NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christerphor Ziglar, et al., Plaintiffs, v. Express Messenger Systems Incorporated, Defendant.	No. CV-16-02726-PHX-SRB **ORDER**

At issue is Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings, and Compel Arbitration ("MTD") (Doc. 35). The Court also considers Plaintiffs' Motion for Conditional Collective Action Certification and Court-Supervised Notice Pursuant to 29 U.S.C. § 216(b) ("MTC") (Doc. 33).

I. BACKGROUND

Plaintiffs brought this case as a class and collective action on behalf of delivery drivers in Arizona and neighboring states. Specifically, Plaintiffs allege that Defendant misclassified its drivers as independent contractors. (Doc. 29, Am. Collective and Class Action Compl. ("CAC") ¶ 1.) Plaintiffs allege Defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to pay its drivers minimum wage and overtime. (*Id.* ¶ 2.) Plaintiffs also allege that Defendant has taken unlawful deductions and failed to pay minimum wage to delivery drivers in Arizona in violation of Arizona Revised Statutes ("A.R.S.") § 23-531 *et seq.* (*Id.* ¶ 3.) Defendant is a corporation that provides package delivery services to businesses and individuals. (*Id.* ¶ 10; Doc. 36,

Def.'s Answer to CAC ("Answer") ¶ 10.) Defendant contracts with Regional Service Providers ("RSPs") to provide these delivery services. (CAC ¶ 14; Answer ¶ 14.) Plaintiffs allege that the RSPs then subcontract with delivery drivers to make the actual deliveries. (CAC ¶ 15.) Plaintiffs further allege that although the written contracts between the drivers and the RSPs state that the drivers are independent contractors, the economic reality is that Defendant supervises and controls the delivery process to an extent that the drivers are really Defendant's employees. (*Id.* ¶¶ 15-17.)

Subcontracting Concepts CT LCC ("SCI") is a third party administrator that contracts with "Carrier and Logistics Clients", like Defendant, as well as "Owner Operator Clients", like the RSPs and Plaintiffs themselves, in order to connect both types of clients as well as handle administrative details in their relationships. (Doc. 35-1, Decl. of Dominick Simone[1] in Supp. of MTD ("Simone Decl.") ¶¶ 2-3.) Defendant and the RSPs with which Plaintiffs contracted entered into agreements with SCI that were operative during the relevant period. (MTD at 10.) Plaintiffs also individually entered into identical Owner Operator Agreements with SCI that contained arbitration provisions and signed Independent Contractor Acknowledgement Forms that included opt-out provisions for the arbitration provision. (Simone Decl. ¶¶ 10-11, 13, 15; *see also* Doc. 35-1, Ex. A – Owner/Operator Agreement signed by Plaintiff Christerphor Ziglar ("Owner/Operator Agreement"); Doc. 35-1, Ex. B – Independent Contractor Acknowledgement Form signed by Plaintiff Ziglar ("Acknowledgement Form").)[2] The Arbitration Provision in the Owner/Operator Agreement provides, in part:

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[1] Dominick Simone is the Vice President of Customer Service for SCI. (Simone Decl. ¶ 1.)

[2] Plaintiffs Leah Candelaria and Maurice Meintzer signed identical Owner Operator Agreements and Independent Contractor Acknowledgement Forms. (*See* Doc. 35-1, Ex. C – Owner/Operator Agreement signed by Plaintiff Candelaria; Doc. 35-1, Ex. D – Independent Contractor Acknowledgement Form signed by Plaintiff Candelaria; Doc. 35-1, Ex. E – Owner/Operator Agreement signed by Plaintiff Meintzer; Doc. 35-1, Ex. F – Independent Contractor Acknowledgement Form signed by Plaintiff Meintzer.) Because the Owner/Operator Agreements and Independent Contractor Acknowledgement Forms are identical, the Court will refer only to Exhibits A and B when referencing them. The Court will refer to the arbitration provisions at issue in these documents as the Arbitration Provision.

> In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, or service arrangement between Owner/Operator and SCI's clients, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. . . .
>
> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts within the locality of the Owner/Operator's residence shall be finally settled by arbitration in accordance with the Federal Arbitration Act.
>
> Neither you nor SCI shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.
>
> The arbitration panel shall be made up of three (3) people. . . .
>
> The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. All parties shall bear their own costs for arbitration and no attorney's fees or other costs shall be granted to either party.

(Owner/Operator Agreement at 10-11.) Defendant moves to dismiss this case and compel individual arbitration in accordance with the Arbitration Provision. (MTD at 6.) Plaintiffs move to conditionally certify collective action and Court-supervised notice to putative class members. (MTC at 2.) The Court will first consider Defendant's Motion.

II. LEGAL STANDARDS AND ANALYSES

A. Motion to Dismiss/Compel Arbitration

The Federal Arbitration Act ("FAA") "provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009) (quoting 9 U.S.C. § 2). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). "The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "If the court finds that an arbitration clause is valid and enforceable, the court should stay

or dismiss the action to allow the arbitration to proceed." *Kam–Ko Bio–Pharm Trading Co. Ltd–Australasia v. Mayne Pharma*, 560 F.3d 935, 940 (9th Cir. 2009). In determining whether a valid agreement to arbitrate exists, the Court applies the same standard used when resolving summary judgment motions pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 939 (D. Ariz. 2011); *see also Perry v. NorthCentral University, Inc.*, No. CV-10-8229-PCT-PGR, 2011 WL 4356499, *3 (D. Ariz. Sep. 19, 2011) (citing multiple cases that a motion to compel arbitration is resolved under the summary judgment standard). Therefore, the Court views all evidence in favor of the non-moving party to determine whether a valid arbitration agreement exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (explaining the summary judgment standard); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (same).

Plaintiffs argue that the Court should deny Defendant's Motion for five reasons: 1) the FAA does not apply because Plaintiffs qualify for the transportation workers exemption; 2) Defendant is not a third-party beneficiary to the Arbitration Provision and therefore may not enforce it; 3) the dispute falls outside the scope of the Arbitration Provision; 4) the Arbitration Provision is substantively unconscionable because of the provisions requiring cost splitting, prohibiting statutory damages, and prohibiting awards of attorneys' fees; and 5) the class action waiver is unconscionable in violation of the FLSA and the National Labor Relations Act. (Doc. 43, Pls.' Opp'n to MTD ("Resp. MTD") at 2-3.) The Court need only consider the fourth reason given by Plaintiffs. Plaintiffs argue that the Arbitration Provision is unconscionable because it prohibits statutory damages, it prohibits the award of attorneys' fees, and it requires the parties to split the costs of arbitration. (Resp. MTD at 17.) The Court agrees. Under Arizona law[3] "[a]n unconscionable contract is unenforceable." *Clark v. Renaissance W., LLC*, 307 P.3d 77, 79 (Ariz. Ct. App. 2013). "A contract may be substantively unconscionable when the

[3] Defendant does not dispute that the validity of the Arbitration Provision is governed by Arizona law. (*See generally* Doc. 47, Reply in Supp. of MTD ("Reply MTD").)

terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties." *Id.* "[A] claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies." *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) (in banc).

Plaintiffs argue that the Arbitration Provision is unconscionable because it bars their "access to statutory remedies and penalties afforded to them under federal and Arizona law." (Resp. MTD at 17.) Specifically, they argue that the Provision's bar against punitive and equitable relief prevents them from recovering liquidated damages and treble damages available under the FLSA and Arizona wage laws. (*Id.*); *see also* 29 U.S.C. §216(b) (providing for liquidated damages to a prevailing FLSA plaintiff); A.R.S. § 23-355 (providing for treble damages for unpaid wages). Defendant argues that the Arbitration Provision does not prevent recovery of these damages because they are not punitive. (Reply MTD at 21.) Defendant is correct that liquidated damages under section 216(b) of the FLSA are characterized as compensatory in nature and are therefore not barred by the Arbitration Provision. *Local 246 Utility Workers Union of Am. v. S. Ca. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996) ("These liquidated damages represent compensation, and not a penalty."). Arizona courts, however, have characterized the treble damages provision of A.R.S. § 23-355 as punitive in nature because it is designed to punish employers who withhold wages without reasonable justification or who attempt to defraud employees of wages earned. *Crum v. Maricopa Cty.*, 950 P.2d 171, 175 (Ariz. Ct. App. 1997) (listing cases in which Arizona courts have characterized wage dispute treble damages as punitive). Therefore, the Arbitration Provision would prevent recovery of these damages. Arbitration agreements are unenforceable if they fail "to provide for all of the types of relief that would otherwise be available in court." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002). Therefore, the Arbitration Provision at issue here is unconscionable because it fails to provide for treble damages that are otherwise available under A.R.S. § 23-355.

Plaintiffs also argue that the Arbitration Provision's prohibition against attorneys' fees and costs awards is unconscionable because it prevents Plaintiffs from recovering an award otherwise available under the FLSA. (Resp. MTD at 18.) Defendant failed to dispute this argument in its Reply. (*See* Reply MTD at 21-23.) Regardless, the Court agrees with Plaintiffs. Fees are awarded in FLSA cases primarily to ensure that what are often small awards of withheld pay are not diminished by fees owed to plaintiffs' attorneys. *See Zhou v. Wang's Restaurant*, No. C 05-0279 PVT, 2007 WL 2298046, *2 (N.D. Cal. Aug. 8, 2007). The potential for a fee award allows plaintiffs to obtain counsel and vindicate their rights when they would otherwise be unable to do so. Therefore, the Court concludes that the prohibition on attorneys' fees in the Arbitration Provision interferes with Plaintiffs' ability to vindicate their rights under the FLSA and is therefore unconscionable.

Finally, Plaintiffs argue that the Arbitration Provision is unconscionable because the cost-splitting provision denies them the opportunity to vindicate their rights. (Resp. MTD at 18.) Under Arizona law, "[a]n arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to 'deny a potential litigant the opportunity to vindicate his or her rights.'" *Clark*, 307 P.3d at 79 (quoting *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005)). "The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive." *Id.* at 80. In determining whether arbitration would be prohibitively expensive, courts consider the cost to arbitrate, evidence showing whether the party can pay the costs to arbitrate, and whether the arbitration agreement or rules of arbitration permit a party to waive or reduce the costs of arbitration based on financial hardship. *Id.* Plaintiffs have produced evidence showing that arbitration of their wage claims before a three-arbitrator panel would likely cost at least $56,000. (Doc. 43-5, Decl. of Tod F. Schleier in Opp'n to MTD ¶¶ 4-10.) Therefore, pursuant to the Arbitration Provision which requires that "all parties shall bear their own costs for arbitration," Plaintiffs would have to pay $28,000 each to arbitrate their claims

individually as required by the class action waiver. Plaintiffs have also produced evidence showing that they lack the financial resources to pay their arbitration costs. (Doc. 43-2, Decl. of Christerphor Ziglar in Opp'n to MTD ¶¶ 8-10; Doc. 43-3, Decl. of Leah Candelaria in Opp'n to MTD ¶¶ 11-18; Doc. 43-4, Decl. of Maurice Meintzer in Opp'n to MTD ¶¶ 11-18.) Finally, the Arbitration Provision itself does not provide for a reduction in costs for financial hardship and contains no reference to the rules that will govern the arbitration. Therefore, the Court concludes that Plaintiffs have met their burden to show that arbitrating their claims would be prohibitively expensive and would prevent them from vindicating their rights. As such, the cost-splitting provision is also unconscionable.

Plaintiffs argue that the Court should hold the entire Arbitration Provision unconscionable and unenforceable because of the unconscionable portions. (Resp. MTD at 19.) Defendant argues the Court should sever the offensive portions of the Arbitration Provision and enforce the remainder. (Reply MTD at 22-23.) In Arizona, "[t]he equitable principles underlying codification of unconscionability are part and parcel of the statute." *Maxwell*, 907 P.2d at 60.

> [C]ourts will not lend their hand to the enforcement of oppressive contracts, and the statute mandates that Arizona courts must either (1) refuse to enforce an unconscionable contract, (2) refuse to enforce any unconscionable portion of a contract, or (3) limit the application of any unconscionable clause of a contract to avoid any unconscionable result.

Id. (citing A.R.S. § 47-2303(A)). The Arbitration Provision at issue here is so permeated by unconscionability that the Court refuses to enforce it. *See Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2014) (district court did not abuse its discretion by refusing to enforce arbitration agreement with five unconscionable provisions); *Newton v. Am. Debt Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2013) (district court did not abuse its discretion by refusing to enforce arbitration agreement with four unconscionable provisions). The extent of unconscionability here would force the Court to rewrite, rather than interpret, the parties' Arbitration Provision. *See Capili v. Finish Line, Inc.*, No. 15-16657, 2017 WL 2839504, at *2 (9th Cir. July 3, 2017)

("Although the [FAA] articulates a preference for the enforcement of arbitration agreements, employers may not stack the deck unconscionably in their favor to discourage claims, then force courts 'to assume the role of contract author rather than interpreter.'" (quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003))). Therefore, the Court denies Defendant's Motion to dismiss the case and compel arbitration.

B. Motion for Conditional Collective Action Certification

Section 216(b) of the FLSA provides that one or more employees may bring a collective action "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To determine whether plaintiffs are "similarly situated," courts in this circuit have applied a two-step approach for making a collective action determination. *See Kesley v. Entertainment U.S.A. Inc.*, 67 F. Supp. 3d. 1061, 1065 (D. Ariz. 2014). At the "notice stage," the court makes an initial determination of whether to conditionally certify the class in order to notify potential class members. *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 925 (D. Ariz. 2010). The plaintiff carries the burden of showing that members of the proposed class are similarly situated. (*Id.*) The standard at this initial stage is a "lenient one that typically results in certification." *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010). The court "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Colson*, 687 F. Supp. 2d at 925 (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)). Courts use their discretion when examining the particular allegations and relevant circumstances of a case to determine whether a plaintiff sufficiently demonstrated potential members are similar. *Kelsey*, 67 F. Supp. 2d at 1068. At the second stage, in response to a motion to decertify the class and typically after the close of discovery, the court re-evaluates certification and applies a more rigorous analysis. *Colson*, 687 F. Supp. 2d at 925.

Plaintiffs move this Court to conditionally certify a class consisting of:

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

(MTC at 3.) Plaintiffs allege that the members of the proposed class are similarly situated because they were all employed by Defendant through the same "fissured employment" scheme in which Defendant attempted to distance itself from the proposed class by requiring them to contract through RSPs but, in reality, maintained almost total control over their work. (*Id.*) Plaintiffs allege that, under this scheme, the drivers all had substantially similar duties, were all classified as independent contractors, were all subject to substantially the same payment structure in which they were paid per delivery (with or without base pay), and were not guaranteed minimum wage or paid for their overtime work. (*Id.* at 3-4.) Defendant argues that Plaintiffs have failed to show that the putative class members are similarly situated and subject to a single policy or plan because all delivery drivers contracted through various RSPs that had power to classify the drivers as independent contractors or employees and set the terms of the relationship. (Doc. 44, Def.'s Memorandum of Points and Authorities in Opp'n to MTC ("Resp. MTC") at 13-14, 15-18.) Defendant also argues that the Court cannot certify a collective action based only on an allegation that all putative members were similarly misclassified.[4] (*Id.* at 14-15.) Finally, Defendant argues that Plaintiffs have not shown that each member of the putative collective worked more than 40 hours in a workweek or earned less than minimum wage. (*Id.* at 18-19.)

The Court concludes that Plaintiffs' evidence is sufficient as a threshold matter to show that Defendant has established a common policy or plan of fissured employment whereby drivers are required to contract with RSPs as independent contractors even

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[4] The Court rejects this argument because, as explained more fully below, Plaintiffs' allegations claim that putative class members performed the same core job duties, that they are subject to similar rules and controls on their work, that they often work more than 40 hours in a week, and that they do not receive overtime or a guaranteed minimum wage. Therefore, their allegations of being similarly situated are not limited to allegations of being misclassified alone.

though Defendant maintains control over their work. The Court also finds that the putative class members are similarly situated with respect to this policy or plan. Along with the factual allegations contained in the CAC, Plaintiffs have submitted declarations claiming that they and other delivery drivers were substantially controlled by Defendant in their work and that they were regularly required to work more than 40 hours per week without overtime pay. (*See* Doc. 33-3, Ex. C – Decl. of Maurice Meintzer in Supp. of MTC ("Meinzter Decl."); Doc. 34, Ex. D – Decl. of Christerphor Ziglar in Supp. of MTC ("Ziglar Decl."); Doc. 33-4, Ex. E – Decl. of Leah Candelaria in Supp. of MTC ("Candelaria Decl.").) Plaintiffs' declarations also state that they all contracted with multiple RSPs and that the rules and regulations that governed their work duties remained the same. (Meintzer Decl. ¶ 4; Ziglar Decl. ¶ 3; Candelaria Decl. ¶ 4.) Although Defendant argues that Plaintiffs rely on evidence that lacks specificity and may not be admissible at trial, the Court concludes that it is sufficient under the relaxed evidentiary standards that are applied at the initial stage of collective action certification. *See Shia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 275 (N.D. Cal. 2015) (noting that although some courts have concluded that only admissible evidence may be considered at this stage, "a majority of courts [in the Ninth Circuit] have determined that evidentiary rules should be relaxed at this stage"); *see also Syed v. MI,* LCC, No. 1:12-CV-1718-AWI-MJS, 2014 WL 6685966, at *6 (E.D. Cal. Nov. 26, 2014) (concluding that evidentiary rules are not strictly applied at the conditional certification stage). The Court also concludes that whether the proposed class members are not similarly situated in the performance of their primary responsibilities and how much control Defendant had over their daily work versus the RSPs with which they contracted are issues more appropriately decided on a more developed factual record. *See Colson*, 687 F. Supp. 2d at 926 ("It is not the Court's role to resolve factual disputes . . . or . . . decide substantive issues going to the ultimate merits . . . at the preliminary certification stage of an FLSA collective action." (quotation marks omitted)). The Court rejects Defendant's argument that Plaintiffs must show that all putative class members worked more than 40 hours per

week and made less than minimum wage for the same reason. The Court concludes that Plaintiffs have provided "substantial allegations" that they and the putative class members are similarly situated because they were subject to the same "fissured employment" scheme, performed the same core job duties, and were subject to Defendant's control in their performance of these duties. Therefore, the Court grants Plaintiffs' Motion to conditionally certify collective action.

C. Notice

Plaintiffs have attached their proposed Notice and Opt-in Forms to their Motion. (*See* Doc. 33-1, Ex. A – Notice Form; Doc. 33-2, Ex. B – Opt-in Form.) Plaintiffs request the Court enter an order certifying their proposed class; requiring Defendant to identify all current and former delivery drivers who worked during the class period and produce their names, addresses, email addresses, telephone numbers, dates they made deliveries[5], birthdates, and the last four digits of their Social Security Numbers; authorizing Plaintiffs to mail, email, and text message the Notice to the person identified; granting 90 days for identified drivers to opt-in; and directing Defendant to post the Notice and Opt-in Forms in conspicuous places at its Phoenix warehouse. (MTC at 17-18.) Defendant argues that Plaintiffs' production request is overly broad and unduly burdensome and requests the Court limit it. (Resp. MTC at 19.) Defendant, however, fails to specify which parts of the request should be limited, and Plaintiffs have cited authority from several courts ordering the production of addresses, email addresses, and telephone numbers. (MTC at 16.) Therefore, the Court will order the production requested by Plaintiffs with the exception of the birthdates, last four digits of the Social Security Numbers, and delivery dates of the delivery drivers because the Court can see no reason why Plaintiffs need this information to provide the drivers with notice of this action.

Defendant also raises several objections to Plaintiffs' proposed Notice Form. (Resp. MTC at 20.) First, Defendant objects to language in the Notice that states that

[5] Although this information may be relevant and appropriately discoverable at a later stage in this action, it is not necessary for the purpose of providing notice to putative collective members.

putative class members "worked as [] delivery driver[s] for OnTrac in Arizona during the last three years and were classified as [] independent contractor[s]" arguing that it misrepresents the relationship between the delivery drivers, the RSPs, and Defendant. (*Id.*) Defendant suggests replacing this language with the following: ". . . you have performed SP services for a[] Regional Service Provider who has contracted work with OnTrac at some point during the last three years." (*Id.*) Plaintiffs argue this proposed language is likely to confuse potential opt-ins, and the Court agrees. (Doc. 46, Pls.' Reply in Supp. of MTC ("Reply MTC") at 9.) The language proposed by Plaintiffs makes sufficiently clear that putative class members were not formally considered Defendant's employees simply because they performed work for Defendant. Therefore, the Court will not require Plaintiffs to amend this language.[6]

Defendant also argues that Plaintiffs should be required to add a disclaimer after the third full paragraph in the Notice setting forth Defendant's position on Plaintiffs' allegations. (Resp. MTC at 20.) Plaintiffs agree to include a sentence in the Notice stating that "Defendant denies these allegations." (Reply MTC at 10.) The Court concludes that this is sufficient to make Defendant's position clear. Defendant also argues that the Notice is deficient because it does not specify that the Court or a jury must determine whether the class members' rights have been violated. (Resp. MTC at 20.) The Notice, however, states that "there has not been a decision by the court as to whether the Plaintiffs' position or Defendant's position is the correct one." (Notice Form at 2.) Therefore, the Court concludes that the proposed Notice is sufficiently clear that the claims will be determined in court.

Defendant argues that the Notice does not sufficiently specify that opt-ins may be required to be deposed or testify at trial. (Resp. MTC at 20.) The relevant language in the Notice states: "You may also be asked to be a witness or to provide evidence in the case,

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[6] Defendant also requests, without providing any justification, that the Notice provide a 60-day deadline to opt into the class instead of a 90-day deadline as requested by Plaintiffs. Because Defendant has failed to offer any justification, the Court declines to change the deadline.

although not all individuals who submit a consent form will be required to do so." (Notice Form at 2.) The Court agrees that this language does not sufficiently notify prospective class members of their potential obligations and will require the language to be amended as follows: "You may also be **required** to be a witness **at a deposition or at trial** or to provide evidence in the case, although not all individuals who submit a consent form will be required to do so." (alterations in bold).

Finally, Defendant argues that the Notice should inform putative class members that they may be subject to counterclaims and be liable for attorneys' fees and costs if they do not prevail. (Resp. MTC at 20.) Plaintiffs argue that including such a warning would be misleading because prevailing defendants are generally not entitled to attorneys' fees under the FLSA. (Reply MTC at 10.) The Court agrees that such a warning would be misleading and appears to be designed to chill participation in the class and will therefore not require it.

III. CONCLUSION

The Court denies Defendant's motion to compel arbitration because the Arbitration Provision at issue is substantively unconscionable and therefore unenforceable. The Court grants Plaintiffs' motion to conditionally certify a collective class because they have met their initial burden of providing substantial allegations showing that the putative class was subject to the same plan or policy. The Court grants Plaintiffs' request for production and to issue Notice to putative class members in accordance with this Order.

IT IS ORDERED denying Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings, and Compel Arbitration (Doc. 35).

IT IS FURTHER ORDERED granting Plaintiffs' Motion for Conditional Collective Action Certification and Court-Supervised Notice Pursuant to 29 U.S.C. § 216(b) (Doc. 33).

IT IS FURTHER ORDERED conditionally certifying this action as a collective action pursuant to 29 U.S.C. § 216(b) for the following: All current or former delivery

drivers who have delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013.

IT IS FURTHER ORDERED directing Defendant to identify all current and former delivery drivers who delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013 and to produce to Plaintiffs the names, last known addresses, all known email addresses, and all known telephone numbers of these drivers within five business days of the date of this Order.

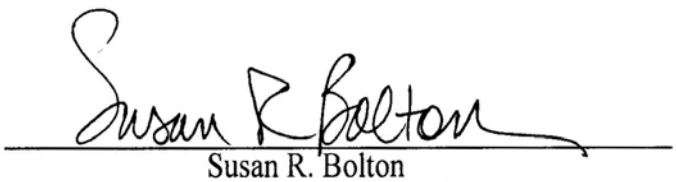
IT IS FURTHER ORDERED directing Plaintiffs to provide Defendant with updated copies of the Notice and Opt-in Forms amended in accordance with this Order.

IT IS FURTHER ORDERED authorizing Plaintiffs to mail, email, and text message the Notice attached to their Motion as Exhibit A as amended pursuant to this Order to all drivers set forth above.

IT IS FURTHER ORDERED granting all drivers set forth above a period of 90 days following receipt of Notice to "opt in" to this action.

IT IS FURTHER ORDERED directing Defendant, beginning on the date Defendant produces the information ordered above, to post for a period of 90 days the Notice and Opt-in Forms provided by Plaintiffs in conspicuous places at OnTrac's Phoenix warehouse and any other such locations controlled by Defendant where delivery drivers within the conditionally certified collective gather and can see such notices.

Dated this 31st day of August, 2017.



Susan R. Bolton
United States District Judge