for FLSA collective action based on estimates of plaintiffs' expert). Indeed, even proxy measurements may be used to

estimate hours of work. *See*, e.g., *Martin v. Selker Brothers*, 949 F.2d 1286, 1298 (3d Cir. 1991) (affirming use of gallons sold by service station attendant as proxy for calculating hours of work); *Donovan v. Williams Oil Co.*, 717 F.2d 503, 506 (10th Cir. 1983) (same).

Here, IQ has not tracked the hours worked for the Drivers for years. PSOF ¶¶ 105-06. Even after the Court's determination that the Drivers are employees under the FLSA and Arizona law (Doc. 343), IQ maintains that it has no obligation to accurately track and record the hours worked by its Drivers and has made no attempt to do so. *Id*. IQ's 30(b)(6) witness testified that IQ is not aware of any way in which it could determine the actual hours worked by Drivers. *Id*. at ¶ 108. Plaintiffs, therefore, may establish their hours of work "as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687.

Plaintiffs retained David M. Breshears, CPA/CFF, a well-known and highly qualified expert witness in wage-related litigation, to establish a just and reasonable approximation of hours worked by the Drivers and to calculate the amount of damages owed. PSOF ¶¶ 135. Mr. Breshears opinions are reliable and admissible under Fed. R. Evid. 702 and 705. *Id*. at ¶¶136-140. Mr. Breshears has determined a reasonable and reliable approximation of hours worked by the Drivers and the amount of unpaid overtime premiums and minimum wages. *Id*. at ¶ 141-42. *See* Ex. 1 to Bonnet Decl. at ¶¶ 9-46.

Specifically, Mr. Breashears used electronic delivery-related records produced by IQ from its CXT software system to calculate hours worked by Drivers based on delivery times of parcels associated with each Driver. *See id*. ¶ 140. Using the resulting calculation of hours worked by the Drivers, Mr. Breshears computed overtime premiums and minimum wages due for each Driver in the FLSA Class and Rule 23 Class. *Id*. at ¶ 142. He determined IQ failed to pay Drivers $3,262,321.97 in overtime; $113,589.05 in minimum wages; and $9,378.79 in overtime premiums on minimum wages. *Id*. ¶141.[7]

There is no genuine dispute as to the reasonableness of Mr. Breshears' calculations. *Id*. at ¶¶ 137-140.[8] The delivery-related records from the CXT system provide a

[7] Defendants have not disclosed any alternate damage calculation.
[8] *See also* Plaintiffs' Motion to Exclude the Testimony of Robert W. Crandall.

reasonable approximation for when and how long a Driver was working as an employee of IQ. *Id*. Mr. Breshears' estimates are conservative and, if anything, do not capture all hours worked by the Drivers. For example, IQ's 30(b)(6) witness testified that the time stamps within the CXT data can be used to determine whether a particular Driver was providing services associated with a delivery on a given day, but that the time spent by Drivers working before or after making deliveries and pickups would not be reflected in the CXT data. *Id*. at ¶ 117-18, 132. The 30(b)(6) representative for the developer of the CXT software also confirmed that the "most reliable" available data for determining Driver activity are the first and last delivery entries in any given day, but that those data points would underestimate hours worked as they would not reflect work completed before and after the driving of a route. *Id*. at ¶ 133.

3. Plaintiffs are Entitled to Liquidated Damages.

An employer who violates the FLSA "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation…and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). "However, if the employer shows that it acted in 'good faith' and that it had 'reasonable grounds' to believe that its actions did not violate the Act, 'the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216.'" *Flores v. City of San Gabriel*, 824 F.3d 890, 904–05 (9th Cir. 2016). "Good faith is an honest intention to ascertain what the FLSA requires and to act in accordance with it." *Local 246 Util. Workers Union v. S. California Edison Co.*, 83 F.3d 292, 298 (9th Cir. 1996) (citation and alteration omitted). "The employer has a heavy burden to prove good faith and objective[] reasonableness because double damages is the award and presumption." *Singleton*, 2011 WL 1103001, at *5.

Here, there is no evidence that creates a genuine dispute as to whether IQ acted in good faith. *See* PSOF ¶ 13. There is no evidence that IQ has ever sought to ascertain what the FLSA requires and to act in accordance with it. Far from an honest intention to act in accordance with the FLSA, IQ continues to willfully disregard it by refusing to track

hours worked and to pay wages owed, including overtime. *Id*. at ¶¶ 105-06. Plaintiffs, therefore, respectfully request that the Court's judgment include liquidated damages.[9]

4. A Three-Year Statute of Limitations Applies to the FLSA Claim.

A two-year statute of limitations applies, unless an employer's violation is deemed "willful." *Flores*, 824 F.3d at 906 (citing 29 U.S.C. § 255(a)). "A violation is willful if the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].'" *Id*. (quoting *Chao v. A-One Med. Services, Inc.*, 346 F.3d 908, 918 (9th Cir. 2003)). An employer need not violate the statute knowingly for its violation to be considered "willful" under § 255(a), although "merely negligent" conduct will not suffice. *Id*. (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003) and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). An employer who knows of a risk that its conduct is contrary to law, yet disregards that risk, acts willfully. *Alvarez*, 339 F.3d at 908-09. The employer must take "affirmative action to assure compliance[.]" *Id.* at 909.

Here, IQ's violation is willful within the meaning of § 255. There is no genuine dispute that IQ knew the differences and "legal ramifications" between employees and independent contractors and that "direction and control" of Drivers would mean they were employees. PSOF ¶¶ 9-11.[10] Even though its entire business model relies on the Drivers, IQ has taken no affirmative action to assure compliance with the FLSA. There is no evidence IQ ever checked with the Department of Labor, consulted an attorney, or made

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[9] Plaintiffs seek treble damages under Count II for violations of the AWL. Plaintiffs may recover a single award under the statute that provides the greater recovery. *See*, e.g., *Quiroz v. Luigi's Dolceria, Inc.*, No. 14-871, 2016 WL 2869780, at *6 (E.D.N.Y. May 17, 2016); *Rose v. Wildflower Bread Co.*, No. 09-1348, 2011 WL 196842, at *1 (D. Ariz. Jan. 20, 2011). *See also* n. 8 above. The liquidated damages owed for violations of the FLSA would, therefore, be covered by an award of treble damages under A.R.S. § 23-355, except for $127,552 for wages due prior to April 19, 2011 for opt-in Plaintiffs based on a three-year statute of limitations for the FLSA claim. *See* 12/2/2016 Breshears Report at 8, ¶ 41.

[10] During part of the class period, IQ and Defendant Spizzirri used third-parties in an attempt to avoid the requirements of the FLSA. PSOF ¶¶ 15-19.

any other reasonable effort to determine whether its classification of Drivers as independent contractors was lawful under the FLSA. In fact, this Court has determined that it was not. IQ's consistent, willful disregard for the law is also evidenced by the fact that even after the Court determined that the Drivers are employees, IQ still maintains that it has no obligation to track and record hours worked or pay overtime, and has made no changes to its business model. *Id*. at ¶¶ 105-06.

5. Defendant Spizzirri is Personally Liable for the FLSA Violations.

Defendant Spizzirri is jointly and severally liable for all unpaid wages as a result of the FLSA violations. "FLSA liability extends to 'any person' acting in the employer's interest in dealing with employees." *Villarreal v. Aircom Mech., Inc*., No. 13-00180, 2015 WL 335933, at *5 (N.D. Cal. Jan. 23, 2015) (citing 29 U.S.C. § 203(d)). As the Court previously recognized (Doc. No. 186, at 3-4), the Ninth Circuit has held that "[t]he definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but 'is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'" *Lambert v. Ackerley*, 180 F. 3d 997, 1011-12 (9th Cir. 1999) (quoting *Bonnette v. California Health & Welfare Agency*, 704 F. 2d 1465, 1469 (9th Cir. 1983)). Where an individual exercises "control over the nature and structure of the employment relationship" or "economic control" over the relationship, that individual can be held to be an "employer" within the meaning of the FLSA and thus subject to individual liability. *Lambert*, 180 F. 3d at 1012; *see also Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009) (same); *Chao v. Hotel Oasis*, 493 F3d 26, 34 (1st Cir. 2007) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.").

In *Lambert*, the court upheld liability against a chief operating officer and a chief executive officer where the officers had a "'significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; [the power to] determin[e][] salaries" and "[the responsibility to]

maintain [ ] employment records.'" 180 F.3d at 1001-02, 1012 (alterations in *Lambert*). *See also Chao*, 493 F.3d at 34 (corporation's president personally liable where he had ultimate control over business's operations and was the corporate officer principally in charge of directing employment practices); *United States Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778-79 (6th Cir. 1995) (president and 50 percent owner was "employer" within FLSA where he ran business, issued checks, maintained records, determined employment practices and was involved in scheduling, payroll and hiring).

Here, there is no genuine dispute that the *Lambert* criteria are met. Spizzirri is the owner and President/CEO of IQ. PSOF ¶ 1, 5. He controls significant aspects of IQ's operations, including, *inter alia*, determination of IQ's business model, setting the rates of pay for IQ's Drivers, ordering deductions and "chargebacks" from Drivers' pay, and hiring and firing employees. *Id*. at ¶ 12, 6, 8, 7. *See also id*. at ¶¶ 9 & 11. Accordingly, Defendant Spizzirri is jointly and severally liable.

B. IQ Violated the Arizona Wage Act (A.R.S. § 23-350 *et seq*.) [Count II].

1. Failure to Pay Overtime & Minimum Wages.

Plaintiffs' state law claims for wages due closely parallel their FLSA claims. To the extent the Court grants Plaintiffs' Motion for their claims under the FLSA, the Court should grant Plaintiffs' corresponding claims under Arizona law. Arizona law provides a remedy against employers who "fail[] to pay wages due," A.R.S. § 23-355, where "wages" is defined as "nondiscretionary compensation due an employee in return for labor or services rendered by an employee for which the employee has a reasonable expectation to be paid." A.R.S. § 23-350. Section 23-351 requires employers, on "regular paydays," to pay "employees all wages due the employees up to such date[.]" A.R.S. § 23-351(C). Section 23-351 requires "[o]vertime or exception pay" to be paid "no later than sixteen days after the end of the most recent pay period." A.R.S. § 23-351(C)(3). Section 23-363 requires employers to "pay employees no less than the minimum wage." A.R.S. § 23-363. Section 23-364(D) requires employers to maintain records "showing the hours worked for each day worked, and the wages and earned paid sick time paid to all employees" and

failure to do so "raise[s] a rebuttable presumption that the employer did not pay the required minimum wage rate[.]" A.R.S. § 23-364(D). Any employer who violates these sections is guilty of a crime. A.R.S. § 23-351(I).

Like the FLSA, Arizona law provides that individuals may also be held liable as employers. As defined in Section 23-350(3), an "employer" includes "any individual, … employing any person," and, as defined in Section 23-362(B), "'[e]mployer' includes any…individual or other entity acting directly or indirectly in the interest of an employer in relation to an employee…" A.R.S. §§ 23-350(3) and 23-362(B). *See Schade v. Diethrich*, 158 Ariz. 1, 15 (1988) (affirming an award under § 23-355 against both the employing entity and its CEO); *Singleton*, 2011 WL 1103001, at *7 (owner and president jointly liable for treble damages for failure to pay wages under § 23-355 and the FLSA).

Where an employer "fails to pay wages due any employee, the employee may recover in a civil action against an employer or former employer an amount that is treble the amount of the unpaid wages." A.R.S. § 355(A). Section 23-352, however, allows an employer to withhold wages when "[t]here is a reasonable good faith dispute as to the amount of wages due." A.R.S. § 23-352(2). "If there is a dispute over unpaid wages the employer acts at his peril and the court in its discretion may award treble damages when the withholding was unreasonable and there was no good faith wage dispute." *Apache E., Inc. v. Wiegand*, 119 Ariz. 308, 312 (App. 1978). [11] Arizona's legislature intended that treble damages be a penalty "directed against employers who seek to delay payment of wages without reasonable justification or who seek to defraud employees of wages earned." *Id*. That is exactly what Defendants IQ and Spizzirri have done.

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[11] Although imposition of treble damages is permissive, the discretion merely reflects that such an award may be inappropriate when, unlike here, a wage dispute "involve[s] a valid close question of law or fact which should properly be decided by the courts," *Apache East*, 119 Ariz. at 312, or when failure to pay wages was due to inadvertent mistake. *Crum v. Maricopa County*, 190 Ariz. 512, 516 (App. 1997). Where there is a showing of a good faith dispute as to some but not all wages owed, the exemption from treble damages extends only to the portion disputed in good faith. *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425 (App. 1994).

There is no evidence that raises a genuine dispute regarding good faith. In fact, the evidence shows that the opposite is true. IQ, through the decisions and control of Mr. Spizzirri, continues to willfully disregard the law that requires it to pay Drivers overtime and minimum wages. PSOF ¶¶ 12, 105-06. Plaintiffs respectfully request that the Court award Plaintiffs treble damages in the amount of $10,155,869.40 for overtime and minimum wages due. *See* 12/2/2016 Breshears Report at 2, Bonnett Decl. Exhibit 1.

2. Unlawful Deductions From Drivers' Paychecks.

Arizona law "protects employees from an employer's groundless refusal to pay compensation which was promised and which was due in return for work performed." *Schade*, 760 P.2d at 1061. Arizona has a strong public policy to protect employees and to discourage employers from withholding or delaying payment of sums which employees have earned. *Apache East*, 580 P.2d at 773. Only in "very limited circumstances" may "an employer may decline to pay an employee." *Dalos v. Novaheadinc*, No. 07-0459, 2008 WL 4182996, at *4 (Ariz. App. Mar. 18, 2008). An employer may withhold wages only if "required or empowered to do so by state or federal law," if "[t]he employer has [the employee's] prior written authorization," or if "[t]here is a reasonable good faith dispute as to the amount of wages due." A.R.S. § 23-352.

Here, IQ deducted paycheck processing fees, insurance premiums to benefit the employer, weekly uniform/laundry fees, and scanning device fees used in the performance the employees' work. PSOF ¶ 91. But IQ cannot show that any of the limited circumstances in Section 23-352 are met. There is no question that Defendants violated A.R.S. §23-352 and are liable to pay treble the amount of the wages deducted under A.R.S. § 23-355. IQ was not empowered or required to withhold the amounts from Drivers' pay by state or federal law; its deductions violated the FLSA and the AWL. Nor can IQ point to any valid written authorization. To the extent IQ attempts to rely on the ICOA agreements, even if it could produce executed agreements (*see* PSOF ¶ 100), the agreements are based on the fiction that the Drivers are independent contractors—not employees—and that IQ is not the Drivers' employer. Employees who are wrongfully

misclassified as independent contractors cannot be found to have given the "employer" "prior written authorization from the employee." Having procured purported authorization based on the fiction that Drivers are independent contractors, any deductions extracted from the wages of the employee Drivers must be reimbursed. Moreover, as discussed below, the ICOA agreements are unconscionable. Section IIIC, *infra*. Even if the agreements are not declared unenforceable by virtue of the unlawful and unconscionable provisions, the section allegedly authorizing IQ to deduct these expenses should be declared unenforceable and void as against public policy. *See* Restatement (Second) of Contracts § 178 (1981). And as shown above, there is no evidence that raises a genuine dispute regarding good faith. In fact, despite the Court's order that the Drivers are employees, IQ continues to extract the fees to cover its business expenses (or to turn a profit, *see* PSOF ¶ 13) under the fiction that the Drivers are independent contractors. And IQ has no system in place to make sure the deductions do not unlawfully reduce overtime or minimum wages.[12]

Even if the agreements themselves are not completely void as unconscionable and against public policy, the Drivers would also be entitled to rescission of the agreement and restitution for the deductions taken from their pay that were in furtherance of IQ's business since agreements are based on a misrepresentation that the Drivers are to be independent contractors. *See, e.g.*, Restatement (Third) of Restitution and Unjust Enrichment § 32 (2011) and comment 3 ("For example, a statute that prohibits employment at less than a minimum wage and (as one remedy for violation) grants the employee a cause of action for any wage deficiency confers an entitlement to restitution on the protected party to an illegal contract."). At a minimum, even if the parties were merely mutually mistaken as to the status of the Drivers, it would still be appropriate to rescind the agreements and reimburse the Drivers or otherwise make them whole for the amounts withheld from their pay. *See Renner v. Kehl*, 722 P.2d 262, 265 (Ariz. 1986) ("In

[12] *See* 29 C.F.R. §531.35.

Arizona a contract may be rescinded when there is a mutual mistake of material fact which constitutes an essential part and condition of the contract."). If there is a mutual mistake and a party rescinds an agreement, that party is entitled to restitution. Restatement (Second) of Contracts § 376.

C. IQ's Adhesion Contracts are Substantively Unconscionable. [Count IV].

The contracts at issue here are a textbook example of unconscionability and are invalid. A contract is substantively unconscionable where its terms are unreasonably favorable to one party. *See Harrington v. Pulte HomeCorp.,* 119 P.3d 1044, 1055 (Ariz. App. 2005). "Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Maxwell v. Fid. Fin. Services, Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (citation omitted). Even if the contract provisions are consistent with the reasonable expectations of a party, they are unenforceable if they are oppressive or unconscionable. *Id.* at 57. The contracts Plaintiffs were required to sign as conditions of employment are oppressively one-sided and imbalanced compared to the benefits provided to IQ. The Court should declare the contracts unenforceable and order Defendants to reimburse Plaintiffs for the standardized deductions it withheld from the Drivers' pay.

The contracts are based on the false premise that Plaintiffs are independent contractors which this Court has rejected. All of the provisions of the agreements flow from Defendants' unlawful scheme to deprive employees of the statutory and common law rights and benefits enjoyed by employees in the State of Arizona. The contracts shift all of the employers' legal responsibilities governing the workplace to the Drivers, imposes unlawful costs on the Drivers, and exacts unlawful commitments. The contracts are invalid under A.R.S. § 23-734 because they shift the employers' obligations under Arizona's unemployment laws to the Drivers by stating that the Drivers are not "entitled to unemployment insurance," and to the extent they want to be covered, Drivers must "procure [their] own insurance of that type." PSOF ¶ 100(c). *See* A.R.S. § 23-734.The

agreements also violate Arizona's workers' compensation laws. The agreements mandate that Drivers "shall not be covered by [IQ's] workers' compensation insurance" and requires the Drivers to "assume[] the responsibilities of an employer for the performance of the service performed" and to "provide workers' compensation insurance" *Id.* ¶ 100(b). These provisions violate A.R.S. § 23-1025(A). *See also Awuah v. Coverall N.A., Inc.*, 952 N.E.2d 890, 899 (Mass. 2011).

With regard to payment, the agreements are also completely one-sided and unlawful. The agreements provide that Drivers will only be compensated if IQ collects the amounts due from its customers. *Id.* ¶ 100(d). They also give IQ "the sole and exclusive right to set or change" the delivery and pick-up charges and prices to be paid by customers, thereby unilaterally impacting Driver compensation. *Id.* ¶ 100(e). As employees, an agreement that conditions the payment of wages for services that have been performed on whether the employer's customer pays is unconscionable. *See,* e.g., *Awuah*, 952 N.E.2d at 897. A term that allows IQ to unilaterally modify contract terms to its benefit is also unconscionable. *See Net Global Marketing, Inc. v. Dialtone, Inc.*, 217 F. App'x 598, 602 (9th Cir. 2007); *Batory v. Sears, Roebuck and Co.*, 456 F.Supp.2d 1137, 1140 (D. Ariz. 2006).

The unlimited and unilateral ability to make deductions under the agreement for the benefit of the employer are also unconscionable. PSOF ¶ 100(f). The cost of items that are primarily for the benefit and convenience of the employer are considered "kick-backs" to the employer and cannot be counted as wages paid. 29 C.F.R. § 531.35. *See also Logan v. Forever Living Products Intern., Inc.*, 52 P.3d 760, 762 (Ariz. 2002) (construing right of employees to be free from extortion of fees or gratuities as a condition of obtaining or continuing employment); *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 165 P.3d 133, 146 (Cal. 2007) (state wage statutes, including wage deduction statute that is nearly identical to Arizona's,[13] "in combination with other statutes, establish a public policy

[13] *Compare*, e.g., Cal. Lab. Code § 224 and A.R.S. § 23-351.

against *any* deductions, setoffs, or recoupments by an employer from employee wages or earnings, except those deductions specifically authorized by statute"). IQ unlawfully demanded as a condition of employment the right to deduct rental expenses for the scanners that employees were required to have with them at all times, auto liability endorsements for IQ's insurance coverage, laundry expenses and "any other expenses Broker is forced to incur on behalf of Owner/Operator." PSOF ¶ 100(f). *See also* PSOF ¶¶ 89-90 (Drivers are charged even if they do not use the uniforms and scanners); ¶ 94 (IQ turns a profit on the fees) and 98 (other business operating expenses). The provision permitting IQ to deduct any other expenses it is forced to incur on behalf of Drivers is so broad and unlimited as to negate the prescriptions of A.R.S. §23-351 in its entirety. Soliciting and obtaining a blanket authorization for unspecified deductions is an attempt to evade the prescriptions of the law. Read literally, the deduction provisions could even allow IQ to deduct the wages it owes the Drivers as expenses incurred on their behalf. The broad and untethered rights to deduct amounts (including the standardized fees that are for the benefit of IQ) shift operating expenses to the employees, are unconscionable, and constitute fees, gratuities, commissions or kickbacks in violation of Arizona law.

The contracts are also unconscionable because they contain employer indemnification provisions and purport to shift all liability and require indemnification of the employer "from any and all claims, demands, damage, suits, losses, liabilities and causes of action arising directly or indirectly from, as a result of or in connection with the actions of [Drivers]…. arising from the performance of [their] services under this Contract…." PSOF ¶¶ 100(g). *See Willoughby v. Cribbs*, No. 13-1091, 2015 WL 4599492, at *2 (S.D. Tex. July 29, 2015); Restatement (Second) of Contracts § 195 (1981) ("(2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if (a) the term exempts an employer from liability to an employee for injury in the course of his employment"); *Valley Nat. Bank v. Natl. Ass'n for Stock Car Auto Racing, Inc.*, 736 P.2d 1186, 1189 (Ariz. App. 1987) (relying on Restatement). The agreements' indemnification and "hold harmless"

provisions are also directly contrary to the fee-shifting provisions of the FLSA and Arizona law which allow a fee for a successful plaintiff in wage statutes but which contains no provision allowing fees to successful defendants. 29 U.S.C. §216(b); A.R.S. § 23-355. *See Smith v. AHS Okla. Heart, LLC,* No. 11–CV–691–TCK–FHM, 2012 WL 3156877 (N.D. Okla. 2012) (refusing to enforce FLSA arbitration agreement that contained a loser pays fee-shifting provision); *See also Quillion v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 233-31 (3d Cir. 2012) ("provisions requiring parties to be responsible for their own expenses, including attorney's fees, are generally unconscionable because restrictions on attorneys' fees conflict with federal statutes providing fee-shifting as a remedy.").

The agreements are also unconscionable in that they purport to waive any Driver dispute regarding the Drivers' settlement or the "billing to the customers" if the Drivers do not "bring its documented records" to IQ's attention within seven days. PSOF ¶ 1005(h). A provision waiving the employee's right to contest the amount of their payment within seven days violates innumerable statutes including for instance, the Arizona Employment Protection Act and Arizona wage statues which permit actions to be brought within one year, the FLSA and the Arizona Minimum Wage Laws which have 2 and/or 3 year statute of limitations for asserting claims. *Potiyevskiy v. TM Transp., Inc.*, 2013 IL App (1st) 131864-U ¶ 7, 2013 WL 6199949, at * 2 (Ill. App. Nov. 25, 2013) (finding contract provision substantively unconscionable that required truck drivers to seek arbitration within ten days following deduction of a disputed amount, noting that "The contract was drafted so as to make it as easy as possible for the defendants to unilaterally make after-the-fact reductions in the pay due to the workers—a practice which would be totally illegal if imposed against employees rather than independent contractors.").

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment in favor of Plaintiffs and the Class and against Defendants

IntelliQuick, Spizzirri, Transportation Authority, LLC, and Robert Lorgeree, on Counts I, II, and IV of the Second Amended Complaint.

Plaintiffs request that the Court declare that Plaintiffs are entitled to liquidated damages and a three-year statute of limitations under the FLSA, and treble damages under the AWL, including on amounts of unpaid overtime, minimum wages, and the standardized deductions (the scanner fees, secondary insurance fees, weekly uniform/laundry fees, and paycheck processing fees).

Plaintiffs request that the Court enter judgment against these Defendants jointly and severally in the amount as calculated by Plaintiffs' expert through September 30, 2016 ($19,232,952.79) for unpaid overtime, minimum wages, and the unlawful standardized deductions, together with liquidated and treble damages and pre-judgment interest through September 30, 2016. Plaintiffs request that the Court order Defendants to produce information regarding amounts owed to Drivers from September 2016 to the present and to grant Plaintiffs leave to submit a supplemental damages report.

Plaintiffs further request that the Court award Plaintiffs and Class Members pre- and post-judgment interest on all unpaid amounts together with attorneys' fees and non-taxable expenses.[14]

Plaintiffs also request that the Court order Defendants to treat all Class Members as employees for all purposes under the FLSA and AWL and to comply with the all requirements of the FLSA and AWL, including the maintenance of required records and the payment of minimum wages and overtime. Plaintiffs request that the Court order Defendants to cease the standardized deductions from Drivers' paychecks and such other and further relief as is equitable and just.

RESPECTFULLY SUBMITTED this 24th day of July, 2017.

MARTIN & BONNETT, P.L.L.C.

By: s/ Daniel L. Bonnett
Daniel Bonnett

[14] Plaintiffs will submit an application for attorneys' fees and non-taxable expenses.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, I electronically transmitted the attached document to the Clerk's Office using the CM-ECF System for filing and transmittal of a Notice of Electronic filing to the following CM-ECF registrants:

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