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RE: **LEON NII-MOI, PHILLIP TERRY, TELESHA HUSKEY, TINA MOSLEY, AND RICHARD COPPOLA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED V. LINDEN BC, INC., ET AL.**
UNN-L-4344-15

Dear Counsel:

The current matter comes before the Court pursuant to a Notice of Motion for Entry of an Order Certifying the Class by Plaintiffs, Leon Nii-Moi, Phillip Terry, Tina Mosley, and Richard Coppola, individually and on behalf of all other similarly situated, represented by Bryan H. Mintz, Esq., of Mintz & Geftic, LLC and Christopher Marlborough, Esq., of the Marlborough Law Firm.

Defendants Linden BC, Inc., Big City Englewood, Inc., and Big City Automotive Inc., represented by Jill R. Cohen, Esq. and Michael D. Jones, Esq. of Eckert Seamans Cherin & Mellott, LLC, oppose this motion. Oral argument on this matter was held on December 15, 2017, wherein, this Court reserved its decision. This written opinion follows.

I. FACTUAL BACKGROUND

By way of background, the current matter arises out of contracts for delivery services that Defendant entered into with the Plaintiffs individually. Plaintiffs' Complaint alleges violations of the New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. 34:11-56a, et seq., for purportedly misclassifying employees as independent contractors and thereby failing to pay the appropriate minimum wage and overtime wages. Plaintiffs' Complaint also alleges a breach of the covenant of good faith and fair dealing.

On November 3, 2016 Plaintiffs filed a motion for class certification. After full briefing on the motion, the Court held a hearing on March 17, 2017. The Court denied the class certification motion without prejudice and directed Plaintiffs to refile the motion after sixty days to allow Defendant an opportunity to depose Plaintiffs about the operator agreements. Following the depositions of four of the named Plaintiffs, Plaintiffs re-filed their motion for class certification.

II. ARGUMENTS

At this time, the Plaintiffs are seeking certification as a class for "all delivery drivers classified directly by defendants as independent contractors during the period from June 1, 2014 through September 30, 2015." Plaintiffs assert that this action presents a classic case for class treatment. They believe that Defendants took common action against a large group of people that were employed as – what Plaintiff allege to be – misclassified independent contractors. In addition to making a Class comprised of delivery drivers that worked for Defendant from June 1, 2014 through September 30, 2015, Plaintiff seeks to certify the following claims:

- Whether the Defendants engaged in a pattern and practice of failing to pay the Class members minimum wages in violation of the NJ Wage and Hour Law;

- Whether the Defendants failed to comply with the posting requirements with respect to wages in violation of the NJ Wage and Hour Law;
- Whether the Defendants engaged in a pattern and practice of failing to pay the Class members overtime when they worked over forty (40) hours per week;
- Whether the Defendants' conduct violated the New Jersey Wage and Hour Law;
- Whether, in accordance with the requirements of the NJ Wage and Hour Law, the Defendants kept adequate records with respect to wages they paid to their employees;
- Whether Defendants misclassified the drivers as independent contractors rather than employees during the Class period;
- Whether Defendants failed to pay minimum wage due to Plaintiffs and other similarly situated drivers during the Class period;
- Whether, in accordance with the requirements of the NJ Wage and Hour Law, the Defendants furnished the Plaintiffs and those similarly situated with statements of wages that are compliant with the law; and
- Whether Defendants failed to reimburse the class members for uncompensated expenses including gas and mileage.

Plaintiffs argue they have met the statutory requirements of numerosity, commonality, typicality, and adequacy to certify a class. Plaintiffs assert there are more than 100 proposed Class members, therefore, the numerosity prong is satisfied. Plaintiffs contend that all Class members share numerous questions of law and fact. Plaintiffs claimed common questions of law include: (1) the enforceability of the independent contractor agreements that all class members were required to sign as a condition of their engagement; (2) the proper classification of class members as employees or independent contractors; and (3) the appropriate formula for determining damages. Plaintiffs claimed common questions of fact include: (1) Defendants' common misclassification scheme; (2) Defendants' common compensation scheme and non-reimbursement policy; and (3) Defendants' failure to comply with the terms of their own misclassification agreements. Plaintiff further maintains that the U.S. Department of Labor concluded that the recitations in the misclassification agreements concerning the drivers' independence was a sham. See pg. 5 of U.S. Department of Labor FLSA Case Narrative.

Regarding the typicality requirement, Plaintiffs argue that Defendants subjected both the Named Plaintiffs and the rest of the Class members to the same fraudulent misclassification

scheme, sham compensation system and non-reimbursement policy, and required them to execute essentially identical misclassification agreements. Plaintiffs posit that none of the Named Plaintiffs are subject to any unique defenses that would render them atypical of other class members.

Plaintiffs argue that even if the Defendants can satisfy prong three of the "ABC" test to determine whether a worker is an employee or independent contractor, Defendants cannot satisfy the other two prongs. In regards to the "control" prong, Plaintiffs contend that although the independent contractor agreements stated workers would not be subject to control, Defendants actually controlled all of the Class members. Plaintiffs assert that they did not have any control over the hours they worked, the days they worked, or the routes they worked. Plaintiffs maintain they were required to check in and out each day with the central dispatching stations and were required to use Defendants' electronic tablet devices that monitored drivers on their route and enable Defendant Big City to confirm deliveries with customers and supervise drivers. Regarding the second prong of the "ABC" test, Plaintiffs argue that automobile parts delivery service is an essential part of Defendants' usual course of business. Further, Plaintiffs argue their work was not performed outside of Defendants' business locations because all of the drivers were required to pick up their routes from Defendants' dispatch stations at one of more of Big City's five New Jersey locations and return to the dispatch center multiple times throughout the day to pick up their next delivery.

In opposition, Defendants argue that the Plaintiffs have failed to properly define a class because the proposed class cannot meet the statutory requirements of numerosity, commonality, typicality and adequacy. Defendants argue the evidence is clear that the vast majority of defenses will be highly individualized to each plaintiff, specifically those pertaining to the "ABC" test that is used in determining whether an independent contractor is properly classified as such. Defendants assert there are material differences between each proposed Named Plaintiff concerning central issues in this matter, such as: the location at which they are based; their typical hours; their start time for the day; their typical number of "points" per day; how they tracked their hours and trips; the number of miles driven per day; the number of deliveries made per day; the amount of their weekly paychecks; the process by which they took time off from work; whether or not they took a lunch break; how they ended their delivery services on a day they performed

services; whether they checked in with the dispatch office at the end of each day; and their understanding of the points system.

Further, Defendants argue that Plaintiffs have failed to demonstrate predominance and superiority, as well as that they have not demonstrated that notice consistent with due process is possible. Defendants contend that the majority of issues Plaintiffs must establish to prove their claims require individual analysis that predominate the landscape of this case.

Defendants also argue this matter should be transferred to New York pursuant to the governing agreement.

III. LAW AND ANALYSIS

As an initial matter, this Court will not consider anything in the USDOL FLSA Case Narrative outside of factual statements supported by the Named Plaintiffs.

a. CLASS ACTIONS GENERALLY

> When making certification determinations, "the best policy" is to interpret the class-action rule "so as to promote the purposes underlying the rule." 5 James W. Moore et al., Moore's Federal Practice -- Civil § 23.03 (3d ed. 1997). Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants. See, e.g.,Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980); In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 430 (1983).

Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 104 (2007). Additionally, when deciding whether to certify a class, the Court will accord the Plaintiff every favorable view that may be ascertained from the complaint and the record. Id. at 95.

The class action rule should be liberally construed. Delgozzo v. Kenny, 266 N.J. Super. 169, 179 (App. Div. 1993). Indeed, a class action should be permitted unless there is a clear showing that it is inappropriate or improper. Lusky v. Capasso Bros., 118 N.J. Super. 369, 373 (App. Div.), certif. denied, 60 N.J. 466 (1972).

b. NEW JERSEY COURT RULE 4:32-1(A)

R. 4:32-1(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

i. NUMEROSITY

Under the first prong, the definition of the proposed class satisfies the numerosity requirement of the class action rule. R. 4:32-1(a)(1) requires that the potential class be comprised of numerous individuals. See Saldana, 252 N.J. Super. at 193 (certifying a potential class of 81 members); In re Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, n78 (D. Md. 1991) (noting that a "class as few as 25 to 30 members raises the presumption that joinder would be impracticable."). No set number of plaintiffs is required to maintain a class action. See Stewart v. Abraham, 275 F.3d 220, 226 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action . . . "). Nor is it "necessary that the exact numbers comprising the class be specified or that the members be identified." Kronisch v. Howard Savings Ins., 133 N.J. Super. 124, 132 (Ch. Div. 1975), rev'd on other grounds, 143 N.J. Super. 423 (App. Div. 1976). Here, Plaintiffs assert the class is composed of more than one hundred drivers. Defendants admitted at oral argument that although they disagree with the exact amount of drivers, they concede there were

more than sixty. Accordingly, this Court finds that Plaintiffs have satisfied R. 4:32-1(a)'s numerosity requirement.

ii. COMMONALITY

Under the second prong, the inquiry is if common questions exist among the members. The class as a whole is only required to raise one common question of law or fact. Gross v. Johnson & Johnson, 303 N.J. Super. 336, 342 (Law Div. 1997). "Numerous courts have found that wage claims are especially suited to class litigation – perhaps 'the most perfect questions for class treatment' – despite differences in the hours worked, wages paid, and wages due." Ramos v. SimplexGrinnell LP, 796 F. Supp. 2d 346 (E.D.N.Y. 2001) quoting Iglesias-Mendoza v. La Belle Farm, Inc. 239 F.R.D. 41, 49 (E.D.N.Y. 2010) and citing e.g. Alleyne v. Time Moving & Storage Inc., 264 F.R.D. 41, 49 (E.D.N.Y. 2010).

This Court finds that the proposed class members share common questions of law and fact. Common questions of fact include: Defendants' common classification scheme of labeling all drivers as independent contractors; Plaintiffs signing of Defendants' Operating Agreement for Delivery Services; Defendants' common compensation scheme, i.e., the point system; and Defendants' non-reimbursement policy. Common questions of law include: the enforceability of the Operator Agreement for Delivery Services that all proposed class members signed; the proper classification of class members as employees or independent contractors; and, if determined to be employees, the appropriate formula for determining damages. Therefore, the Plaintiffs satisfy the requirement that class members share at least a single question of law or fact.

iii. TYPICALITY

Under the third prong, a plaintiff's claim is typical of the claims of the class if it arises from the same event or course of conduct that has given rise to the claims of the other class members. Gross, 303 N.J. Super. at 340. Defendants argue they have unique defenses against the proposed class representatives based on the application of New Jersey's "ABC" test to determine independent contractor status. See, Hargrove v. Sleepy's, LLC, 220 N.J. 2889, 305 (2015). This Court disagrees. This Court finds that Defendants subjected the proposed class representatives

and all potential class members to the same classification as "independent contractors"; the same "points system" to determine compensation; the same non-reimbursement policy; and required all to sign essentially identical "Operator Agreement[s] for Delivery Services." Therefore, this Court finds that the Named Plaintiffs are not subject to any unique defenses that would render them atypical of other class members. As discussed about commonality, there is no doubt that the proposed members of the class are alleging facts that arose from the same course of events. As such, the typicality prong is satisfied.

iv. ADEQUACY

Elements of meeting this requirement include the interests of the named representatives being co-extensive with the interests of the other members of the class and assurance that the representatives will vigorously prosecute the interests, which requires the assistance of responsible and able counsel. Gross, 303 N.J. Super. at 343; see Delgozzo, 266 N.J. Super. at 188.

"The defendant bears the burden of demonstrating that the proposed representation would be inadequate." Delgozzo, 266 N.J. Super. at 188. New Jersey Courts, however, have opined two factors for fulfilling the adequacy requirement. First, Plaintiffs' attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and second, the Plaintiff must not have interests antagonistic to those of the class. Delgozzo v. Kenny, 266 N.J. Super. 169, 188 (App. Div. 1993).

There has not been any argument as to the inadequacy of counsel. Further, counsel for plaintiffs have submitted proofs of their experience in handling similar claims. Defendants have also not produced any evidence that the Named Plaintiffs have any interests antagonistic to the remainder of the proposed class. Therefore, Plaintiffs satisfy the adequacy prong.

c. WHETHER THE CASE QUALIFIES FOR CLASS ACTION TREATMENT PURSUANT TO RULE 4:32-1(B)(3).

Based on the above, and assuming that the prerequisites of R. 4:23-1(a) have been satisfied, it would then necessitate consideration of R. 4:32-1(b)(3), where the court must determine whether the case qualifies for class action treatment. Rule 4:32-1(b) provides that once a class is certified,

an action may be maintained as a class action if it satisfies one of the three additional factors. Plaintiff relies on R. 4:32-1(b)(3), - the Predominance and Superiority requirement - which provides:

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.

N.J. Court Rules, R. 4:32-1.

Weighing these factors, this Court finds Plaintiffs satisfy the superiority and predominance requirements and each of the factors relevant to that inquiry.

i. PREDOMINANCE

> A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them. As a matter of efficient judicial administration, the goal is to save time and money for the parties and the public and to promote consistent decisions for people with similar claims. Fed.R.Civ.P. 23 Advisory Committee Note, 39 F.R.D. 98, 102-03 (1966). Sometimes the common questions may not warrant certification of a matter as a class action, but in other cases, they will be sufficient to sustain a

> class action even if they do not dispose of the entire matter. 7A Wright & Miller, Federal Practice & Procedure § 1778 at 54 (1972). If a "common nucleus of operative facts" is present, predominance may be found. Id. at 53. From another perspective, the basic question is whether the potential class, including absent members, seeks "to remedy a common legal grievance." 3B Moore's Federal Practice, para. 23.45[2] at 23-332 (1982).

In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 430-31 (1983).

Defendants contend that there are factual differences between the class representatives themselves as well as between the Named Plaintiffs and the proposed class members, which would require numerous mini-trials to resolve the independent contractor status issue. This Court disagrees. The Defendants' reliance on differences between the Named Plaintiffs, such as which location they worked at, the number of deliveries per day, the number of miles driven per day, and the amounts already paid to each class member fall on deaf ears. These facts are irrelevant to the "ABC" test, and relate to the difference in damages among proposed class members. That difference in damages is a matter of arithmetic that could be calculated by using a common formula to determine individual damages for each proposed class member, rather than entertain a hundred individual lawsuits. The court in Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88 (2007) opined:

> Individual questions may yet remain, such as: whether particular employees voluntarily missed rest and meal breaks; why employees who worked off-the-clock did not avail themselves of the curative time-clock procedures; how much time was worked off-the-clock; whether employees worked off-the-clock with the expectation of compensation; and how much in damages employees suffered, if any. However, the mere existence of remainder issues is insufficient to defeat class certification in New Jersey, see, e.g., Strawn, supra, 140 N.J. at 67-69, 567 A.2d 420; Varacallo, supra, 332 N.J. Super. at 45, 752 A.2d 807; Fiore, supra, 151 N.J. Super. at 529, 377 A.2d 702, and elsewhere, see, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988) (holding that remaining

> questions peculiar to individual members of class do "not dictate the conclusion that a class action is impermissible"); Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 189-90 (4th Cir. 1993) (finding predominance and certifying asbestos class action).

Iliadis, supra, at 112.

This Court finds that a class action would be the most efficient manner in which to adjudicate the claims of over sixty class members, all of whose injuries arise from a common nucleus of operative facts. While their damages may need to be considered on an individual basis, the Court in Iliadis was able to determine what was appropriate for over 72,000 workers over multiple years. Here, the issues are more limited in time, amount, and locations than they were in Iliadis, and this Court is satisfied that the common issues predominate.

ii. SUPERIORITY

The superiority requirement necessitates:

> (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method."

In re Cadillac, supra, 93 N.J. at 436.

In this matter, putative class members would be able to submit their claims to the Wage Collection Division of the Department of Labor pursuant to the Wage and Hour Law, N.J.S.A. 34:11-56a to -56a30. However, in Iliadis, the Court considered multiple factors in determining whether a class action or the Wage Collection Division of the Department of Labor would be more appropriate.

First, the Iliadis Court considered the value of each members' claim and the independent financial resources of the individual plaintiffs. Here, it appears that some of these claims may be more than nominal, but it also appears that the proposed class may not be able to financially support independent litigation.

Second, the Iliadis Court discussed the administrative framework, which they believed may prove arduous for the aggrieved employees. Similarly, the process tends to favor those with greater resources and litigation experience, which could potentially deter proposed class members from acting.

Third, much like Iliadis, unitary adjudication would be fair to defendant because the claims do arise out of the same nucleus of operative facts. Defendants would have the chance to defend themselves with regards to the allegations presented under the NJWHL.

In Iliadis, the Court also makes reference to the applicable statutes of limitations, but those are not presently at issue here.

Based on the foregoing, Plaintiffs have made an informed consideration to the available alternative methods of adjudication. Additionally, this Court is satisfied with the comparison provided by the Plaintiffs as to why a class action would be the more efficient method of adjudication. Having the class claims in a single forum is in the best interest of all parties as it allows the parties to streamline the discovery process, and resolve all disputes in an efficient and cost effective manner. Further, Courts have noted the importance of class actions in the employment context given the fear employees may have of retaliation from the employer. See, e.g., Adames v. Mitsubishi Bank, Ltd., 133 F.R.D. 82, 89 (E.D.N.Y. 1989) (holding that the numerosity requirement was satisfied "[s]ince here a number of putative members are current employees, the concern for possible employer reprisal action exists and renders the alternative of individual joinder less than practicable.) Based on the submissions provided, Plaintiffs are choosing the appropriate mechanism for adjudicating this claim. This Court also finds that there are likely to be no difficulties in managing this action as a class action, since the issues facing the class are uniform. Therefore, Plaintiffs have satisfied the superiority requirement.

For the preceding reasons, common issues of fact and law predominate over individual issues, and the class action procedure is superior to individual actions in this matter. Accordingly, this Court finds that Plaintiffs have satisfied R. 4:32-1(b)(3)'s predominance and superiority requirements.

There is no legal mechanism where this Court can transfer an action to the court of a foreign state. The procedurally improper request for transfer by Defendants is denied.

IV. HOLDING

Whereas, for the reasons stated herein, Plaintiffs' motion to certify class is hereby, **GRANTED**.

/S/ Mark P. Ciarrocca

Hon. Mark P. Ciarrocca, J.S.C.