

Susan Martin, AZ Bar No. 014226
smartin@martinbonnett.com
Daniel Bonnett, AZ Bar No. 014127
dbonnett@martinbonnett.com
Jennifer Kroll, AZ Bar No. 019859
jkroll@martinbonnett.com
Mark Bracken, AZ Bar No. 026532
mbracken@martinbonnett.com
MARTIN & BONNETT, P.L.L.C.
1850 North Central Avenue, Suite 2010
Phoenix, AZ 85004
Telephone: 602.240.6900
Attorneys for Plaintiffs

Mark Ogden; AZ Bar No. 017018
mogden@littler.com
Rick D. Roskelley pro hac vice
rroskelley@littler.com
Jeffrey S. Judd; AZ Bar No. 18816
jjudd@littler.com
Juliet S. Burgess; AZ Bar No. 023475
jburgess@littler.com
LITTLER MENDELSON, P.C.
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
Telephone: 602.474.3600
Attorneys for Defendants
IntelliQuick Delivery, Inc.; Keith and Miriam Spizzirri; Majik
Leasing, LLC; Felicia Tavison; Jason Mittendorf and Jane Doe
Mittendorf; Jeffrey Lieber; William "Bill" Cocchia and Jane Doe
Cocchia; Steven Anastase and Jane Doe Anastase

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Collinge, Melonie Priestly, and
Heather Arras, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

IntelliQuick Delivery, Inc., an Arizona
corporation, et al.

Defendants.

Case No. 2:12-cv-00824-JWS

**PROPOSED JOINT CASE
MANAGEMENT PLAN**

Pursuant to Fed. R. Civ. P. 26, Plaintiffs David Collinge, Melonie Priestly and
Heather Arras on behalf of themselves and all others similarly situated ("Plaintiffs"), and
Defendants IntelliQuick Delivery, Inc., ("IntelliQuick"), Keith Spizzirri, Miriam Spizzirri,

1 Majik Leasing, LLC (“Majik”), Felicia Tavison, Jason Mittendorf, Jane Doe Mittendorf,
 2 Jeffrey Lieber, William “Bill” Cocchia and Jane Doe Cocchia, Steven Anastase and Jane
 3 Doe Anastase (collectively referred to herein as “IntelliQuick Defendants”), by and through
 4 undersigned counsel hereby submit the following Proposed Joint Case Management Plan.

- 5
 6 1. **The nature of the case, including the factual and legal basis of plaintiff’s
 claims and defendant’s defenses.**

7
 8 **PLAINTIFFS:**

9 Plaintiffs work or have worked for Defendants as delivery drivers or couriers and are
 10 commonly classified as “Route Drivers,” “Freight Drivers,” and/or “On-Demand Drivers.”
 11 Defendant IntelliQuick is a same-day package delivery service provider. Plaintiffs allege
 12 they provide these delivery services under Defendants’ direction and control. Plaintiffs also
 13 allege the following: Defendants knowingly and intentionally misclassify Plaintiffs as
 14 independent contractors, rather than employees. Defendants control the number of each
 15 drivers’ deliveries and pick-ups, determine the hours worked by each driver, assign drivers to
 16 certain geographic areas or routes, determine and control the time in which deliveries and
 17 pick-ups are made, and monitor and redirect the drivers throughout the workday. Defendants
 18 regularly assign drivers additional or extra delivery assignments or pick-ups without any
 19 additional pay. Plaintiffs are threatened with pay deductions or charge-backs if they refuse
 20 additional work or fail to follow Defendants’ directives. Drivers are also expected to
 21 perform additional non-delivery work, such as sorting, logging or loading packages and other
 22 administrative tasks. Defendants’ actions deny Plaintiffs any entrepreneurial opportunities,
 23 such as an opportunity to control their own profit. Defendants continue to misclassify their
 24 drivers in order to shift their business expenses to their employees, avoid liability under state
 25 and federal employment protection statutes, and maintain a competitive advantage over
 26 competitors that treat employees in compliance with the law.

27 Plaintiffs further allege Defendants also make mandatory deductions from the drivers’
 28 pay for administrative fees, scanner fees, secondary insurance fees, and uniform laundry

1 fees, regardless of the number of hours worked and regardless if these services are actually
2 provided or used.

3 As a result of Defendants' unlawful conduct, Plaintiffs allege they have been denied
4 minimum wages and overtime wages in violation of the Fair Labor Standards Act (FLSA),
5 29 U.S.C. §§ 201 *et seq.*, (Count I) and the Arizona wage statutes, A.R.S. §§ 23-350, *et seq.*
6 (Count II). In addition, Plaintiffs contend Defendants have been unjustly enriched by their
7 unfair and unlawful practices, including unlawful pay deductions and failure to pay all wages
8 owed (Count III). In addition, Plaintiffs allege Defendants denied Plaintiffs benefits and
9 protections provided under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et*
10 *seq.* (Count V). Moreover, Plaintiffs allege Defendants have retaliated against Plaintiffs for
11 voicing their concerns regarding Defendants' unlawful practices and filing this action, in
12 violation of 29 U.S.C. §§ 201 *et seq.* (Count VI). In particular, Plaintiffs allege Defendants
13 intentionally and callously terminated named Plaintiff David Collinge soon after the Court
14 granted conditional class certification in an effort to discourage other drivers from
15 participating in this lawsuit.

16 This action is brought as a collective action under the FLSA, 29 U.S.C. § 216(b), to
17 recover minimum wages, overtime wages, liquidated damages, attorneys' fees and other
18 statutory penalties resulting from Defendants' violations of the FLSA. The Court granted
19 conditional collective action certification on July 31, 2012. (Doc. 59.) This lawsuit is also
20 brought as a class action under Federal Rule of Civil Procedure 23, to recover unpaid
21 minimum and overtime wages, unlawful deductions from wages, benefits, compensatory
22 damages, treble damages, attorneys' fees and any other statutory penalty resulting from
23 Defendants' violations of the Arizona wage statutes and FMLA.

24 **DEFENDANTS:**

25 Plaintiffs allege that they and the class of individuals they seek to represent were
26 improperly classified as independent contractors. Defendants contend this contention is
27 simply wrong. Specifically, Plaintiffs' allege that IntelliQuick knowingly misclassified its
28 "Freight Drivers", "Route Drivers" and "On-Demand Drivers" (collectively referred to as

1 “Drivers”) and consequently failed to pay Plaintiffs minimum wage and overtime.
2 Defendants allege the following: Plaintiffs were properly classified as independent
3 contractors because IntelliQuick did not and does not exercise the requisite control and/or
4 direction over Plaintiffs. IntelliQuick is a logistics provider. In this regard, IntelliQuick is
5 principally responsible for coordinating the most efficient means to ensure a secure and
6 expedient pick-up and delivery of various packages from its customers. In contrast, Drivers
7 are individuals in the delivery business, whose primary function is to transport packages
8 from one location to another. Accordingly, in order to facilitate its customers’ needs,
9 IntelliQuick enters into individual contracts with Drivers, whereby they are compensated a
10 pre-agreed and set amount for various deliveries and routes (i.e. independent contractor
11 arrangements). This arrangement is beneficial for Drivers as they have a reliable built-in
12 income stream, and they are able to accept or reject jobs based on their existing workload,
13 schedule and preferences. While IntelliQuick requires Drivers to follow certain basic
14 requirements (i.e. wearing a red polo shirt and following certain grooming requirements),
15 these isolated practices are not sufficient to create an employment relationship. Likewise,
16 any pre-shift or post-shift work alleged is *de minimis* in nature.

17 Moreover, and in any event, Defendants allege they properly compensated Plaintiffs
18 for all hours worked, including those in excess of 40 hours. Further, Defendants allege they
19 paid Plaintiffs in a timely fashion a pre-agreed amount that met all applicable federal
20 requirements. Consequently, Defendants allege they paid Plaintiffs all monies to which they
21 were entitled under applicable law and Defendants did not abridge any rights of Plaintiffs or
22 violate any law in compensating them. Defendants also allege they complied with the
23 Family Medical Leave Act and Arizona’s wage payment statute in all respects.

- 24 2. **A list of the elements of proof necessary for each count of the complaint**
25 **and each affirmative defense and, if applicable, each counterclaim. For**
26 **those claims in which the burden of proof shifts, the elements that the**
27 **party must prove in order to prevail must be listed. The list of the**
28 **elements of proof must contain citations to relevant legal authority (i.e.,**
United States statutory and/or administrative law, U.S. Supreme Court
case, Ninth Circuit Court of Appeals case law, Arizona State case and
statutory law, and other authority as dictated by the conflict of law rules).

PLAINTIFFS:**A. Failure to Pay Minimum Wages and Overtime Wages (Counts I & II)**

The elements of an FLSA minimum wage claim are: (1) plaintiffs were employed by defendants during the relevant period; (2) plaintiffs were covered employees; and (3) defendants failed to pay plaintiffs minimum wages. *See* 29 U.S.C. § 206 (minimum wages); *Quinonez v. Reliable Auto Glass, LLC*, CV-12-000452-PHX-GMS, 2012 WL 2848426, *2 (D. Ariz. July 11, 2012).

The elements of a minimum wage claim under the state wage statutes are: (1) plaintiffs were employed by defendants during the relevant period; and (2) defendants failed to pay plaintiffs minimum wages. *See* A.R.S. § 23-363 (employer shall pay employees no less than the minimum wage);

B. Failure to Pay Overtime Wages Owed (Counts I & II)

The elements of an FLSA overtime claim are: (1) plaintiffs were employed by defendants during the relevant period; (2) plaintiffs were covered employees; (3) defendants failed to pay plaintiffs overtime pay. 29 U.S.C. § 207(a)(2) (employers must pay employees at a rate of not less than one and one-half times the regular rate for all hours worked in excess of forty hours in a workweek); *Quinonez v. Reliable Auto Glass, LLC*, CV-12-000452-PHX-GMS, 2012 WL 2848426, *2 (D. Ariz. July 11, 2012).

Similarly, the elements of an unpaid wage claim under the Arizona wage statutes are: (1) plaintiffs were employed by defendants during the relevant time period; and (2) defendants failed to pay plaintiffs all wages due. *See* A.R.S. § 23-355(A) (“if an employer... fails to pay wage due..., the employee may recover in a civil action against an employer or former employer an amount that is treble the amount of unpaid wages”)

C. Unlawful Pay Deductions (Count II)

The elements of an unlawful deduction claim under the Arizona wage statutes are: (1) plaintiffs were employed by defendants during the relevant time period; and (2) defendants withheld or diverted any portion of plaintiffs’ wages. If plaintiff establishes that Defendants made deductions from plaintiffs’ wages, Defendants may avoid liability if they can show:

(1) defendants were required by state or federal law to make the deductions, (2) defendants had prior written authorization to make the deductions; or (3) there is a good faith dispute as to the wages due plaintiffs. *See* A.R.S. § 23-352 (an employer may not withhold or divert any portion of an employee's wages unless required by law, the employer has prior written authorization, or there is a good faith dispute as to the wages due).

D. Unjust Enrichment/Restitution (Count III)

To show a claim of unjust enrichment and be granted restitution, a plaintiff must show: (1) the defendant received a benefit; (2) by receipt of that benefit the defendant was unjustly enriched at the plaintiff's expense; and (3) the circumstances were such that in good conscience the defendant should make compensation. *Pyeatte v. Pyeatte*, 135 Ariz. 346, 352, 661 P.2d 196, 202 (Ct. App. 1982) (citing *John A. Artukovich & Sons v. Reliance Truck Co.*, 126 Ariz. 246, 614 P.2d 327 (1980); *Restatement of Restitution* § 1 at 13 (1937)). Unjust enrichment does not depend upon the existence of a valid contract, nor is it necessary that plaintiff suffer a loss corresponding to the defendant's gain for there to be valid claim for an unjust enrichment. *Id.* (quotation omitted).

E. Declaratory Judgment (Count IV)

Plaintiffs seek a declaratory judgment stating that Defendants have violated state and federal law and that they have been wrongfully classified as independent contractors. If Plaintiffs establish the substantive claims alleged in Counts I, II, II, V and VI, Plaintiffs are entitled to a declaratory judgment in their favor.

F. Violations of FMLA (Count V)

Under the FMLA, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" the substantive rights guaranteed by FMLA. 29 U.S.C. § 2615(a)(1). In the Ninth Circuit, the courts do not apply the type of burden shifting framework recognized in *McDonnell Douglas* to FMLA "interference" claims; rather, an employee can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both. *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011) (internal quotation omitted).

1 It is also “unlawful for any employer to discharge or in any other manner discriminate
2 against any individual for opposing any practice made unlawful by this subchapter.” 29
3 U.S.C. § 2615(a)(2). Although undecided in the Ninth Circuit, other circuits have considered
4 a discrimination or retaliation claim under the FMLA have adopted some version of the
5 *McDonnell Douglas* burden shifting framework. *See Sanders*, 657 F.3d at 778 (citations
6 omitted).

7 **G. Retaliation in Violation of FLSA (Count VI)**

8 The FLSA makes it unlawful “to discharge or in any other manner discriminate
9 against any employee because such employee has filed any complaint or instituted or caused
10 to be instituted any proceeding under or related to this chapter.” 29 U.S.C. § 215(a)(3).
11 Claims for retaliation under this provision are subject to the burden-shifting analysis applied
12 under Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000e–7. *Campbell-Thomson v.*
13 *Cox Cmm’ns*, CV-08-1656-PHX-GMS, 2010 WL 1814844 (D. Ariz. May 5, 2010) (citing
14 *Spata v. Smith's Food & Drug Ctrs., Inc.*, 253 F. App'x 648, 649 (9th Cir.2007); *Conner v.*
15 *Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997))

16 Thus, a plaintiff must first set forth a *prima facie* case of retaliation by showing: (1) a
17 plaintiff engaged in protected activity; (2) that a plaintiff suffered a materially adverse
18 employment action; and (3) a causal connection between the two. *Campbell-Thomson v. Cox*
19 *Cmm’ns*, 2010 WL 1814844 at * 5 (citations omitted). “An employee engages in a protected
20 activity when she participates in conduct that reasonably could be perceived as directed
21 toward the assertion of rights protected by the statute.” *Id.* (citations omitted). Protected
22 conduct not only includes formal complaints with a court or the Department of Labor, but
23 also informal oral or written complaints to an employer. *See Williamson v. Gen. Dynamics*
24 *Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000); *Kasten v. Saint-Gobain Performance Plastics*
25 *Corp.*, 131 S. Ct. 1325, 1331, 179 L. Ed. 2d 379 (2011) (holding anti-retaliation provision of
26 FLSA protects oral as well as written complaints). An employment action is adverse if “it is
27 reasonably likely to deter employees from engaging in protected activity.” *See Ray v.*
28 *Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). The causal link at the *prima facie* stage is

1 construed broadly and a plaintiff must merely “prove that the protected activity and the
2 negative employment action are not completely unrelated.” *See Poland v. Chertoff*, 494 F.3d
3 1174, 1181 n. 2 (9th Cir. 2007).

4 After plaintiffs establish a *prima facie* case, the burden shifts to the employer to
5 articulate a legitimate, non-retaliatory explanation for its decision. *See Steiner v. Showboat*
6 *Operating Co.*, 25 F.3d 1459, 1464–65 (9th Cir. 1994) (citations omitted).

7 If the employer satisfactorily presents a legitimate explanation for its decision, the
8 burden shifts back to the plaintiff to present evidence that the employer’s reason is pretext
9 for retaliation. *See Steiner*, 25 F.3d at 1464–65 (holding that a plaintiff “has the ultimate
10 burden of showing that [defendant’s] proffered reasons are pretextual”); *see also Spata*, 253
11 F. App’x at 649. To show pretext, a plaintiff must show that a retaliatory “reason more likely
12 motivated the employer,” or “that the employer’s proffered explanation is unworthy of
13 credence.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). To
14 show an employer was more likely motivated by a retaliatory motive, a plaintiff must present
15 direct or circumstantial evidence of the employer’s allegedly illegal motive. *See id.* “[V]ery
16 little evidence,” however, “is necessary to raise a genuine issue of fact regarding an
17 employer’s motive; any indication of [an improper] motive ... may suffice to raise a question
18 that can only be resolved by a fact-finder.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103,
19 1124 (9th Cir. 2004) (internal quotations and citations omitted). “To satisfy the unworthy of
20 credence test, a plaintiff must identify specific inconsistencies, contradictions,
21 implausibilities, or weaknesses in the employer’s explanation so that a reasonable fact finder
22 could infer that the employer did not act for the asserted reason.” *See Dominguez–Curry v.*
23 *Nev. Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir.2005).

24 25 **DEFENDANTS:**

26 A. Failure to State a Claim:

27 Plaintiffs’ Complaint fails to state a claim upon which relief may be granted. *See*
28 Fed.R.Civ.P. 12(b)(6); *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*,

1 129 S.Ct. 1937, 1950 (2009). Specifically, Plaintiffs cannot establish one or more of the
2 required elements of their claims for overtime and minimum wages (under both state and
3 federal law), restitution/unjust enrichment, declaratory judgment, and violations of the
4 FMLA.

5 B. Plaintiffs' FLSA Claim Is Barred By The Applicable Statute of Limitations.

6 The FLSA allows Plaintiffs to pursue claims only within two years of accrual, or three
7 years for willful violations. 29 U.S.C. § 255(a). Plaintiffs bear the burden of establishing
8 that Defendants "either knew or showed reckless disregard for the matter of whether [their]
9 conduct was prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133
10 (1988). As noted above, the Defendants did not commit any willful violations of the FLSA.
11 Accordingly, Plaintiffs may only pursue FLSA claims, if any, that accrued on or after April
12 19, 2010, two years before Plaintiffs filed their original complaint.

13 C. Defendants Did Not Willfully Violate The FLSA.

14 To establish a "willful" violation of the FLSA, Plaintiffs must prove that Defendants
15 "either knew or showed reckless disregard for the matter of whether its conduct was
16 prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).
17 Plaintiffs cannot make that showing here. The Defendants acted in good faith and complied
18 with the Wage and Hour Administrator's written enforcement policies and other published
19 rulings/opinions.

20 D. Section 10 of the Portal-to-Portal Act Bars Plaintiffs' FLSA Claim.

21 Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, provides that an employer
22 shall not be held liable for failure to pay wages required if it proves good faith reliance on
23 "any written administrative regulation, order, ruling, approval, or interpretation" issued by
24 the Department of Labor. The Defendants will prove that any alleged failure to pay wages
25 was based on good faith reliance and conformity with the Wage and Hour Administrator's
26 written enforcement policies and other published rulings and opinions.

27 ///

28 ///

1 E. If Improperly Classified as Independent Contractors, Plaintiffs Were Exempt
 2 Employees.

3 Plaintiffs' claims are barred in whole or in part to the extent that the work they
 4 performed falls within exemptions, exclusions, exceptions, or credits provided for in Section
 5 13 of the FLSA, 29 U.S.C. § 213. Under regulations promulgated by the US DOL, 29 CFR
 6 Part 541, individual potential claimants may properly be classified as individuals exempt
 7 from overtime requirements as executive or administrative employees, or a combination of
 8 both, due to their compensation and duties within their individual organization(s) over which
 9 Defendants do not exercise control.

10 F. Section 11 of the Portal-to-Portal Act Bars Plaintiffs' FLSA Claim

11 Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 60, provides the Court with
 12 discretion to deny liquidated damages if an employer's failure to pay overtime was in good
 13 faith and the employer had reasonable grounds for believing that its omission did not violate
 14 the FLSA. *See, e.g., General Elec. Co. v. Porter*, 208 F.2d 805, 816 (9th Cir. 1953)
 15 (refusing to award liquidated damages for failure to pay overtime where the Company
 16 researched overtime requirements, obtained advice from counsel, and relied on counsel's
 17 opinion regarding an uncertain area of law). Defendants will show good faith and reasonable
 18 grounds for their actions in the present case that should bar Plaintiffs from recovering some
 19 or all of the requested liquidated damages in that Defendants were aware of prior IRS
 20 determination and prior determination by state agencies about proper classification of drivers
 21 as independent contractors.

22 G. Plaintiffs' FLSA Claim Is Barred by 213(a) and (b)

23 Plaintiffs' claims are barred in whole or in part to the extent that the work they
 24 performed falls within exemptions provided for in Section 13(a) and/or (b) of the FLSA, 29
 25 U.S.C. § 213(a) and/or (b).

26 H. Plaintiffs' FLSA Claim Is Barred by 29 U.S.C. § 254

27 Plaintiffs' claims are barred because the alleged work (i.e. attending pre-shift briefing
 28 meetings) consisted of non-compensable preliminary or postliminary tasks. 29 U.S.C. § 254.

1 I. Plaintiffs' FLSA Claim Is Barred Because It Is *De Minimis* In Nature.

2 Courts have held that time can be classified as worktime may not be compensable if it
3 is too trivial to be accounted for, under the legal precept that *de minimis non curat lex*.
4 Defendants bear the burden of establishing the applicability of the de minimis doctrine
5 through four (4) factors, of which the first is the most important: (1) the amount of daily time
6 spent on de minimis activities; (2) the administrative difficulty in recording such time
7 accurately; (3) the regularity with which such work is performed; and (4) the aggregate
8 amount of the claim. *Lindow v. United States*, 738 F.2d 1057, 1062-63 (9th Cir. 1984). As a
9 separate and distinct defense, Plaintiffs' claims are barred in whole or in part because the
10 work performed was de minimis in nature.

11 J. Plaintiffs' FLSA Claim Is Barred By Waiver

12 A party knowingly relinquishing a right or privilege, or intentionally abandoning,
13 either expressly or impliedly, such a right or privilege may have waived the right to bring
14 such an action. *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602-03 (9th Cir.
15 1995). Further, to the extent that discovery reveals that Plaintiffs have previously received
16 compensation for their alleged unpaid regular or overtime wages in connection with, or as a
17 result of, a payment to Defendants' employees supervised by the Department of Labor; or in
18 connection with, or as a result of, a prior judicial action that was resolved through a court-
19 approved settlement or judgment, Defendants hereby invoke the doctrine of waiver to bar the
20 claims asserted by Plaintiffs.

21 K. Plaintiffs' Claims Are Barred By Laches

22 When a party unreasonably delayed the bringing of an action so that it causes
23 prejudice to the opposing party as to its legal defenses, the dilatory party can be precluded
24 from recovery under the equitable doctrine of laches. *Danjaq, LLC v. Sony Corp.*, 263 F.3d
25 942, 952-56 (9th Cir. 2001). To establish laches, the Defendants must prove that (a)
26 Plaintiffs did not pursue their claims against the Defendants with diligence; and (b) the
27 Plaintiffs' delay prejudiced the Defendants. *Foster v. Metro Life Ins. Co.*, 243 Fed. Appx.
28 208, 210 (9th Cir. 2007).

1 L. Plaintiffs' Claims Are Barred By Estoppel

2 Plaintiffs' claims are barred or limited, in whole or in part, due to the affirmative
3 defenses of waiver and/or estoppel. Equitable estoppel applies where the party to be
4 estopped engages in acts inconsistent with a position it later adopts and the other party
5 justifiably relies on those acts, resulting in injury. *See Flying Diamond Airpark, LLC v.*
6 *Meienberg*, 215 Ariz. 44, 50, 156 P.3d 1149, 1155 (App. 2007). The Defendants may
7 establish the affirmative defense of estoppel by showing that Plaintiffs made "a definite
8 misrepresentation of fact" with "reason to believe" that Defendants would rely on it.
9 *Heckler v. Community Health Servs. Of Crawford County, Inc.*, 467 U.S. 51, 59 (1984)
10 (citing Restatement (Second) of Torts § 894(1)). Defendants may establish the affirmative
11 defense of waiver where it can show that Plaintiff knowingly relinquished a right or
12 privilege, or intentionally abandoned it, either expressly or impliedly, and therefore waived
13 the right to bring such action. *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602-03
14 (9th Cir. 1995). The Defendants may establish the affirmative defense of estoppel by
15 showing that Plaintiffs made "a definite misrepresentation of fact" with "reason to believe"
16 that Defendants would rely on it.

17 M. Plaintiffs' Claims Are Barred By Failure To Exhaust

18 Defendants assert that Plaintiffs' claims may be barred in whole or in part, to the
19 extent that Plaintiffs failed to exhaust their exhaust administrative, statutory and/or
20 contractual remedies.

21 N. Plaintiffs' Claims Are Barred By The After-Acquired Evidence Doctrine.

22 Defendants state that, to the extent that Plaintiffs engaged in misconduct during their
23 employment that would have resulted in their termination had Defendants been aware of said
24 misconduct, Plaintiffs' claims should be barred or reduced for their having engaged in said
25 misconduct. *McKennon v. Nashville Banner Co.*, 513 U.S. 352, 362 (1995); *Martin v. Arrow*
26 *Elecs., Inc.*, 336 Fed. Appx. 596, 599 (9th Cir. 2009) (affirming district court's decision to
27 bar all damages under the after-acquired evidence doctrine.)
28

O. Plaintiffs' State Wage Claims Are Barred Because There Is A Good Faith Dispute As To Any Amounts Owed Or To The Extent A Conflict Exists With The FLSA As A Matter Of Preemption.

Plaintiffs' state law wage claims are barred in whole or in part, to the extent a reasonable good-faith dispute existed regarding the amounts of wages, if any, which were owed by Defendants to Plaintiffs, A.R.S. § 23-352(3), and to the extent that remedies for violation of state law claims interfere or conflict with the remedial scheme of the FLSA, such provisions are inapplicable in this matter under the doctrine of preemption.

P. Plaintiffs' Claims Are Barred Because Defendants Acted In Good Faith

Plaintiffs' claims are barred or limited, in whole or in part, because Defendants at all times acted in good faith and in full compliance with the Family Medical Leave Act, the Fair Labor Standards Act, and other relevant laws and regulations. Accordingly, an award of punitive damages in this case would be contrary to Defendants' good faith efforts to comply with the law. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

Q. Failure To Mitigate

Plaintiffs' claims are barred or limited, either in whole or in part, by Plaintiff's failure to mitigate damages. *See Mamola v. Group Mfg. Servs.*, No. CV-08-1687-PHX-GMS, 2010 U.S. Dist. LEXIS 71847 *2 (D. Ariz. June 30, 2010) (noting that plaintiff carries the burden of showing damages and mitigation of damages is an affirmative defense for which the defendant carries the burden). To prevail on this issue, Defendants must prove that, during the time in question there were substantially equivalent jobs available that Plaintiff could have obtained and that Plaintiff failed to use reasonable diligence in seeking one. *See EEOC v. Farmer Brothers Co.*, 31 F.3d 891 (9th Cir. 1994); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995) (citations omitted); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).

R. Improper Joinder

Defendant maintains that Plaintiffs are improperly joined in this action and will pursue its decertification motion at the close of discovery.

- 1 7) Whether Defendants intentionally misclassified Plaintiffs as independent contractors
- 2 or intentionally misclassified them as exempt.
- 3
- 4 8) Whether Defendants intentionally failed to pay Plaintiffs all wages owed.
- 5
- 6 9) Whether Defendants retaliated against Plaintiffs for protesting their unlawful
- 7 employment practices and/or filing this lawsuit.
- 8
- 9 10) The nature and extent of remedies available to Plaintiffs.

9 **4. The jurisdictional basis of the case, citing specific statutes**

10 The Court has federal question jurisdiction over Plaintiff's claims pursuant to
11 28 U.S.C. § 1331. The FLSA, 29 U.S.C. §216(b) and (c), provides that the District Courts
12 have original jurisdiction over cases arising under the statute. The FMLA, 29 U.S.C.
13 2611(4)(A), provides that the District Courts have original jurisdiction over cases arising
14 under the statute. The Court has supplemental jurisdiction over the state law wage claims.
15 *See* 28 U.S.C. § 1367(a).

16 **5. Parties, if any, which have not been served, as well as parties which have**
17 **not filed an answer or other appearance.**

18 The parties agree the following Defendants have been timely served or have
19 voluntarily appeared in this action: Intelliquick Delivery, Inc.; Keith and Miriam Spizzirri;
20 Majik Leasing, LLC; Felicia Tavison, Jason Mittendorf; Jeffrey Lieber; and Steven
21 Anastase. Although an Answer to the Amended Complaint has been filed on behalf of
22 Defendants William and Jane Doe Cocchia, Jane Doe Mittendorf, and Jane Doe Anastase
23 (*see* Doc. 97), Intelliquick Defendants' counsel does not yet know if they will remain
24 counsel of record for these Defendants. In the event any of these Defendants contest
25 personal jurisdiction, Plaintiff will file a Motion for Extension of Time to serve these
26 additional Defendants. Intelliquick Defendants will not oppose any such Motion for
27 Extension of Time.
28

Defendants Transportation Authority, LLC and Robert F. Lorgeree have not filed an answer or other appearance. Default was entered as to these Defendants on May 25, 2012. (Doc. 36.)

6. The names of parties not subject to the court's jurisdiction

None.

7. Whether there are dispositive issues to be decided by pretrial motions and hearings including evidentiary hearings pursuant to *Daubert* and/or Fed.R.Evid. 702

PLAINTIFFS:

Plaintiffs anticipate filing a dispositive motion at the conclusion of the first phase of discovery that will address whether Defendants misclassified Plaintiffs and other similarly situated drivers as independent contractors.

Plaintiff may also file a dispositive motion at the conclusion of the second phase of discovery that may address some of the issues regarding whether any exemption applies under 29 U.S.C. § 213(a) and/or (b) as well as Plaintiffs' damages and Defendants' liability.

DEFENDANTS:

Defendants anticipate filing a dispositive motion after conducting sufficient discovery. This motion(s) will likely address Plaintiffs' FLSA claims, FMLA claims, Arizona wage statute claims, and all equitable claims asserted. More specifically, Defendants anticipate that their motion(s) will address liability, willfulness, and whether Plaintiffs engaged in compensable work that was not *de minimis* in nature.

8. Whether the case is suitable for reference to arbitration, to a master, and/or to a United States Magistrate Judge for all further proceedings

The parties do not believe this case is suitable for reference to arbitration, a special master or to a United States Magistrate Judge. The parties request the Court retain jurisdiction of this case.

9. The status of related cases pending before other judges of this court or before other courts

The parties are not aware of any related cases pending before this court or other courts.

1 10. **Suggested changes in the timing, form, or requirement for disclosure**
 2 **under Rule 26(a) Fed.R.Civ.P., including a statement of when initial**
 3 **disclosures were made or will be made**

4 The parties will exchange initial disclosures under Fed. R. Civ. P. 26(a) on or before
 5 **May 24, 2013.**

6 11. **Suggested changes, if any, on the limitations imposed by Fed.R.Civ.P. 30,**
 7 **31 and 33**

8 The parties propose that the IntelliQuick Defendants will be permitted to take 12
 9 depositions, collectively, and Plaintiffs will be permitted to take 12 depositions during the
 10 first phase of discovery. If the second phase of discovery is necessary, the Intelliquick
 11 Defendants will be permitted to take up to 12 additional depositions and Plaintiffs will be
 12 permitted to take up to 12 additional depositions during the second phase of discovery. If
 13 either party believes that additional depositions are necessary during the first phase of
 14 discovery, either party may request leave to take additional discovery for good cause if the
 15 parties cannot agree.

16 The parties agree that during the second phase of discovery, if necessary, the use of
 17 written interrogatories or depositions by written questions under Fed.R.Civ.P. 31 shall be
 18 used to the extent practical on the issue of damages for class members.

19 The parties agree that each subpart of any interrogatory that is related to and in
 20 furtherance of the primary interrogatory shall be considered a single interrogatory for the
 21 purpose of Fed.R.Civ.P. 33(a)(1). The parties anticipate that given the nature of the claims
 22 and defenses and the fact that discovery is suggested to be conducted in phases, they may
 23 need more than 25 interrogatories and will seek leave of the court before propounding more
 24 than 25 interrogatories if the parties cannot agree.

25 12. **The scope of discovery, the date discovery should be completed, and**
 26 **whether discovery should be conducted in phases or should be limited to**
 27 **or focused upon particular issues. For example, when dispositive motions**
 28 **will be filed counsel should consider limiting discovery to the issue to be**
 addressed in the motion until the court has ruled on it.

 The parties may seek discovery of any matter, not privileged, that is not otherwise
 objectionable and which is reasonably calculated to lead to the discovery of admissible
 evidence. Discovery will be completed in two stages. The first phase of discovery will

1 focus upon the issues of misclassification, exemptions, and class certification. The first
 2 phase of discovery shall be completed by **November 29, 2013**. The second phase of
 3 discovery will focus upon damages and any other remaining issues regarding liability. The
 4 second phase of discovery shall be completed by **July 25, 2014**.

5 **13. The final date for supplementation of discovery, that shall be scheduled**
 6 **two to three weeks after the close of discovery:**

7 The deadline to supplement discovery under Fed.R.Civ.P. 26(a)(3) shall be
 8 **September 13, 2014**. The parties shall not use this deadline to disclose new or additional
 9 information that was available but not disclosed prior to the discovery deadline. Regardless
 10 if the discovery deadline has passed, the parties will supplement all disclosures and
 11 responses “in a timely manner if the party learns that in some material respect the disclosure
 12 or response is incomplete or incorrect, and if the additional or corrective information has not
 13 otherwise been made known to the other parties during the discovery process or in writing,”
 14 pursuant to Fed.R.Civ.P. 26(e)(1).

15 **14. The Proposed Deadlines for:**

16 (a) The exchange of initial disclosure statements under Fed. R. Civ. P.
 17 26(a) shall be on or before **May 24, 2013**;

18 **A. Phase I:**

19 (b) Plaintiffs’ disclosure of any experts and their testimony under
 20 Fed.R.Civ.P. 26(a)(2) shall be on or before **August 9, 2013**, and Defendants’ disclosure of
 21 any experts and their testimony under Fed.R.Civ.P. 26(a)(2) shall be on or before
 22 **September 6, 2013**; disclosure of any rebuttal experts and their testimony shall be on or
 23 before **October 4, 2013**;

24 (b) the filing of procedural motions including motions to amend,
 25 consolidate, and join additional parties shall be completed on or before **June 14, 2013**;

26 (c) the first phase of discovery shall be completed by **November 29, 2013**;

27 (d) any dispositive motions relating to the issues from the first phase of
 28 discovery and any motions for class certification or motions for class decertification shall be
 filed on or before **December 6, 2013**;

B. Phase II:

(d) Plaintiffs' disclosure of any experts and their testimony under Fed.R.Civ.P. 26(a)(2) shall be on or before **April 25, 2014**, and Defendants' disclosure of any experts and their testimony under Fed.R.Civ.P. 26(a)(2) shall be on or before **May 23, 2014**; disclosure of any rebuttal experts and their testimony shall be on or before **June 20, 2014**;

(e) the second phase of discovery shall be completed by **July 18, 2014**;

(f) the deadline to supplement discovery under Fed.R.Civ.P. 26(a)(3) shall be **August 29, 2014**;

(g) any dispositive motions relating to the issues from the second phase of discovery shall be filed on or before **August 29, 2014**;

(h) if no dispositive motion is pending, the lodging of the Joint Proposed Pretrial Order shall be completed on or before **September 26, 2014**.

15. The estimated date the case will be ready for trial, the anticipated length of trial, and any suggestions for shortening the trial

Assuming no dispositive motion is pending, the parties anticipate the case will be ready for trial on **October 20, 2014**, and will take approximately 10 days to complete, depending upon the Court's rulings on any motions *in limine* or partially dispositive issues prior to trial. The parties do not have any suggestions at this time to shorten the length of the trial.

16. Whether a jury trial has been requested

Plaintiff requested a jury trial on all issues in this matter.

17. The prospects for settlement, including request for a settlement conference before another United States District Court Judge or Magistrate Judge, or other requests of the court of assistance in settlement efforts

The parties believe it may be too early in litigation to meaningfully discuss settlement at this time. The parties may be in a better position to evaluate settlement after the first phase of discovery is complete. However, the parties may contact the Court for assistance in settling this case at a later date.

1 **18. In class actions, the proposed dates for class certification proceedings and**
2 **other class management issues**

3 As the Court is aware, the Court granted conditional collective action certification of
4 Plaintiffs' FLSA claims on July 31, 2012. (Doc. 59.) The deadline for Defendants to
5 provide Plaintiffs with a list of "all names, addresses, and associated information" of
6 potential class members was **September 7, 2012**. (Doc. 64.) Plaintiffs contend Defendants
7 still have not provided Plaintiffs with a complete and accurate list of all potential class
8 members. As set forth in Plaintiffs' Motion to Enforce the Court's Orders (Doc. 100),
9 Plaintiffs have reason to believe there are putative class members who never received notice
10 of the collective action and that a more accurate list of putative class members and address
11 can be made available to Plaintiffs' counsel. The parties have met and conferred regarding
12 the issues raised in Plaintiff's Motion (Doc. 100) and the parties have agreed to the
13 following: (1) Plaintiff's will provide Defendants with a list of all class members' whose
14 Notices were returned undeliverable, (2) Plaintiff's previously provided Defendants with a
15 list of individuals who are or were drivers for IntelliQuick during the relevant time period
16 but whose names were not included on Defendants' original or supplemental lists of class
17 members, and (3) Defendants will search all available or accessible databases, compile and
18 disclose a list containing the names, addresses and associated information they currently
19 possess for each individual included on Plaintiff's lists described in (1) and (2) above.
20 Defendants have agreed to perform the search, compile and provide the information
21 described herein or provide Plaintiffs a written explanation why they are unable to provide
22 this information on or before **April 26, 2013**. Plaintiff reserves the right to seek further relief
23 from the Court if the information is not disclosed or is incomplete.

24 Furthermore, Plaintiff's anticipate there will be issues regarding equitable tolling
25 relating to one or more members of the opt-in class.

26 **19. Whether any unusual, difficult, or complex problems or issues exist which**
27 **would require that this case be placed on the complex track for case**
28 **management purposes**

1 The parties are not aware of any unusual, difficult, or complex problems or issues
2 existing warranting placing this case on the complex track.

3 **20. The E-mail address of respective counsel or parties**

4 Plaintiffs: Susan Martin, smartin@martinbonnett.com
5 Daniel Bonnett, dbonnett@martinbonnett.com
6 Jennifer Kroll, jkroll@martinbonnett.com
7 Mark Bracken, mbracken@martinbonnett.com

8 Defendants: Mark Ogden, mogden@littler.com
9 Rick D. Roskelley, rroskelley@littler.com
10 Cory Glen Walker, cgwalker@littler.com
11 Jeffrey S. Judd, jjudd@littler.com
12 Juliet S. Burgess, jburgess@littler.com

13 **21. Any other matters that counsel believe will aid the court in resolving this
14 dispute in a just, speedy, and inexpensive manner**

15 The parties agree that a protocol for the retention, preservation, and disclosure of
16 electronically stored information (ESI) will assist in a just, speedy and cost efficient
17 resolution of this matter. This protocol should address issues such a procedure for the
18 identification, retrieval and production of ESI and provisions for a claw-back agreement
19 under Fed.R.Evid. 502 and Fed.R.Civ. P. 26(b)(5). The parties continue to work on a joint
20 proposed ESI protocol and will submit a stipulated proposed order or their own, respective
21 proposed orders for the Court's review no later than **April 26, 2013**.

22 The parties will also submit a joint proposed protective order for the Court's
23 consideration by **April 26, 2013**.

24 Finally, the parties request a Rule 16 Scheduling Conference and are available on any
25 of the following dates: April 24, 25 and May 15, 16, 17, 28, 29, 30, or 31, 2013.

26 ///

27 ///

28 ///

///

///

DATED this 15th day of April, 2013.

s/ Daniel Bonnett

Susan Martin
Daniel Bonnett
Jennifer Kroll
Mark Bracken
MARTIN & BONNETT, P.L.L.C.
Attorneys for Plaintiffs

s/ Rick Roskelley

Mark Ogden
Rick D. Roskelley
Jeffrey S. Judd
Juliet S. Burgess
LITTLER MENDELSON, P.C.
Attorneys for Defendants
INTELLIQUICK DELIVERY, INC.; KEITH
and MIRIAM SPIZZIRRI; MAJIK LEASING,
LLC; FELICIA TAVISON; JASON
MITTENDORF AND JANE DOE
MITTENDORF; JEFFREY LIEBER;
WILLIAM "BILL" COCCHIA AND JANE
DOE COCCHIA; STEVEN ANASTASE
AND JANE DOE ANASTASE

I certify that the content of this document is acceptable to all persons required to sign the document and that authorization to electronically sign this document has been obtained.

s/ Daniel Bonnett

I hereby certify that 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, and mailed a copy of same to the following if non-registrants, this 15th day of April, 2013:

s/Kathy Pasley