James S. Jardine (1647)
Scott A. Hagen (4840)
David B. Dibble (10222)
Adam K. Richards (14487)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500

Attorneys for Defendants C.R. England, Inc. and Opportunity Leasing, Inc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CHARLES ROBERTS; and KENNETH MCKAY, on behalf of themselves and others similarly situated, Plaintiffs, v. C.R. ENGLAND, INC.; OPPORTUNITY LEASING, INC.; and HORIZON TRUCK SALES AND LEASING, LLC, Defendants.	**DEFENDANTS' OPPOSITION TO MOTION FOR CLASS CERTIFICATION** Civil No. 2:12-CV-00302 RJS Judge Robert J. Shelby Magistrate Judge Brooke C. Wells

Defendants C.R. England, Inc. ("England") and Opportunity Leasing, Inc. ("Opportunity") (collectively referred to as "Defendants") respectfully submit their opposition to Plaintiffs' Motion for Class Certification and Memorandum in Support ("Motion").

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INTRODUCTION

Plaintiffs Charles Roberts and Kenneth McKay move to certify a nationwide class of thousands of truck drivers whose choice to become independent contractors with England was allegedly the result of coercion or misrepresentation, a choice Plaintiffs allege doomed these independent contractors to "inevitable failure." But the personal experiences of present and former independent contractors ("ICs"), who chose to become ICs for a wide variety of individual reasons unrelated to Plaintiffs' theories and who by their own account succeeded with England, show that Plaintiffs fail Rule 23's commonality, typicality, and predominance requirements. As Jack Reynolds, a current England IC, states: "Although some people at England do not succeed, I personally saw a lot of success stories. I feel like England has always wanted me to succeed, and I consider myself a success story. I am truly grateful to England. England gave me a chance when nobody else would. Now I own my own truck, my credit has improved, and England gives me all the freight I can handle." Declaration of Jack Reynolds ("Reynolds Decl.") (Ex. 3) ¶¶ 20–21.[1]

Plaintiffs rely on the wrong legal standards for class certification, citing outdated cases and ignoring recent Supreme Court decisions. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Just last year, the Supreme Court warned that Rule 23 "***imposes stringent requirements for certification that in practice exclude most claims***." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (emphasis added). Accordingly, the Tenth Circuit requires a rigorous analysis, holding plaintiffs to a "strict burden of proof" on the elements of Rule 23. *Tabor v. Hilti, Inc.*, 703 F.3d 1206,

[1] All exhibits cited in this opposition have been filed separately.

1227-31 (10th Cir. 2013). A rigorous analysis to assess satisfaction of Rule 23's "stringent requirements . . . that in practice exclude most claims" is far from the "liberal construction" Plaintiffs advocate. Pls.' Mot. for Class Certification and Mem. in Supp. ("Mot."), Dkt. No. 206 at 50.

Applying the required rigorous analysis, Plaintiffs fail to meet their burden to show central, common issues. A common issue "'must be of such a nature that it is capable of *classwide resolution*—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) (quoting *Wal-Mart*, 131 S. Ct. at 2551). But individual differences in the information available to, choices made by, and driving experiences of ICs defeats Plaintiffs' assertions of commonality, typicality, and predominance.

Applicants to England's schools and trainees who completed the program did not receive and rely on a uniform advertisement or statement. When prospective applicants spoke with England recruiters, they did not have uniform conversations in which recruiters consistently misrepresented the IC option, as Plaintiffs allege. Rather, drivers testify that recruiters usually discussed getting to the school and obtaining a Commercial Driver's License – the subjects foremost on prospective students' minds; rarely was the IC option even raised.

Prospective students who left home, enrolled in England's schools, went through the typically 90 days of on-the-road training with experienced trainers/drivers, and ultimately chose to become ICs had multiple sources of information by that time, including their own experiences and what they learned from their IC trainers. Trainers often shared their IC weekly settlement

statements during the 90-day training, and trainees could observe the IC experience first-hand and make a decision based on individual assessment. One at a time, trainees learned the reality of IC miles and income, and their own suitability, through direct, personal observation, and often through discussing the pros and cons of becoming an IC versus a company driver with their trainers and other drivers, and such communications "would necessarily be a unique occurrence." *Berger v. Home Depot USA, Inc.*, ___ F.3d ___, 2014 WL 350082, *5 (9th Cir. Feb. 3, 2014).

The evidence shows no uniform representations, no common sources of information, and no common issues of reliance and causation. "Because proof often varies among individuals concerning what representations were received, and the degree to which individual persons relied on the representations, fraud cases often are unsuitable for class treatment." *In re St. Jude Medical, Inc.*, 522 F.3d 836, 838 (8th Cir. 2008).

Individual testimony also refutes Plaintiffs allegation that England uniformly breached its contracts with students by not having company trucks available at the end of training for those requesting company positions. Included in the proposed class, however, are drivers who never requested to become company drivers. For those who did, multiple drivers confirm that neither they nor their fellow trainees had to wait for a company truck. Indeed, since May 2009, over 12,000 trainees exercised the very choice to become company drivers that Plaintiffs contend was denied to all.

Nor is driver turnover class-wide evidence that failure as in IC was inevitable and uniform. In fact, turnover occurred for individual and varied reasons, including family issues, the desire for more home time, health challenges, accidents or safety violations, other job opportunities, and lease completion. And turnover among long-haul truck drivers is an industry-

wide challenge, not just at England. Moreover, turnover is no secret to ICs; they learn about it from many sources including other drivers as well as England's company-wide public efforts to reduce turnover. Why an individual IC terminated a lease early—and thus contributed to turnover—would necessitate asking each one.

Plaintiffs cannot show with common evidence that an IC contracting with England "inevitably" and uniformly fails economically. Many England ICs succeed, and economic success turns on a number of factors, many of which are in the IC's own control, including the number of hours driven each day, the number of days driven each week, the number of weeks driven each year, making on-time deliveries, working with their driver managers to arrange their next loads, limiting break times, accepting the loads offered, and driving efficiently to conserve fuel.[2] Each IC driver's experience was individual, and the outcome far from inevitable.

All of these facts make proving causation and reliance an individual driver-by-driver effort. Trainee drivers[3] choose to be ICs for varied individual reasons—some preferring "the freedom to choose how I will operate,"[4] some because they "felt like I could succeed where some didn't,"[5] and some because they decided from observing their trainers that "I could make more money as an independent contractor."[6] One current IC drove trucks for many years as an IC and decided to join England as an IC because it "would allow me to train my wife" to drive

[2] Declaration of Paul Lucey ("Lucey Decl.") (Ex. 1) ¶ 12; Declaration of Robert Andrews ("Andrews Decl.") (Ex. 11) ¶ 13; Declaration of Jerry Upton ("Upton Decl.") (Ex. 2) ¶¶ 13-16; Declaration of Rick Hoffman ("Hoffman Decl.") (Ex. 39) ¶¶ 12-25.
[3] England typically referred to individuals in its schools as "students" or "student drivers," to individuals in its Phase I training as "trainees," and individuals in its Phase II training as "apprentices" or "apprentice drivers." However, those terms were also used interchangeably at England and will be referred to interchangeably herein.
[4] Declaration of Bret Hatch ("Hatch Decl.") (Ex. 12) ¶ 11.
[5] Declaration of Jack Reynolds ("Reynolds Decl.") (Ex. 3) ¶ 10.

with him.[7] The uniformity of IC experience Plaintiffs tout is fiction, as the evidence shows.

Moreover, Plaintiffs' proposed damages models do not allow for class-wide proof and are impermissibly flawed. First, Dr. Mahal's proposed models would include damages for people who were not legally harmed, e.g., those ICs who have succeeded as described in the Declarations submitted herewith. Those models would also award damages to drivers who chose to become ICs for reasons having nothing to do with any alleged England wrongdoing. Second, Dr. Mahla's proposed models do not (and cannot) take into account the impact of individual decisions, skill, and effort by ICs that led to differing economic results. For example, they would award damages to ICs who terminated for reasons unrelated to England, such as safety violations and accidents, or who simply choose not to drive in ways designed to produce positive economic results. Third, Dr. Mahla's proposed models do not (and cannot) take into account what, if any, representations each driver saw or relied upon, if at all, and would thus "identif[y] damages that are not the result of the [alleged] wrong." *See Comcast*, 133 S. Ct. at 1434.

The OWNRRE database Dr. Mahla says he will use to calculate damages shows miles paid and income statistics, but it does not resolve the need for individual proof because it does not account for individually controlled factors such as time at home, miles driven in a week, and driving efficiency that are important components of driver success. Defendants' damages expert, Richard Hoffman, explains: "Without taking into account the individual skill and effort of each driver, Dr. Mahla's proposed method would lead to the least efficient and poorest performing drivers being awarded the most damages"—an obvious flaw.[8] Under the teaching of *Comcast*,

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[6] Declaration of Primo Benigni ("Benigni Decl.") (Ex. 7) ¶ 5.
[7] Declaration of Gary Manfull ("Manfull Decl.") (Ex. 13) ¶ 8.
[8] Hoffman Decl. (Ex. 39) ¶ 6(2)(a)

such individual issues preclude class certification.

In short, Plaintiffs' contentions of uniformity that supposedly establish commonality, typicality, and predominance fail on every level. Future drivers came to England schools for diverse reasons. And they learned the relevant facts about being an IC during their 90-day on-the-road training ***before*** they were given the option to become an IC or continue as an employee driver with England. Indeed, England's 90-day training program, giving participants an extended preview of the IC experience, is the antithesis of the Plaintiffs' assertion that England sought to deceive drivers about that experience. England's training program gave each driver substantial information on the IC option based on actual experience:

> When you're finished with Phase 2 Training, you'll have the choice whether or not to become an Independent Contractor. Many find it rewarding to start and grow their own business. Part of Phase 2 Training is to help you understand what it means to be an Independent Contractor and how to do it successfully. This understanding will help you make a decision about which path you want to follow. ***Even if you choose not to become an[] Independent Contractor, the information in these modules will be useful in your life and in your career***.[9]

Those who chose to be ICs had a variety of information, experiences, and outcomes. Many succeeded; others did not. What information each had available, why each chose to become an IC, and why each succeeded or failed could be proved only with overwhelmingly individual evidence.

Finally, the Court should deny certification of several of Plaintiffs' state statutory and common-law claims under Rule 23(b)(3) because the need to apply the laws of 48 states, the District of Columbia, Puerto Rico, and the Virgin Islands (the laws of each driver's home state) causes individual questions of law to predominate and would make the trial unmanageably

[9] Phase 2 Training Apprentice Module E ("Module E") (Ex. 61) at 7 (emphasis added).

complex for the Court and jury.

Plaintiffs fail to meet the stringent requirements for class certification.

FACTUAL BACKGROUND

I. DEFENDANT C.R. ENGLAND AND THE TRUCKING INDUSTRY.

A. History and Organization

Started in 1920 in Plain City, Utah by Chester R. England, C.R. England ("England") is a fourth-generation, family-owned trucking company now headquartered in West Valley City, Utah.[10] England has grown over the past 94 years from a local, to a regional, and currently a nationwide carrier, now with operations in Mexico. England is now Utah's fifth largest private employer.[11]

England specializes in moving temperature-sensitive freight, primarily food, from producers to destination. Its success depends on its ability to acquire freight and attract and keep drivers who can safely and efficiently haul that freight from one location to another in a highly competitive industry.[12] England is now run by the family's third and fourth generations. Its current chairman, third-generation Dan England, has overseen much of its growth, serving as its CEO from 1988 to 2005. He served as Chairman of the American Trucking Association ("ATA") from 2011 to 2012[13] and has testified on behalf of the ATA twice before Congress on

[10] Declaration of Dan England ("D. England Decl.") (Ex. 29) ¶ 9.
[11] Declaration of Josh England ("J. England Decl.") (Ex. 32) ¶ 6. As of February 2014, England employed over 7300 people in its operations. *Id.* ¶ 7; *see also* D. England Decl. (Ex. 29) ¶ 10 (explaining England's ability to grow).
[12] J. England Decl. (Ex. 32) ¶ 4.
[13] D. England Decl. (Ex. 29) ¶¶ 3-4. He also served as Chairman of the ATA's Executive Committee from 2012 to 2013. *Id.* ¶ 4.

national trucking issues.[14] Fourth-generation Josh England, the current President and CFO, was named a Director of the Salt Lake City Branch of the Federal Reserve Bank of San Francisco in February 2012.[15]

B. Horizon and Equinox

In 1997, England family members formed Defendant Opportunity Leasing, Inc., which has often done business under the name Horizon Truck Sales and Leasing ("Opportunity" or "Horizon").[16] Horizon is an affiliated company whose primary purpose is to lease tractor trailers to individuals electing to become ICs with England.[17]

In their Motion, Plaintiffs mention another independent entity called Equinox Owner Operator Solutions. Equinox provides business services for owner operators in the industry, such as tax, accounting, and consulting services.[18] It also provides training materials to help owner operators understand how to successfully run a business.

[14] He testified on May 11, 2005, before the House Committee on Transportation and Infrastructure, Subcommittee on Highways, Transit and Pipelines, on "Background Checks for Hauling Hazardous Materials," and on July 21, 2011, before the Senate Committee on Commerce, Science, and Transportation, at a hearing on "Improving Highway and Vehicle Safety." D. England Decl. (Ex. 29) ¶ 5.
[15] J. England Decl. (Ex. 32) ¶ 3.
[16] *See* Articles of Incorporation of Opportunity Leasing, Inc. (Ex. 79). In general, Opportunity used the Horizon name when dealing with drivers and the public, but signed lease agreements with its formal corporate name.
[17] Horizon also sells trucks and other equipment to drivers and third parties. Deposition of Bud Pierce ("Pierce Dep.") (Ex. 45) at 181-183; Deposition of James MacInnes ("MacInnes Dep.") (Ex. 42) at 63. Horizon also occasionally leased to drivers who were not under contract with England. Deposition of Michael Fife ("Fife Dep.") (Ex. 41) at 58.
[18] *See* Deposition of Josh England, dated December 6, 2012 ("J. England Dep., 12/6/12") (Ex. 56) at 72.

C. Company Drivers and Independent-Contractor Drivers

England hires company (employee) drivers and utilizes ICs to haul freight. In 1998, England began contracting with ICs to meet the competition for drivers from other carriers that were doing so and because England perceived ICs as "the wave of the future within trucking companies."[19] Indeed, attracting ICs was one way to get more drivers, which England needed to grow.[20] Implementing IC-contracting attracted drivers who wanted to be independent or gain the opportunity to make more money.[21] England benefited because IC drivers were more productive and had better on-time deliveries and fewer accidents than company drivers.[22]

Unlike a company driver, an IC can decline a load assignment, take as much home time as desired, and decide what routes to take and when and where to fuel.[23] Although England compensates both company and IC drivers by the mile, the rate differs significantly. For example, the lowest loaded rate for company solo drivers is $0.25/mile while the lowest rate for an IC driver is $0.90/mile because the IC must pay his own costs such as the truck lease and fuel.

England's drivers, whether company or IC, work as individual or "solo" drivers or as teams of drivers. A team can consist of two company drivers, two ICs, or a trainee and an IC acting as a trainer.

Since the late 1990s the percentage of England's fleet consisting of trucks driven by IC drivers has fluctuated. Although IC-driven trucks made up as much as 75% of England's fleet at

[19] MacInnes Dep. (Ex. 42) at 100-01; Deposition of Josh England, dated May 17, 2013 ("J. England Dep., 5/17/13") (Ex. 43) at 263.
[20] D. England Dec. (Ex. 29) ¶ 11.
[21] MacInnes Dep. (Ex. 42) at 162-63. D. England Decl. (Ex. 29) ¶ 12.
[22] MacInnes Dep. (Ex. 42) at 100-01; Deposition of Stephen Brinkman ("Brinkman Dep.") (Ex. 44) at 175; Pierce Dep.(Ex. 45) at 58; D. England Decl. (Ex. 29) ¶ 13.

one point, the percentage since 2008 has fluctuated significantly. Currently, IC drivers operate approximately 24% of the trucks in England's fleet.[24] England contracts with ICs who lease trucks, who have lease-to-purchase arrangements, and who are owner-operators. England has approximately 200 owner-operators and approximately 300 lease-to-purchase drivers.[25]

D. England Truck Driving Schools

While many trucking companies hire only experienced drivers, England finds and trains individuals with no prior experience driving a big rig—providing an opportunity for new drivers to break into the industry.[26] England recruits individuals to one of its five truck driving schools (in Utah, California, Texas, and Indiana) where they can earn their Commercial Driver's License ("CDL") for a comparatively low tuition.[27]

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[23] IC drivers have freedom to turn down loads, choose their route, choose fuel stops, etc. Deposition of Tricia O'Neal, dated July 15, 2013 ("O'Neal Dep., 7/15/13") (Ex. 46) at 31.

[24] Declaration of Brandon Harrison ("Harrison Decl.") (Ex. 38) ¶ 3 (If you look at the entire company across all divisions the balance between company drivers and IC drivers is approximately 76% company and 24% IC drivers).

[25] Deposition of Tricia O'Neal, dated December 7, 2012 ("O'Neal Dep., 12/7/12") (Ex. 48) at 203.

[26] J. England Decl. (Ex. 32) ¶ 8. A survey of 54 fleets in 2011 revealed that only 55% of the truckload carriers in that group hired inexperienced drivers. *See* ATA recruiting study ("ATA Study") (Ex. 62) at 49; *Id.* at 71 ("Most TL carriers do not operate their own school . . . .").

[27] Deposition of Rigoberto Sierra ("Sierra Dep.") (Ex. 52) at 163-64. For example, Plaintiff Roberts had registered for a truck driving school in Sacramento, whose tuition was $5995, before switching to an England school. Deposition of Charles Roberts ("Roberts Dep.") (Ex. 49) at 63-64; *see also* Declaration of Francisco Parras ("Parras Decl.") (Ex. 14) ¶ 4 (considered community college program for $7000-$8000). Aaron Shepherd, England's former Director of Driver Development, recommended to his superiors on numerous occasions that England raise school tuition because he felt "like for what the school offers, it's bargain basement price, and there's $10,000 CDL schools out there that offer, in my opinion, less than what we do . . . ." Deposition of Aaron Shepherd ("Shepherd Dep.") (Ex. 50) at 174.

Tuition amounts and arrangements have varied since May 2009. At times it ranged from $1995, if paid at the outset, to $2995 if financed.[28] At other times, England has offered various tuition programs or incentives, including free tuition and different types of tuition reimbursement or forgiveness for company drivers and ICs who stayed with England for certain periods.[29] Both named Plaintiffs financed their $2995 tuition.[30] England does not make a profit on the schools; indeed, the schools are one of England's biggest costs.[31] England uses the schools as a means to find and recruit drivers.

For those with no previous truck driving experience, the school program is typically 17 days long.[32] Students receive classroom instruction and on-the-road training necessary to obtain a CDL. While in school, minimal information is provided about being a company driver versus an IC.[33] Indeed, Plaintiff McKay has no recollection of Horizon—which leases trucks to ICs—having any role at the school.[34]

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[28] England had an affiliated financing arm, Eagle Atlantic, that would enter into loan agreements with students. Declaration of Carol Killinger ("Killinger Decl.") (Ex. 30) ¶ 7. If a driver terminated his or her employment or ICOA before paying off the loan balance, Eagle Atlantic would attempt to collect the amount owing, but collected only a small fraction of that amount. *Id.* ¶ 14.

[29] *See, e.g.*, Roberts Dep. (Ex. 49) at 91; O'Neal Dep. 12/7/12 (Ex. 48) at 116-17; Sierra Dep. (Ex. 52) at 153. There was a time when England would pay an IC driver's weekly school tuition payment for as long as the IC driver remained in the lease program or until the debt was paid off. O'Neal Dep., 12/7/12 (Ex. 48) at 115-16. The policy of tuition reimbursement changed to 50 percent reimbursement in August 2009. O'Neal Dep., 12/7/12 (Ex. 48) at 117–18.

[30] McKay paid off his tuition. To date, Roberts has not and still owes England $643.40. Killinger Decl. (Ex. 30) ¶ 12.

[31] Deposition of Thom Pronk ("Pronk Dep.") (Ex. 51) at 165-66.

[32] J. England Dep., 5/17/13 (Ex. 43) at 51; Sierra Dep. (Ex. 52) at 35–36.

[33] *See, e.g.*, Declaration of Millard Mahala ("Mahala Decl.") (Ex. 8) ¶ 8; Parras Decl. (Ex. 14) ¶ 6.

[34] Deposition of Kenneth McKay ("McKay Dep.") (Ex. 53) at 140.

II. THE DECISION TO BECOME AN IC WAS BASED ON INDIVIDUAL, NOT COMMON INFORMATION, AND WAS FOR REASONS UNIQUE TO EACH DRIVER.

Plaintiffs allege that England "induc[ed] thousands of students to enroll in their driving schools using false promises of employment . . . and then once enrolled . . . coerc[ed] those students into [becoming ICs]" by making them wait for company trucks if they elected to be company drivers, or through uniform misrepresentations, primarily regarding average miles and income.[35] But students came to England for various reasons unrelated to a promise of guaranteed employment. And many drivers who came to England chose to be company drivers instead of IC drivers (over 12,000 since 2008). Certainly, many drivers chose the path of being an IC. But drivers say they did so after carefully considering the relevant contacts. They also say they made the decision based on a wide variety of information and for reasons unrelated to the alleged misrepresentations. Indeed, by the time drivers had to choose whether to become an IC, they knew personally the reality of the IC experience, including available miles and potential income, from their 90 days of observing and working with their IC trainers. England intended this 90-day trial process to inform that decision. The evidence shows it did.

A. Individuals Chose England Truck Driving School For Individual Reasons.

Individuals chose to attend England truck driving schools for myriad reasons unrelated to website ads or conversations with recruiters.[36] Former IC Christopher Evans chose England "because it seemed to have the newest equipment out on the road" and because "England was the

[35] Mot. at 5.

[36] For Plaintiffs Roberts and McKay, it was at least in part because England's school was closest to their homes. Roberts Dep. (Ex. 49) at 47; McKay Dep. (Ex. 53) at 62.

first company to call me."[37] IC Primo Benigni chose England because his brother "recommended it to me."[38] IC Brian Hunter saw England's phone number on the back of a truck, called it, and asked if he "could get on a specific route, the dedicated Walmart route out of Cheyenne, Wyoming," which he still drives today.[39] IC Tony Mathos chose the school because of "England's dedication to safety."[40] IC David Gonzalez contacted England because his father, a truck driver, recommended England.[41] Individuals who spoke with England recruiters report that they did not discuss income and miles available to ICs, whether average or potential.[42] Others report they did not either see or consider a representation of guaranteed employment.[43] And, of course, many did not look at the website or see the pro formas or other representations there.[44]

B. Individual Evidence Shows Drivers Had a Choice Between the Company and IC Options.

1. The Student Training Agreement

Following graduation with a CDL from an England school, graduates could either become employees of England for a 90-day training experience or leave for other employment

[37] Declaration of Christopher Evans ("Evans Decl.") (Ex. 5) ¶¶ 4-5.
[38] Benigni Decl. (Ex. 7) ¶ 4; *see also* Parras Decl. (Ex. 14) ¶ 3 (recommendation of brother).
[39] Declaration of Brian Hunter ("Hunter Decl.") (Ex. 15) ¶¶ 4-5.
[40] Declaration of Tony Mathos ("Mathos Decl.") (Ex. 9) ¶ 5.
[41] Declaration of David Gonzalez ("Gonzalez Decl.") (Ex. 16) ¶ 6.
[42] Mathos Decl. (Ex. 9) ¶ 8; Reynolds Decl. (Ex. 3) ¶ 7; Declaration of Joseph Broccardo ("Boccardo Decl.") (Ex. 10) ¶ 4; Mahala Decl. (Ex. 8) ¶ 7; Declaration of John Durr ("John Durr") (Ex. 4) ¶¶ 8-9; Andrews Decl. (Ex. 11) ¶ 7; Declaration of Barry Toole ("Toole Decl.") (Ex. 17) ¶ 6; Gonzalez Decl. ¶ 8.
[43] Declaration of Joseph Love ("Love Decl.") (Ex. 23) ¶ 5; Declaration of Jeffrey Hardin ("Hardin Decl.") (Ex. 24) ¶ 5; Parras Decl. (Ex. 14) ¶ 4; Gonzalez Decl. (Ex. 16) ¶ 8.
[44] *See, e.g.*, Declaration of Thomas Lovett ("Lovett Decl.") (Ex. 27) ¶ 4 (explaining that he learned about England through word of mouth and newspaper ad); *cf.* Hatch Decl. (Ex. 12) ¶ 6 (stating that he did not see anything on England's website in terms of promised income).

opportunities. If they chose to become England employees, new trainees were presented a Student Training Agreement ("STA") to sign.[45] The STA describes Phase I and Phase II training and explains: "During [Phase II training] I will have the opportunity to observe the C. R. England lease program and receive further training in running my own business, plus gain addition[al] driving experience."[46] The STA sets out the choices available to those who complete the Phase I and II training:

> At the completion of Phase II training I can choose one of the following career paths:
>
> 1. Become a lease operator and begin my own business.
> 2. Become a lease operator and become a Phase II Trainer.
> 3. Remain a C. R. England employee as a second seat with a lease operator and receive $.13 cents per mile for all paid truck miles.
> 4. Remain a C. R. England employee with a company truck.[47]

2. Phase II upgrade and the choice to become an IC or company driver

After completing their 90-day[48] Phase I and II training, apprentices returned to either the West Valley City, Utah or Burns Harbor, Indiana facilities to pass final checks, a process called "Phase II Upgrade." Drivers are given the choice of becoming a non-trainee company driver or becoming an IC. IC, Jack Reynolds explained, "I, along with other drivers in my training, went into a room, heard a presentation from one guy about being a company driver and another from a guy about being an independent contractor. At the end, they said, 'If you want to be an independent contractor, go with this guy, and if you want to be a company driver go with this

[45] Copies of the Student Training Agreement signed by Roberts and McKay are attached as Exhibits 64 ("McKay STA") and 65 ("Roberts STA"). England ceased using the STA in approximately May 2011. *See* Email from A. Shepherd to School Managers, dated May 24, 2011 (Ex. 63).
[46] McKay STA (Ex. 64).
[47] McKay STA (Ex. 64).

guy.' I felt no pressure either way. Some of the drivers I knew elected to become company drivers and they got into company trucks right away."[49]

3. England honored drivers' choices to become company drivers

Plaintiffs contend apprentices were not given a "genuine opportunity to accept the promised career path of remaining an England employee driving a company-owned truck," in breach of the STA, because England did not have company trucks or company positions available.[50] But the evidence contradicts these allegations.

First, many apprentices never asked to become company drivers.[51]

Second, multiple company drivers at England confirm their choice was honored. Joseph Love stated: "After training, I opted to remain a company driver for England. I did not have to wait for a company truck. I never felt pressured to be an independent contractor."[52] Frank Redwing said: "After I completed my Phase I and Phase II training, I elected to remain as a

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[48] There were brief periods when trainees could choose to become an IC without completing the 90 day training. Deposition of Brandon Harrison ("Harrison Dep.") (Ex. 47) at 127.
[49] Reynolds Decl. (Ex. 3) ¶ 12-13; *see also* Durr Decl. (Ex. 4) ¶ 11 ("I always felt the choice between being an independent contractor and a company driver was mine."); Hatch Decl. (Ex. 12) ¶ 11 ("I never felt pressured to lease a vehicle, and it was always made clear to me that I had several options."); Evans Decl. (Ex. 5) ¶ 10 ("I never felt pressure . . . to become an independent contractor."); Mathos Decl. (Ex. 9) ¶ 15 ("I never felt any pressure to become an independent contractor, and several of my classmates elected to become company drivers. I do not recall any of them having to wait to be assigned to a company truck."); Declaration of Frank Redwing ("Redwing Decl.") (Ex. 25) ("I never felt pressured to lease a truck.").
[50] Third Am. Compl. ("TAC"), Dkt. No. 101, ¶¶ 51, 224.
[51] *See, e.g.*, TAC ¶ 52; Declaration of Charles Roberts ("Roberts Decl."), Dkt. No. 199, ¶ 22; Toole Decl. (Ex. 17) ¶ 12 ("I knew going into England that I wanted to lease a truck."); Declaration of Randy Aguilar ("Aguilar Decl.") (Ex. 20) ¶ 7 (explaining that he entered Phase I training with his mind made up that he wanted to be an IC); Evans Decl. (Ex. 5) ¶ 9 ("I decided in orientation that I wanted to be an independent contractor."); Manfull Decl. (Ex. 13) ¶ 10 ("During the refresher course, I decided to be an independent contractor because of my prior experience as an independent contractor.").
[52] Love Decl. (Ex. 23) ¶¶ 8-9.

company driver and I was immediately offered a solo route. I was assigned to a truck approximately two days later."[53] For Jeffrey Hardin, "[o]nce I made the decision to be a company driver, the response of England representatives was, 'Okay, no problem.' They had a truck ready for me the next day."[54] Other company drivers had the same experience.[55] Those who chose to be ICs confirm this history. IC Christopher Evans was put on a thirty-day waiting list for a ***lease truck*** but observed that "[d]rivers who elected to be company drivers, in contrast, were being assigned to trucks right away"[56]—the opposite of England's supposedly uniform practice of making ICs, but not company drivers, wait for trucks.

Third, and tellingly, since January 2008 over 12,500 individuals have become company drivers,[57] successfully making the choice that Plaintiffs contend did not exist.

On occasion, either or both company trucks or lease trucks were unavailable for short periods because England orders its new trucks months in advance.[58] For company drivers, the wait was typically 2-3 days.[59] But drivers were not forced to sit around and wait for a truck until they "capitulate[d] . . . and purchase[d]" the IC option;[60] rather those electing to be company

[53] Redwing Decl. (Ex. 25) ¶ 5.
[54] Hardin Decl. (Ex. 24) ¶ 8.
[55] Declaration of Fariborz Farahmand ("Farahmand Decl.") (Ex. 26) ¶ 9 (noting that elected to be a company team driver and was on the road the next day); Lovett Decl. (Ex. 27) ¶ 8 (noting that "after deciding to become a company driver, I did not wait for a company truck, one was available right away"); Declaration of Ulysses Yates ("Yates Decl.") (Ex. 28) ¶ 11 ("A truck was available for me the same day that I completed the refresher course.").
[56] Evans Decl. (Ex. 5) ¶¶ 12-13; *see also* Benigni Decl. (Ex. 7) ¶ 6 (noting a two-week wait list).
[57] Declaration of Rigoberto Sierra ("Sierra Decl.") (Ex. 31) ¶ 4.
[58] *See* Shepherd Dep. (Ex. 50) at 190 ("I'm aware of drivers waiting for both IC and company trucks based on their availability."); Harrison Dep. (Ex. 47) at 176 (explaining that there were times in 2009 and 2010 when drivers had to wait for lease trucks after completing Phase II).
[59] Fife Dep. (Ex. 41) at 186; *see also id.* at 272–73 (explaining that there were company truck shortages "here and there").
[60] Declaration of Kenneth McKay ("McKay Decl."), Dkt. No. 22 ¶ 14.

drivers could continue as a second seat with a Phase II trainer or go out on other England trucks as a company employee, as Plaintiff McKay did.[61]

Determining whether a student had to wait for a company truck, and, if so, for how long—and if the wait caused the student to choose the IC option instead of the company option—would require individualized inquiry.

4. Plaintiffs Roberts' and McKay's own experiences demonstrate there was no denial of choice

The named Plaintiffs' own experiences demonstrate there was no denial of choice, and certainly no common issue, to become a company driver. Plaintiff Roberts never asked to be a company driver,[62] so he was never denied choice.

McKay signed his Phase 2 Upgrade Planning Sheet when his trainer dropped him off at West Valley City on June 17, 2009.[63] He answered "Yes" to the question, "Are you going to be a Phase 2 Trainer?" And McKay knew he had to be an IC to be a Phase 2 Trainer.[64] Then McKay completed his Phase 2 (P2) Program Completion form[65] on June 23, by circling "L" (lease operator) instead of "C" (company driver). In other words, he decided to become an IC upon arriving in Utah on June 17 and confirmed his decision on June 23, before the time he claims he was forced to sit around and wait.

Yet he testified that after completing Phase II training, he was made to

> wait[] for approximately a few weeks at Defendants' facility in Utah for a company driver employment position but capitulated when Defendants finally offered me a Driving Opportunity under a six-month program. In that three weeks, I observed many

[61] MacInnes Dep. (Ex. 42) at 236–37.
[62] TAC ¶ 52; Roberts Dep. (Ex. 49) at 182-83; Roberts Decl., Dkt. No. 199, ¶ 22.
[63] Phase 2 Upgrade Planning Sheet (Ex. 74); McKay Dep. (Ex. 53) at 190.
[64] McKay Dep. at 191; Shepherd Dep. (Ex. 50) at 54-55.
[65] McKay's Phase 2 (P2) Program Completion form (Ex. 80).

> other Drivers that were hungry, tired, and lacking any income capitulate sooner and purchase the Driving Opportunity under two or three year program.[66]

However, records show McKay was not sitting around Utah but was on a Relief and Recovery Truck[67] as an England employee for 14 days during this time. Specifically, on June 25, just two days after completing his Phase II upgrade form, McKay departed on a trip. From June 25 until July 8, England paid McKay 26 cents per mile for trips from Salt Lake City to Ohio, Arkansas, Missouri, Idaho, Nebraska, and Ogden.[68] On July 9, the day after he returned to Utah, McKay signed a "Pre-lease Inspection" form for a truck,[69] and on July 10, he signed a lease Commitment Form for a new truck.[70] McKay signed his VLA and ICOA on July 13 and he left the yard with his first load as an IC on July 14—five days after his return to Utah from paid trips.

C. Whether a Driver Had Sufficient Time to Review and Sign the VLA and ICOA Before Choosing the IC Option Requires Individual Testimony.

Plaintiffs contend that apprentice drivers electing to become ICs were pressured into signing the VLA and ICOA without adequate time to review.[71] But individual evidence shows otherwise.[72]

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[66] McKay Decl., Dkt. No. 22, ¶ 14. This specific allegation was contained in Plaintiffs' first two complaints but omitted from the TAC.

[67] England has Relief and Recovery employee drivers who go out to pick up abandoned trucks or relieve other drivers while they take time off. Shepherd Dep. (Ex. 50) at 190-91; Deposition of Steve Branch ("Branch Dep.") (Ex. 55) at 82.

[68] McKay Dep. (Ex. 53) at 218-26. *See also* McKay's pay statement (Ex. 66).

[69] McKay's Pre-Lease Inspection Summary (Ex. 67).

[70] McKay's Horizon Commitment Form (Ex. 81).

[71] Mot. at 21 n.46. A careful reading of Plaintiffs' motion makes clear the referenced pressure was the individual driver's own desire to get out on the road and start making money. Such pressure does not constitute duress. *See State Bank of S. Utah v. Troy Hygro Sys., Inc.*, 894 P.2d 1270, 1275 (Utah Ct. App. 1995) ("[T]he mere fact that a contract is entered into under stress or pecuniary necessity is insufficient to constitute duress." (alterations and internal quotation marks omitted)).

1. The Vehicle Lease Agreement

Although ICs can lease trucks from anyone, many ICs lease trucks from Horizon under a form Vehicle Lease Agreement ("VLA").[73] The VLA details the terms of the lease, including the fixed and variable lease payments to be paid by the driver.[74] Plaintiffs do not allege that the VLA contained any misrepresentations. Instead, they criticize the lease payments as too high, but do not contend they were uncompetitive or unlawful. Plaintiffs attack Opportunity's variable lease payment on several grounds,[75] but nowhere do they claim it was not fully disclosed in the VLA or that it constitutes a legal wrong.

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[72] After an apprentice driver elects to become an IC, the driver must have or obtain a truck. O'Neal Dep., 7/15/13 (Ex. 46) at 205. An IC may lease a truck from any company as long as the truck meets England's standards, but why a driver chose to lease from Opportunity or elsewhere requires individual testimony. *See* O'Neal Dep., 12/7/12 (Ex. 48) at 26-27; MacInnes Dep. (Ex. 42) at 212, 266-68 (recognizing ICs lease trucks from companies other than Horizon). For example, many ICs chose to lease from Opportunity because it did not require a down payment or good credit. *See, e.g.*, Durr Decl. (Ex. 4) ¶ 18; Evans Decl. (Ex. 5) ¶ 11; Gonzalez Decl. (Ex. 16) ¶ 15; Hunter Decl. (Ex. 15) ¶ 11; Lucey Decl. (Ex. 1) ¶ 16; Upton Decl. (Ex. 2) ¶ 10; Broccardo Decl. (Ex. 10) ¶ 13. An independent contractor has also been able to lease-to-purchase from Opportunity. Six drivers who cancelled their ICOAs with England but retained their VLAs with Opportunity are driving with another carrier. O'Neal Dep., 7/15/13 (Ex. 46) at 153-54. Approximately 2-5% of drivers coming out of Phase II lease their trucks from somewhere else. *Id.* at 187-88. O'Neal believes that option is explained in the Equinox Business 101 presentation. *Id.* at 187-89. Approximately 400 ICs do not have a VLA with Horizon. *Id.* at 189-90.

[73] *See, e.g.*, VLA signed by Plaintiff McKay ("McKay VLA") (Ex. 68).

[74] McKay VLA (Ex. 68) at Schedule A.

[75] Plaintiffs assert that the variable mileage charged increased over time, that it was too high, that its purpose was not legitimate, and that it contributed to Opportunity's excessive profits. Mot. at 42-44. For example, Plaintiffs assert the variable mileage lease payment had no legitimate purpose because it just produced additional profit margin. Mot. at 42 n.88. While England disputes that assertion, Plaintiffs' hostility to Opportunity earning a profit finds no support in the law. Finally, Plaintiffs call it a "duplicative variable mileage charge," but they do not explain how that is the case. Mot. at 43.

Horizon leased new and used trucks and provided a variety of options for the length of the lease.[76] A number of ICs completed leases with Horizon and thereafter purchased trucks from it.[77]

2. The Independent Contractor Operating Agreement

Those who choose to become ICs with England execute an Independent Contractor Operating Agreement ("ICOA").[78] The ICOA is governed by the federal Truth-in-Leasing Act, which requires the accurate and full disclosure of all revenues to be paid to, and all expenses and charges to be paid by, the IC.[79] England's ICOA does "not violate the [federal Truth-in-Leasing] Regulations,"[80] and Plaintiffs do not allege otherwise. The ICOAs Plaintiffs signed specify both their revenues (*e.g.*, the cents per mile paid for loaded and empty trips) and their expenses (*e.g.*, lease payments, fuel). The ICOA also details optional products and services Plaintiffs could choose to buy out of their weekly compensation (*e.g.*, health insurance, accounting and tax services, etc.).

IC drivers had no obligation to purchase insurance, fuel, products, or services through England:

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[76] England has a standard three year lease, a ninth month "demo lease" (formerly a six moth "demo lease"), and available leases for used trucks for the period remaining on the underlying lease from the dealer to England. Pierce Dep. (Ex. 45) at 152-55; O'Neal Dep., 12/7/12 (Ex. 48) at 158.

[77] Reynolds Decl. (Ex. 3) ¶ 21; Benigni Decl. (Ex. 7) ¶ 2; Andrews Decl. (Ex. 11) ¶11; Evans Decl. (Ex. 5) ¶ 16; Weber Decl. (Ex. 6) ¶ 10; Hatch Decl. (Ex. 12) ¶ 16 (noting that his lease ends this month and he plans to purchase a truck).

[78] *See, e.g,.* ICOA signed by Plaintiff McKay ("McKay ICOA") (Ex. 69).

[79] *See* 49 U.S.C. §§ 14102, 14704, *et seq.*; 49 C.F.R. Part 376, *et seq*. (hereinafter collectively the "Regulations").

[80] *See OOIDA v. C.R. England, Inc.*, 508 F. Supp. 2d 972, 982 (¶ 53) (D. Utah 2007). The ICOA signed by Plaintiffs in this case is consistent with the form of ICOA Judge Stewart upheld.

> YOU are not required to purchase or rent any products, equipment, or services from US as a condition of entering into this Agreement.[81]

And "[e]ither party may terminate the Agreement at any time for any reason by giving thirty (30) calendar days' written notice to that effect to the other party."[82]

3. Reviewing and signing the contracts

Apprentices interested in becoming ICs first went to the Horizon offices for a presentation and to begin the signing process and then went to England's offices for a presentation on the ICOA and to complete it. Up until 2010, the presentations were live two- to three-hour sessions that included PowerPoint presentations and question and answer sessions.[83] Drivers could take as much time as they wished to review the contracts before signing.[84] IC Robert Andrews "spent three days reviewing those documents from cover to cover" before signing.[85] IC Carol Gleave took "a couple days to read my ICOA before signing it."[86] IC Paul Weber went over the documents with his lawyer before signing.[87] Beginning in 2010, England and Horizon began using a self-operated online explanation of the contracts that allowed drivers to review the document at their own pace.[88]

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[81] McKay ICOA (Ex. 69) ¶ 1B.
[82] McKay ICOA (Ex. 69) ¶13.
[83] MacInnes Dep. (Ex. 42) at 278–279, 281.
[84] O'Neal Dep., 7/15/13 (Ex. 46) at 246–47.
[85] Andrews Decl. (Ex. 11) ¶ 11; *see also* Durr Decl. (Ex. 4) ¶17(noting opportunity to ask questions and read contract).
[86] Declaration of Carol Gleave ("Gleave Decl.") (Ex. 18) ¶ 12.
[87] Declaration of Paul Weber ("Weber Decl.") (Ex. 6) ¶ 11.
[88] MacInnes Dep. (Ex. 42) at 302, 312-14; Gonzalez Decl. (Ex. 16) ¶ 14 ("On the day I signed up, I was given plenty of time to read the contracts with England and Horizon. Those contracts were on a computer. I read both contracts before signing them.").

Drivers could obtain and review the VLA and ICOA contracts long before completing training.[89] Indeed, IC Bret Hatch "requested and obtained a copy of England's Independent Contractor Operating Agreement and Horizon's Vehicle Lease Agreement" before he attended England's school.[90] Although it is unusual for a prospective student to ask about IC arrangements, Mr. Hatch did.

Plaintiffs' contention that "[d]rivers were rushed through the contract signing process without adequate time to review the agreements"[91] is contradicted by the actual experiences described above. But this can only by learned by asking each individual what his or her experience was.

D. Apprentice Drivers Chose to Be ICs Based Upon a Wide Variety of Information and for Individual Reasons Unrelated to the Alleged Misrepresentations.

Central to this motion is why apprentice drivers chose to be ICs, including what information they relied upon. Plaintiffs cannot prevail on their motion if, as here, some proposed class members (1) were not aware of the alleged misrepresentations, (2) chose to be ICs for reasons unrelated to the alleged misrepresentations, or (3) knew actual available miles and income and yet chose to be ICs. *See, e.g., Martinez v. Nash Finch Co.*, 2013 U.S. Dist. LEXIS 45576, 2013 WL 1313899 (D. Colo. Mar. 29, 2013) (unpublished).

1. Apprentice drivers' primary source of information was their trainers, not the alleged misrepresentations.

Individual ICs had many sources of information about the IC option at England, but the primary source was their own experience working with their trainers over the typical 90-day

[89] MacInnes Dep. (Ex. 42) at 243-45; Pierce Dep. (Ex. 45) at 184-85.
[90] Hatch Decl. (Ex. 12) ¶ 7.

training period. This occurred both in Phase I (where the trainer could be either a company driver or an IC) and in Phase II (where the trainer was almost always an IC). England told trainees:

> When you're finished with Phase 2 Training, you'll have the choice whether or not to become an Independent Contractor. Many find it rewarding to start and grow their own business. Part of Phase 2 Training is to help you understand what it means to be an Independent Contractor and how to do it successfully. This understanding will help you make a decision about which path you want to follow. ***Even if you choose not to become an[] Independent Contractor, the information in these modules will be useful in your life and in your career***.[92]

England also counseled apprentice drivers to observe closely their IC trainer: "If your Trainer is managing their business well, then ask questions and learn as much as you can. If your Trainer does not yet have a handle on the business yet, your job as a Phase 2 apprentice is to team with that Phase 2 Trainer, practice and learn. Observe and take note of those things you would avoid if you were managing the business."[93]

Individual drivers confirm that their trainers were their primary source of information. Tony Mathos "[i]nitially planned to be a company driver; however, after discussing the ins and outs of being an independent contractor with my Phase I trainer, I determined that I wanted to be an independent contractor. . . . My Phase I trainer was very open about what it is like to be an independent contractor, even showing me his settlement statements."[94] Jack Reynolds similarly reports: "My Phase I trainer . . . had been an independent contractor during his first three years

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[91] Mot. at 21 n.46.
[92] Module E (Ex. 61) at 7 (emphasis added).
[93] Module E (Ex. 61) at 7-8. As an example, Millard Mahala, a former IC, "initially planned on being a company driver, but I changed my mind during Phase I. I saw what my Phase I trainer was doing, and **thought that I could do better**. I also talked to other independent contractors for England who had a positive experience as independent contractors." Mahala Decl. (Ex. 8) ¶ 9 (emphasis added); *see also* Gonzalez Decl. (Ex. 16) ¶ 11.

with England and then he switched to being a company driver . . . We looked at his pay statements and saw he would have been much further ahead as an independent contractor."[95] And John Durr's "Phase I trainer sat me down and showed me how to make money and he showed me his settlement statements. He had been an independent contractor for about ten years."[96] Carol Gleave, a former IC, said her "Phase I trainer was an awesome woman, who really taught me a lot. . . . She was a company driver, but she had previously been an independent contractor. I talked to her about both options and she told me it was my choice. She explained I could make good money as an independent contractor but that being a company driver was a good option too."[97] IC Christopher Evans explained, "Both my Phase I and Phase II trainers discussed the option of being an independent contractor and they showed me their incomes as independent contractors. I never felt pressure, however, to become an independent contractor."[98] And Joseph Love ultimately chose to be a company driver after "[t]he trainers I drove for explained the independent contractor program to me and let me make up my own mind."[99]

Phase II trainers do not follow a rote script, but rather teach by example and share their experiences. Current IC and trainer Bret Hatch testified: "As a trainer, I carefully explain to my trainees the potential income and costs of being an independent contractor versus a company driver. There are times I recommend one path or another to a trainee based on where I think

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[94] Mathos Decl. (Ex. 9) ¶ 11.
[95] Reynolds Decl. (Ex. 3) ¶ 11.
[96] Durr Decl. (Ex. 4) ¶ 13.
[97] Gleave Decl. (Ex. 18) ¶ 8.
[98] Evans Decl. (Ex. 5) ¶ 10; *see also* Parras Decl. (Ex. 14) ¶¶ 7-8; Toole Decl. (Ex. 17) ¶ 9.
[99] Love Decl. (Ex. 23) ¶ 7; *see also* Lovett Decl. (Ex. 27) ¶ 7 (explaining that he did not feel any pressure from his trainers and he chose to become a company driver).

they'll have more success, based on their personal goals and personality."[100] In sum, no two training experiences or imparted information are identical because no two trainers and no two apprentices are alike. Thus, what is orally discussed and observed during the 90 days of on-the-road training by each apprentice driver is "necessarily . . . a unique occurrence"[101] and is not susceptible to class-wide proof.

Apprentices also obtained information from discussions with other England drivers. IC Paul Lucey learned about England from a "friend from trucking driving school [sic], who was driving for England" who told him "'We're all driving around, we're making money, and we're having fun at England.'"[102] And he obtained "feedback from other drivers I knew from the truck driving school" and learned that "the folks who were getting the highest miles, who were the busiest travelers, and who were making the most money, were those driving for England."[103]

Plaintiffs point to various materials they allege contain misrepresentations, but drivers' individual testimony shows those materials were often not considered or important in making their decision to become ICs. Indeed, some ICs did not either see or remember the website[104] or

[100] Hatch Decl. (Ex. 12) ¶ 13; *see also* Weber Decl. (Ex. 6) ¶ 8; Durr Decl. (Ex. 4) ¶ 12.
[101] *Berger*, 2014 WL 350082 at *5.
[102] Lucey Decl. (Ex. 1) ¶ 6.
[103] *Id.* at ¶ 7; Reynolds Decl. (Ex. 3) ¶ 9 ("So I had lots of opportunity to talk to drivers and ask questions during school. I frequently spoke with other drivers and talked with about their experiences. Consequently, I had access to all kinds of information about England's trucking program."); Hatch Decl. (Ex. 12) ¶ 9 ("I primarily decided to drive for England because of the size of the England company and because I had spoken with former drivers at England who had good experiences there.").
[104] *See, e.g.*, Benigni Decl. (Ex. 7) ¶ 4 (noting that referred to England by brother); Declaration of Thomas Lovett ("Lovett Decl.") (Ex. 27) ¶ 4 (explaining that he learned about England through word of mouth and newspaper ad); *cf.* Hatch Decl. (Ex. 12) ¶ 6 (stating that he did not see anything on England's website in terms of promised income and that mileage information on website was not motivating factor in his decision to attend England's school).

advertising materials,[105] Horizon brochures[106] or the graphs in the England Business Guide ("EBG").[107] For example, Brian Hunter "received a copy of the England Business Guide, but I don't recall seeing any graphs with average pay or mileage representations."[108]

2. Drivers chose to be ICs for a variety of reasons unrelated to the alleged misrepresentations.

Trainee and apprentice drivers ultimately decided to become ICs for a variety of reasons unrelated to the alleged misrepresentations.[109] Individual testimony reveals these reasons were varied and individual to each driver:

- IC **Tony Mathos**: "Initially I planned to be a company driver; however, after discussing the ins and outs of being an independent contractor with my Phase I trainer, I determined that I wanted to be an independent contractor," and did not rely on EBG graphs or Horizon brochure. Mathos Decl. (Ex. 9) ¶¶ 11, 14-15.

- IC **Bret Hatch**: "I didn't want to be under the control of a company. I wanted the freedom to choose how I will operate," and did not rely on the EBG. Hatch Decl. (Ex. 12) ¶¶ 10, 11.

- IC **Jack Reynolds**: "I chose to be an independent contractor because I wanted my own business. I hoped to one day start a fleet." Reynolds Decl. (Ex. 3) ¶ 14.

- IC **Primo Benigni**: "I had a business background from working as a contractor, evaluated the material from England, and I determined that I could make more

[105] *See, e.g.*, Hunter Decl. (Ex. 15) ¶ 4 (explaining that he called England after seeing England's phone number on the side of an England truck).
[106] Mathos Decl. (Ex. 9) ¶ 14; Upton Decl. (Ex. 2) ¶ 11. And the Horizon brochure is not mentioned in the declarations of former ICs filed by Plaintiffs—Roberts, McKay, McLintic, and Cavezas.
[107] Mathos Decl. (Ex. 9) ¶ 14; Hatch Decl. (Ex. 12) ¶ 10; Broccardo Decl. (Ex. 10) ¶ 7; Hunter Decl. (Ex. 15) ¶ 9; Gleave Decl. (Ex. 18) ¶ 11; Weber Decl. (Ex. 6) ¶ 9; Declaration of David Reisig ("Reisig Decl.") (Ex. 19) ¶ 12; Toole Decl. (Ex. 17) ¶ 10.
[108] Hunter Decl. (Ex. 15) ¶ 9.
[109] Plaintiffs also assert that they and other potential class members were misled because they did not have "[a]ccurate information on length of tenure and knowledge concerning Defendants' high turnover." Mot. at 45. However, as noted below, trainees testified they were well aware of both those issues, requiring individual analysis.

money as an independent contractor," and "I feel like I have been successful driving for England." Benigni Decl. (Ex. 7) ¶¶ 5, 11.

- IC **Joseph Broccardo**: "In the beginning, I planned to work as a company driver again [after driving for England in the 1990s], but I understood at that time I would be required to drive in a team, which I did not want to do. So I decided to become an independent contractor. That was the best decision I ever made." Broccardo Decl. (Ex. 10) ¶8.

- IC **Brian Hunter**: "I decided to become an independent contractor because there were too many restrictions on company drivers and more freedom as an independent contractor. In addition . . . I relied on my own experience as an owner-operator, and I ran the numbers of potential income." Hunter Decl. (Ex. 15) ¶ 8.

- Former IC **Millard Mahala**: "I initially planned on being a company driver, but I changed my mind during Phase I. I saw what my Phase I trainer was doing, and thought that I could do better. I also talked to other independent contractors for England who had a positive experience as independent contractors." Mahala Decl. (Ex. 8) ¶ 9.

- IC **John Durr**: Based on information from trainers, "I understood the expenses and responsibilities involved with being an independent contractor, and I decided that I wanted to become an independent contractor," and "I have experienced financial success with England." Durr Decl. (Ex. 4) ¶¶ 13-16, 19.

- Former IC and current company driver **Carol Gleave**: "I ultimately decided to be an independent contractor because I liked the idea of having my own business. I figured, if I'm going to do this, I'm going to go all the way." She was an IC for three years and then switched to being a company driver in order to retain her dedicated route, where she now "ma[kes] a little less money driving as a company driver [b]ut I am still happy driving for England." Gleave Decl. (Ex. 18) ¶¶ 10, 11, 14-15.

- IC **Randy Aguilar**: "I entered my Phase I training **with my mind made up**. I wanted to make something of myself. I had previously run a business and believed I could be successful. I also understood that starting as a new independent contractor was not without risk, like starting any new business." Aguilar Decl. (Ex. 20) ¶ 7 (emphasis added).

- IC **Robert Andrews**: After discussions with Phase I and Phase II trainers, "I decided to sign a three-year truck lease." "I have been content with my experience at England, and my daughter, at my recommendation, is now also driving for England." Andrews Decl. (Ex. 11) ¶¶ 10-11, 13.

- Former IC **Christopher Evans**: Evans attended a different driving school and "decided in orientation that I wanted to be an independent contractor." He went through Phase I and Phase II training, where his trainers discussed his options. "I made good money driving as an independent contractor for England . . . I also now own my own truck. As a result of my hard work at England, my credit has also gone from poor to great." Evans Decl. (Ex. 5) ¶¶ 9-10, 20-21.

- IC **Paul Weber**: "I decided to become an independent contractor after discussing it with my Phase I trainer. I saw my trainer's paycheck and did the math for what I would make as a company driver versus an independent contractor. . . . I am making more money at England than I anticipated." Weber Decl. (Ex. 6) ¶¶ 8, 12.

- Former IC **Jerry Upton**: He made his decision based on observation and what he learned from discussions with from his trainers. "I did not rely on any of that information [in any Horizon brochure or the England Business Guide] because I was familiar with the realities of driving for England based upon the time I spent with my trainers. . . . I value the independence and self-determination of being an independent contractor, and by choice I limit my time off." Upton Decl. (Ex. 2) ¶¶ 6-8, 11, 16 (emphasis added).

- IC **Gary Manfull**: He worked as an independent contractor for other trucking companies before. "At some point my wife expressed interest in joining me as a trucker, so we decided to find a company where she could go to school and then be trained by me. Given that England was the first to respond and would allow me to train my wife, we decided to work for England. . . . During the refresher course, I decided to be an independent contractor because of my prior experience as an independent contractor." Manfull Decl. (Ex. 13) ¶¶ 4, 8, 10.

- Former IC **David Reisig**: He drove for another large trucking company before coming to England. "I had the intention of being an independent contractor from day one. . . . I did not, however, rely on any income or mileage representations contained in the England Business Guide in deciding to become an independent contractor for England . . . ." Reisig Decl. (Ex. 19) ¶¶ 4, 12.

- IC **Paul Lucey**: He started out as a company driver for England, but "constantly ran the numbers and evaluated whether it made sense for me to become an independent contractor. . . . Ultimately, however, I finally made the decision to switch to leasing because I thought it would give me a better chance to switch divisions (in addition to the business reasons I had for making the switch.)" Lucey Decl. (Ex. 1) ¶¶ 10-11.

- Former IC and current company driver **John Pratt**: He started as a company driver but "decided to lease a truck [because] my driver manager suggested that

being an independent contractor would be a good fit for me because I was a good driver and I was driving a lot of miles. I was particularly encouraged by the fact that I could become an independent contractor without any out-of-pocket expenses." In 2010, he decided to become a company driver because his wife "was concerned about my health and the stress of being an independent contractor." Declaration of John Pratt ("Pratt Decl.") (Ex. 21) ¶¶ 9, 13.

- IC **Francisco Parras**: "[M]y Phase I trainer showed me what I could earn as an independent contractor . . . if I managed my business properly. . . . During Phase II, I was able to confirm what my Phase I trainer had told me. . . . I have been successful and I like what I am doing." Parras Decl. (Ex. 14) ¶¶ 7-8.

- IC **David Gonzalez**: "My father was a trucker. . . . [and] recommended England. I liked that England had been in the business a hundred years. I also liked that it is a family-owned business. . . . My Phase II trainer was [an] independent contractor and he discussed his personal experiences as an independent contractor with me. He wasn't making money because he wasn't working smart enough – for example, he wasn't efficient with his fuel. . . . In my opinion, England does a pretty good job of giving you the tools to succeed . . . In sum, I've had a great experience with England and I am pleased with the income I have been able to earn as an independent contract[or]." Gonzalez Decl. (Ex. 16) ¶¶ 4, 6, 11, 13, 17.

- Former IC **Barry Toole**: "I knew going into England that I wanted to lease a truck. Having owned my own business previously, I knew I wanted to be my own boss from day one. I wanted to make my own decisions." Toole Decl. (Ex. 17) ¶¶ 12.

- Former IC and company driver **Jimm Simpkins**: After completing his training with England, Simpkins ran for many years as a company driver, but "[h]aving already owned my own business before, I felt that England's leasing program was a good deal for me. I approached Horizon Truck Sales and Leasing ("Horizon" on my accord." Declaration of Jimm Simpkins ("Simpkins Decl.") (Ex. 22) ¶¶ 9-11.

The various reasons any driver chose the IC option (or the company option) can be determined only by asking each driver.

E. There Were No Uniform or Common Misrepresentations About Average Miles or Income.

Plaintiffs premise many of their claims on the allegation that England uniformly and broadly misrepresented "average" miles and average income that would be available to a driver

electing to become an IC, and that it promised guaranteed employment that it failed to provide.[110] But the alleged misrepresentations asserted by Plaintiffs demonstrate there was no uniformity of content, time, distribution, or receipt by drivers. And as detailed previously by the ICs' testimony, causation and reliance could be proved only individually.

1. Lack of uniform content.

First, there was no uniform representation. The information Plaintiffs point to on the website, advertisements, the communications with recruiters, the England Business Guide ("EBG"), and the Horizon brochures varied in content.

Notably, the website, advertisements, and Horizon brochures had no representations of ***average*** miles or income. The distinction between "average" miles or income and of "potential" miles or income is an important one that Plaintiffs ignore. In addition, average miles per driver per week calculations can be performed in different ways and my not reflect the typical experience for a diligent IC. For example, an average could include trucks that are idle (either because they are not assigned, being repaired, or assigned to a driver who is taking home time), and drivers with low mileage weeks, which can occur because the driver is just getting started, is terminating or completing a lease, or is not a diligent driver. Low mileage weeks occurring for individual reasons such as these make any "average" miles calculation atypical for an IC who is driving actively and takes advantage of the miles available.[111]

[110] Mot. at 8-30.

[111] Plaintiffs cite to several internal England documents that discuss "average" miles as indicating that the alleged representation of "average miles" in the EBG graph was inaccurate. Mot. at 29-30, 40-41. However, as discussed below, the one graph in the EBG that purportedly represents "average miles" does not include such a representation in the text. And, in any event, average miles for those ICs driving a full week with reasonable planning and efficient driving is different than the gross averages apparently referenced in the cited internal documents.

Plaintiffs single out presentations of potential miles or income in pro formas provided on the website or in Horizon brochures, but those pro formas were always qualified as ***dependent on individual performance***. Specifically, Plaintiffs point to a pro forma on England's website in 2010 as "indicating solo IC Drivers received 3,250 miles weekly."[112] But immediately preceding the pro forma, England explains: "Potential Independent Contractor Solo Weekly Truck Lease Income—*Below figures are only projections; actual income will vary based on individual performance."[113] And the website changed in March 2011 to read: "Weekly miles ranging from 1,800 in higher-pay, desirous Dedicated accounts to upwards of 3,000 in traditional over-the-road household name accounts!" But with that change, the website still had the same caveat that the numbers "are only projections; actual income will vary based on individual performance."[114] In addition, the March 2011 website contains a description of some specific **examples** of "independent contractors operating solo [who] have earned big money" as of January 2011.[115] But these were clearly labeled "examples" and not "averages."

Plaintiffs criticize England's pro formas for being based on the top 10% of IC drivers and assert that England "passed off these figures as being representative of the Driver experience in

[112] Mot. at 15.
[113] England website, Independent Contractor Lease Program ("England Website") (Ex. 70).
[114] England revised website, Independent Contractor Lease Program ("Revised Website") (Ex. 71). Sometime subsequently, the prose description was removed from the website. Currently, the website contains no IC mileage figures. *See* http://www.crengland.com/driver-services/independent-contractors-program (last visited February 17, 2014); *see also* Mot. at 16.
[115] Revised Website (Ex. 71).

the program."[116] But the pro formas describe what an IC could potentially achieve based on "individual performance"—not as representative of averages. Some ICs achieved them.[117]

Plaintiffs also assert that there were "uniform misrepresentations by recruiters," that "recruiters would begin the process of pushing prospects into the Driving Opportunity through carefully choreographed interactions," and that "recruiters were consistently instructed to state the average weekly miles for a solo lease operator at between 2,800 and 3,200." But individual testimony shows the opposite; there were no uniform communications, as every applicant-recruiter communication was tailored to the individuals' questions.

Recruiters did not use scripts in any regular or uniform way because every call is different and every need is different. As England's Director of Recruiting and Advertising, Steve Branch, testified: "[e]very single call that comes in is different and every need that comes in is different. So there's really no way that one script is going to satisfy, you know, our needs as filling those different jobs."[118] Manuals and guides (like the ones Plaintiffs point out) are provided to recruiters as a reference, but recruiters do not discuss much of what was in the

[116] Mot. at 16.

[117] Alisha Garrett testified that the numbers in the March 2011 website were based on an actual study she had done and that "these were real live examples of real live drivers at that time that the data was pulled." Deposition of Alisha Garrett ("Garrett Dep.") (Ex. 54) at 289, 293; Pay study, Version 3 (Ex. 72). Plaintiffs cite to Deposition Exhibit 488, Ms. Garrett's informal list of "questions" generated in March 2011 that note a need to change England's website "currently advertising 3000 miles per solo IC. Our average is 1891." Mot. at 40. But Ms. Garrett was not asked about this document in her deposition, and there is no document reflecting how that purported "average" for solo ICs was calculated. Presumably, the average included idle trucks and included "all divisions," Garrett Dep. at 286, not just the National (over the road, longer hauls), which is also reflected on her study summary. (Ex. 72).

[118] Deposition of Steve Branch ("Branch Dep.") (Ex. 55) at 203-04; *see also* Declaration of Kristine Christenson ("Christenson Decl.") (Ex. 35) ¶ 7.

manual with an applicant because it was too detailed.[119] On occasion when applicants had detailed questions about leasing a truck and driving as an IC, recruiters referred the applicants to a Horizon representative.[120] Former recruiter Claudia Donato testified that on the rare occasions early on during her employment when she was asked about average miles for a solo IC, she would answer "2500," but she was clear that miles were not guaranteed.[121] As Steve Branch explained, the communications between England recruiters and applicants were almost entirely about getting to school and obtaining a CDL. This is confirmed by ICs themselves.[122] A recruiter's primary mission was to get inexperienced drivers to the schools.[123]

Next, Plaintiffs allege that Horizon Program brochures contained uniform misrepresentations about average miles and misrepresented that (1) C.R. England's pay was the best in the industry, (2) C.R. England's average length of haul was 1,500 miles, (3) England offered a "successful business plan."[124] The brochures did not, however, contain any representations about average miles. Rather, they contained pro formas that gave potential

[119] Branch Dep. at 202-03, 210.
[120] Branch Dep. at 74.
[121] Declaration of Claudia Donato ("Donato Decl.") (Ex. 37) ¶ 21.
[122] Hatch Decl. (Ex. 12) ¶ 5 ("We didn't discuss pay or miles."); Reisig Decl. (Ex. 19) ¶ 5 (noting recruiter did not make income or mileage representations); Broccardo Decl. (Ex. 10) ¶ 4 (same); Manfull Decl. (Ex. 13) ¶ 6 (same); Toole Decl. (Ex. 17) ¶ 6 (same); Andrews Decl. (Ex. 11) ¶ 7 (same); Mahala Decl. (Ex. 8) ¶ 6 (same); Lucey Decl. (Ex. 1) ¶ (same); Mathos Decl. (Ex. 9) ¶ 8 (explaining conversation with recruiter was limited to logistical matters); Parras Decl. (Ex. 14) ¶ 5 (conversation concerned logistical matters and the recruiter did not discuss pay or mileage or say anything that influenced Parras' decision to attend England's school); Evans Decl. (Ex. 5) ¶ 6 (noting that recruiter simply explained basic arrangements for joining England).
[123] Branch Dep. at 241. Contrary to Plaintiffs, contention, recruiters were not incentivized to "aggressively promote the Driving Opportunity as a superior 'career' option to company employment." Mot. at 17 (relying only on declarations of four former ICs who lacked any personal knowledge). Incentive pay for England recruiters was neutral as to whether a school attendee chose to be a company driver or an IC. Donato Decl. (Ex. 37) ¶ 23; Branch Decl. (Ex. 33) ¶ 7.

incomes for solo ICs, a team of ICs, and IC trainers based on stated assumptions regarding weekly mileage, weeks worked, pay rate, and fixed and variable expenses.[125] As with the pro formas on England's website, the pro formas in the brochure stated that "Below figures are only projections; actual income will vary based on individual performance."[126] The representations about pay being the "best in the industry," about length of haul and about a "successful business plan" are not asserted by Plaintiffs to appear in other forms of England communications,[127] and these brochures were not distributed to potential class members but were on a counter in the Horizon offices where they could be picked up.[128] Thus, there is no common communications to drivers on these subjects. Finally, the brochures varied in content over time.[129]

2. Lack of uniform time period

Second, there was no uniformity over time because the representations Plaintiffs point out changed over time. Indeed, Defendants no longer make any of the alleged misrepresentations regarding income and miles. England's website, where anyone could learn about England and its schools, contained various information about the IC option that evolved over time.[130] The website pro formas changed over time and were discontinued in 2012. And

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[124] *See* Mot. at 22–23.
[125] Horizon brochure (Ex. 82).
[126] Horizon brochure (Ex. 82).
[127] For example, other England materials contained different representations as to "length of haul." *See, e.g.*, England website (Ex. 83) ("C.R. England has one of the longest lengths of haul of all temperature control carriers"); England Independent Contractor Information (Ex. 84).
[128] Answer to Int. No. 24, Def. Opportunity Leasing, Inc.'s Second Am. Resps. to Pl. Charles Roberts' Interrogs., Set One (Ex. 78).
[129] *Compare* Horizon brochure (Ex. 82), *with* Earlier Horizon brochure (Ex. 90).
[130] *See* Revised Website (Ex. 71); England Website (Ex. 70); England website 7/26/2010 (Ex. 91); England website 9/14/2010 (Ex. 92); J. England Dep., 5/17/2013 (Ex. 43) at 196–207; J. England Dep., 12/6/2012 (Ex.56) at 269–270.

the England Business Guide, as Plaintiffs acknowledge, was discontinued in July 2010.[131] Similarly, the Horizon brochures containing the alleged misrepresentations were not used after early to mid 2012.[132] And in 2013, England removed the IC mileage and income figures from the recruiting guides, which are guides that recruiters had the option of referring to but never uniformly conveyed to potential applicants.[133] Indeed, and as a general rule recruiters no longer make average mileage or income representations.[134]

3. Lack of uniform distribution

Third, there was no uniformity of distribution to drivers. England advertised both its truck driving school and truck driving jobs through a variety of media nationwide including online advertisements (Google, job sites, social media), print advertisements, radio and television ads, billboards, advertisements on its trailers, etc.[135] Many applicants heard about England through truck-driver word of mouth,[136] from family,[137] or after seeing an England truck drive by.[138] The only source of information distributed to all class members was the EBG, although

[131] *See* Mot. at 24; *see also* Email from J. Ringer to Doug Ivie et al., dated July 7, 2010, (Ex. 85); England Business Guide Versions Chart (Ex. 86). The latest revision of the Equinox Business Guide, which was created by a separate company and replaced the England Business Guide, was the November 2010 revision. *See* Mot. at 24-25. And although Plaintiffs also refer to England's CAT training module, the latest version of the CAT module to contain the same graphs appears to be 2008. CAT Module Versions chart (Ex. 87).
[132] Answer to Int. No. 24, Def. Opportunity Leasing, Inc.'s Second Am. Resps. to Pl. Charles Roberts' Interrogs., Set One (Ex. 78).
[133] Pronk Dep. (Ex. 51) at 191–94; Branch Dep. (Ex. 55) at 335–36.
[134] Donato Decl. (Ex. 37) ¶ 21; Christenson Decl. (Ex. 30) ¶ 9.
[135] Branch Dep. (Ex. 55) at 98; Branch Decl. (Ex. 33) ¶ 5.
[136] *See, e.g.*, Parras Decl. (Ex. 14) ¶ 3; Lucey Decl. (Ex. 1) ¶ 7; *see also* Donato Decl. (Ex. 37) ¶ 10.
[137] *See, e.g.*, Gonzalez Decl. (Ex. 16) ¶ 6; Benigni Decl. (Ex. 7) ¶ 4.
[138] *See, e.g.*, Hardin Decl. (Ex. 24) ¶ 4; Hunter Decl. (Ex. 15) ¶ 4.

many did not read, interpret or remember the graphs in question.[139] Most importantly, apprentice drivers discussed miles and pay and reviewed weekly settlement statements with their IC trainers—a huge and individual source of information.

4. Lack of uniform receipt

Fourth, drivers did not uniformly receive all of the information available. Some applicants did not see the website[140] and many did not discuss mileage or income with their recruiters at all.[141] While most if not all trainees received the England Business Guide, not all read or recall the graphs.[142] And Plaintiffs admit that the Horizon brochures were not distributed by England or Horizon, but were only available for individuals to pick up from a counter at Horizon.[143] Some ICs recalled hearing discussions of mileage or income, but understood them

[139] Mathos Decl. (Ex. 9) ¶ 14; Hatch Decl. (Ex. 12) ¶ 9; Broccardo Decl. (Ex. 10) ¶ 12; Hunter Decl. (Ex. 15) ¶ 9; Gleave Decl. (Ex. 18) ¶ 11; Weber Decl. (Ex. 6) ¶ 9; Declaration of David Reisig ("Reisig Decl.") (Ex. 19) ¶ 12; Toole Decl. (Ex. 17) ¶ 10.

[140] *See, e.g.*, Hunter Decl. (Ex. 15) ¶ 4 (explaining that he called England after seeing England's phone number on the side of an England truck).

[141] *See* Donato Decl. (Ex. 37) ¶ 19 ("During my time at England, I only spoke to applicants about pay and/or mileage if asked by the applicants, and only a small fraction of the applicants ever asked (I would estimate that only about 10% of the applicants would ask about pay, income, or mileage."); *see also* Hatch Decl. (Ex. 12) ¶ 5 ("We didn't discuss pay or miles."); Reisig Decl. (Ex. 19) ¶ 5 (noting recruiter did not make income or mileage representations); Broccardo Decl. (Ex. 10) ¶ 4 (same); Manfull Decl. (Ex. 13) ¶ 6 (same); Toole Decl. (Ex. 17) ¶ 6 (same); Andrews Decl. (Ex. 11) ¶ 7 (same); Mahala Decl. (Ex. 8) ¶ 6 (same); Lucey Decl. (Ex. 1) ¶ (same); Mathos Decl. (Ex. 9) ¶ 8 (explaining conversation with recruiter was limited to logistical matters); Parras Decl. (Ex. 14) ¶ 5 (conversation concerned logistical matters and the recruiter did not discuss pay or mileage or say anything that influenced Parras' decision to attend England's school); Evans Decl. (Ex. 5) ¶ 6 (noting that recruiter simply explained basic arrangements for joining England).

[142] Decl of T. Mathos ¶ 14; Decl. of B. Hatch ¶ 10; Decl. of J. Broccardo ¶ 7; Decl. of B. Hunter ¶ 9; Decl. of C. Gleave ¶ 11; Decl. of P. Weber ¶ 9; Decl. of D. Reisig ¶ 12.

[143] Mot. at 22. Roberts is not sure whether he saw the Horizon brochure before or after he decided to lease. Roberts Dep. (Ex. 49) at 210. In his deposition, when McKay was shown the Horizon Brochure attached to Plaintiffs' complaint and asked whether he had ever seen the

as potential and not promises or guarantees.[144] Nor do Plaintiffs' mere citations to internal materials in England's Recruiting Department on average miles and income demonstrate that this information was ever communicated to applicants.[145]

5. Lack of uniform reliance and causation

Finally, as the IC declarants make clear, these purported mileage and income representations—if drivers even saw or heard them—did not cause all apprentice drivers to choose to become ICs.[146] Others who became ICs made the choice for similarly individual

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document, he testified "No . . . I might have seen similar, but not this." McKay Dep. (Ex. 53) at 235.

[144] *See, e.g.*, Gonzalez Decl. (Ex. 16) ¶ 12; Weber Decl. (Ex. 6) ¶ 9; Upton Decl. (Ex. 2) ¶ 11.

[145] Plaintiffs allege that the "core promises used to lure Drivers into the Driving Opportunity were reduced to an actual written script." Mot. at 19. The only document cited that appears to have any income or mileage representations is Appx. 4161. But that document is not an official recruiting document distributed to England recruiters. Rather, it is a document created by one recruiter for his own reference. *See* Christenson Decl. (Ex. 35) ¶¶ 3–6. Although Cathy Mattan claims that England recruiters used scripts (although she does not identify any such script), other testimony shows that recruiters did not used scripts and infrequently spoke about income or miles with applicants. *See id.* ¶ 7; Donato Decl. ¶¶ 18–21.

[146] *See, e.g.*, Hatch Decl. (Ex. 12) ¶¶ 4, 6, 9 (visited England's website and recalls seeing some information about mileage "but it was not the motivating factor in my decision to attend England's school" and primarily chose England because of the size of the company and he spoke with former England drivers who had a good experience with England); Reynolds Decl. (Ex. 3) ¶¶ 4, 6 (looked at trucking options on the web and picked England because it "was offering half-price tuition over the Christmas holidays"); Love Decl. (Ex. 23) ¶¶ 4-5 ("I did not join England because of any income or mileage representations or because of any guarantee of employment." He was interested in applying at England because he had seen its trucks all around and he had met Gene England and it seemed like a good company.); Redwing Decl. (Ex. 25) ¶ 3 (responded to an advertisement on television); Hunter Decl. (Ex. 15) ¶ 4 (got England's number off the back of an England truck); Hardin Decl. (Ex. 24) ¶ 4 (applied to England after seeing its trucks on the road); Yates Decl. (Ex. 28) ¶ 7 ("I decided to go with England because they offered me a free bus ticket to attend England's refresher course"); Gleave Decl. (Ex. 18) ¶ 5 (researched various trucking companies on the Internet, and selected England because it "was really into safety, and I liked the fact that trainees were on a truck with another person for approximately three months. I also looked at the pay on the website." Pay on the website is the amount paid per mile.); Aguilar Decl. (Ex. 20) ¶ 3 (researched truck companies for 18-24 months; "focused on which schools would be the easiest to get into and which would require the least money down;" looked at the

reasons.[147]

Whether a proposed class member relied on the alleged misrepresentations in the graphs of the EBG necessarily includes the individual question of how he or she interpreted it because the text associated with the graphs makes a different point than the "representation" Plaintiffs urge. *See Martinez*, 2013 WL 1313899, at *6 (denying certification in part because the court would have to "inquire as to how each individual Plaintiff or class member construed" the allegedly misleading advertisement).

The first graph, labeled "Independent Contractors vs. Company Average Solo Income," includes the text: "This graph shows that independent contractors make more money, faster than company drivers do." Nothing in the text states specific income dollar averages. And the graph shows data points for both ICs and company drivers at 1 year, 2 years, etc. Plaintiffs interpret the graph as showing average solo IC income of approximately $34,000 for the first year and average solo company income of approximately $32,000, with the average solo IC income increasing to approximately $47,000 for the second year. But knowing if each proposed class member agreed with Plaintiffs' interpretation requires an individual inquiry of each proposed class member.[148]

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size of the company; England was second choice but recruiter responded first, so he went with England).

[147] *See, e.g.*, Mathos Decl. (Ex. 9) ¶ 5 (researched trucking schools on the Internet and chose England for its dedication to safety); Manfull Decl. (Ex. 13) ¶¶ 4, 6 (noting he chose England because England would allow him to train his wife and England was first to respond).

[148] *See, e.g.*, Hunter Decl. (Ex. 15) ¶ 9 ("I received a copy of the England Business Guide, but I don't' recall seeing any graphs with average pay or mileage representations. I simply remember seeing some examples of potential income based on certain variables. I did not understand such examples to be a guarantee of any miles or income."); *see also* Upton Decl. (Ex. 2) ¶ 11 ("I recall seeing pay and mileage examples in the England Business Guide, but I understood that they were

The second graph, labeled "Miles," includes text that reads: "The miles comparison between independent contractors and company drivers is significantly different. IC solo drivers average 33% more miles than company drivers do. More miles can equal more money." Plaintiffs do not contend that the statement that ICs drive 33% more miles than company drivers do is false.[149] Rather, they say the graph constitutes a uniform representation of average solo IC miles per week of approximately 2800.[150] Indeed, Plaintiffs call it the "Weekly Mileage Graph," a term nowhere found in the EBG. To interpret the graph as Plaintiffs do requires a trainee or apprentice to read and interpret the bar in the graph against the miles axis and rely on that information. Many did not. IC Jerry Upton stated, "I recall seeing pay and mileage examples in the England Business Guide, but I understood that they were not promises or guarantees of any particular mileage or income and that they simply showed what you could earn if you drove a certain number of miles. In any event, I did not rely on any of that information because I was familiar with the realities of driving for England based upon the time I spent with my trainers."[151]

Graph 3 has no label, and says: "In this graph you can see that 21% of independent contractors make more than $50,000 a year. Only 12% of company drivers make that same amount." Unlike Graphs 1 and 2, Graph 3 is not focused on solo drivers but includes all ICs and company drivers who have driven for at least one year. Plaintiffs contend that the graph and

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not promises or guarantees of any particular mileage or income and that they simply showed you what you could earn if you drove a certain a number of miles.").

[149] Mot. at 29-30.

[150] *Id.* at 29.

[151] Upton Decl. (Ex. 1) ¶ 11.

representation are false because "almost no one achieved this level of success."[152] While this brief is not the place to defend that representation on the merits, it is worth noting that Plaintiffs ignore the reference in the text to earnings "a year," meaning the relevant data set would be those ICs who had at least one year's tenure, not the universe of all ICs reflected in the documents to which Plaintiffs cite. For purposes of Plaintiffs' Motion, however, the relevant point is whether all class members saw this graph and relied upon it for the decision to become ICs, which the evidence answers "no."

F. Turnover Among England Drivers Was Typical of the Trucking Industry, Was Known to Most Apprentice Drivers, and Turns on Individual Choice.

Plaintiffs repeatedly say England's turnover among ICs is evidence of "inevitable failure" and should have been disclosed to trainees/apprentices.[153] But individual inquiry is needed to determine what each driver knew about turnover and whether it influenced his or her decision.

First, turnover is not unique to England. The long-haul trucking industry has faced the challenge of high turnover among drivers for years.[154] Although companies calculate turnover differently,[155] by one estimate turnover was almost 100% among long-haul drivers in 2012.[156] Driving a long-haul truck is a difficult job that leads to turnover. According to the U.S. Department of Labor, "[w]orking as a long-haul truck driver is a major lifestyle choice because

[152] Mot. at 31.
[153] Mot. at 44-47.
[154] *See* Critical Issues in the Trucking Industry – 2013 (Ex. 89) at 9; J. England Dep., 12/6/12 (Ex. 56) at 185; D. England Dec. (Ex. 29) ¶ 14.
[155] Pronk Dep. (Ex. 51) at 88 (explaining that companies calculate turnover differently, including different populations in their figures).
[156] http://www.businessweek.com/articles/2013-06-14/trucking-recruiters-shift-into-high-gear.

these drivers can be away from home for days or weeks at a time . . . spend[ing] much of this time alone." [157]

Plaintiffs contend that turnover at England was higher than at other trucking companies.[158] But such a comparison, if accurate, is misplaced because unlike most other companies England recruits and trains potential drivers with no prior experience,[159] and its turnover is predictably higher. Moreover, between 2008 and July 2013, turnover among company drivers in most months exceeded the turnover rate for ICs .[160]

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[157] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Heavy and Tractor-trailer Truck Drivers, on the Internet at http://www.bls.gov/ooh/transportation-and-material-moving/heavy-and-tractor-trailer-truck-drivers.htm (visited *November 05, 2013*).

[158] Mot. at 44-45. England actively works to reduce turnover as one of its highest corporate goals. D. England Decl. (Ex. 29) ¶¶ 15-22. Plaintiffs cite to an internal email from Sara Cutler about driver turnover (it is not specific to IC turnover) and Corey England's response to her as indication of a turnover problem. Mot. at 46-47. Corey England's response, however, is one of hundreds of internal documents at England focusing on improving driver retention and expressing ongoing concern about the challenge. *See, e.g.*, Email from C. England (England President) to Everyone (at England), dated Aug. 12, 2010 (Ex. 73) ("We need the men and women that drive our trucks to be successful or we will fail. I'm asking you to do everything in your power to help all I.C. and company drivers (and students) to be successful."); Email from C. Moore to Everyone (SLC), dated Dec. 4, 2008 (Ex. 88) (discussing monthly company driver retention rally and encouraging all to "work harder to support our drivers"). England devotes a substantial amount of time and resources to understanding and reducing driver turnover because it wants its drivers to succeed. D. England Decl. (Ex. 29) ¶ 18. Managers at England are all held responsible for turnover. Throughout the period of this case, England tied bonuses to lowering company-wide driver turnover, irrespective of whether company driver or IC. *Id.* ¶ 19. For that reason, England strives to work with ICs who are struggling in their driving efficiency, management skills, etc.

[159] J. England Decl. (Ex. 32) ¶ 8 (explaining England's decision to hire inexperienced drivers).

[160] *See* Answers to Pl. Kenneth McKay's Second Set of Interrogs. to Def. Opportunity Leasing, Inc., No. 2 (Ex. 75). Moreover, as demonstrated in the attached interrogatory answer, if the trainees/apprentice drivers (who are company drivers) are excluded from the turnover calculation, the turnover of ICs is only slightly higher than for company drivers, and in some months was lower. *See id.*; *see also* Pronk Dep. (Ex. 51) at 55 (noting that company driver and IC turnover is about the same); *see also* O'Neal Dep., 12/7/12 (Ex. 48) at 239.

Second, driver turnover was well-known to many drivers.[161] Trainees "knew . . . about the high turnover at England, and . . . had a chance to talk to drivers who were struggling and those who were succeeding."[162] Plaintiff Roberts was aware of turnover before deciding to become an IC.[163] England's goal of reducing turnover was a weekly if not daily message throughout the company that most students, trainees and apprentice drivers heard. Other present and former ICs confirm they knew about turnover before deciding to become ICs.[164] For example, Robert Andrews testified: "My instructor also told us about the high turnover at England and in the trucking industry."[165]

Finally, Plaintiffs mistakenly equate termination, which is what "turnover" calculations measure, with "failure."[166] But terminations occur for a host of reasons, many unrelated to "failure."[167] Indeed, an aggregate turnover number reveals little about any single driver's experience; only by asking each driver can the Court determine if England omitted to disclose turnover to that driver and if a lack of information about turnover caused him or her to become an IC. The principal reasons drivers terminate include:

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[161] Fife Dep. (Ex. 41) at 245.
[162] Reynolds Decl. (Ex. 3) ¶ 10.
[163] Roberts Dep. (Ex. 49) at 132-33.
[164] Mathos Decl. (Ex. 9) ¶ 16; Hatch Decl. (Ex. 12) ¶ 8; Reynolds Decl. (Ex. 3) ¶ 10; Broccardo Dec. (Ex. 10) ¶ 2(had driven with England before, this is his second time); Hunter Decl. (Ex. 15) ¶ 7; Mahala Decl. (Ex. 8) ¶ 5; Evans Decl. (Ex. 5) ¶ 17; Manfull Decl. (Ex.13) ¶ 12; Lucey Decl. (Ex. 1) ¶ 17.
[165] Andrews Decl. (Ex. 11) ¶ 9.
[166] Mot. at 45-47.
[167] O'Neal Dep., 12/7/12 (Ex. 46) at 239; *see also* Email from M. Fife to Dustin England, dated April 16, 2010 (Ex. 57) (listing a variety of Termination Codes and associated percentages in a study from April 2010, of which "More Money" represented 12% and "More Money – Miles" represented 3%); Lease & LP Term Reasons (Ex. 93) (showing that ICs "terminations" result from drivers completing their lease; policy violations; family and health; accidents and log violations; and "Money, Miles, Hometime").

- **Insufficient Home Time**. Absence from home is a significant cause of driver termination.[168] Former IC Jerry Upton said, "although I loved driving for England, I recently completed my lease and stopped driving for England this month, so that I can accept a local job and be home more with my wife and family."[169] And Former IC Millard Mahala took a pay cut for a driving job closer to home.[170]

- **Completing a Lease and/or Releasing.** England's IC turnover statistics include drivers who complete their leases.[171] For example, Primo Benigni completed a three year lease in approximately 2011 and then purchased a truck using his Truck Investment Fund, so he would be shown as a turnover event in the England system.[172] Carol Gleave was happy as an IC but switched to being a company driver after completing her lease so that she could keep her dedicated route even though she "made a little less money."[173]

- **Log Violations and Safety Violations.** Internally at England, those studying turnover at one point believed the "[g]reatest turn over for drivers is within the first 4 to 6 months due to log violations"[174]

- **Leaving for Other Jobs/More Money.** "[M]any drivers get trained in the TL industry and then move on to LTL and private fleets where they stay."[175] Christopher Evans was an England IC for over five years. He quit in June 2013 even though he "made good money driving as an independent contractor for England" because he was "tired of driving reefer trucks" and was "interested in a new challenge . . . involv[ing] some physical labor" so he "started driving flatbed loads."[176]

- **Family Emergencies or Health Issues.** Some drivers report family illness or other family emergencies require them to have more time at home. Others have personal health issues requiring them to terminate.[177] Former IC Barry Toole terminated to be near his "mother who was having a hard time."[178] And Former IC John Pratt switched in 2010 to become a

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[168] O'Neal Dep., 12/7/12 (Ex. 48) at 239; O'Neal Dep., 7/15/13 (Ex. 46) at 347.
[169] Upton Decl. (Ex. 2) ¶ 17.
[170] Mahala Decl. (Ex. 8) ¶¶ 1, 16.
[171] Garrett Dep. (Ex. 54) at 181.
[172] Benigni Decl. (Ex. 7) ¶ 2.
[173] Gleave Decl. (Ex. 18) ¶¶ 14-15.
[174] *See* Meeting Minutes - Retention and Recognition Committee, dated May 24, 2011 (Ex. 58).
[175] ATA Study (Ex. 62) at 36. "TL" means "truckload" and indicates a long-haul trucker. "LTL" means "less than truckload" and is usually associated with local trucking jobs.
[176] Evans Decl. (Ex. 5) ¶¶ 20, 23-24.
[177] Simpkins Decl. (Ex. 22) ¶ 2 (explaining that he quit after his "knees gave out and [he] had to go on disability").
[178] Toole Decl. (Ex. 17) ¶ 3.

company driver because he "was closer to retirement [and] my wife encouraged [me] to take a position that would be easier, less stressful, and/or that would keep me closer to home."[179]

- **Abandonment, Voluntary and Other.** In some instances, drivers simply abandon their trucks and provide no reason for termination. England tracks this as "Abandoned." Others voluntarily leave for undisclosed reasons. Former IC David Reisig left England "for primarily personal reasons. I did not leave because I was unhappy with the miles or income at England."[180]

G. Individual IC Success is a Function of Individual Driver Performance.

Plaintiffs assert that failure was uniformly "inevitable" for ICs and that England's use of ICs was a "broken model."[181] But individual ICs' experience was anything but uniform, and for the most part turned on factors within their control. First, many drivers succeeded as ICs. Second, determining why an IC was successful or unsuccessful necessarily focuses on the IC's choices as much or more than Defendants' conduct. A number of factors impact success or failure:

1. Time running versus home or down time

England tells all trainees that an important key to success of an IC is "tak[ing] no more than 3 to 4 days off every 4 to 6 weeks."[182] Randy Aguilar, a current IC, explains, "[B]eing an independent contractor is not for everyone and you basically have to be married to the truck. It's good money but you've got to keep those wheels turning."[183] Individual testimony from

[179] Pratt Decl. (Ex. 21) ¶ 14.
[180] Reisig Decl. (Ex. 19) ¶ 16.
[181] Mot. at 40, 44.
[182] England Business Guide (Ex. 59) at p. 11.
[183] Aguilar Decl. (Ex. 20) ¶ 8.

numerous present and former England ICs confirms this as critical to their success and the success of other ICs.[184]

2. The number of miles driven each week

The number of miles driven per week is another key factor in a driver's economic success.[185] Weekly miles are not solely a function of how many miles England makes available or assigns; they are significantly affected by an IC's own choices and performance,[186] including: (1) staying on route, (2) driving the maximum number of miles the hours of service allow, (3) managing follow-up loads in advance by communicating with your Driver Manager, and (4) never turning down a load.[187] IC Tony Mathos testified: "In my experience, home time is the most significant cause of low-mile periods. Low miles are also often the result of taking too long at truck stops, failing to make the best use of the hours available, making late deliveries, failing to cooperate with your driver manager, and turning down loads."[188] IC Joseph Broccardo stated: "Some of the things that have helped me to be successful as an independent contractor include making my deliveries on time and getting to my delivery spot early, so I can get scheduled for a reload in advance. In my observation, some drivers do not get the miles they want because they

[184] *See, e.g.*, Mathos Decl. (Ex. 9) ¶ 23; Hunter Decl. (Ex. 15) ¶ 13; Broccardo Decl. (Ex. 10) ¶17.
[185] Plaintiffs claim that "Defendants do not dispute that the single most important factor in determining Driver income is miles driven." Mot. at 38. But neither of the appendix pages cited support Plaintiffs' assertion. As this section explains, an IC's expenses, including fuel expenses, significantly impact driver income.
[186] O'Neal Dep., 7/15/13 (Ex. 46) at 148; J. England Dep., 5/17/13 (Ex. 43) at 76.
[187] *See, e.g.*, Mathos Decl. (Ex. 9) ¶ 23; Hunter Decl. (Ex. 15) ¶ 13; Broccardo Decl. (Ex. 10) ¶17; Parras Decl. (Ex. 14) ¶¶ 13-15.
[188] Mathos Decl. (Ex. 9) ¶ 23.

make late deliveries and take too long to make delivers for reasons they can control, like hanging out too long at truck stops."[189]

Looking only at the average miles per week or the miles driven in a particular week by an IC, as Plaintiffs propose, does not provide sufficient information. If, for example, the total miles in a particular week could have been higher with better planning or by accepting all loads, Plaintiffs provide no way to account for the difference on a class-wide basis. IC Tony Mathos said he has "never turned down a load, and I have always had enough freight from England to haul."[190]

3. Fuel costs and the efficiency of the driving

The efficiency of an IC's driving, reflected in fuel costs and measured in part by "paid miles per gallon," is a significant factor in an IC's economic success. Individual choices within the IC's control impacting that efficiency include staying on route, purchasing fuel at appropriate places and times,[191] and driving at recommended lower speeds (55-60 MPH).[192] England advises drivers: "Not slowing down is the biggest cause of failure to control variable expenses.

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[189] Broccardo Decl. (Ex. 10) ¶ 17; *see also* Hunter Decl. (Ex. 15) ¶ 13; Mathos Decl. (Ex. 9) ¶ 23; Gleave Decl. (Ex. 18) ¶¶ 18-20.

[190] Mathos Decl. (Ex. 9) ¶ 24; *see also* Reynolds Decl. (Ex. 3) ¶ 21; Broccardo Decl. (Ex. 10) ¶ 16; Gleave Decl. (Ex. 18) ¶ 19; Andrews Decl. (Ex. 11) ¶ 13 ("I never turn down loads and I get all the miles I want."); Weber Decl. (Ex. 6) ¶ 12 ("I have found that miles are always available, and I was never misled about what I could earn or how many miles I could get."); Upton Decl. (Ex. 2) ¶15; Reisig Decl. (Ex. 19) ¶ 15 ("I was able to get the miles I asked for"); Pratt Decl. (Ex. 21) ¶ 13 ("I was happy with the miles I was driving and I was earning a good income."); Parras Decl. (Ex. 14) ¶¶ 14-15 ("I am making more money than I expected . . . I rarely turn down loads, and even then I usually only turn down a load because I do not have time to deliver it.").

[191] England has a fuel optimizer program that advises drivers, both company and IC, when and where to purchase fuel on their routes to maximize time, cost and truck weight. England Business Guide (Ex. 59) at 46. ICs are free to follow or ignore this advice.

[192] *See, e.g.*, Module E (Ex. 61) at 9; England Business Guide (Ex. 59) at 11; Hoffman Decl. (Ex. 39) ¶¶ 21-25.

Independent Contractors pay serious money for the privilege of driving fast. For every mile-per-hour you reduce your speed, you save 1/10th of a mile per gallon."[193] As IC Jerry Upton learned from his Phase II trainer, "I discovered how to slow it down and make more money. I learned that by driving slower I could make a huge impact on my miles per gallon and my overall income."[194] Mr. Hoffman explains that ICs with higher incomes consistently have higher paid miles per gallon.[195]

4. Trip planning

Trip planning is crucial to driving efficiency and economic success. To maximize miles, ICs need to "plan ahead to arrange their next load in advance of dropping off their current load"[196] and to "get[] to my delivery spot early, so I can get scheduled for a reload in advance."[197] In describing the flip side of this, current IC Brian Hunter observed: "In my experience, many drivers at England don't succeed because of their own decisions . . . including . . . failing to plan trips in advance, failing to work with their driver managers in advance to arrange for their next loads . . ."[198] "[E]ffective trip planning is essential to success as a driver."[199]

[193] Module F: Business Development Part I (Ex.60) at 3.
[194] Upton Decl. (Ex. 2) ¶ 7.
[195] Hoffman Decl. (Ex. 39) ¶ 25.
[196] Upton Decl. (Ex. 2) ¶15.
[197] Broccardo Decl. (Ex. 10) ¶ 17.
[198] Hunter Decl. (Ex. 15) ¶ 13.
[199] Durr Decl. (Ex. 4) ¶ 20.

5. Solo v. team driving

England ICs have the choice to run solo and or as teams with other ICs or trainees. Teams can haul more freight more efficiently in a week, and make more money for drivers.[200] England thus encourages team driving because it allows drivers to earn more money, but for ICs it remains a matter of personal choice,[201] one that affects income.[202] Former IC David Reisig "was a solo driver while at England. I was never interested in being a trainer, and I did not feel that I had to train in order to make leasing profitable. I was able to get the miles I asked for, and I was paid for the miles I ran."[203] ICs at England made varying choices about whether to drive solo or in a team. In fact, most ICs chose to drive both solo and in a team during their time hauling freight for England, making it difficult to categorize any single driver as a "solo IC" or "team IC."[204]

The impact of these individual choices in the experience of each IC cannot be established through class-wide proof but would require individual inquiry.

[200] Pronk Dep. (Ex. 51) at 64.
[201] Based on a single statement in one internal England document, Plaintiffs assert that "Defendants now acknowledge . . . that Drivers cannot financially survive unless they drive as a trainer or team." Mot. at 36 n.75 (citing to Plaintiffs' Appx. 1633). But that comment is made in a 2010 email discussing adjustments to certain revenue and expense items for ICs in the middle of the Recession.
[202] Hoffman Decl. (Ex. 39) ¶ 26.
[203] Reisig Decl. (Ex. 19) ¶ 14-15.
[204] *See* Kearl Decl. (Ex.40) ¶ 13 & Exs. C, D.

H. Many ICs Were Successful; Other ICs with the Same Opportunity Were Not.

Plaintiffs contend that ICs were uniformly doomed to "failure"—the "inevitable end."[205] But, as the evidence discussed above shows, many ICs succeeded because of their own individual choices.

"Success" is primarily an individual question determined by each proposed class member's definition of success. Nonetheless, many drivers regard their experience with England as successful[206] and in a number of instances as life-changing because they were given an opportunity for work and economic improvement when they were unemployed. IC Jack Reynolds testified: "I am truly grateful to England. England gave me a chance when nobody else would. Now I own my own truck, my credit has improved, and England gives me all the freight I can handle."[207]

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[205] Mot. at 44. Plaintiffs make a number of assertions that it was effectively impossible for ICs to succeed financially. *See, e.g.*, Mot. at 36-40.

[206] *See., e.g.*, Mathos Decl. (Ex. 9) ¶25 ("I believe that I earn a good income at England, and I am happy with my experience as an independent contractor at England"); Hatch Decl. (Ex. 12) ¶ 16 ("My first lease ends later this month, and I plan to purchase a truck following the expiration of my lease. I also plan to keep driving for England."); Benigni Decl. (Ex. 7) ¶ 11 ("I feel like I have been successful driving for England, and I find my work as a trainer personally satisfying."); Broccardo Decl. (Ex. 10) ¶¶ 16-17 ("I get the miles I desire [and] also get home time when I want it. Some of the things that have helped me to be successful . . ."); Hunter Decl. (Ex. 15) ¶ 12 ("I have been able to make good money as an independent contractor at England"); Mahala Decl. (Ex. 8) ¶17 ("I would still be driving for England, if I had been able to get home as frequently as I do now"); Lucey Decl. (Ex. 1) ¶ 20 ("I have been happy with my experience at England, including the miles I have been offered . . . and the income I have earned . . ."); Reisig Decl. (Ex. 19) ¶ 15 ("I was able to get the miles I asked for, and I was paid for the miles I ran."); Manfull Decl. (Ex. 13) ¶¶13, 16 (noting he went through bankruptcy 18 months ago, but now "[m]y financial prospects are good, and my wife and I hope to buy our truck after our lease is up"); Weber Decl. (Ex. 6) ¶ 12 ("I am making more money at England than I anticipated . . . I have found that miles are always available"); Evans Decl. (Ex. 5) ¶ 20 ("I made good money driving as an independent contractor for England").

[207] Reynolds Decl. (Ex. 3) ¶ 21; *see also* Evans Decl. (Ex. 5) ¶¶19-22.

Many ICs are satisfied enough to sign new vehicle leases with England when their current leases expire.[208] And since January 1, 2008, England has had over 3000 ICs contract with it for longer than one year.[209] Such instances of re-leasing and longevity are evidence of driver satisfaction that contradict the uniformly inevitable failure Plaintiffs assert.

While many ICs succeed, some do not. But as explained above, this occurs for many reasons. Long-haul truck driving is a "difficult job," and despite the 90 days of training, many ICs find it difficult or unsatisfying once the reality of being away from home sets in. Many quit in the first few weeks.[210] Those who do not like the job often perform ineffectively or inefficiently.

Whether a driver succeeds or fails cannot be shown with uniform evidence. Each individual IC's experience, choices, and challenges are unique and require individual proof.[211]

III. ENGLAND'S DATABASES DO NOT DISCLOSE INFORMATION CRITICAL TO DAMAGES ANALYSIS.

Plaintiffs contend that "from the information in Defendants' OWNRRE database it is possible to determine exactly how much each plaintiff or class member paid in costs and

[208] *See, e.g.*, Mathos Decl. (Ex. 9) ¶ 19; Hatch Decl. (Ex. 12) ¶ 16 (noting intends to sign a second lease in one month); Benigni Decl. (Ex. 7) ¶ 2 (completed three-year lease and purchased truck); Weber Decl. (Ex. 6) ¶ 10 (completed one lease and signed in lease-to-own program); Lucey Decl. (Ex. 1) ¶ 12; Pratt Decl. (Ex. 21) ¶12; Hunter Decl. (Ex. 15) ¶ 10.

[209] Declaration of James Kearl ("Kearl Decl.") (Ex. 40) ¶ 14, Ex. E. Of that number, roughly 20% are solo drivers (meaning drivers whose miles were 75% or more solo miles), contradicting Plaintiffs' assertion that solo ICs cannot survive. *See id.*

[210] Mot. at 45.

[211] Plaintiffs cite to several internal England communications to argue that IC drivers could not succeed. *See* Mot. 40–41, 46. But these documents represent the individual opinions of their authors and are part of the internal debate that takes place in any company. As the testimony of the IC declarants show, ICs did and could succeed at England.

expenses and was paid,"[212] a point with which Defendants do not disagree. However, Plaintiffs go on to state that "[t]hus, the damages suffered by, and restitution owed to, Plaintiffs and the Class 'can be readily calculated under a variety of different damage theories . . .'"[213] The latter conclusion, represented by Plaintiffs' use of the word "thus," does not follow for several clear reasons inherent in the limitations in the database in question.

First, the raw data in the OWNRRE database does not reflect the individual choices ICs make about how to operate their businesses, such as when and how long to work, the efficiency and particularly fuel efficiency of their driving, the effectiveness of their trip planning, and their decisions whether and how to drive as a team. The impact of these individual choices must be assessed to avoid counting as damages differences in revenues and expenses, and thus earnings due to drivers' choices of how to operate.[214] Nothing in the database allows for those assessments.

Second, the database contains no information about what alleged misrepresentations individual drivers relied upon, if any, let alone what their individual expectations might have been.[215] Such information is necessary to limit a damages model to damages attributable to a specific basis of liability that the jury might accept or reject.[216] For example, drivers chose to be ICs for reasons unrelated to the alleged misrepresentations, but the database would not distinguish them from drivers who relied on an alleged misrepresentation.

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[212] Mot. at 48.
[213] *Id.* (citations omitted).
[214] Hoffman Decl. (Ex. 39) ¶¶ 12-14.
[215] *Id.* at ¶¶ 6(2)(d), 29, 38-44.
[216] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

Third, the OWNRRE database does not contain information that identifies or distinguishes injury in fact. For example, the database does not distinguish between drivers who were successful, and thus presumptively were not harmed by the alleged misrepresentations, from drivers who may contend they were harmed by reliance on a particular alleged misrepresentation. Nor does the database identify drivers who terminated early for reasons unrelated to any alleged wrongdoing by England, such as drivers who were terminated for safety or log violations.

Thus, Plaintiffs' assertion that England's OWNRRE database contains revenue and expense data by driver ignores critical limitations in that database, such as determination of the driving choices made by individual ICs necessary to an assessment of actual damages and cannot provide a basis for class-wide proof of Dr. Mahla's proposed damages theories.

IV. CASE HISTORY

On May 27, 2011, Plaintiffs filed a Class Action Complaint asserting ten claims against Defendants in the Northern District of California.[217] Defendants moved to dismiss Plaintiffs' claim under the California Franchise Investment Law ("CFIL"), to dismiss or transfer all of Plaintiffs' claims for improper venue under the forum selection clauses pursuant to 28 U.S.C. § 1406(a), or in the alternative to transfer venue for convenience pursuant to 28 U.S.C. § 1404(a).[218] On November 22, 2011, the court dismissed Plaintiffs' CFIL claim with leave to amend,[219] and subsequently dismissed Plaintiffs' CFIL claim "[b]ecause Plaintiffs have failed to allege a franchise under the CFIL, . . . the transfer of this action to the District of Utah is required

[217] *See* Class Action Compl., Dkt. No. 1.
[218] *See* Dkt. No. 18.
[219] *See* Dkt. No. 37 at 2.

under 28 U.S.C. § 1406(a)" for improper venue and, alternatively, under 28 U.S.C. § 1404(a) as a matter of convenience.[220]

On August 31, 2012, Plaintiffs filed their Third Amended Complaint, adding claims under state and federal racketeering laws, for breach of contract, and for breach of fiduciary duty.[221] Plaintiffs' Motion references a "negligent misrepresentation claim,"[222] but the TAC does not include such a claim.[223]

[220] Dkt. No. 44 at 10.

[221] On June 18, 2013, months after the deadline for amending pleadings, Plaintiffs sought leave to file a Fourth Amended Complaint adding an additional plaintiff, Carlos Cavezas. On September 18, 2013, Judge Wells denied Plaintiffs' motion to amend, Dkt. No. 182, to which Plaintiffs filed a pending Objection, Dkt. No. 188.

[222] Mot. at 84.

[223] The TAC's Ninth Claim for Relief is labeled "Common Law Fraud and Misrepresentation," but contains no specific allegations of "negligence" but rather of "intention" and knowing falsity of representation. TAC ¶¶ 216 and 217. Even if the TAC contained such a claim, it would be barred by the economic-loss doctrine. *See Se. Directional Drilling, LLC v. Kern River Gas Transmission Co.*, 2013 WL 209492, at *2 (D. Utah Jan. 17, 2013) (unpublished) ("The economic loss rule prevents a party from claiming economic damages in negligence absent physical property damage or bodily injury. . . . Utah courts apply the economic loss rule to negligent misrepresentation claims. Negligent misrepresentation falls outside the economic loss rule only when the party making the misrepresentation owes an independent duty of care." (internal citations and quotation marks omitted)).

ARGUMENT

Plaintiffs move to certify three proposed classes of current and former drivers who signed a VLA and an ICOA: (1) a nationwide class of drivers for violations of the Utah Truth In Advertising Act (UTIAA), Utah Consumer Sales Practices Act (UCSPA), and Utah Business Opportunity Disclosure Act (UBODA) and for breach of fiduciary duty, unjust enrichment, and negligent misrepresentation; (2) a subclass of drivers who executed the Student Training Agreement (STA) for breach of contract; and (3) a subclass of drivers who became ICs during the time England used the EBG for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), Utah Pattern of Unlawful Activity Act (UPUAA), and for common-law fraud. *See* Mot. at 1–2.[224] Plaintiffs' motion should be denied because they fail to meet their strict burden to demonstrate with evidence that their proposed classes satisfy Federal Rule of Civil Procedure 23's stringent requirements.[225]

First, Plaintiffs cannot satisfy either the commonality or typicality requirements of Rule 23(a) because answering the central question in this case—why did a driver choose to become an IC—requires individual evidence. Plaintiffs offer no convincing proof that Defendants uniformly distributed any single representation throughout the proposed class period. And

[224] Plaintiffs say the applicable limitations periods limit their classes but fail to specify what those limitations periods are. Defendants reserve the right to challenge any class certified as overbroad. *See Duprey v. Conn. Dep't of Motor Vehicles*, 191 F.R.D. 329, 341 (D. Conn. 2000) ("A class action cannot proceed on behalf of class members whose claims are time-barred."); *Daniels v. Fed. Reserve Bank of Chicago*, 194 F.R.D. 609, 618 (N.D. Ill. 2000) ("individuals with time-barred claims may not be included within a proposed class" (internal quotation marks omitted)).

[225] Plaintiffs' RICO, UPUAA, and UBODA claims are also the subject of pending dispositive motions. *See* Defs.' Mot. of Partial Jud. on the Pleadings, Dkt. No. 189; Defs.' Mot. for Partial Sum. Jud., Dkt. No. 230.

drivers say they considered and acted on information other than the alleged misrepresentations in deciding to join England and become ICs.

Second, Plaintiffs cannot satisfy Rule 23(b)(3)'s predominance requirement for at least three independent reasons: (1) proving that Defendants' alleged misrepresentations caused harm to each proposed class member requires predominantly individual evidence about what alleged misrepresentations a driver did or did not see, what other information the driver received and considered, what reasons the driver had for joining England and becoming an IC, and why the IC driver ultimately succeeded or failed; (2) establishing proof of injury or the amount of damages for each proposed class member requires predominantly individual evidence not present in England's driver database; and (3) applying the law of 51 jurisdictions (each driver's home state where the driver allegedly first received and acted in reliance on the alleged misrepresentations) means that individual issues of law would predominate and make the trial unmanageably complex for the Court and jury.[226]

I. PLAINTIFFS SEEK CLASS CERTIFICATION UNDER THE WRONG STANDARD.

Plaintiffs ignore recent Supreme Court and Tenth Circuit decisions and urge the Court to apply "a liberal construction of Rule 23" that would impermissibly lower their burden.[227] Relying on *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 794 (10th Cir. 1970), Plaintiffs say "if there was to be error on the part of allowing or disallowing a class action suit, it should be on the side of allowing class actions to proceed."[228]

[226] Because some of Defendants' arguments vary by claim, in an appendix to this opposition Defendants list by claim the reasons each claim cannot be certified.
[227] Mot. at 50.
[228] *Id.*

Contrary to Plaintiffs' claim, "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013), and *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). "To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)). Plaintiffs "must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wallace B. Roderick*, 725 F.3d at 1217 (quoting *Wal-Mart*, 131 S. Ct. at 2551). A district court may certify a class only if satisfied after a "'rigorous analysis'" that the prerequisites of Rule 23 have been satisfied, which "[o]ften . . . requires looking at the merits of a plaintiff's claims." *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

Last year, the Supreme Court warned that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights," as Plaintiffs seek here, but rather "***imposes stringent requirements for certification that in practice exclude most claims***." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (emphasis added). A "rigorous analysis" to assess satisfaction of Rule 23's "stringent requirements . . . that in practice exclude most claims" is far from the "liberal construction" Plaintiffs advocate.

Plaintiffs compound their error by telling the Court that "[t]he threshold of commonality is not high."[229] But in 2011, the Supreme Court rejected this view; a common question "must be capable of classwide resolution—which means that determination of its truth or falsity will

[229] Mot. 60.

resolve an issue that is central to the validity of each one of the claims in a single stroke. . . . What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate ***common answers apt to drive the resolution of the litigation***." *Wal-Mart*, 131 S. Ct. at 2545, 2551 (internal quotation omitted) (emphasis added). Plaintiffs cannot "demonstrate, under a strict burden of proof, that all of the requirements of Rule 23(a) are clearly met," *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1228 (10th Cir. 2013) (internal quotation omitted), because the supposedly common questions require individual proof to answer.

"In addition [to meeting Rule 23(a)'s requirements], '[Plaintiffs] must also satisfy ***through evidentiary proof*** at least one of the provisions of Rule 23(b).'" *Wallace B. Roderick*, 725 F.3d at 1217 (quoting *Comcast*, 133 S. Ct. at 1432) (emphasis added). Here, Plaintiffs seek damages so they must also meet Rule 23(b)(3)'s predominance requirement, which is "far more demanding" than commonality and the other Rule 23(a) requirements. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *Comcast*, 133 S. Ct. at 1432. But a rigorous analysis of Plaintiff's claims reveals that individual questions predominate.

II. PLAINTIFFS CANNOT SATISFY RULE 23(A)'S COMMONALITY AND TYPICALITY REQUIREMENTS.

Plaintiffs fail to show that their proposed classes based on common-law fraud, negligent-misrepresentation, UTIAA, UCSPA, UPUAA, RICO, unjust-enrichment, breach-of-fiduciary-duty, and breach-of-contract claims satisfy Rule 23(a)'s commonality and typicality

requirements.[230] Accordingly, their motion for certification should be denied.

A. Plaintiffs Fail to Satisfy Rule 23(a)(2)'s Commonality Requirement Because Classwide Proceedings Would Not Generate Common Answers.

Plaintiffs may sue on behalf of a proposed class only if the class presents common questions of law or fact. *See* FED. R. CIV. P. 23(a)(2). But "the mere raising of a common question does not automatically satisfy Rule 23(a)'s commonality requirement." *Wallace B. Roderick*, 725 F.3d at 1218. In *Wal-Mart*, the Supreme Court reversed certification of a class of Wal-Mart's current and former female employees and breathed new life into Rule 23(a)(2)'s commonality requirement.[231]

The Supreme Court explained that commonality requires plaintiffs to "demonstrate that the class members have suffered the same injury." 131 S. Ct. at 2551 (internal quotation marks omitted). "This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* Rather, their claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution. . . . What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation marks omitted). "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (internal quotation marks omitted).

In *Wal-Mart*, female employees alleged that the company denied them equal pay and promotions based on their gender and that local managers exercised their discretion

[230] For ease of reference, Defendants will refer to Plaintiffs' common-law fraud, negligent-misrepresentation, UTIAA, UCSPA, UPUAA, and RICO claims as Plaintiffs' "fraud-based claims."

disproportionately in favor of men. But their claims turned on local discretionary decisions; they could offer no "convincing proof of a companywide discriminatory pay and promotion policy." *Id.* at 2556. "Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 2552. Here, as in *Wal-Mart*, dissimilarities among drivers prevent common answers.

To have suffered the same injury, proposed class members must have **received** and **relied** on the same alleged misrepresentations or omissions and had no independent knowledge of the reality of the IC experience. But Plaintiffs' TAC and Motion acknowledge that Defendants made a wide variety of representations through a variety of sources.[232] *See supra* Background II.E.1. And many of these alleged misrepresentations—in particular, those allegedly made by recruiters, school instructors, and in the Horizon brochures—were not made uniformly to all proposed class members. *See id.* II.E.1, 2, 3, 4. Moreover, not all proposed class members saw or considered the alleged representations on England's website or in the EBG. *See id.* II.E.4. And even those who did see those representations could have interpreted them differently. See id. II.E.5. Furthermore, many drivers obtained and considered information about England and its IC program beyond the information provided by England, including information from the internet, other students and drivers, relatives and friends, and especially on-the-road trainers

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[231] Plaintiffs never mention *Wal-Mart*, relying instead on two pre-*Wal-Mart* district court decisions. *See* Mot. at 60-61.

[232] The absence of a common misrepresentation distinguishes this case from *Miller v. Basic Research*, 286 F.R.D. 647 (D. Utah 2010). In *Miller*, the court certified a class where there was a singular advertisement—"Eat All You Want & Still Lose Weight"—because "Defendants uniformly marketed and sold Akavar as a proven weight loss product with a core message" and all of the representative plaintiffs "bought Akavar because of some variation of the slogan."

(both through conversation and observation). *See id.* II.D. Indeed, many ICs indicate that information and conversations with their trainers were the primary sources of information on which they based their decisions, which as the Ninth Circuit held this month "would necessarily be a unique occurrence."[233]

Most important, drivers had a wide range of reasons for coming to England and becoming IC drivers that had nothing to do with the alleged misrepresentations. *See id.* II.D.2. And several drivers say that they felt Defendants were entirely forthright and honest with them.[234] Thus, determining whether Defendants' alleged practices violated any particular class member's statutory or common-law rights depends on what information each individual driver received (or did not receive), considered, and relied on.[235]

Plaintiffs nevertheless say they satisfy commonality because they alleged that England and Horizon "engaged in a common course of conduct." Mot. at 60. *See also id.* at 64–65, 68–69, 72, 75, 77–80. But under *Wal-Mart*, allegations of a common course of conduct do not establish commonality if the conduct's impact, as here, varies from one proposed class member to the next. For example, in *Foster v. Apache Corp.*, a proposed class of oil well royalty owners alleged that the well operator systematically underpaid them and argued that the operator's practice of paying all royalty owners on the same basis, regardless of each owner's particular lease language, provided the necessary common question. *See* 285 F.R.D. 632, 635–36, 641

[233] *Berger v. Home Depot USA, Inc.*, 2014 WL 350082, *5 (9th Cir. Feb. 3, 2014).
[234] *See, e.g.*, Simpkins Decl. (Ex. 22) ¶¶ 8, 13; Evans Decl. (Ex. 5) ¶ 19; Parras Decl. (Ex. 14) ¶ 14; Reynolds Decl. (Ex. 3) ¶ 12.
[235] Causation is a required element of Plaintiffs' UCSPA, UTIAA, UPUAA, RICO, and fraud claims. *See* Argument III.A. *infra*. Defendants' alleged misrepresentations could not have caused a driver's injury if the driver never saw or relied on the representation. *See id.* Similarly,

(W.D. Okla. 2012). The court rejected the argument, holding that "[s]imply identifying a common practice of the defendant, by itself, does not" generate "common *answers* which drive the resolution of the litigation." *Id.* "Whether defendant's payment practices violate its obligations to any class member is necessarily dependent on what those obligations were—and those may differ from class member to class member." *Id.*[236]

Focusing on England's conduct, as Plaintiffs do here, does nothing to drive the resolution of this litigation because of the dissimilarities in the alleged representations made to IC drivers and in the knowledge, experience, and personal choices each driver brings to deciding whether to become an IC or company employee. Thus Plaintiffs' questions about England's supposedly common course of conduct cannot generate a common answer to the crucial question of **why** a driver chose to haul freight as an IC rather than an employee. So Plaintiffs' fraud-based claims and claims for breach of fiduciary duty and unjust enrichment fail to satisfy Rule 23(a)(2)'s commonality requirement.

Plaintiffs' breach-of-contract claim fares no better. Once again, a supposedly common question—whether England failed to fulfill its obligation under the STA to honor a choice to become a company driver rather than an IC—cannot drive common answers because of the apprentice drivers' dissimilarities when making that choice at the Phase II Upgrade. Mot. at 76. Plaintiffs contend that England forced those who chose company positions to wait for a truck

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Plaintiffs' unjust-enrichment and fiduciary-duty claims depend on Defendants having defrauded a driver out of his labor. *See* TAC ¶¶ 227–39. *See also* Argument III.B., C. *infra*.

[236] *See also Onyx Properties LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty.*, 2013 WL 179123, at *4–*5 (D. Colo. Jan. 17, 2013) (unpublished) (rejecting the plaintiffs' argument that the defendant's "common course of conduct" satisfied the commonality requirement because "the analysis as to whether the [defendant's] alleged illegal activities . . . violated the [class members'] substantive due process rights requires individualized inquiry").

under dire circumstances, thereby coercing them into becoming ICs instead. But multiple declarants say England honored their election to become company drivers. *See* Argument III.D. *infra*. And others say that when they came to Phase II Upgrade, they had already made up their minds to be an IC and never requested a company position. *See* Mathos Decl. (Ex. 9) ¶¶ 11–12; Parras Decl. (Ex. 14) ¶¶ 7–9. Roberts similarly never requested a company position. Although McKay alleges in the TAC that he wanted to be a company driver, he was unwilling to say in his deposition that he ever told England. *See* TAC ¶ 52; McKay Dep. (Ex. 53) at 270, 277-78. Because drivers made different requests and had different experiences at Phase II Upgrade, no amount of common questions will drive common answers for the subclass asserting claims for breach of the STA. Therefore, Plaintiffs' contract claim fails to satisfy Rule 23(a)(2)'s commonality requirement.

B. Plaintiffs Fail to Satisfy Rule 23(A)(3)'S Typicality Requirement Because Their Experiences Differ From the Experiences of Other Drivers.

Dissimilarities in the named Plaintiffs' and proposed class members' circumstances prevent them from meeting the typicality requirement as well. *See Wallace B. Roderick*, 725 F.3d at 1219 ("the commonality, typicality, and adequacy requirements of Rule 23(a) tend to merge") (internal quotation marks omitted). "The 'typicality' requirement instructs courts to assess whether the class representatives themselves present the common issues of law and fact that justify class treatment." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 376 n.4 (3d Cir. 2013) (alterations and internal quotation marks omitted). Roberts and McKay are far from typical.

First, Plaintiffs and proposed class members considered different information before coming to England's school. Roberts and McKay visited England's website before submitting online applications. *See* TAC ¶¶ 26–28, 41–42. But while Roberts alleges that he saw the offer

of guaranteed employment, *see id.* ¶¶ 27–28, McKay does not allege he saw any particular representations. Rather, McKay claims his recruiter told him he could make $30,000 a year driving for England, *see id.* ¶¶ 42–43, something Roberts does not allege to have been told. Other drivers say they talked with their recruiters only about logistical matters—not about guaranteed employment or income. *See* Mathos Decl. (Ex. 9) ¶ 8; Parras Decl. (Ex. 14) ¶ 5. Some heard about England from a friend or relative or saw a phone number on an England truck rather than visiting the website. *See* Lucey Decl. (Ex. 1) ¶6; Hunter Decl. (Ex. 15) ¶ 4.[237]

Second, Plaintiffs and other drivers had different reasons for coming to England's school. The primary factor in Plaintiffs' decisions to come to England was its proximity to their homes. Roberts Dep. (Ex. 49) at 47; McKay Dep (Ex. 53) at 62. Others say they chose England's school because of its reputation for training, its commitment to safety, or because its recruiters called sooner than other companies. *See* Gleave Decl. (Ex. 18) ¶ 5; Manfull Decl. (Ex. 13) ¶¶ 5–8. While Plaintiffs' TAC emphasizes England's promise of guaranteed employment, others came to England without ever learning of that promise. *See, e.g.*, Parras Decl. (Ex. 14) ¶ 4.

Third, Plaintiffs and other drivers considered different information about England's IC program and had different reasons for becoming an IC driver. Although Plaintiffs propose a subclass of drivers who became ICs while England was using the EBG, neither Plaintiff claims he reviewed or relied on any of its allegedly misleading graphs. Roberts says when he decided to lease he considered England's pro formas instead and discussed the IC program with his Phase I

[237] Drivers also had different knowledge about life as a truck driver generally and as a truck driver at England. For example, Roberts knew of the high turnover in long-haul trucking because of his previous experiences in truck driving. *See* Roberts Dep. (Ex. 49) at 133. Other drivers say they learned of turnover in the industry and at England specifically by reading websites and speaking with friends and relatives. *See* Background II.F.

trainer, who recommended that Roberts become an IC driver. Roberts Dep. (Ex. 49) at 133, 199.[238] Others say they chose to be ICs because they wanted the freedom from company control, wanted to own their own truck someday, or believed, based on their own analysis, that they could make more money as an IC. *See* Background II.D.2. Many drivers do not recall seeing any graphs in the EBG or relying on any income or mileage representations from England. *See* Toole Decl. (Ex. 17) ¶ 10; Weber Decl. (Ex. 6) ¶ 9. And several say that everything Defendants told them about the IC program was accurate. *See, e.g.*, Evans Decl. (Ex. 5) ¶ 19.

Fourth, Plaintiffs and other drivers had different experiences as IC drivers. Roberts claims he never had enough miles and made no money. Roberts Dep. (Ex. 49) at 275. But he had two accidents in his brief time operating his truck, which he does not allege was a common occurrence for other proposed class members. *Id.* at 267, 272-73. Others say they had all the miles they wanted and were satisfied with the income they earned. *See* Reynolds Decl. (Ex. 3) ¶ 21; Lucey Decl. (Ex. 1) ¶ 20. Some say that since switching from IC to company drivers, they make less money. *See* Gleave Decl. (Ex. 18) ¶ 15. Others say that many factors impacting income are in the driver's control, including good trip planning, good communication with the driver manager, and fuel-efficient driving. *See id.* ¶¶ 17, 20; Durr Decl. (Ex. 4) ¶ 20. Moreover, drivers stopped driving as ICs for England for many different reasons, including for health and family reasons—not because they failed economically as Plaintiffs contend. *See* Pratt Decl. (Ex. 21) ¶ 13; Upton Decl. (Ex. 2) ¶ 17.

[238] Roberts also says he saw the Horizon Brochure but is unsure whether it was before or after he decided to lease. *See* Roberts Dep. (Ex. 49) at 210. And Roberts testified that his Phase I trainer said he began making money only when he started driving with Roberts. *See id.* at 133-34.

Fifth, Plaintiffs and other drivers had different experiences at Phase II Upgrade. Although McKay alleges he had to wait for a company truck, neither Roberts nor McKay requested a company position. *See* TAC ¶ 52; McKay Dep (Ex. 53) at 270, 277-78. Several who chose to become company drivers say they never waited for a truck and that England honored their choice. Others say they entered Phase II Upgrade wanting to be an IC driver and never asked for a company position.

The dissimilarities between Plaintiffs and the proposed class members prevent them from satisfying Rule 23(a)(3)'s typicality requirement. *See Wiedenbeck v. Cinergy Health, Inc.*, 2013 WL 5308206, at *9–*11 (W.D. Wis. Sept. 20, 2013) (unpublished) (holding that plaintiffs had failed to satisfy commonality on a fraud claim because misrepresentations were not uniform and proposed class members received other, material information that may have impacted their individual purchase decisions); *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 499 (N.D. Ga. 2006) (holding that plaintiff failed to meet the typicality requirement because he "will only be able to prove that the representations he saw or heard were misleading or untrue" and "will be unable to prove the claims of absent class members who saw different representations").

III. PLAINTIFFS CANNOT SATISFY RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT FOR THEIR FRAUD-BASED CLAIMS, THEIR UNJUST ENRICHMENT CLAIM, THEIR BREACH OF FIDUCIARY DUTY CLAIM, OR THEIR BREACH OF CONTRACT CLAIM BECAUSE EACH REQUIRES OVERWHELMINGLY INDIVIDUAL PROOF.

Each of Plaintiffs' fraud-based claims turns on the differing knowledge and personal choices of individual proposed class members because: (1) England and Horizon did not make uniform representations, and some proposed class members were not exposed to some (or any) of them; (2) most drivers knew about mileage, income, and turnover from their own experience

in driving with trainers for 90 days; (3) many drivers chose the IC option for reasons unrelated to the alleged misrepresentations or omissions; and (4) success or failure for most turned on individual choices. Plaintiffs cannot avoid the need for individual proof by presuming reliance; a presumption is unavailable where many drivers did not rely on the alleged misrepresentations or omissions in choosing the IC option but, instead, chose it for various reasons unrelated to the alleged fraud. The individual inquiry necessary to resolve these issues and establish the causation and reliance elements of Plaintiffs' fraud-based claims precludes class certification.

Similarly, Plaintiffs' unjust-enrichment claim requires individual inquiry to determine whether anything was unjust about England's and Horizon's receipt of funds from the freight ICs hauled. Whether it was unjust turns on what each driver was told (or not told) about the IC option and the importance of the representations (or omissions) to that driver. And Plaintiffs' breach-of-fiduciary-duty claim requires the same individual inquiry to prove causation and reliance.

Finally, Plaintiffs' breach-of-contract claim requires individual evidence to prove (1) whether an apprentice driver was told a company truck was unavailable when he was ready for it, and (2) whether an apprentice driver chose the IC option for that or other reasons.

Plaintiffs have not met their "strict burden of proof" to show any of these claims can be proved with predominantly common evidence. *Tabor*, 703 F.3d at 1228. "[T]he district court has a 'duty to take a close look at whether common questions predominate over individual ones.'" *Wallace B. Roderick*, 725 F.3d at 1219 (quoting *Comcast*, 133 S. Ct. at 1432). "Every proposed class action must be decided on its own facts, on the basis of practicalities and prudential considerations." *Id.* at 1220 (internal quotation marks omitted). "[P]redominance

may be destroyed if individualized issues will overwhelm those questions common to the class." *Id.* That is undoubtedly the case here.

A. Plaintiffs' Fraud and Omissions Claims Require Predominantly Individual Proof.

Plaintiffs bring fraud and omissions claims under the UCSPA, the UTIAA, RICO, the UPUAA, and for common-law fraud and negligent misrepresentation. They say England misrepresented mileage, potential income, turnover, and guaranteed employment. On the other side of the same coin, they claim England omitted material facts: that ICs faced a grim economic outcome and suffered a high turnover rate, and that a job as a company driver might not be available when an apprentice completed training.[239] They claim these alleged misrepresentations and omissions induced them to leave home, pay to attend England schools, and, after training, sign up as ICs rather than company drivers. They say that IC drivers invariably failed economically and that their failure was England's fault.

Each of Plaintiffs' fraud-based claims requires proof that Defendants' alleged misrepresentations and omissions caused them injury.[240] And "[w]here . . . plaintiffs allege that

[239] Plaintiffs also accuse England of manipulating apprentice drivers by letting them out of Phase II training early if they chose to become ICs but making them complete the whole program at low pay if they wanted company jobs. But the named Plaintiffs lack standing to pursue this claim because neither alleges England let him out of training early. And the practice occurred for only a limited time. *See* Harrison Dep. (Ex. 47) at 126-27.

[240] *See* UTAH CODE ANN. § 13-11-19(4)(a) (consumer may bring action under UCSPA "for the actual damages caused by an act or practice" violating the act); UTAH CODE ANN. § 13-11a-4(2)(a) (damages under the UTIAA require plaintiff was "injured by the act."); *Hill v. Estate of Allred*, 216 P.3d 929, 937 (Utah 2009) (the UPUAA permits civil suits by "a person injured by a pattern of unlawful activity."); *Albright v. Attorney's Title Ins. Fund*, 504 F. Supp. 2d 1187, 1203 (D. Utah 2007) (RICO permits an action by "'[a]ny person injured in his business or property by reason of a violation of the Act's substantive restrictions,'" which "requires … a causal connection or direct relationship between the plaintiffs' injury and the defendants' injurious conduct.") (quoting 18 U.S.C. § 1964(c) and citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S.

their damages were caused by deceptive, misleading, or fraudulent statements . . . , as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes." *In re St. Jude Med., Inc.*, 522 F.3d 836, 839-40 (8th Cir. 2008) (internal quotation marks and citation omitted).[241] *See also Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668, 679 (D. Kan. 2007) (holding under Kansas's consumer-protection statute that "it is not at all clear to the court how [plaintiff] and the other class members can recover damages caused by the statements without showing individual reliance on them").

Determining causation and reliance for proposed class members turns on the following individual facts:

- Did each driver receive any of the alleged misrepresentations (or not receive any of the alleged omissions);
- What did each driver learn and rely upon from other sources such as:
    - From driving with trainers typically for 90 days, including from reviewing their trainers' weekly mileage and pay Settlement Statements;
    - From listening to other England employees;

258, 265-66 (1992)); *Pace v. Parrish*, 247 P.2d 273, 274-75 (Utah 1952) (elements of a fraud claim include plaintiff was "induced to act" resulting in injury and damages); *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1271 (Utah 1998) (negligent misrepresentation requires injury as a result of "reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact.").

[241] In *In re St. Jude Medical, Inc.*, the court reversed the district court's grant of class certification on plaintiffs' claims under state consumer-protection statutes. 522 F.3d at 839-40. The Eighth Circuit held that even if reliance was not a required element of plaintiffs' claims, the defendants could still present direct evidence that an individual plaintiff did not rely on the defendants' representations to defeat causation. *Id.* The court reasoned that because the

- From listening to other drivers at truck stops and terminals; or
- From doing their own research;

- Why did each driver choose to leave home, attend school, and sign up as an IC; and
- Why did each driver succeed or fail as an IC driver.

Here, only individual inquiry can prove exposure to the alleged misrepresentations and omissions in the first place because many drivers testify that they did not receive some (or any) of the alleged misrepresentations or omissions. Beyond that, Drivers testify that they left home, attended school, and chose the IC option with varying information and for personal reasons unrelated to the alleged misrepresentations or omissions. And they testify that their success or failure as an IC turned on their own choices. The Court should deny certification of Plaintiffs' negligent-misrepresentation, UCSPA, and UTIAA nationwide class and RICO, UPUAA, and fraud subclass because individual proof will predominate at trial.

1. Representations differed and many drivers never saw or heard them.

From England's initial advertisements, to its website, to its recruiters' communications with prospective students, to its instructors at school, and through its extensive training period, the evidence shows that England and Horizon did not make any singular or uniform representation about the IC program or uniformly coerce drivers into becoming ICs. Indeed, many drivers testify that they never saw or heard some (or any) of the representations alleged and that they voluntarily chose the IC option.[242]

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defendant had shown it could present such evidence, the need for plaintiff-by-plaintiff determinations meant that common issues would not predominate. *Id.*

[242] Plaintiffs blur the decision to attend England's schools and the choice to become an IC, but do not allege any fraud relating to the school or CDL. Regardless, that evidence is also individual. IC Tony Mathos chose England for its safety record, paid training, and reimbursable tuition.

First, contrary to Plaintiffs' claim, the recruiters' alleged omissions or misrepresentations were anything but "uniform." Mot. 16-18, 32-35. Rather than using scripts, recruiters treated each call differently and tailored conversations to the callers' questions. Branch Dep. (Ex. 55) at 203-04. And recruiters rarely gave average income or mileage figures, focusing mainly on getting drivers like Plaintiffs, who needed a Class A CDL, to an England school.[243]

Second, England did not "consistently and uniformly promote[] the" IC option while omitting or misrepresenting its economic reality during driver training. Mot. at 20. In the first place, the fact of a 90 day training period that England explicitly identified as a time for trainees to observe and learn for themselves the IC experience rebuts the allegations of deception. Thousands of drivers had different trainers in different phases—and the testimony from drivers and trainers reveals that trainers said different things to their individual trainees. Former IC Carol Gleave said neither her Phase I nor Phase II trainer "pushed" her toward the IC option. Gleave Decl. (Ex. 18) ¶¶ 8-9. IC Paul Lucey believes from what he saw that England "historically encouraged drivers to consider the independent contractor option, but nobody forces drivers to do it. And I found the information England and Horizon provided to be honest and straightforward." Lucey Decl. (Ex. 1) ¶ 13. IC Jack Reynolds said after training, he watched

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Mathos Decl. (Ex. 9) ¶¶ 5-6. IC Paul Lucey chose England after getting "feedback from other drivers" and because he "liked the different driving opportunities and the option to be a trainer." Lucey Decl. (Ex. 1) ¶ 7. IC David Gonzales chose England because his father recommended the company, it was family owned, and it was a large company. Gonzalez Decl. (Ex. 16) ¶ 6. Even the Plaintiffs here testified the principal reason they chose England was that it was the closest to their homes. McKay Dep. (Ex. 53) at 62; Roberts Dep. (Ex. 49) at 47. And Ulysses Yates chose England because they gave him a free bus ticket. Yates Decl. (Ex. 28) ¶ 7.

[243] *See, e.g.*, Donato Decl. (Ex. 37) ¶ 19; Toole Decl. (Ex. 17) ¶ 6 ("Although I don't remember a lot about the details of my conversation with the recruiter, I know that the recruiter did not say anything about income, pay, or miles."); Parras Decl. (Ex. 14) ¶ 5 ("The recruiter offered

two presentations, one on becoming an IC and one on becoming a company driver, but felt no pressure either way. Reynolds Decl. (Ex. 3) ¶ 12. And trainers told drivers about the high turnover rate both "at England and in the trucking industry." Andrews Decl. (Ex. 11) ¶ 9.

As a trainer, IC Robert Andrews testified he "was never taught to try and dissuade potential company drivers in favor of becoming [lessees]. In fact I did the opposite, I said if you're not absolutely sure of what you are doing be a company driver first." *Id.* ¶ 12.[244] But the only way to find out what each proposed class member saw or heard from his or her trainer is to ask. Indeed "any oral notice given by [England's trainers] about the [IC program] during a particular [conversation] would necessarily be a unique occurrence." *Berger v. Home Depot USA, Inc.*, 2014 WL 350082, *5 (9th Cir. Feb. 3, 2014) (affirming the denial of class certification where proposed class members received different information from different sources).

Third, England did not uniformly withhold company trucks to coerce drivers to become ICs. Mot. at 9, 20-21. Like more than 12,500 others since 2008, Fariborz Farahmand, Jeffrey Hardin, Joseph Love, Thomas Lovett, Frank Redwing, and Ulysses Yates testified that they chose the company driver option, and they did not have to wait for a truck.[245] Indeed, former IC

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logistical information; he did not say anything about pay or mileage and he did not say anything that influenced my decision to attend England's school.").

[244] *See also* Hatch Decl. (Ex. 12) ¶ 13 ("I carefully explain to my trainees the potential income and costs of being an [IC] versus a company driver. There are times I recommend one path or another . . . based on where I think they'll have more success, based on their personal goals and personality."); Aguilar Decl. (Ex. 20) ¶ 8 ("I advise some trainees to become company drivers, especially if they want to spend time with their families"); Parras Decl. (Ex. 14) ¶ 16 ("I show my trainees how they can be successful, without trying to convince them one way or another whether to be [ICs] or company drivers.").

[245] Farahmand Decl. (Ex. 26) ¶ 9; Hardin Decl. (Ex. 24) ¶ 8; Love Decl. (Ex. 23) ¶ 8; Lovett Decl. (Ex. 27) ¶ 8; Redwing Decl. (Ex. 25) ¶ 5; Yates Decl. (Ex. 28) ¶¶ 10-11; *see also* Pratt

Christopher Evans said he ***chose the IC option*** and had to wait to get a truck, whereas he saw drivers who chose the company option receiving trucks immediately. Evans Decl. (Ex. 5) ¶¶ 12-13. IC Tony Mathos said he "never felt any pressure to become an [IC], and several of my classmates elected to become company drivers [but] I do not recall any of them having to wait to be assigned to a company truck." Mathos Decl. (Ex. 9) ¶ 15; Reynolds Decl. (Ex. 3) ¶ 13.

Finally, drivers viewed or heard different representations or none at all. Where alleged representations vary, determining which representations a class member saw or heard—if any—is an individual issue. *Berger*, 2014 WL 350082, at *5-6; *see also Crab House of Douglaston Inc. v. Newsday, Inc.*, 2013 WL 1338894, at *12 (E.D.N.Y. Mar. 29, 2013) (unpublished) (denying certification because "generalized proof would not be sufficient for plaintiffs' fraud claim because the misrepresentations were not uniform"). And drivers who did not see or remember the alleged misrepresentations could not have been deceived by them. *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d at 838 ("In a typical common-law fraud case, a plaintiff must show that he or she received the defendant's alleged misrepresentation and relied on it"); *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 632 (2010) (reversing class certification where many, if not most, class members never saw the allegedly deceptive advertising). "The relevant class must be defined in such a way as to include only members who were exposed to the advertising that is alleged to be materially misleading." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012).

Decl. (Ex. 21) ¶ 15 (After switching from the IC option to being a company driver, "I was offered a company truck the next day.").

Here, numerous drivers testified they do "not remember seeing any graphs in the England Business Guide containing income or mileage representations." Toole Decl. (Ex. 17) ¶ 10.[246] Similarly, many drivers did not view the website in deciding to attend the England school. Thomas Lovett chose England after hearing about it "by word of mouth and from a newspaper ad." Lovett Decl. (Ex. 27) ¶ 4. Other drivers who saw the website do not remember seeing the alleged misrepresentations. IC Bret Hatch does "not remember seeing anything on England's website in terms of promised income—just pay rates for specific quantities of work." Hatch Decl. (Ex. 10) ¶ 6. IC David Gonzalez testified "trainees were told that they could potentially earn certain amounts of money, but we were never given any promises." Gonzalez Decl. (Ex. 16) ¶ 12. Regardless, Hatch did his own research by talking to drivers in his family, reviewing "complaint websites," and reviewing other company websites. Hatch Decl. (Ex. 10) ¶¶ 4-6; *see also* Gonzalez Decl. (Ex. 16) ¶ 10 (he did not "really discuss the [IC] option because I did my own research."). Moreover, lease program brochures were placed only on Horizon's reception desk; only drivers who happened to pick them up saw what was inside. Mot. at 22. Like other ICs, former IC Jerry Upton said he does not remember "seeing any Horizon brochure with any type of pay information." Upton Decl. (Ex. 2) ¶ 11. This testimony demonstrates the only way to find out which proposed class members saw the alleged misrepresentations, let alone whether those representations impacted their decisions, is to ask them.

[246] *See also* Broccardo Decl. (Ex. 10) ¶ 7; Gleave Decl. (Ex. 18) ¶ 11; Hatch Decl. (Ex. 12) ¶ 10; Hunter Decl. (Ex.15) ¶ 9; Manfull Decl. (Ex. 13) ¶ 10; Mathos Decl. (Ex. 9) ¶14.

2. Most drivers knew the realities of potential mileage, income, individual effort, and turnover in the IC option.

Determining whether an individual driver was aware of potential mileage and income opportunities as an IC from his or her 90-day training, and thus was not harmed by Defendants' alleged misrepresentations and omissions, also requires individual evidence. *See In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practices Litig.* ("*Countrywide*"), 277 F.R.D. 586, 605 (S.D. Cal. 2011) (individual issues of causation predominated where defendant came "forward with evidence that many borrowers with knowledge of essential loan terms nevertheless elected to proceed given the benefits of the loan product under then-favorable market conditions"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 226 (2d Cir. 2008), *abrogated in part on other grounds*, *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008) ("[S]ome members of plaintiffs' desired class were aware that Lights are not, in fact, healthier than full-flavored cigarettes, and they therefore could not have relied on defendants' marketing in deciding to purchase Lights."); *Martinez v. Nash Finch Co.*, 2013 WL 1313899, at *5-6 (D. Colo. Mar. 29, 2013) (unpublished) (concluding individual issues predominated and denying certification of a class of consumers alleging a store promoted itself through false or misleading advertisements, where some shoppers might have known the truth).

Here, individual testimony demonstrates many drivers understood the costs and benefits of becoming an IC rather than a company driver; so the alleged misrepresentations and omissions did not cause their alleged harm. Some drivers, like IC Randy Aguilar, "researched trucking companies for one and a half or two years" before choosing England. Aguilar Decl. (Ex. 20) ¶ 3. He "was told that being an independent contractor is harder and you've got more responsibility,

but the pay is better," and that the IC choice "is not for everybody." *Id.* ¶ 5. Aguilar started Phase I training with his "mind made up." *Id.* ¶ 7.

During Phase I and II training, drivers frequently discussed the IC option versus the company option with their trainers—and many choose the IC option after seeing their trainers' settlement statements, which fully disclosed mileage and income. Mathos Decl. (Ex. 9) ¶ 11; Andrews Decl. (Ex. 11) ¶10; Upton Decl. (Ex. 2) ¶ 8. Others talked to their trainers and other drivers about their experiences. Reynolds Decl. (Ex. 3) ¶¶ 9-11; Gonzalez Decl. (Ex. 16) ¶ 11. IC Paul Lucey first chose (and worked under) the company option, evaluated the numbers himself, and eventually chose to switch to the IC option. Lucey Decl. (Ex. 1) ¶¶ 10-11. Similarly, after working for "many years" as an England company driver, Jimm Simpkins "approached Horizon Truck Sales and Leasing on [his] own accord. [He] was not pressured into leasing." Simpkins Decl. (Ex. 22) ¶ 11. *See also* Durr Decl. (Ex. 4) ¶ 12 (As a trainer, he leaves the choice to his students after explaining the pros and cons of each option).

Drivers also testified they knew what they were getting into. Primo Benigni believes he "understood everything about the [ICOA] with England and the [VLA] with Horizon." Benigni Decl. (Ex. 7) ¶ 10; *see also* Gleave Decl. (Ex. 18) ¶¶ 12-13. IC Paul Lucey described the leasing option as "a long process. There are no surprises whatsoever by the time you actually sign the lease. They really take their time and explain everything. They really bend over backwards to be upfront about all aspects of the lease." Lucey Decl. (Ex. 1) ¶ 14; *see also* Evans Decl. (Ex. 5) ¶ 17 ("I also completely understood how mileage and length of haul operated with respect to pay.").

Similarly, the "high turnover rate"[247] in the trucking industry, including at England, was no secret to the drivers. Many trainees learned about turnover at school, in conversations with their trainers, in conversations with other drivers, from their own prior experience as a driver, and from England's frequent messages about turnover.[248]

Plaintiffs wrongly claim that each of their fraud- and omissions-based claims can be resolved with common evidence. They rely primarily on *Miller v. Basic Research, LLC*, 285 F.R.D. 647 (D. Utah 2010), which, unlike what the evidence shows here, turned on a uniform representation on which every buyer relied. In *Miller*, the defendant weight loss company uniformly advertised that consumers could "Eat all you want & still lose weight" despite the lack of any scientific basis. *Id*. at 655. The advertisements "affected each consumer in the same way." *Id.* at 657. There was no evidence of any proposed class members who not see the advertisement; nor did any proposed class member purchase the supposed diet drug for any reason other than viewing and responding to the advertisement. *Id.* at 659. Indeed, all named plaintiffs said the same statement motivated their purchases. *Id.*

Here, by contrast, many drivers testified that they knew from various sources how many miles they could expect, what their potential income could be, and why the turnover rate in the trucking industry was so high. *See, e.g.*, Parras Decl. (Ex. 14) ¶ 8 (His "trainers explained . . . expenses and the variable mileage payment as well as the possible income. I believe the information my trainers gave me was accurate. I have been successful and I like what I am doing."). Only by asking all proposed class members individually what they knew, how they

[247] Mot. at 9, 19, 44-47.

knew it, and when they knew it could causation or reliance be proved at trial. Such a case cannot be tried on a classwide basis.

3. Drivers chose the IC option for various reasons unrelated to the alleged misrepresentations and omissions.

Neither causation nor reliance can be established with classwide proof where drivers chose the IC option for reasons unrelated to the alleged fraud or omissions. *See, e.g.*, *McLaughlin*, 522 F.3d at 226 ("If smokers purchased more light cigarettes and drove up demand for reasons unrelated to defendants' misrepresentation, plaintiffs could not show that their economic injury was directly caused by defendants' fraud."); *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2003) ("Fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate."); *Sprague v. General Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (claims requiring "proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on the statements to his detriment . . . are typically inappropriate for class treatment"); *In re St. Jude Medical, Inc.*, 522 F.3d at 838 ("Because proof often varies among individuals concerning what representations were received, and the degree to which individual persons relied on the representations, fraud cases often are unsuitable for class treatment.").

Individual issues predominate where individual inquiries "respecting whether a potential class member received the misrepresentation, how that misrepresentation was interpreted and whether the class member purchased the product or service for reasons wholly unrelated to the

[248] *See, e.g.*, Evans Decl. (Ex. 5) ¶ 17; Mathos Decl. (Ex. 9) ¶ 16; Hatch Decl. (Ex. 12) ¶ 8; Reynolds Decl. (Ex. 3) ¶10; Hunter Decl. (Ex. 15) ¶ 7; Mahala Decl. (Ex. 8) ¶ 5; Lucey Decl.

fraud" are necessary. *Hale v. Enerco Grp., Inc.*, 288 F.R.D. 139, 150 (N.D. Ohio 2012) (citing cases). In *Poulos v. Caesars World, Inc.*, for example, the Ninth Circuit affirmed the denial of class certification because "individualized reliance issues related to plaintiffs' knowledge, motivations, and expectations bear heavily on the causation analysis" and affirmed the denial of class certification. 379 F.3d 654, 665 (9th Cir. 2004).

Similarly, in *Martinez*, "common questions of misrepresentation [were] subordinate to the individualized issues of reliance" where shoppers did not care about the discount, knew the truth, or shopped at the store for reasons unrelated to the allegedly misleading advertisement. 2013 WL 1313899, at *8. In that fraud-based case, as here, the plaintiffs failed to "materially grapple with the questions of common and individualized questions of fact and law," including that shoppers choose to patronize a store for any number of reasons, "geographical convenience, product availability, habit, ease of parking, etc.—entirely unrelated to that store's advertising efforts." *Id.* at *5-6; *see also* Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes to the 1966 Amendment ("[A] fraud case may be unsuited for treatment as a class action if there was material variation . . . in the kinds or degrees of reliance by the persons to whom they were addressed.").

In *McLaughlin*, a group of smokers claimed they were deceived "into believing that 'light' cigarettes ('Lights') were healthier than 'full-flavored' cigarettes." 522 F.3d at 220. The Second Circuit reversed class certification because "individuals may have relied on defendants' misrepresentation to varying degrees in deciding to purchase Lights; some may have relied completely, some in part, and some not at all." *Id.* at 226; *see also Hale*, 288 F.R.D. at 151 (if

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(Ex. 1) ¶ 17; Simkins Decl. (Ex. 22) ¶ 16.

potential class members did not see the allegedly deceptive advertisement, did not interpret it as plaintiffs did, "decided to purchase the [product] for reasons entirely unrelated to the representation," or, even knowing about the misrepresentations, "may well have purchased the [product] anyway, on the basis of . . . price, performance, reputation, durability, safety record, attractiveness, etc.," reliance may not be presumed, and individual issues will predominate); *Crab House*, 2013 WL 1338894, at *14 (individual issues of reliance predominate where "each plaintiff . . . could have chosen to advertise in *Newsday* for any number of reasons besides" the alleged misrepresentation).

As in *McLaughlin*, *Poulos*, *Hale*, and *Martinez*, "[i]ndividualized proof is needed to overcome the possibility that a member of the purported class [chose the IC option] for some reason other than the [Defendants' alleged misrepresentations or omissions]." *McLaughlin*, 522 F.3d at 223. Here, many did. IC Joseph Broccardo did not rely on any mileage or income representations in the EBG, but instead chose to become an IC because he did not want to drive as a team, which electing to be a company driver might have meant. Broccardo Decl. (Ex. 10) ¶¶ 7-8.[249] IC Gary Manfull, in contrast, chose the IC option because he would be allowed to train and drive with his wife; "Marketing materials did not play a part in our choice." Manfull Decl. (Ex. 13) ¶¶ 6-8. IC Brian Hunter chose the IC option relying "on my own experience as an owner-operator, and I ran the numbers of potential income based on England's pay scale." Hunter Decl. (Ex. 15) ¶ 8. IC Paul Lucey switched to the IC option after driving as a company driver and determining through his own experience that he would make more money as an IC.

[249] Plaintiffs also refer to England's CAT training module. But the last version of the CAT module to contain the same graphs as those in the EBG appears to be 2008. *See* CAT Module Versions chart (Ex. 87).

Lucey Decl. (Ex. 1) ¶¶ 10-11. IC David Gonzalez "knew I wanted to be an independent contractor before I joined England because I wanted the freedom and independence associated with being an independent contractor." Gonzalez Decl. (Ex. 16) ¶ 3. And former IC Barry Toole "did not decide to become an [IC] based on any sales pitch or marketing material." Toole Decl. (Ex. 17) ¶ 13.

Determining what each driver understood various representations to mean also requires individual analysis. *See, e.g.*, *Martinez*, 2013 WL 1313899, at *6 (denying certification where some shoppers might have construed the advertisement exactly as the store did). Former IC Jerry Upton, for example, "recall[ed] seeing pay and mileage examples in the England Business Guide, but I understood that they were not promises or guarantees of any particular mileage or income and that they simply showed what you could earn if you drove a certain number of miles." Upton Decl. (Ex. 2) ¶ 11. IC Brian Hunter remembered "seeing some examples of potential income based on certain variables [in the EBG, but he] did not understand such examples to be a guarantee of any miles or income. Hunter Decl. (Ex. 15) ¶ 9. IC Tony Mathos found the materials provided "to be very helpful and accurate." Mathos Decl. (Ex. 9) ¶ 13. Asking each individual driver why he or she chose the IC option and how he or she interpreted the alleged misrepresentations is the only way to determine what caused a driver to make one choice or another.

4. Success or failure as an IC turned on drivers' personal choices and cannot be shown with common evidence.

Plaintiffs claim England failed to explain the "grim outcome" and high turnover facing ICs, and that England's misrepresentations and omissions caused drivers to choose the IC option "and [f]ail to [s]urvive." Mot. 4, 16, 36-40, 44-47. But many drivers testified they were not

harmed at all by choosing the IC option. Indeed, they are happy with their decisions and have been successful in their careers.[250] IC Jack Reynolds said, "England gave me a chance when nobody else would. I now own my own truck, my credit has improved, and England gives me all the freight I can handle." Reynolds Decl. (Ex. 3) ¶ 21.

As ICs explain, success in the IC program usually turns on the driver's own decisions. For example, "taking long and frequent breaks, failing to plan trips in advance, failing to work with their driver managers in advance to arrange for their next loads, and failing to make on-time deliveries" are "important mistakes." Hunter Decl. (Ex. 15) ¶13; Broccardo Decl. (Ex. 10) ¶ 17.[251] In contrast, getting to delivery spots early and making deliveries on time helps ICs be successful. Broccardo Decl. (Ex. 10) ¶ 17. Former IC Jerry Upton testified he learned in training that slowing down saves money. Upton Decl. (Ex. 2) ¶ 7. And Former IC David Reisig said he "was able to get the miles he asked for [and] in [his] experience, you have to be proactive to get all the miles you want." Reisig Decl. (Ex. 19) ¶ 15. In sum, "you get out of the [IC] experience what you put into it, and the amount you earn working as an IC for England depends on how hard and how smart you work (staying in route, getting good fuel mileage, etc.)." Upton Decl. (Ex. 2) ¶ 14.[252]

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[250] *See, e.g.*, Benigni Decl. (Ex. 7) ¶ 2; Broccardo Decl. (Ex. 10) ¶ 8; Durr Decl. (Ex. 4) ¶¶ 19-20; Evans Decl. (Ex. 5) ¶¶ 20-21; Parras Decl. (Ex. 14) ¶ 8; Simpkins Decl. (Ex. 22) ¶ 18.

[251] *See also* Mathos Decl. (Ex. 9) ¶ 23 ("In my experience, home time is the most significant cause of low mile periods. Low miles are also often a result of taking too long at truck stops, failing to make the best use of the hours available, making late deliveries, failing to cooperate with your driver manager, and turning down loads."). England's training materials told students that success as a truck driver required taking "no more than 3 to 4 days off every 4 to 6 weeks." England Business Guide (Ex. 59) at 11.

[252] *See also* Gonzalez Decl. (Ex. 16) ¶ 13 ("In my opinion, England does a pretty good job of giving you the tools to succeed—they teach you about fuel efficiency, give you business tips,

And drivers left England—resulting in "high turnover"—for individual reasons unrelated to mileage or income. Former IC Millard Mahala testified he "earned what [he] hoped to earn as an [IC]," but "the amount of time I was gone from home as an over-the-road driver was difficult for my family. Consequently, I left England to accept a truck driving job that would keep me closer to home," despite having to take a pay cut. Mahala Decl. (Ex. 8) ¶¶ 14, 16; Upton Decl. (Ex. 2) ¶ 17 (same). Former IC David Reisig "had a good experience driving as an [IC] at England," but "left England for primarily personal reasons . . . not . . . because I was unhappy with the miles or income." Reisig Decl. (Ex. 19) ¶¶ 16, 17. Jimm Simpkins left because of a disability. Simpkins Decl. (Ex. 22) ¶ 2. And current company driver John Pratt changed from an IC to a company driver because his "wife encouraged [him] to take a position that would be easier, less stressful, and/or that would keep me closer to home." Pratt Decl. (Ex. 21) ¶ 14; *see also* Toole Decl. ¶ 3 ("I left England in 2010, in order to take a local job and be home near my mother who was having a hard time.")

In sum, success or failure as an IC often turns on individual drivers' own actions or inactions, not on any alleged misrepresentations, omissions, or manipulation.

5. Reliance cannot be presumed.

Reliance cannot be presumed for Plaintiffs' RICO, UPUAA, and common law fraud subclass of drivers who chose to become ICs while the England Business Guide was in use—allegedly from November 2006 to July 2010—but must be proved individually. Plaintiffs insist their RICO, UPUAA, and common law fraud claims can be resolved through common proof because reliance can be presumed for every proposed class member using a "common sense" or

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that kind of thing—but a lot of people get in there and breeze by."); Parras Decl. (Ex. 14) ¶ 7

"logical explanation" presumption. Mot. 69-74.[253] But reliance cannot be presumed here because "there is more than one logical explanation for the plaintiffs' participation in the transaction or conduct at issue." *Countrywide*, 277 F.R.D. at 604. As shown above, drivers chose the IC option for various reasons unrelated to the alleged fraud. *See Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 746-47 (7th Cir. 2008) (rejecting conclusion that reliance could be presumed classwide where individual hearings would be required to determine what each class member understood the allegedly deceptive advertisement or label to mean and whether it impacted the decision to purchase); *Mazza*, 666 F.3d at 595-96 (reliance cannot be presumed where class includes consumers "who learned of the … allegedly omitted limitations before they purchased the … system."). Only where "there is an obvious link between the alleged misconduct and harm," eliminating the need to "forg[e] a chain of inferences" that links the alleged misrepresentations to plaintiffs' losses, might an inference be appropriate. *Poulos*, 379 F.3d at 665. In *Poulos*, the court concluded that a presumption of reliance was impermissible where the differing knowledge, motivation, and expectations of players raised individual questions as to why they chose to play video poker or electronic slot machines. 379 F.3d at 658, 660-61, 665.

Plaintiffs' cases agree that reliance can be presumed only if the evidence shows no proposed class members would have entered the transaction without relying on a uniform misrepresentation or omission. In *In re Baldwin-United Corp. Litig.*, defendants failed to

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(trainers taught him that managing fuel expenses "is a key factor in determining" success).

[253] The Tenth Circuit has not decided whether this presumption is even appropriate outside of the securities context and "[t]he law in other jurisdictions is mixed." *CGC Holding Co., LLC v. Hutchens*, 2013 WL 798242, at *17 (D. Colo. Mar. 4, 2013), *on reconsideration in part*, 2013 WL 1687678 (D. Colo. Apr. 18, 2013) (collecting cases).

disclose that the issuer of the annuities proposed class members bought "was experiencing financial and regulatory difficulties . . . , ***[that it was in] precarious financial condition*** . . . [and] that information available to defendants ***foretold Baldwin-United's collapse***." 122 F.R.D. 424, 426 (S.D.N.Y. 1986) (emphasis added). Similarly, in *CGC Holding Co.*, whether proposed class members would have chosen to pay advance fees to the defendant, a criminal engaged in an *American Hustle*-like scheme, who collected advance fees but lacked the intent or ability to fund most of the loans they sought, was a common question. 2013 WL 798242, at *17. "It is difficult to conceive that any individual or entity contemplating a substantial payment of advance fees in support of a loan application would not consider those facts to be important in the making of their decision." *Id.* In *Miller*, all named plaintiffs pointed to a single statement as motivating their purchases of a diet product that was worthless if "Eat all you want & still lose weight" were untrue. The court certified a liability class and deferred the issue of individual reliance for later. 285 F.R.D. at 660-61. Finally, in *Negrete v. Allianz Life Ins. Co. of N. Am.*, plaintiffs could "resort to the 'common sense' inference for proving class-wide reliance" because consumers had no reason to purchase an allegedly inferior investment product absent "the standardized marketing materials at issue in this litigation." 287 F.R.D. 590, 612 (C.D. Cal. 2012).[254]

[254] *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 515-16 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998), is distinguishable from this case because it was certified for settlement and because all purchasers received the same misrepresentations and omissions and received annuities that proved to be worth much less than promised. There, evidence showed agents provided uniform misrepresentations and omissions about a policy's value without disclosing the mostly negative impact of fluctuating dividends or the complex use of policy loan values. And like *Negrete* and Plaintiffs' other cases, when the policies turned out to be worth far less, it was reasonable to presume that "class members acted in a manner consistent with reliance" by purchasing the policies due to the sales pitch they received. In deciding reliance did not defeat predominance, the court observed that "most of the plaintiffs' claims do not even involve a reliance element. An individual issue with respect to one element

Plaintiffs argue that reliance can be presumed "[i]f the truth had been disclosed, it would have been illogical for subclass members to purchase the Driving Opportunity." Mot. at 71. But here, there is no such "obvious link" between the alleged misrepresentations or omissions and the proposed class members' decisions to become ICs because drivers often chose to become ICs instead of company drivers for reasons unrelated to the alleged fraud.[255] The "many possible motivations for" choosing to become an IC make "'the common sense approach to causation'" unavailable here. *Negrete*, 287 F.R.D. at 612-13 (quoting *Countrywide*, 277 F.R.D. at 604). Unlike *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 120 (2d Cir. 2013), where there was "no . . . individualized proof indicating knowledge or awareness of the fraud by any plaintiffs," many drivers here testified they were fully informed about mileage, income, haul length, and turnover rate—mostly from their trainers and other drivers or their own previous experience—and chose to become ICs anyway.[256]

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of a small portion of plaintiffs' claims does not outweigh the multitude of issues common to the remaining elements and claims." *Id.* at 516.

[255] *See, e.g.*, Broccardo Decl. (Ex. 10) ¶¶ 7-8; Hunter Decl. (Ex. 15) ¶¶ 8; Lucey Decl. (Ex. 1) ¶¶ 7, 10-11; Manfull Decl. (Ex. 13) ¶¶ 6-8.

[256] *See, e.g.*, Aguilar Decl. (Ex. 20) ¶¶ 3-5; Andrews Decl. (Ex. 11) ¶10; Benigni Decl. (Ex. 7) ¶ 10; Durr Decl. (Ex. 4) ¶ 12; Evans Decl. (Ex. 5) ¶ 17; Gleave Decl. (Ex. 18) ¶¶ 12-13; Hatch Decl. (Ex. 12) ¶ 8; Hunter Decl. (Ex. 15) ¶ 7; Lucey Decl. (Ex. 1) ¶¶ 10-11, 14, 17; Mahala Decl. (Ex. 8) ¶ 5; Mathos Decl. (Ex. 9) ¶ 11, 16; Reynolds Decl. (Ex. 9) ¶¶ 9-11; Upton Decl. (Ex. 2) ¶ 8. The individual evidence here showing numerous drivers knew exactly what they were getting into and still chose the IC option distinguishes this case from *Smith v. MCI Telecommunications Corp.*, 124 F.R.D. 665, 677-80 (D. Kan. 1989). There, the court presumed reliance where MCI allegedly underpaid commissions called for in salespersons' contracts and there was no evidence salespersons entered into contracts despite knowing they would not receive the agreed compensation. Plaintiffs also suggest that *MCI* held that reliance is an objective inquiry. *See* Mot. at 73. But the court held, applying Kansas law, that actual reliance is in fact a subjective inquiry. *See* 124 F.R.D. at 677.

B. Plaintiffs' Unjust-Enrichment Claim Requires the Same Individual Evidence as Their Fraud-Based Claims.

Plaintiffs' proposed nationwide class includes an alternative claim for unjust enrichment. *See* Mot. at 77-78. They say Defendants (1) passed off their own costs on the proposed class members who chose the IC option and (2) tacked on an illegitimate variable mileage charge. *Id.* They claim common issues predominate because "the focus of this claim is on the conduct of Defendants." *Id.* 78. Not so.

Unjust enrichment requires proof of "receipt of a benefit and unjust retention of the benefit at the expense of another." *Berger*, 2014 WL 350082, at *6 (internal quotation marks and citation omitted). But, "[t] his equitable test does not turn merely on the transfer of money or other benefits from one party to another—it requires injustice." *Id.* (citation omitted). Determining whether England's and Horizon's receipt of funds was unjust here depends on what proposed class members were told about the IC option, how they understood it, and the differing information various trainers and recruiters conveyed to individual proposed class members, much of it orally. *See id.* Just as Plaintiffs' fraud-based claims require individual determinations individual questions predominate here. *See id.*; *see also Countrywide*, 277 F.R.D. at 609 ("Plaintiffs argue that because the elements of unjust enrichment focus on the defendant's conduct, as does California's UCL, 'the same common evidence will establish this claim for the whole class,'" but because individual questions predominated for the UCL claim, the unjust enrichment claim could not be certified either); *Crab House*, 2013 WL 1338894, at *14 (individual issues predominated because determining whether the defendants benefited at the plaintiffs' expense depends "on the circumstances of each" plaintiff).

C. Plaintiffs' Breach of Fiduciary Duty Claim Requires the Same Individual Evidence as Their Fraud-Based Claims.

Plaintiffs' proposed nationwide class includes a claim for breach of fiduciary duty. Mot. 78-79. They allege Defendants "knew of facts that made express representations relating to earnings and to a 'career' and the ability of Drivers to successfully operate a business untrue or misleading." *Id.* 78. Plaintiffs cite *First Security Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1990), for the proposition that a "confidential relationship that will support a breach of fiduciary duty claim may arise whenever a continuous trust is reposed by one party in the skill and integrity of another." Mot. at 78. But *Banberry* recognizes that "[w]hether or not a confidential or fiduciary relationship exists depends on the facts and circumstances of each individual case." 786 P.2d at 1332. Here, given the varied backgrounds of each driver, including those who had previously been ICs with other companies,[257] individual inquiry would be required.[258] Even if a fiduciary duty existed, Plaintiffs would still need to prove England and Horizon breached it by fraudulently concealing or misrepresenting material facts and that Plaintiffs relied on those misrepresentations or omissions. *Owen v. Regence BlueCross BlueShield of Utah*, 388 F. Supp. 2d 1335, 1337 (D. Utah 2005); *Kerber v. Qwest Group Life Ins. Plan*, 656 F. Supp. 2d 1279, 1287 (D. Colo. 2009); *Horn v. Cendant Operations, Inc.*, 69 F. Appx. 421, 427 (10th Cir. 2003). But the same individual evidence that many drivers knew

[257] *See, e.g.*, Hunter Decl. (Ex. 15) ¶ 2; Manfull Decl. (Ex. 13) ¶¶ 2-3; Reisig Decl. (Ex. 19) ¶ 3; Lucey Decl. (Ex. 1) ¶ 5.

[258] In addition, Plaintiffs argue that "[i]t has been recognized that '[i]nherent in a franchise relationship is a fiduciary duty,'" citing to *Arnott v. Am. Oil Co.*, 609 F.2d 873, 881 (8th Cir. 1979). Mot. at 78. In making that argument, Plaintiffs ignore the prior ruling in this case that the IC relationship here does not constitute a franchise. *See* Dkt. Nos. 37, 44.

about the high turnover rate, actual mileage, and potential income would be admissible here to show no breach or reliance, and thus lead to predominating individual inquiry.

In *Owen*, this Court denied class certification of plaintiffs' claim alleging a breach of fiduciary duty based on a material omission in an ERISA-governed insurance policy. 388 F. Supp. 2d at 1339-41. In order to prevail on the claim, the plaintiff had to show reliance, *i.e.*, that she was materially misled. "At oral arguments . . . , the plaintiff agreed that if reliance is an element of proof required for her claim, certification would not be appropriate." *Id.* at 1341. This Court rightly observed, "The case law is clear on this point." *Id.*

Certification of the breach of fiduciary duty claim should be denied along with the fraud-based claims.

D. Plaintiffs' Breach of Contract Claim Requires Individual Inquiry.

Plaintiffs seek certification of a subclass claiming that England breached the STA by telling drivers at the end of training that company trucks were unavailable in order to coerce drivers into taking the IC option. Mot. 75-76. But determining whether England breached the STA with respect to any individual driver requires predominantly individual evidence.[259]

First, whether a driver was told a company truck was unavailable and had to wait requires individual proof. Contrary to Plaintiff McKay's testimony (McKay Decl. ¶ 14), Messrs. Hardin, Farahmand, Love, Lovett, Redwing, and Yates testified that they chose the company driver option and did not have to wait for a truck.[260]

[259] *See* Broccardo Decl. (Ex. 10) ¶¶ 7-8; Manfull Decl. (Ex. 13) ¶¶ 6-8; Hunter Decl. (Ex. 15) ¶ 8; Lucey Decl. (Ex. 1) ¶¶ 10-11.
[260] Hardin Decl. (Ex. 24) ¶ 8; Farahmand Decl. (Ex. 26) ¶ 9; Love Decl. (Ex. 23) ¶ 8; Lovett Decl. (Ex. 23) ¶ 8; Redwing Decl. (Ex. 25) ¶ 5; Yates Decl. (Ex. 28) ¶¶ 10-11.

Second, even if a delay occurred in some cases, the length of the delay and whether it was material would raise individual issues of fact. *E.g.*, *Cross v. Olsen*, 303 P.3d 1030, 1036 (Utah Ct. App. 2013).

Third, whether a driver chose the IC option because he or she was told no company truck was available also requires individual proof. IC Tony Mathos said he "never felt any pressure to become an [IC], and several of my classmates elected to become company drivers [but] I do not recall any of them having to wait to be assigned to a company truck." Mathos Decl. (Ex. 9) ¶ 15; Reynolds Decl. (Ex. 3) ¶ 13. Former IC Carol Gleave chose the IC option not because no company trucks were available, but because, after discussing the options with her trainers and reading and understanding the ICOA, she believed she could make more money and "liked the idea of having my own business." Gleave Decl. (Ex. 18) ¶¶ 8-10, 12. IC Brian Hunter chose to become an IC not because company jobs or trucks were unavailable, but because "there were too many restrictions on company drivers and more freedom as an independent contractor." Hunter Decl. (Ex. 15) ¶ 8.

Whether a driver was told a company truck was unavailable and whether that was the reason the drivers chose the IC option require individual inquiries that would predominate and preclude certification of Plaintiffs' breach of contract claim.

IV. PLAINTIFFS' DAMAGES CANNOT BE ESTABLISHED THROUGH CLASS-WIDE PROOF.

Plaintiffs also fail to satisfy Rule 23(b)(3)'s demanding predominance requirement because proving the fact and amount of damages for each proposed class member will require predominantly individual evidence that will overwhelm any questions common to the class.

A. Proving Injury In Fact Will Require Predominantly Individual Evidence.

To satisfy Rule 23(b)(3) "plaintiffs must . . . show that they can prove, through common evidence, that all class members were in fact injured by [defendant's] alleged [misconduct]." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("[W]e do expect the common evidence to show all class members suffered *some* injury.").[261] Plaintiffs concede that they must prove the fact of damages but mistakenly claim that they can do so with common evidence. *See* Mot. at 80.

Proposed class members had different reasons for choosing to become IC drivers and did not rely on any single, uniform misrepresentation.[262] And some drivers say that they obtained the income they expected.[263] Dr. Mahla's proposed models ignore this reality and would award damages to drivers who chose to become ICs for reasons wholly separate from any alleged wrongdoing by England and to drivers who, by their own testimony, suffered no harm. For example, Mahla proposes a damage model that assumes a particular expectancy or "benefit" tied to an alleged misrepresentation.[264] But determining whether a proposed class member saw a particular representation, relied upon it, and thus had an expectation of a particular "level of

[261] *See also id.* at 252–53 ("Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact."); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[W]e have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.").
[262] *See* Background II.D.
[263] *See* Parras Decl. (Ex. 14) ¶ 14; Pratt Decl. (Ex. 21) ¶ 13; Gonzalez Decl. (Ex. 16) ¶ 17; Lucy Dec. (Ex. 1) ¶ 20; Mathos Decl. (Ex. 9) ¶ 25.
[264] *See, e.g.*, Mahla Decl. at 6 ("The first measure of potential earnings for Class members is the level of earnings that Defendants represented to the Class.").

earnings" would require individual evidence.[265] Mahla also proposes damage models that would award drivers the difference between what they earned as ICs and what they would have earned as company drivers. But determining whether Defendants' alleged wrongdoing actually caused any individual driver to choose the IC option over the company option would require individual evidence. Moreover, Dr. Mahla's model cannot predict which division within England these drivers would be if they were employees or the miles these drivers would drive as employees.[266]

Proving the fact of injury on Plaintiffs' breach-of-contract claim would similarly require predominantly individual evidence. Drivers did not uniformly request company positions at Phase II Upgrade. And England did not uniformly force drivers who did ask for a company position to wait for a company truck. Moreover, even if a proposed class member became an IC because of the wait for a company truck, determining whether the alleged waiting period constituted a breach of the STA would be a fact intensive inquiry.

B. Proving Each Proposed Class Member's Amount of Damages Will Require Predominantly Individual Evidence That Will Overwhelm Any Questions That May Be Common to the Class.

As with proving the fact of damages, the evidence needed to prove each proposed class member's amount of damages is overwhelmingly individual. In *Comcast*, the Supreme Court emphasized that district courts should conduct a "rigorous analysis" of a plaintiff's damages

[265] Plaintiffs argue that "[e]ven if the fact of damages were not subject to class-wide proof, class certification would still be appropriate," citing to *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010). *See* Mot. at 81 n.138. But *Pella* does not help Plaintiffs because there the Seventh Circuit certified a narrow liability issue—whether Pella's window design was defective—for classwide treatment but agreed with the district court's decision to deny certification on issues related to causation and damages. *See id.* at 392–93, 394 ("Under the district court's plan, class members still must prove individual issues of causation and damages.").

[266] *See* Hoffman Decl. (Ex. 39) ¶ 45.

model. 133 S. Ct. at 1433 (internal quotation marks omitted). *See also Wallace B. Roderick*, 725 F.3d at 1220 ("[T]he district court should consider the extent to which material differences in damages determinations will require individualized inquiries."). After analyzing the plaintiffs' model, the Court in *Comcast* reversed class certification because the "model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Comcast*, 133 S. Ct. at 1433 (emphasis added). *See also id.* at 1434 (noting that the plaintiffs' proposed model would impermissibly "identif[y] damages that are not the result of the [alleged] wrong"). Although the need for individualized evidence does not necessarily destroy predominance, it does so here.[267]

As Defendants' damages expert Richard Hoffman states, plaintiffs cannot rely on the OWNRRE database to calculate classwide damages resulting from Defendants' alleged misconduct because each proposed class member's financial performance resulted from individual decisions not necessarily reflected in that database. As Mr. Hoffman points out, each driver made decisions on how to operate his or her business, such as when and how long to work, how efficiently to operate his or her business in terms of fuel purchase and consumption, whether to drive as a team, etc. "The impact of these decisions must be assessed in order to avoid counting as damage any differences in earnings due to the driver's choices to operate in a manner

[267] *See Wallace B. Roderick*, 725 F.3d at 1220 ("Although individualized monetary claims belong in Rule 23(b)(3), predominance may be destroyed if individualized issues will overwhelm those questions common to the class." (internal citations and quotation marks omitted)); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003) ("Class treatment, however, may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate.").

inconsistent with any England representations."[268] For example, Mahla's models assume that the total miles driven in a week is reflective entirely of England's conduct, i.e., how many miles it made available. But an individual driver's choices and driving conduct significantly impact the actual miles the driver runs in a particular week. The same analysis applies to each individual driver's fuel efficiency, which is a key factor in a driver's income. As a consequence, Mr. Hoffman concludes that because Dr. Mahla's proposed models do not and cannot take into account individual skill and effort, his method would improperly lead to the least efficient drivers being awarded the most damages.[269]

Dr. Mahla's models also wrongly assume that proposed class members would have received the same miles as company drivers that they received as IC drivers. *See* Mot. at 82. But company drivers generally drove fewer miles than IC drivers because England gave IC drivers priority over company drivers.[270] So determining what any driver would have earned as a company driver would require individual inquiry.

In this case, the individual evidence necessary to ensure that proposed class members were in fact injured by the alleged misrepresentations and that their damages are the result of Defendants' alleged wrongdoing would overwhelm any issues common to the class. Accordingly, Plaintiffs' motion to certify claims seeking actual damages should be denied.[271]

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[268] Hoffman Decl. (Ex. 39) ¶ 12.
[269] *Id.* at ¶ 6(2)(a).
[270] *See* J. England Dep., 12/6/2012 (Ex. 56) at 169.
[271] Plaintiffs argue that the UCSPA would allow class members to recover their "loss," which is broader than actual damages. *See* Mot. at 65 (citing *Andreason v. Felsted*, 2006 UT App 188, 137 P.3d 1). *Andreason* held that an individual plaintiff could recover the $2,000 penalty without proving actual damages; a showing of loss is sufficient. *See* 2006 UT App 188, ¶ 14. But here, Plaintiffs concede the $2,000 penalty is not available in a class action. *See* Mot. at 66. So under the UCSPA recovery is limited to actual damages, which is a narrower concept than

C. Individual Damages Issues Will Also Predominate on Plaintiffs' UBODA and UTIAA Claims.

Plaintiffs argue that they can calculate damages for their UBODA and UTIAA claims on a classwide basis because each statute provides for minimum statutory damages of $2,000.[272] But individual damages issues predominate on these claims for at least four reasons.

First, the laws of each proposed class member's home state govern the business-opportunity and consumer-fraud claims.[273] The remedies available under those statutes, and specifically the availability of any minimum damages, differ significantly. *See infra* Argument V.B.

Second, even if Utah law applies, the $2,000 statutory penalty is available only in individual actions, not class actions. This restriction comes from the UCSPA, which expressly defines the term "consumer transaction" using the term "business opportunity." UTAH CODE ANN. § 13-11-3(2)(A)(II). Under the UCSPA, class actions on Utah state-law claims related to a transaction governed by the UCSPA can seek only those remedies prescribed by the UCSPA. *See* UTAH CODE ANN. § 13-11-23 ("The remedies of this act are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this act may be brought only as prescribed by this act."). And the UCSPA does not allow consumers to seek the $2,000 statutory penalty in a class action. *See* UTAH CODE ANN. § 13-11-19(2) ("A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is

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either "loss" or "damages." *See Andreason*, 2006 UT 188, ¶ 13. Moreover, recovering actual damages or loss under the UCSPA requires a showing of causation. *See id.* ¶¶ 10, 14. Proving causation or amount of actual damages requires predominantly individual evidence.

[272] Mot. at 81.

greater, plus court costs."). Here, Plaintiffs allege that their decision to drive for England as an IC driver is governed by the UCSPA.[274] Therefore, members of any class certified on Plaintiffs' UBODA or UTIAA claims cannot seek a $2,000 statutory penalty.[275] Rather, such a class would have to seek actual damages. So individual damages evidence will overwhelm common issues.

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[273] *See infra* Argument V.B.

[274] Defendants dispute that a driver's decision to sign an ICOA and a VLA is a consumer transaction under the UCSPA. To qualify as a consumer transaction, the person performing personal services cannot have been previously engaged in those services. *See* UTAH CODE ANN. § 13-11-3(2)(a)(ii)(B). But to sign an ICOA with England a driver must have had some previous driving experience, either through England's training program or with another company. *Cf.* Sierra Dep. (Ex. 52) at 33–36.

[275] These provisions apply in federal court because they are "so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring). In *Shady Grove*, the Supreme Court held that a provision in New York law prohibiting class actions in suits seeking penalties or statutory minimum damages did not preclude a class action in federal court. But in doing so, the plurality expressly stated that the case before it was different from one where a statute limited the remedies available in a class action instead of completely prohibiting a class action altogether. *See id.* at 401–02 (Scalia, J., plurality opinion) ("*We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23*; that is not what § 901(b) does. By its terms, the provision precludes a plaintiff from 'maintain[ing]' a class action seeking statutory penalties. *Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions*, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all. Consequently, a court bound by § 901(b) could not certify a class action seeking both statutory penalties and other remedies even if it announces in advance that it will refuse to award the penalties in the event the plaintiffs prevail; to do so would violate the statute's clear prohibition on 'maintain[ing]' such suits as class actions." (emphasis added)). Justice Stevens also observed in his concurring opinion that the provision at issue was "a rule in New York's procedural code about when to certify class actions brought under any source of law." *Id.* at 436 (Stevens, J., concurring). Here, the applicable UCSPA provisions, unlike the New York law in *Shady Grove*, do not prevent a class action from coming into existence at all. Instead, the provisions simply put the $2,000 statutory penalty out of reach in properly filed class actions. Moreover, the provisions do not apply to claims under any source of law but rather apply only to Utah state-law claims that relate to a transaction governed by the UCSPA. Furthermore, the provisions do not appear in Utah's general procedural code but rather in a statute creating a substantive cause of action.

Third, even if the $2,000 penalty is available in a class action, neither Roberts nor McKay can seek statutory damages. Utah has a one-year limitations period that applies to claims for a statutory penalty.[276] And Plaintiffs filed this lawsuit more than one year after they terminated their relationship with Defendants, the latest accrual date for any claim under the UBODA or the UTIAA.[277] Therefore, they are barred from pursuing a statutory damages claim and are subject to individual analysis of actual damages.

Fourth, comparing the amount of any individual driver's actual damages and the $2,000 statutory penalty requires predominantly individual evidence.

V. A TRIAL ON CERTAIN CLAIMS OF THE PROPOSED NATIONWIDE CLASS WOULD BE UNMANAGEABLY COMPLEX BECAUSE THE COURT AND THE JURY WOULD HAVE TO APPLY THE LAWS OF 51 JURISDICTIONS.

Plaintiffs' proposed classes for violations of the UTIAA, UCSPA, and UBODA and for common-law fraud, breach of fiduciary duty, and unjust enrichment fail Rule 23(b)(3)'s requirements because the need to apply the laws of 48 states, the District of Columbia, Puerto Rico, and the Virgin Islands (the laws of each driver's home state)[278] causes individual questions

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[276] UTAH CODE ANN. § 78B-2-302(2) ("An action may be brought within one year . . . upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."). The contractual two-year limitation period in the VLA and ICOA does not extend the one-year Utah statute of limitation in this case. Utah courts have only enforced contractual limitation periods "shorter" than the statutory period, never longer than that provided in Utah statute. *See Deer Crest Assocs. I, LC v. Silver Creek Dev. Grp. LLC*, 2009 UT App 356, ¶ 11, 222 P.3d 1184 ("Utah courts follow the general principle that parties may contractually limit the time in which to bring an action in contract to a *period shorter than that of the applicable statute of limitations*, so long as the limitation is reasonable." (emphasis added)).

[277] McKay operated as an IC from approximately July 2009 to October 2009. *See* Dkt. No. 204, ¶ 3. Roberts operated as an IC from approximately September 2009 to April 2010. *See* Dkt. No. 199 ¶ 3.

[278] The home addresses for proposed class members are in 48 different states, Washington, D.C., Puerto Rico, and the Virgin Islands. *See* Declaration of Jackson Rooks (Ex. 36) ¶ 6.

of law to predominate and would make the trial unmanageably complex for the Court and jury.[279]

A. Under Utah's Choice-of-Law Rules, the Laws of the State With the Most Significant Relationship to the Claims and the Parties Govern.

Plaintiffs agree that Utah's choice-of-law rules determine what laws apply to proposed class members' claims even though this case was transferred here under 28 U.S.C. §§ 1406(a) and 1404(a). *See* Mot. at 52–53; *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 134 S. Ct. 568, 582–83 (2013); Dkt. No. 44 at 10 (transferring this case to this district under § 1406(a) for improper venue and alternatively under § 1404(a) for convenience in the interest of justice).

"Typically, a choice of law analysis is preceded by a determination of whether there is a true conflict between the laws of those states that are interested in the dispute." *One Beacon Am. Ins. Co. v. Huntsman Polymers Corp.*, 2012 UT App 100, ¶ 27 n.10, 276 P.3d 1156. If a conflict exists, Utah courts apply "the 'most significant relationship' approach as described in the Restatement (Second) of Conflict of Laws in determining which state's laws should apply." *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 14, 54 P.3d 1054. The first step is determining "whether the problem presented relates to torts, contracts, property, or some other field." *Id.* ¶ 15. Then the court looks to the contacts applicable to each type of claim to determine which state has the most significant relationship to the claims and the parties. *See id.* ¶¶ 15, 18.

[279] Although the substantive law of each driver's home state should apply to these claims, Utah's statutes of limitation still apply. In Utah, statutes of limitation are "essentially procedural in nature," so that "Utah courts have concluded that under a general conflict of laws analysis, the

B. The Laws of Each Proposed Class Member's Home State Govern Each Driver's Fraud, Negligent-Misrepresentation, Unjust-Enrichment, Fiduciary-Duty, UTIAA, UBODA, and UCSPA Claims Because That is Where Drivers First Received and Acted in Reliance on the Alleged Misrepresentations and Offer to Purchase a Business Opportunity.

The laws of the 48 states governing consumer-protection,[280] business-opportunity,[281] unjust-enrichment,[282] breach-of-fiduciary-duty,[283] and fraud claims[284] conflict with one another.

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limitations period of the forum applies." *Records v. Briggs*, 887 P.2d 864, 870 (Utah Ct. App. 1994) (internal quotation marks omitted).

[280] *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012) (holding that the consumer-protection laws of 44 states vary materially); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) ("the differences between the consumer-protection laws of the many affected States would cast a long shadow over any common issues of fact plaintiffs might establish"); *In re Bridgestone/Firestone*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules."); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (following *In re Bridgestone/Firestone's* conclusion that state consumer protection laws vary considerably and reversing nationwide class certification); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 625–26 (D. Kan. 2008) (holding that "there are significant differences among the States' consumer protection laws," including whether they require proof of scienter or reliance and the amount of damages recoverable); *In re Prempro*, 230 F.R.D. 555, 564 (E. D. Ark. 2005) ("Both consumer fraud and unfair competition laws of the states differ with regard to the defendant's state of mind, type of prohibited conduct, proof of injury-in-fact, available remedies, and reliance, just to name a few differences."). *See also* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 17 (2005) ("The elements necessary to bring private lawsuits under little-FTC Acts vary from state to state."). Here, variances in state laws with respect to reliance, available remedies (particularly in a class action), and the need to prove actual injury are material to Plaintiffs' consumer-protection claims.

[281] Only approximately half of the states even have business-opportunity statutes. *See* Rupert M. Barkoff, *Franchise Sales Regulation Reform: Taking the Noose Off the Golden Goose*, 3 Entrepren. Bus. L. J. 233, 242 & n.49 (2009) (identifying twenty-five states with business-opportunity statutes). *See also* ALA. CODE § 8-19-5(20); ARIZ. REV. STAT. ANN. § 44-1271. And these statutes have varying definitions of a business-opportunity. *Compare* UTAH CODE ANN. § 13-15-2(1)(a), *with* CAL. CIV. CODE § 1812.201(a). Moreover, the UBODA provides for $2,000 in minimum damages, *see* UTAH CODE ANN. § 13-15-6, while most other statutes do not contain a fixed minimum damage amount, *see, e.g.*, CAL. CIV. CODE § 1812.218; IOWA CODE ANN. § 551A.8(1); FLA. STAT. ANN. § 559.813(2).

[282] *See Mazza*, 666 F.3d at 591 ("The elements necessary to establish a claim for unjust enrichment also vary materially from state to state."); *Rivera v. Bio Engineered Supplements &*

Therefore, the Court must choose the laws to apply. Because these claims arise out of alleged fraud, misrepresentation, and material omissions ("fraud-based claims"), § 148 of the Restatement (Second) of Conflict of Laws lists the applicable contacts:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicil, residence, nationality, place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is

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Nutrition, Inc., 2008 WL 4906433, at *3 (C.D. Cal. Nov. 13, 2008) (unpublished) ("[T]here are material differences among the 50 states with regard to the law of unjust enrichment and fraud."); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 626 (D. Kan. 2008) ("[T]here are differences nationwide in the very definition of unjust enrichment and its availability as a remedy."); *Vulcan Golf, LLC v. Google Inc.*, 254 F.R.D. 521, 532–33 (N.D. Ill. 2008) (citing cases finding "significant differences" in the unjust-enrichments laws of the 50 states); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999) ("variances exist in state common laws of unjust enrichment").

[283] *See Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 194 (5th Cir.2010) ("While the basic principles of fiduciary law may be the same throughout the country, the nuances vary, and those nuances affect the outcome of claims."); *Marshall v. H & R Block Tax Servs. Inc.*, 270 F.R.D. 400, 409–10 (S.D. Ill. 2010) (holding that the fiduciary duty laws of 11 states differ in key respects, including in the definition of what constitutes a fiduciary relationship); *Doll v. Chicago Title Ins. Co.*, 246 F.R.D. 683, 690 (D. Kan. 2007) (holding that "the 18 different jurisdictions in which the class members resided do not employ a single standard governing liability for breach of fiduciary duty"). Here, because Plaintiffs allege a fiduciary relationship under the facts and circumstances of a driver's relationship with Defendants, variations in the definition of what constitutes a fiduciary relationship are material to Plaintiffs' fiduciary-duty claim.

[284] *See Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 WL 4906433, at *3 (C.D. Cal. Nov. 13, 2008) (unpublished) ("[T]here are material differences among the 50 states with regard to the law of unjust enrichment and fraud."); *Lewis Tree Serv., Inc. v. Lucent Technologies Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002) ("The common law of fraud is materially different in the fifty states. The elements of fraud vary greatly from state to state, with respect to elements including mitigation, causation, damages, reliance, and the duty to disclose."); *Sanders v. Robinson Humphrey/Am. Exp., Inc.*, 634 F. Supp. 1048, 1068 (N.D. Ga. 1986), *aff'd in part, rev'd in part by Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987) ("While this court does not intend to survey the law of fraud in all 50 states, several major differences do exist."). The elements of causation, damages, reliance, and the duty to disclose are material to Plaintiffs' fraud claim as alleged in the Third Amended Complaint.

> to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) Conflict of Laws § 148(2) (1971).

Plaintiffs ground their fraud-based, unjust-enrichment, and fiduciary-duty claims on Defendants' alleged scheme to induce individuals across the country to leave home, enroll in an England school, and haul freight for England as ICs rather than as employees.[285] Plaintiffs claim England achieved this objective by deceiving drivers about mileage, income, and guaranteed employment before they ever left home.[286] They say both England's website and its recruiters communicated these misrepresentations to future drivers through the Internet and long-distance phone calls before they left their home states. And future drivers allegedly relied on these claimed misrepresentations by leaving home to pursue training and a supposedly worthless economic opportunity.[287] Everything allegedly started in each future driver's home state.

A comment to § 148(2) explains that the place where the proposed class member received the representations "is the place where the representations were *first* communicated to the plaintiff." Restatement (Second) Conflict of Laws § 148(2) cmt. g (1971) (emphasis added).

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[285] *See* TAC ¶¶ 1–11, 187–90, 215–220, 227–34, 235–39, 243–53; Mot. at 5–6.

[286] *See* Mot. at 14–19; TAC ¶¶ 27–30, 42–43, 188, 245–51; Pl. Kenneth McKay's Objections and Am. Resps. to Def. Opportunity Leasing, Inc.'s First Set of Interrogs. to Pl. Kenneth McKay (Ex. 76) at 36, 38 ("The England Defendants also bait Drivers with promises of 'guaranteed employment.' . . . The England Defendants were able to keep their pipeline of Drivers full thanks, in part, to the promise of guaranteed employment for all drivers that completed school and training. The promise was made on the C.R. England website . . . ."); *id.* at 37 (alleging that recruiters made false mileage representations); Pl. Charles Roberts' Objections and Am. Resps. to Def. C.R. England, Inc.'s First Set of Interrogs. to Pl. Charles Roberts (Ex. 77) at 54 (stating that "putative class members were duped into and paid tuition to attend C.R. England's truck driving school based upon the fraudulent scheme pursued by the England Defendants, promises of 'guaranteed employment' . . . and/or the concealment of information . . .").

[287] *See* TAC ¶¶ 32–33, 41, 190, 254. In fact, proving whether a driver received or relied on any particular representation at trial will require predominantly individual evidence.

And the proposed class member's residence is a relevant contact of "substantial significance." *Id.* cmt. i. Here, both of these contacts, as well as the place where the driver first acted in reliance on Defendants' alleged misrepresentations, are the driver's home state. And if any two contacts (other than the defendant's location) "are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." *Id.* cmt. j. Accordingly, the law of each proposed class member's home state govern the fraud-based claims and the unjust-enrichment and fiduciary-duty claims.

Plaintiffs' UBODA claim—failing to register a business opportunity with the state or make required disclosures—is no different than their fraud-based claims. According to Plaintiffs, Defendants first offered the business opportunity to future drivers through the website. *See* TAC ¶ 30. So future drivers allegedly first viewed and relied on Defendants' misrepresentations—and omissions to register or provide UBODA disclosures—while in their home states. *See id.* ¶¶ 26, 30, 32, 41–42.

Committing fraud-based claims to each proposed class member's home state's law is sound policy. "The plaintiff's domicil or residence . . . are contacts of substantial significance when the loss is pecuniary in nature . . . because a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship." Restatement (Second) of Conflict of Laws § 148 cmt. i (1971). Here, each proposed class member's home state has the closest relationship because that is where each first received the alleged misrepresentations and was lured away to an allegedly unprofitable opportunity.

Two circuit courts of appeals recently found a related policy—each state's interest in balancing consumer protection and business interests as its legislature thinks best—influential in

deciding to apply the consumer protection laws of all states where proposed class members lived. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 592 (9th Cir. 2012). In *Pilgrim*, where a health care discount program was allegedly deceptively marketed to consumers in multiple states, the Sixth Circuit rejected the application of a single state's law. *See* 660 F.3d at 944–45. It reasoned that although "States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders . . . the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it." *Id.* at 946. "To conclude otherwise would frustrate the basic policies underlying consumer-protection laws. . . . [I]t would permit nationwide companies to choose the consumer-protection law they like best by locating in a State that demands the least." *Id.* at 947 (alterations, citations, and internal quotation marks omitted). *See also Hale*, 288 F.R.D. at 145 (N.D. Ohio 2012) (holding that *Pilgrim* applies both to statutory and common-law claims). Indeed, "the idea that one state's law would apply to claims by consumers throughout the country . . . is a novelty." *Id* at 947 (internal quotation marks omitted).[288]

Similarly, the Ninth Circuit reversed a district court's application of California law—the defendant automobile manufacturer's U.S. headquarters was located in California—to a

[288] Plaintiffs rely on *Anapoell v. Am. Express Bus. Fin. Corp.*, 2007 WL 4270548 (D. Utah Nov. 29, 2007) (unpublished), arguing Utah law governs all proposed class members' claims. *See* Motion 57-58. But the court decided only whether Utah or California law applied to a California subclass. It did not consider a proposed nationwide class. Moreover, the court emphasized a clause in the parties' contract that stated that the contract "*shall be deemed* entered into and *performed in Salt Lake County, Utah*." *Id.* at *12 (internal quotation marks omitted). The court held that the clause support a finding that the place of the alleged conduct and the place where the parties' relationship was centered, both contacts under § 145, were in Utah. Here, the ICOA and the VLA do not contain a similar clause, and § 148 provides the relevant contacts.

proposed nationwide class of consumers who bought cars with an allegedly defective automatic braking system. *See Mazza*, 666 F.3d at 585, 590. "In our federal system, states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers," and courts err "by discounting or not recognizing each state's valid interest in shielding out-of-state businesses from what the state may consider to be excessive litigation." *Id.* at 592. Indeed, "each state has an interest in setting the appropriate level of liability for companies conducting business within its territory." *Id*.

Whether considering contacts or policy, each driver's home state has the most significant relationship with the parties and Plaintiffs' fraud-based claims.

C. Because the Laws of Each Driver's Home State Govern That Driver's Claims, The Nationwide Class and Fraud Subclass are Unmanageable.

Because the laws of each driver's home state govern that driver's claims, adjudicating the claims of Plaintiffs' proposed nationwide class and the proposed fraud subclass would force the Court and jury to apply the laws of 51 jurisdictions—an unmanageable undertaking in which individual questions of law would predominate.[289] Therefore, the Court should deny certification of Plaintiffs' fraud, negligent-misrepresentation, unjust-enrichment, fiduciary-duty, UTIAA, UBODA, and UCSPA claims. Although "[d]ifferences across states may be costly for courts and litigants alike, . . . they are a fundamental aspect of our federal republic and must not

[289] *See Mazza*, 666 F.3d at 596 ("Because the law of multiple jurisdictions applies here to any nationwide class of purchasers or lessees . . . , variances in state law overwhelm common issues and preclude predominance for a single nationwide class."); *Pilgrim*, 660 F.3d at 947 (holding that where the laws of potential class members' home states governed and those laws varied in material ways, "no common legal issues favor a class-action approach to resolving this dispute"); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.").

be overridden in a quest to clear the queue in court. Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone*, 288 F.3d at 1020–21 (citations omitted).

D. The Parties Never Agreed to Have Utah Law Govern Statutory or Tort Claims.

Plaintiffs seek to shoehorn their fraud-based claims into the ICOA's and VLA's narrow choice-of-law clause in which the parties agreed that those agreements "shall be interpreted under the laws of the United States and the State of Utah." McKay ICOA (Ex. 69) ¶ 18; Mot. at 51–52, 54–56. This Court has rejected such proposals.[290] Plaintiffs rely on cases with choice-of-law clauses extending beyond contractual interpretation to "any dispute connected with" or "any

[290] *See Wolfe Tory Med., Inc. v. C.R. Bard, Inc.*, 2008 U.S. Dist. LEXIS 13867, at *4–*5 (D. Utah Feb. 25, 2008) (unpublished) (agreeing with the parties that a choice-of-law provision stating that the parties' agreement "shall be governed and construed in all respects in accordance with the internal laws of the State of Georgia" did not extend to the plaintiff's tort claims); *Anapoell v. Am. Express Bus. Fin. Corp.*, 2007 U.S. Dist. LEXIS 88182, at *33–*34 (D. Utah Nov. 29, 2007) (unpublished) (holding that a provision stating that "each lease shall be governed by the laws of Utah" did not extend to claims alleging duties outside the contract); *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266, 267–68 (D. Utah 1992) (holding that a contractual provision stating that "The Contract shall be governed by, subject to, and construed according to the laws of the State of Colorado" showed that "[t]he parties have selected the contract law of Colorado as the substantive law to govern the interpretation of the contract and contractual relationships between the parties, but nothing more").

controversy relating to" the contract.[291] The broad choice-of-law provisions in those cases are distinguishable from the narrow provision here.[292]

When the parties here wanted the VLA's and ICOA's contractual terms to govern claims beyond the contracts, they knew how to say so. They agreed that "any claim or dispute arising from or in connection with this agreement . . . shall be brought . . . within two years . . . ." McKay ICOA (Ex. 69) § 18. But they chose federal and Utah law only for "interpret[ing]" the agreements. Therefore, the Court should apply the laws of 48 states to the fraud-based claims and the unjust-enrichment and fiduciary-duty claims as Utah's choice-of-law rules direct.[293]

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[291] *See Brigham Young Univ. v. Pfizer, Inc.*, 2012 U.S. Dist. LEXIS 37086, at *5–*9 (D. Utah Mar. 16, 2012) (unpublished) (holding that a choice-of-law provision stating that "The validity, interpretation and performance of this Agreement and any dispute connected herewith shall be governed and construed in accordance with the laws of the State of Missouri" applied to non-contract claims); *Unibase Sys. v. Professional Key Punch*, 1987 U.S. Dist. LEXIS 16741, at *2–*5 (D. Utah July 14, 1987) (unpublished) (holding that a provision stating that "This agreement and any controversy between the parties relating to the subject matter of this agreement shall be governed by the laws of the State of Utah" extended to a plaintiff's tort claim).

[292] *See Jones v. Koons Auto., Inc.*, 2013 U.S. Dist. LEXIS 98284, at *18–*19 (D. Md. July 15, 2013) (unpublished) (distinguishing *BYU* and holding that a provision stating that "the law of the state of our address shown on the front of this contract apply to this contract" did not extend to tort claims). *See also Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 335 (2d Cir. 2005) ("Under New York law, then, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract, even when the contract also includes a broader forum-selection clause."); *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 987 (7th Cir. 2005) ("A choice of law provision will not be construed to govern tort as well as contract disputes unless it is clear that this is what the parties intended . . . ."); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300–01 (11th Cir. 2003) (holding that a choice-of-law clause providing that the "release shall be governed and construed in accordance with the laws of the State of Delaware" did not govern tort claims); *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001) ("The narrow contractual language that the [contract] is to be governed and construed by Illinois law simply does not address the entirety of the parties' relationship.").

[293] Plaintiffs also rely on the choice-of-law clause in the COE, but the ICOA's integration clause supersedes that agreement. "This Agreement [the ICOA] . . . shall constitute the entire Agreement and understanding between YOU and US, and fully replaces and supersedes all prior agreements and undertakings . . . , oral and written." McKay ICOA (Ex. 69) § 17.

VI. PLAINTIFFS' CANNOT BRING A CLASS ACTION FOR DAMAGES UNDER THE UCSPA BECAUSE NO ADMINISTRATIVE RULE NOTIFIED DEFENDANTS THAT THE ALLEGED CONDUCT VIOLATES THE UCSPA.

Even if Plaintiffs had met Rule 23's requirements, the Court could not certify their claim for actual damages under the UCSPA because they fail to meet a statutory requirement for seeking actual damages in a class action—that an administrative rule notified England and Horizon that their conduct violates the statute but they engaged it in anyway. "A consumer who suffers loss as a result of a violation of [the UCSPA] may bring a class action for the actual damages caused by ***an act or practice specified as violating this chapter by a rule adopted by the enforcing authority . . . before the consumer transactions on which the action is based*** . . . ." UTAH CODE ANN. § 13-11-19(4)(a) (emphasis added).[294]

Here, no rule outlaws the conduct at issue. Plaintiffs argue that Utah Administrative Code Rule 152-11-11(B) does so but, in fact, it applies only to franchises or distributorships—not to operator agreements for truck drivers. "'[F]ranchise or distributorship' means a contract or agreement ***requiring substantial capital investment***" that meets certain additional requirements. UTAH ADMIN CODE r. 152-11-11(A)(2) (emphasis added). Here, the rule does not apply because neither the ICOA nor the VLA requires any capital investment, much less a substantial one. *See* Defs.' Mot. for Partial Sum. Jud., Dkt. No. 230. A driver can sign an ICOA with England and haul freight without paying England a cent. *Id*. at 11-13. Neither the VLA nor

[294] This provision applies to class actions brought in federal court. *See, e.g.*, *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 742–49 (N.D. Ohio 2010) (applying Justice Stevens' concurring opinion in *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 130 S. Ct. 1431 (2010) and holding that a similar restriction on class actions in Ohio's Consumer Sales Practices Act was not preempted by Federal Rule of Civil Procedure 23); *Phillips v. Philip Morris Companies Inc.*, 290 F.R.D. 476, 481–82 (N.D. Ohio 2013) (same). Like these district courts, the Tenth Circuit treats

the ICOA requires a driver to make any investment with England or Horizon. *Id.* at 13-15. The only payments to Defendants are deductions from drivers' revenues to pay specified costs—not investments.

Because the UCSPA does not permit actual damages in a class action here, the Court could not certify Plaintiffs' UCSPA actual damage claim even if they had met Rule 23's requirements—which they did not.[295]

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to deny Plaintiffs' Motion for Class Certification.

Justice Stevens' concurring opinion in *Shady Grove* as controlling. *See James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011).

[295] Plaintiffs argue that notice to any class certified must comport with Federal Rule of Civil Procedure 23(c)(2). *See* Mot. at 89. But any notice sent to any class certified on any Utah claims would need to comport with Utah Code § 13-11-20, which in part says that the notice "shall advise each member that . . . the court will exclude him from the class, unless he requests inclusion, by a specified date." UTAH CODE ANN. § 13-11-20(4)(a). *See* UTAH CODE ANN. § 13-11-23 ("a class action relating to a transaction governed by [the UCSPA] may be brought only as prescribed by this act"); *Driscoll v. George Wash. Univ.*, 2012 WL 3900716, at *7–*8 (D.D.C. Sept. 10, 2012) (holding that the opt-in provision in the D.C. Minimum Wage Act applied in federal court under *Shady Grove*).

APPENDIX

I. NATIONWIDE-CLASS CLAIMS

A. UCSPA

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation/reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.
6. Plaintiffs cannot bring a class action for damages under the UCSPA because no regulation specifies that Defendants' conduct violates the UCSPA.

B. UTIAA

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation/reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.

C. UBODA

1. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.
2. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern Plaintiffs' claim under the UBODA.

D. Negligent Misrepresentation

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation/reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.
6. Plaintiffs cannot bring a class action for this claim because they did not plead it in their Third Amended Complaint.

E. Breach of Fiduciary Duty

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving the existence of a fiduciary duty or the breach of any such duty requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.

F. Unjust Enrichment

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving that England or Horizon unjustly received funds from proposed class members requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.

II. SUBCLASS OF DRIVERS WHO EXECUTED THE STA

Breach of contract

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation and reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.
6. Plaintiffs cannot bring a class action for this claim because they did not plead it in their Third Amended Complaint.

III. SUBCLASS OF DRIVERS WHO SIGNED THE VLA AND ICOA WHILE THE EBG WAS IN USE

A. RICO

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation/reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proving actual damages requires predominantly individual evidence.

B. UPUAA

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation/reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proposed class members must seek actual damages and proving actual damages requires predominantly individual evidence.

C. Common-law fraud

1. Plaintiffs cannot satisfy Rule 23(a)(2)'s commonality requirement.
2. Plaintiffs cannot satisfy Rule 23(a)(3)'s typicality requirement.
3. Plaintiffs cannot satisfy Rule 23(b)(3) because proving causation and reliance requires predominantly individual evidence.
4. Plaintiffs cannot satisfy Rule 23(b)(3) because proving actual damages requires predominantly individual evidence.
5. Plaintiffs cannot satisfy Rule 23(b)(3) because the laws of 51 jurisdictions govern.

DATED this 18th day of February, 2014.

RAY QUINNEY & NEBEKER P.C.

/s/ *James S. Jardine*
James S. Jardine
Scott A. Hagen
David B. Dibble
Adam K. Richards

Attorneys for Defendants C.R. England, Inc. and Opportunity Leasing, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of February, 2014, I electronically filed the foregoing **DEFENDANTS' OPPOSITION TO MOTION FOR CLASS CERTIFICATION** using the CM/ECF system which sent notification of such filing to:

Robert S. Boulter
1101 Fifth Avenue, Suite 235
San Rafael, CA 94901
rsb@boulter-law.com

Stephen E. Kravit
Christopher J. Krawczyk
Benjamin J. Glicksman
Aaron H. Aizenberg
Benjamin R. Prinsen
KRAVIT, HOVEL & KRAWCZYK, S.C.
825 N. Jefferson Street, Suite 500
Milwaukee, WI 53202
bjg@kravitlaw.com
aha@kravitlaw.com
kravit@kravitlaw.com
cjk@kravitlaw.com
brp@kravitlaw.com

Thomas R. Karrenberg
Jon V. Harper
Heather M .Sneddon
ANDERSON & KARRENBERG, P.C.
50 West Broadway, Suite 700
Salt Lake City, UT 84101
tkarrenberg@aklawfirm.com
jharper@aklawfirm.com
hsneddon@aklawfirm.com

Kevin P. Roddy
Wilentz, Goldman & Spitzer P.A.
90 Woodbridge Center Drive, Suite 900, Box 10
Woodbridge, NJ 07095
kroddy@wilentz.com

/s/ Shauna L. Beckstead

1270641