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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DAVID COLLINGE, MELONIE PRIESTLY, HEATHER ARRAS, ROBERT CAMPAGNA, JOHN MORENA, BRIAN BLACK, AND BRIAN KINGMAN on behalf of themselves and all others similarly situated, Plaintiffs, vs. INTELLIQUICK DELIVERY, INC., an Arizona corporation; KEITH SPIZZIRRI and MIRIAM SPIZZIRRI, husband and wife; TRANSPORTATION AUTHORITY, LLC, a Nevada corporation; ROBERT F. LORGEREE, JR; MAJIK LEASING, LLC, an Arizona corporation, FELICIA TAVISON; JASON MITTENDORF and JANE DOE MITTENDORF; JEFFREY LIEBER; WILLIAM "BILL" COCCHIA and JANE DOE COCCHIA; STEVEN ANASTASE and JANE DOE ANASTASE; MAJIK ENTERPRISES I, INC., an Arizona corporation, Defendants.	CASE NO.: CV12-00824-PHX-JWS **PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF DEFENDANTS' EXPERT WITNESS, ROBERT W. CRANDALL** **(Oral Argument Requested)**

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Pursuant to Federal Rule of Evidence ("FRE") 104 & 702 -704, Plaintiffs file this motion for a pretrial determination concerning the admissibility of opinions and anticipated testimony from Defendants' disclosed expert witness, Robert W. Crandall. For the reasons set forth herein, Plaintiffs ask the Court to exclude the testimony and opinions of Mr. Crandall. [1] This motion is supported by the Court's March 23, 2015 Orders (Docs. 342 & 343), the Declaration of Daniel Bonnett filed on July 24, 2017 along with the exhibits attached to thereto (hereinafter "Bonnett Decl."), Plaintiffs' Separate Statement of Facts in Support of Plaintiffs Motion for Partial Summary Judgment filed on July 24, 2017 ("PSOF"), and the record before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Crandall's testimony is inadmissible because it does not meet the requirements of FRE 702-705. Robert Crandall was disclosed by Defendants as their expert witness regarding Phase II damages issues. (Bonnett Decl. ¶ 7(b)). Mr. Crandall's opinions and conclusions are set forth in his declaration dated March 23, 2017 (hereinafter referred to as the "Crandall Decl."), attached as Exhibit 2 to the Bonnett Decl.[2] For the reasons set forth herein, Mr. Crandall's opinions and conclusions do not satisfy the standards set forth in FRE 702 - 704. They are not based on sufficient facts or data; they are not the product of reliable principles and methods, and the principles and methods used were not reliably applied to the facts of this case. In addition, many of his opinions are admittedly based on incomplete data that is not be reasonably relied upon by experts in similar fields. Further, Mr. Crandall attempts to introduce inadmissible hearsay disguised as expert opinion, offers legal conclusions that ignore and directly contradict previous rulings of this Court and the law, and fails to recognize or address the effect of this Court's determination that

[1] *Daubert v. Merell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[2] Plaintiffs' expert is David M. Breshears, CPA/CFF. His initial report dated December 2, 2016 is set forth at Exhibit 1 to the Bonnett Decl. His rebuttal report referred to herein as "06/05/17 Breshears Rebuttal Report "is set forth at Exhibit 3 to the Bonnett Decl.

the Drivers are employees of Defendant IntelliQuick for purposes of the FLSA and the Arizona Wage Law ("AWL"), Ariz. Rev. Stat. § 23-350 *et seq*. *See* Doc. 343. Mr. Crandall also failed to consider the sworn testimony of key IntelliQuick management witnesses as well as the testimony of the named Plaintiffs and other Drivers. Accordingly, his opinions and conclusions will mislead and confuse, not help, the trier of fact and should be excluded.

II. SUMMARY OF BASIS TO EXCLUDE DEFENDANTS' EXPERT

Mr. Crandall provides an unreliable estimate of time worked by members of the Class[3] that is based on a constructed methodology using a hypothetical and irrelevant "optimal route" without regard to the actual route Drivers use. (06/05/17 Breshears Rebuttal Report ¶¶ 8, 14, 25). As further explained below, Mr. Crandall frequently references and uses an independent contractor analogy to support his opinions despite the fact the Court has found, as a matter of law, that the Drivers were and are "employees" for purposes of the FLSA and Arizona wage statutes. (Crandall Decl. ¶¶ 30-32, 38; Doc. 340 at pp.14-16).

Mr. Crandall also bases a significant part of his analysis and opinions on an unreliable time study based on GPS data for only the named Plaintiffs – a total of seven Drivers out of approximately 950 Class members. (Crandall Decl. ¶¶ 8, 25; 06/05/17 Breshears Rebuttal Report ¶ 8; Bonnett Decl. ¶ 4). To further undermine the reliability of his opinions, this data is not for the complete class period, has significant gaps where days and months are missing and is admittedly insufficient to be a reliable representation across the entire Class. (Crandall Decl. ¶ 8; 06/05/17 Breshears Rebuttal Report pp. 7-10 ¶¶ E-G; 07/21/17 Breshears Dep. at pp.159:4-25 (Ex. 4 to Bonnett Decl.)).

In addition, Mr. Crandall considered only a single deposition (*i.e.*, "Spizziri, Keith -- PMK Deposition") as part of his analysis. (Crandall Decl. pp. 26-27). While

[3]For purposes of this motion, "Class" refers to both the "FLSA Class" and the "Rule 23 Class" as defined by the Court's Order dated March 23, 2015 and the members of those respective classes including recognized subclasses. (Doc. 342).

Defendants may argue that Mr. Crandall did not need to rely exclusively on Plaintiffs' evidence of the Plaintiffs' working hours, it does not mean that it was reasonable to ignore all of that evidence. Likewise, there can be no excuse for Mr. Crandall's complete failure to read or consider the sworn testimony of key IntelliQuick management personally familiar with Defendants' delivery operations.[4]

The unreliability of Mr. Crandall's methodology is further demonstrated by IntelliQuick's own testimony and that of the developer of IQ's CXT software - two witnesses with direct, personal knowledge of the CXT system that tracks Driver activity within IntelliQuick's delivery cycle. These witnesses testified that the most reliable measure for determining Driver activity (*i.e.*, worktime) are the first and last data entries relating to Driver activity on any given day. (PSOF ¶¶ 132-133). Even so, these witnesses concede that this does not capture all time Drivers spend working before and after the first and last package related timestamps. (PSOF ¶¶ 102, 133).

Mr. Crandall's opinions also ignore undisputed evidence that Drivers often work more 40 hours in a regular workweek. Even though IntelliQuick's contemporaneous business records include daily and weekly data for each Driver that indisputably establish that Drivers worked more than 40 hours in a particular week thereby entitling those Drivers to overtime pay, Mr. Crandall contends that hours can be averaged across multiple weeks and in so doing, concludes no Driver worked more than 40 hours in a week. . (Crandall Decl. ¶ 38). Such an approach is in direct violation of the FLSA. *See, e.g., Doe 1 v. Swift Transp. Co., Inc.*, 2:10-CV-00899 JWS, 2017 WL 735376, at *4 (D. Ariz. Feb. 24, 2017). As this Court has held, "the FLSA is considered on a workweek by workweek basis and does not permit averaging of hours over two or more weeks ...." *Id.* Mr.

[4]For example, Jeff Lieber, IQ's former National Sales Manager (PSOF ¶ 39); Leighton Hasslegrove, IntelliQuick's distribution manager(PSOF ¶ 9);William Cocchia, who was employed in several positions with IntelliQuick, including general manager for IntelliQuick's Phoenix operation including General Manager - Phoenix, Senior Business Development Manager, Sales and Marketing Manager, and Vice President of Quality Assurance (Doc. 305 ¶ 3); Jason Mittendorf, who was IntelliQuick's Distribution Manager, a Supervisor and Logistics Manager (Doc. 305 ¶ 11); Felecia Tavison, who was Branch Manager, Operations Manager and Quality Assurance Manager for Intelliquick, (Doc. 305 ¶ 6).

Crandall's methodology that averages the Drivers' hours over the employees' career is not a reliable or acceptable way to determine whether Drivers are entitled to overtime under the FLSA and his opinions should be excluded on this basis alone.

Mr. Crandall also offers opinions regarding amounts he asserts IntelliQuick allegedly factors into Drivers' gross pay to allow for reimbursement of certain Driver related expenses which he then claims IntelliQuick turned around and deducted from Drivers' pay. (Crandall Decl. ¶ 28). These opinions rely on inadmissible hearsay unsupported by the record and are contradicted by IQ's own Rule 30(b)(6) designee. (PSOF ¶ 93). Furthermore, these opinions are irrelevant to the determination of whether these amounts were unlawfully deducted in violation of the AWL. (*See* Plaintiffs' MSJ).

III. ARGUMENT

A. Legal Standard

Under FRE 104(a), the Court "must decide any preliminary question about whether a witness is qualified … or evidence is admissible." FRE 104(a). The Court may exclude expert testimony that lacks reliability or helpfulness under FRE 702.

> In the Ninth Circuit, "[t]he general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony." *United States v. Gwaltney*, 790 F.2d 1378, 1381 (9th Cir. 1986). Because unreliable and unfairly prejudicial expert witness testimony is not helpful to the trier of fact, the trial court should exclude such evidence. *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir.2001). Likewise, expert testimony that merely tells the jury what result to reach is inadmissible. *See, e.g., United States v. Duncan*, 42 F.3d 97, 101 (2d Cir.1994).("When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's.").

In re Apollo Group Inc. Sec. Litig., 527 F. Supp. 2d 957, 962 (D. Ariz. 2007).

In its role as gatekeeper, the Court makes the initial determination whether to allow expert testimony. *Barabin v. AstenJohnson, Inc.*, 700 F.3d 428, 431 (9th Cir. 2012) *on reh'g en banc sub nom. Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) ("In its role as gatekeeper, the district court determines the relevance and reliability of expert testimony and its subsequent admission or exclusion."). *See also* FRE. 702

(Advisory Committee Notes, 2000 Amendment) ("In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science."). This can be done either by reviewing the expert report or conducting a hearing outside the presence of the jury. The choice of the particular procedure lies within the discretion of the Court. *United States v. Nacchio*, 555 F.3d 1234, 1251 (10th Cir. 2009). Whatever procedure the Court employs, a determination of reliability must first be made before the testimony may be presented to the jury. *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000). Mr. Crandall's opinions are neither reliable nor relevant and, therefore, should be excluded.

B. Mr. Crandall Seeks to Offer Opinions and Conclusions Based on Incomplete Facts and Data

The foundation for most, if not all, of Mr. Crandall's opinions rely on GPS tracking data. (Crandall Decl. ¶¶ 8, 14). He uses this data to construct what he describes as "optimal routes" then estimates the time it takes for what he envisions is the ideal delivery driver to complete that route as a basis for measuring all Drivers' worktime. His opinions relying on the GPS data should be excluded for at least three reasons.

First, the GPS data produced by IntelliQuick and examined by Mr. Crandall was only for the seven named-Plaintiffs and was incomplete. (Crandall Decl. ¶ 8; 06/05/17 Breshears Rebuttal Report p. 11 ¶ I). Mr. Crandall concedes this data is not a sufficient representation to ensure that the data and conclusions drawn from it are reliable on a class-wide basis. (Crandall Decl. ¶¶ 8, 25; 06/05/17 Breshears Rebuttal Report p 2 ¶¶ E-G, p. 10 ¶ G, p. 11 ¶ I). In fact, as Plaintiffs' expert points out, there are large gaps in the data even for these seven individuals. (Crandall Decl. ¶ 8; 06/05/17 Breshears Rebuttal Report p. 10 ¶ 6, p. 11 ¶ I). Coupled with the fact the GPS data is such a small sample, it cannot be reliable for application to the entire Class. (06/05/17 Breshears Rebuttal Report p 2 ¶ E-G, p. 10 ¶ G, p. 11 ¶ I. *See, e.g., Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146–47 (1997) (studies relied on by expert witness did not support the expert's opinion); *Keystone Fruit*

Mktg., Inc. v. Brownfield, 352 F. App'x 169, 172 (9th Cir. 2009) ("the factual basis for the expert testimony sought to be admitted was insufficient…"); *Arjangrad v. JPMorgan Chase Bank, N.A.*, No. 3:10-CV-01157-PK, 2012 WL 1890372, at *6 (D. Or. May 23, 2012) ("Reliance on incomplete facts and data may make an expert opinion unreliable because an expert must know[ ] of facts which enable him to express a reasonably accurate conclusion.") (citation omitted); *United States v. City of Miami, Fla.*, 115 F.3d 870, 873 (11th Cir. 1997) ("Relevant expert testimony is admissible only if an expert knows of facts which enable him to express a reasonably accurate conclusion. Opinions derived from erroneous data are appropriately excluded") (citations omitted).

Second, Mr. Crandall uses the GPS data and a Google application to establish what he refers to as an "optimal route" or "route optimization" then asserts that efficient Drivers using route optimization would not work more than 40 hours in an average week. (Crandall Decl. ¶¶ 32-35). This purported analysis is pure conjecture and ignores the reality of the Drivers' workday where deliveries are often prioritized not based on route optimization but on customer demands. (06/05/17 Breshears Rebuttal Report p. 2 ¶ H, pp. 10-11 ¶¶ H-I). The evidence in this case shows that time requirements for deliveries and pickups and other customer demands prevent Drivers from choosing a so-called "optimal route" based solely on the location of various pickups and deliveries throughout the day. (*See* PSOF ¶¶ 41, 65, 70; 06/05/17 Breshears Rebuttal Report p. 2 ¶ H, pp. 10-11 ¶¶ H-I). For example, Plaintiff Robert Campagna testified that because certain deliveries had to be made by a specific time, he had to drive part of his route "twice," adding an hour and a half to his daily route. (PSOF ¶ 41, citing Deposition of Robert Campagna. at 174:13-175:17; 249:7-15). Susan Little, another IQ Driver, testified that "[I]f it says an order is due at this time you have to get it there at that time." (*Id.*, citing Deposition of Susan Little at 74:12-14). Mr. Crandall does not ever account for these factors let alone analyze or apply them to his methodology.

Third, given the Court's finding that the Drivers are employees, whether or not a particular driver uses the "optimal route" or one arguably less efficient is irrelevant.

Accordingly, related opinion testimony is equally irrelevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509, 591 (1993) (expert testimony must have a valid connection to the issues presented); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 884 n. 2 (10th Cir. 2005) ("Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case.").

Drivers are entitled to be compensated for all hours worked even if Mr. Crandall believes their work was not performed in the most efficient manner. "It is axiomatic, under the FLSA, that employers must pay employees for all 'hours worked.'" *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005). If the route taken by the Drivers is not "optimal," an employer may deal with the Drivers in the traditional labor/management way to improve efficiency, but the employer has no license to ignore all hours worked by an employee or to refuse to pay them the required wage for doing so.

C. Mr. Crandall Offers Inadmissible Hearsay Statements, Conjecture and Speculation Disguised As Expert Opinion

Mr. Crandall's opinions and conclusion are further objectionable because they are attempts to introduce inadmissible hearsay and irrelevant evidence. In addition, they are peppered with conjecture and speculation that are inappropriate for expert testimony. For example, the Crandall Decl. speculates that some Drivers may use subcontractors or employ other Drivers. (Crandall Decl. ¶¶ 14, 41). There is nothing in the record to support that statement. Furthermore, given the Court's ruling that the Drivers are employees, such a statement is irrelevant and related opinions and comments are inadmissible. *Daubert*, *supra*.

Similarly, Mr. Crandall speculates that route deliveries often arrive at IntelliQuick offices in bulk but offers no support for such a statement. (Crandall Decl. ¶ 7). He further speculates that "some Drivers are less diligent than others," a point that is unsupported by anything other than an opaque reference to "data" and even if true, is equally irrelevant. (*Id.*). Mr. Crandall acknowledges that he is even unclear what routes Drivers actually take during their delivery or the actual stop times they make for specific pick up or drop off

while doing so. (Crandall Decl. ¶ 25). Mr. Crandall further offers sheer unsupported speculation that certain IntelliQuick records "very unlikely" represent actual time, some "amount[s] of time cannot be reasonably explained," and that "Drivers may not have worked overtime." (*Id*. at ¶¶ 22, 24, 26 & 29; *see also* Crandall Decl. ¶¶ 7, 9, 10 & 41 at fn.15 for similar speculative, equivocal or unsupported statements). Expert opinions and conclusions based on conjecture and speculation are not admissible because courts find them unreliable and unhelpful to the trier of fact. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) ("speculative testimony is inherently unreliable,") (citing *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir.1997) and *Daubert* , 509 U.S. at 590).

In addition to being speculative and equivocal, many of the above referenced statements contain in admissible hearsay.[5] (*See, e.g.*, Crandall Decl. ¶ 41 at fn. 15

[5] The following are examples excerpted from the Crandall Decl. that are unsupported and that appear to be efforts by Defendants to use Mr. Crandall's testimony as a means of introducing inadmissible hearsay and other evidence that lacks foundation or is otherwise irrelevant:

- Route deliveries often arrive at IntelliQuick's facility in bulk, in which case a single 'drop off" time is recorded. (*Id.* ¶ 7);
- GPS data provides insight regarding Drivers' routing decisions and the work and non-work related stops they make throughout the day. (*Id.* ¶ 8);
- The fundamental problem with Mr. Breshears' approach is that it does not consider that the Driver pay structure includes expense reimbursements. (*Id.* ¶ 28);
- If IntelliQuick had structured the workforce as employees instead of ICs, then it would have paid the Drivers the net pay amount because IntelliQuick would absorb those costs directly. (*Id.* ¶ 28);
- Based on information from the company, the average stop time ranges between 5 and 7 minutes. This information was provided in a discussion with the company's [unidentified] CFO. (*Id.* ¶ 37);
- To the extent that certain Drivers did work overtime on some work weeks, individualized inquiry would be necessary to identify the reasons for the longer than average work hours and to investigate whether the Driver

indicating he "was informed" that there may be Drivers that "employed additional Drivers"). While an expert may base his opinion on hearsay or facts not in evidence, a party offering expert witness opinion may not use such testimony as a means of introducing otherwise inadmissible hearsay. FRE 703. *Hutchinson v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991) (improper bolstering of expert witness' credibility by asking witness to identify documents prepared by others, offering his own opinion regarding his prognosis, then stating whether his opinion was consistent with those expressed by others); *Blue Cross & Blue Shield of S. Carolina v. W.R. Grace & Co.*, 781 F. Supp. 420, 427 (D.S.C. 1991).("While an expert witness may base his opinion on [hearsay] evidence, this does not magically render the hearsay evidence admissible."), quoting *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F.Supp. 107, 158 (D.Del.1983) *aff'd*, 740 F.2d 956 (3d Cir.1984)).

D. The Incomplete Data and Hearsay Statements Are Not Reasonably Relied Upon By Experts in Similar Fields.

Given his acknowledgement that he relied incomplete and extremely limited GPS data and that he is unclear about routes actually taken by Drivers for their deliveries or actual stop time during pick up and drop off of packages, there is simply no way Mr. Crandall's report could meet the reliability test regardless of his *ipse dixit* statement that his methodology is reliable. Significantly, the Crandall Decl. fails to provide support that despite this incomplete data, other experts in the field of calculating unpaid minimum and overtime wages in the absence of employer records accurately recording all hours worked would find his methodology reliable.[6] *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d

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was compensated fairly for that work week relative to some benchmark. (*Id.* ¶ 38).

[6]Unlike Mr. Crandall, Plaintiffs' expert, David Breshears, explained why the limited GPS data is unreliable as a standalone bases for determining hours worked. (Breshears Rebuttal Report p. 2 ¶¶ D, E, G&I, p. 6, ¶3 , p, 7 ¶¶ D(2) & E, p.10 n.13; 07/21/17 Breshears Dep. at p.159, Bonnett Decl. Exhibit 4). Notwithstanding, Mr. Breshears did perform an analysis of GPS data after reviewing the Crandall Decl. as a secondary means of validating his (Breshear's) original methodology and calculations, and determined that, if anything, his calculations were conservative in that they potentially underestimated the

1142, 1169 (E.D. Wash. 2009) ("Nothing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

Nowhere in his report does Mr. Crandall attempt to explain why or how his facts and information are reasonably relied upon by experts in his field in reaching their opinions or that this methodology has been peer reviewed and approved. FRE 702(c) requires that expert testimony be "the product of reliable principles and methods." *Arjangrad*, 2012 WL 1890372, at *5 (finding purported HR expert's testimony to be unreliable because he "relies on the mere fact of his experience with respect to human resources matters to support this conclusion—in essence, he requests the Court to take his word for it. This subjective, conclusory approach cannot reasonably be assessed for reliability and is plainly insufficient under Daubert.") (citing *Parton v. United Parcel Serv.*, 1:02CV2008-WSD, 2005 WL 5974445, at *5 (N.D. Ga. Aug. 2, 2005)).

E. Mr. Crandall's Opinions Are Not the Product of Reliable Principles and Methods.

Perhaps the most fundamental flaw in Mr. Crandall's analysis is his failure to acknowledge that IntelliQuick has repeatedly shirked its legal obligation as employer to accurately track all hours worked by its Drivers -- even after this Court found them to be employees in March 2015. Likewise, he completely ignores sworn testimony of the Drivers about their daily routine as delivery Drivers for Defendants. Instead, Mr. Crandall uses a methodology that fails to take into account testimony of Drivers, IntelliQuick's key management personnel familiar with the delivery cycle, and pertinent data from IntelliQuick's business records (the CXT data that shows actual Driver interactions with the parcels they deliver) in favor of a hypothetical time study based on so-called "optimal" routes that ignore the Drivers' actual working conditions and on data that he admits is incomplete and not "large enough to make class-wide inferences about

time actually worked by the Drivers. (Breshears Rebuttal Report, pp. 8-10 ¶ F; 07/21/17 Breshears Dep. at pp.164:8-166:19, Bonnett Decl. Exhibit 4).

Drivers' hours worked." (Crandall Decl. ¶¶ 8, 25).

Mr. Crandall tries to bolster his flawed analysis by claiming in conclusory fashion that "the most reliable method to examine liability and damages is to conduct individualized analysis based on Driver-specific facts" despite having completely ignored those facts and the evidence that was readily available and part of the record.[7] (Crandall Decl. ¶ 16). *Vale v. United States of Am.*, 673 Fed. Appx. 114, 116 (2d Cir. 2016) (expert testimony inadmissible as unreliable where it consists of conclusory and speculative opinions or lacks foundation); *Poulis-Minott v. Smith*, 388 F.3d 354, 359 (1st Cir. 2004) (recognizing expert testimony to be excluded if nothing more than a conclusory assertion about ultimate legal issues).

F. Crandall Offers Legal Conclusions that Ignore and Directly Contradict Previous Rulings of This Court that the Drivers Are "Employees."

Mr. Crandall makes a number of improper and incorrect legal assertions in his report. For example, he claims Plaintiffs cannot rely on averages for overtime and wage liability and damages purposes. Crandall Dec. ¶ 17. That assertion is contrary to the law, particularly where, as here, the employer, IntelliQuick, has failed to track and accurately record the hours its employees work. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946) ("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 requirements of [the FLSA]...."); *Brick Masons Pension Tr. v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333, 1338 (9th Cir. 1988) ("An employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required."). *See*, e.g.,

[7] Mr. Breshears' calculations do, in fact, contain individual calculations of time worked for each Driver and their individual damage amounts based on what IntelliQuick and CXT representative Rule 30(b)(6) designees both testified is the most reliable data. (12/02/16 Breshears Report ¶ 8 and Exhibit "1" attached thereto; *see also* PSOF ¶¶ 132-134).

Superior Production Partnership v. Gordon Auto Body Parts, Co., 784 F.3D 311, 324-35 (6th Cir. 2015) (expert testimony excluded because based on incorrect legal premise).[8]

Mr. Crandall also asserts an incorrect legal proposition that liability for the unlawful deductions Plaintiffs seek to recover on behalf of the Rule 23 Class hinges on whether Driver expenses were built into the Drivers' rates of pay. (Crandall Dec. ¶ 10). For reasons set forth in Plaintiffs' Motion for Summary Judgment, that is an incorrect statement of the law. More to the point, opining on the law is not within Mr. Crandall's purview. "[A]n expert witness cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008); *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) ("Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury."); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985)(testimony of witness who had taken part in selection process as to whether she believed that employee had been discriminated against because of national origin in the interview process contained a legal conclusion and was inadmissible in employment discrimination action); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 202 F. Supp. 2d 1212, 1217 (D. Kan. 2002) (expert may not testify with respect to legal conclusions). The Court will presumably instruct on the law and the trier of fact is responsible for determining if Defendants have engaged in liability-creating conduct. *United States v. Meises*, 645 F.3d 5, 16-17 (1st Cir. 2011); *United States v. Samet*, 466 F.3d 251, 255 (2d Cir. 2006); *Kostelecky v. NL Acme Tool/NL Industries, Inc.*, 837 F.2d 828, 830 (8th Cir. 1988) ("evidence that merely tells the jury what result to reach is not sufficiently helpful to the trier of fact to be admissible."); *see also Andrews v. Metro Notrht Commuter R.R. Co.*, 8 F.3d 930, 941-42 (2d Cir. 1993) (error to admit expert

[8] Mr. Crandall evaluates Driver activity as if they are independent contractors and applies that business model to his methodology despite this Court's express rejection of it in this case. (*See*, e.g., Crandall Dec. ¶¶ 21, 39, 40, 42, 44).

testimony where expert failed to state legal criteria upon which opinion was based).

G. Mr. Crandall Failed To Consider the Sworn Testimony Of Key IntelliQuick Management Witnesses As Well As the Testimony of the Named Plaintiffs and Other Drivers.

Mr. Crandall recites that he considered only a single deposition (i.e., "Spizziri, Keith -- PMK Deposition") as part of his analysis. (Crandall Decl. at pp. 26-27). Other than this deposition and Plaintiffs' expert's deposition, Mr. Crandall appears not to have considered any testimony in this case at all. To Plaintiffs' knowledge, Defendants' expert did not interview a single Driver or test his methodology against the sworn statements and testimony of Drivers and key IntelliQuick employees directly involved in Defendants' delivery cycle.[9] *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 865 (8th Cir. 2010) (where expert's analysis "is unsupported by the record, exclusion of that analysis is proper, as it can offer no assistance to the jury."); *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996) ("the district court properly excluded Dr. Reed's expert testimony, which was not based upon the facts in the record but on altered facts and speculation designed to bolster Deere's position"); *Estate of Gaither ex rel. Gaither v. D.C.*, 831 F. Supp. 2d 56, 66 (D.D.C. 2011) (excluding expert testimony about judge's sentencing practices where record is devoid of any *meaningful measure of detail* about the extent of Roberts' experience with and knowledge of Judge Kramer's sentencing practices specifically"); *Wurtzel v. Starbucks Coffee Co.*, 257 F. Supp. 2d 520, 526 (E.D.N.Y. 2003) (excluding testimony of expert who "never met with the Plaintiff, did not review the Complaint, discovery responses or deposition transcripts" and finding that "[n]ot surprisingly, Dr. Goldberg's tests have no relationship to the alleged facts").

H. Mr. Crandall's Opinions Will Confuse, Not Help, the Trier of Fact

For the reasons stated, Mr. Crandall's opinions will only confuse and mislead the

[9] Mr. Crandall claims he also had information from "a discussion with the company's CFO." (Crandall Decl. p. 20 n. 11). This person is not identified by name and the "discussion" appears to be limited to a single point (i.e. approximate stop time of 6 minutes per delivery), which is not in the record at all.

trier of fact. Because this Court has determined that the Drivers were misclassified and are employees, Drivers are entitled to be paid minimum wages and overtime at the applicable premium rates of pay for all hours worked in excess of 40 hours in a regular workweek. Mr. Crandall attempts to ignore this fundamental legal principle by ignoring their status as employees and constructing a hypothetical methodology based on unreliable, incomplete and irrelevant facts to achieve the intended result of claiming that Class members are owed nothing at all. Because Mr. Crandall's opinions are seriously flawed, misleading and unreliable, they will not help the trier of fact. *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994) (expert testimony sufficiently grounded for purposes of litigation only if it will help trier of fact to reach accurate results).

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that Defendants' disclosed expert witness, Robert W. Crandall, be precluded from offering any expert testimony and that his opinions and conclusions as set forth in the Crandall Declaration dated March 23, 2017 be excluded for all purposes. Plaintiffs request such further relief as is just and proper.

Respectfully submitted this 24th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2017, 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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