Robert S. Boulter, Esq.
Law Offices of Robert S. Boulter
Attorneys for Plaintiffs
1101 Fifth Avenue
Suite 310
San Rafael, CA 94901
Telephone: (415) 233-7100
E-Mail: rsb@boulter-law.com

Joseph S. Goode
Mark M. Leitner
Benjamin J. Glicksman
Kravit, Hovel & Krawczyk, S.C.
Attorneys for Plaintiffs
825 N. Jefferson Street
Suite 500
Milwaukee, WI 53202
Telephone: (414) 271-7100
E-Mail: jsg@kravitlaw.com
E-Mail: mml@kravitlaw.com
E-Mail: bjg@kravitlaw.com

Brennan H. Moss
Pia Anderson Dorius Reynard & Moss LLC
Attorneys for Plaintiffs
222 S. Main Street
Suite 1800
Salt Lake City, Utah 84101-2194
Telephone: (801) 350-9000
E-Mail: bmoss@padrm.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(CENTRAL DIVISION)

CHARLES ROBERTS, an individual, and **KENNETH MCKAY**, an individual, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

C.R. ENGLAND, INC., a Utah corporation; **OPPORTUNITY LEASING, INC.**, a Utah corporation; and **HORIZON TRUCK SALES AND LEASING, LLC**, a Utah limited liability company,

Defendants.

C.R. ENGLAND, INC., a Utah corporation; and **OPPORTUNITY LEASING, INC.**, a Utah corporation,

Counter-Complainants,

vs.

CHARLES ROBERTS, an individual, and **KENNETH MCKAY**, an individual,

Counter-Defendants.

PLAINTIFFS' FIRST MOTION TO COMPEL AND BRIEF IN SUPPORT

****REDACTED-NOT UNDER SEAL****

Civil No. 2:12-CV-00302

Judge Robert J. Shelby

Magistrate Judge Brooke C. Wells

BASIS FOR MOTION

PLEASE TAKE NOTICE that plaintiffs Charles Roberts ("Roberts") and Kenneth McKay ("McKay") (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, through their attorneys Kravit Hovel & Krawczyk S.C. and the Law Offices of Robert Boulter, move the Court, pursuant to Fed. R. Civ. P. 26, 33-34, and 37(a) and DUCivR 7-1 and 37-1, for an order compelling defendants C.R. England, Inc. ("C.R. England"), Opportunity Leasing, Inc. ("Opportunity"), and Horizon Truck Sales and Leasing LLC ("Horizon") (collectively the "England Defendants") to do the following:

(i) Either answer Interrogatories Nos. 4-24 of Roberts' Interrogatories to England (Set One) and Interrogatories Nos. 22-23 of McKay's Interrogatories to England (Set Two) or, alternatively, to aggregate and produce in an electronic and searchable format the settlement statement data sought for the 14,708 drivers who signed Vehicle Lease Agreements and Independent Contractor Operator Agreements since January 1, 2008 to the present;

(ii) Produce the expense related documents requested in Document Request Nos. 9-14, 16, 19, and 24-26 of Roberts' Request for Production (Set One) and Document Request Nos. 10(aa), 10(bb), and 10(cc) of Plaintiffs Second Set of Requests for Documents;

(iii) Provide the last known address, phone number, and full name of each individual identified in their December 19, 2012 amended responses to Interrogatory No. 1 of McKay's Interrogatories to England (Set One), Interrogatories Nos. 15-19 of McKay's Interrogatories to England (Set Two), Interrogatory No. 1 to Roberts' Interrogatories to England (Set One), and Interrogatories Nos. 1 and 18 of Roberts' Interrogatories to Opportunity (Set One); and

(iv) Pay the reasonable expenses incurred in bringing this motion to compel (including attorneys' fees) as provided in Fed. R. Civ. P. 37(a)(5)(A).

PLEASE TAKE FURTHER NOTICE that, in accordance with DUCivR 7-1(f) and for good cause shown, Plaintiffs request oral argument on the motion at a date and time to be set by the Court. Good cause exists because the matters subject to this motion implicate critical facts bearing on Plaintiffs' motion for class certification (the current deadline for which is August 23, 2013 [Dkt. 119]) as well as on the ultimate merits of the case.

PLEASE TAKE FURTHER NOTICE that, pursuant to the requirements of DUCivR 37-1(a), Plaintiffs state that reasonable efforts have been made to reach an agreement with the England Defendants over the discovery matters set forth in this motion and that the parties have been unsuccessful in reaching a resolution. The subjects of the motion have been the topic of more than 30 substantive letters and emails exchanged between August 24, 2012 and January 15, 2013 as well as 5 extensive, telephonic "meet and confer" conferences held between the following individuals on the dates and times listed below:

DATE AND TIME	PARTICIPANTS
September 6, 2012 10:30 a.m. (CDT)	James Jardine, David Dibble, Jasmine Diamanti, Robert S. Boulter, Joseph S. Goode, Benjamin J. Glicksman, Martha J. Pettengill
September 17, 2012 3:00 p.m. (CDT)	James Jardine, David Dibble, Jasmine Diamanti, Robert S. Boulter, Joseph S. Goode, Benjamin J. Glicksman, Martha J. Pettengill
September 27, 2012 9:00 a.m. (CDT)	James Jardine, David Dibble, Jasmine Diamanti, Robert S. Boulter, Joseph S. Goode, Benjamin J. Glicksman, Martha J. Pettengill
November 14, 2012 3:00 p.m. (CST)	James Jardine, David Dibble, Jasmine Diamanti, Robert S. Boulter, Joseph S. Goode, Benjamin J. Glicksman, Martha J. Pettengill
January 3, 2013 3:00 p.m. (CST)	James Jardine, David Dibble, Robert S. Boulter, Joseph S. Goode, Benjamin J. Glicksman, Martha J. Pettengill

The parties have expended significant and good faith efforts in attempting to resolve the matters that are the subject of this motion and need the Court's assistance in resolving them.[1] (Boulter Decl. ¶¶ 2-3.)

INTRODUCTION

"The language and interpretation of Rule 26(b)(1) indicate that, at least at the discovery stage, the concept of relevance should be construed very broadly." *Gohler v. Wood*, 162 F.R.D. 691, 695 (D. Utah 1995). Despite this strong presumption favoring broad discovery, the England

[1] The "meet and confer" process worked; the parties agreed to resolve many of their disputes. It did not work perfectly, and this motion brings the primary disputes remaining between the parties before the Court for resolution. (Boulter Decl. ¶ 3.)

Defendants are resisting disclosure of many factual matters that lie at the heart of Plaintiffs' Third Amended Complaint, including information that directly implicates Plaintiffs' effort to obtain class certification and materials that will shed light on the economics of the independent contractor agreements and truck leases that the England Defendants induced the Plaintiffs and nearly 15,000 others in the putative class to enter. As a result, this Court should grant Plaintiffs' motion to compel and order the England Defendants to respond to the interrogatories and produce the documents and electronic records they have been withholding.

BACKGROUND FACTS

A. Nature of the Case.

On May 27, 2011, Roberts and McKay filed this putative class action against the England Defendants for violations of various state and federal laws.[2] Plaintiffs allege that the England Defendants fraudulently solicited and sold them a business opportunity to drive big rig trucks for England (the "Driving Opportunity"). (TAC, ¶ 1; 8/26/11 Roberts Decl. [Dkt. 23] ¶¶ 1-27; McKay Decl. [Dkt. 22] ¶¶ 1-25.) They assert fourteen claims for relief in their August 31, 2012 Third Amended Complaint ("TAC").[3] The England Defendants answered the TAC and filed a Counterclaim against Plaintiffs on September 27, 2012 [Dkt. 105].

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[2] This case summary gives the Court the factual and legal context of the discovery dispute. The Third Amended Complaint [Dkt. 101] sets forth with particularity the operative facts of this case. We invite the Court to read it if the Court wishes further detail about what is and is not relevant to Plaintiffs' claims as pleaded.

[3] The 14 claims include: (i) Violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c) ("Fraudulent Scheme to Sell Driving Opportunity and Have Drivers Bear the Expenses and Risks of England's Transportation Business") (TAC, ¶¶ 113-133); (ii) Violations of the Utah Pattern of Unlawful Activity Act, Utah Code § 76-10-1601 *et seq*. ("Fraudulent Scheme to Sell Driving Opportunity and Have Drivers Bear the Expenses and Risks of England's Transportation Business") (TAC, ¶¶ 134-154); (iii) Violations of the California Seller Assisted Marketing Plan ("SAMP") Act, Cal. Civ. Code § 1812.200 *et seq*. (TAC, ¶¶ 155-162); (iv) Violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. (TAC, ¶¶ 163-182); (v) Violations of the Utah Consumer Sales Practices Act, Utah Code § 13-11-1 *et seq*. (TAC, ¶¶ 183-191); (vi) Violations of the Utah Business Opportunity Disclosure Act Utah Code, § 13-15-1 *et seq*. (TAC, ¶¶ 192-196); (vii) Violations of the Indiana Business Opportunity Transactions Law, Ind. Code § 24-5-8-1 *et seq*. (TAC, ¶¶ 197-201); (viii) Violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq*. (TAC, ¶¶ 202-214); (ix) Common Law Fraud and Misrepresentation (TAC, ¶¶ 215-220); (x) Breach of Student Training Agreement (TAC, ¶¶ 221-226); (xi) Breach of Fiduciary Duty (TAC, ¶¶ 227-234); (xii) Unjust Enrichment

The Driving Opportunity is Plaintiffs' name for a specific program that the England Defendants refer to as the "Horizon Truck Sales and Leasing Program" and/or the "C.R. England Independent Contractor Program." (TAC, ¶ 3 and Exh. D.) The England Defendants are affiliated interstate transportation industry companies with corporate headquarters and a truck driving school in Salt Lake City, Utah and truck driving schools in Mira Loma, California, Burns Harbor, Indiana, and Cedar Hills, Texas. (TAC, ¶¶ 2, 5, 22.) Plaintiffs are California residents who trained at England's school in Mira Loma and ultimately drove tractor-trailers under the Driving Opportunity for England using rented vehicles from Opportunity.[4] (8/26/11 Roberts Decl. [Dkt. 23] ¶¶ 1-27; McKay Decl. [Dkt. 22] ¶¶ 1-25.)

C.R. England uses four kinds of truck drivers to transport freight for its customers: (i) company employees; (ii) independent owner-operators who own and operate their own tractors but contract with C.R. England to haul its freight; (iii) independent contractors who enter into truck lease agreements with Horizon and/or Opportunity and haul freight for C.R. England, whose leases are designed for them to own the tractor at the completion of the lease term; and (iv) independent contractors who sign an "Independent Contractor Operator Agreement" ("ICOA") with C.R. England and a "Vehicle Lease Agreement" ("VLA") with Horizon and/or Opportunity who simply rent the tractor and build no residual value in it.[5] (12/7/12 O'Neal Dep. 27-28, Boulter Decl. ¶ 4 and Exh. A; TAC, ¶¶ 3 and 55-57 and Exhs. E and F.)

(Alternative Claim) (TAC, ¶¶ 235-239); (xiii) Violations of Utah Truth in Advertising Act, Utah Code § 13-11a-1 *et seq.* (TAC, ¶¶ 240-256); and (xiv) Declaratory Judgment, 28 U.S.C. § 2201 (TAC, ¶¶ 257-262).

[4] Horizon is alleged to be the successor and replacement leasing entity of Opportunity as of August 28, 2008 and is understood to perform today the same functions as Opportunity did prior to that date. (TAC, ¶¶ 57-58 and Exh. G.) Plaintiffs will ultimately show that there is little actual separation between any of these companies and that all of them are controlled by C.R. England. (*See e.g.*, TAC, ¶¶ 22-24, 77.)

[5] C.R. England also relies on students who, as part of their training, perform over the road driving services with a trainer purportedly as part of their instructional course. They are paid as company employees. (O'Neal Dep. 40, Boulter Decl. ¶ 4 and Exh. A.)

This fourth group of drivers—the so-called independent contractors who signed ICOAs and VLAs—are represented by Roberts and McKay in this action. (TAC, ¶¶ 1-12 and 101-112.) "To be a member of the Class alleged in paragraph 101 of the TAC ("consisting of all Drivers in the United States that purchased the Driving Opportunity") and the specifically alleged sub-classes referenced in paragraph 102 (a California Class, an Indiana Class, a Telemarketing Class, a National Class, and a Utah Class), a Driver, at a minimum, must meet the following criteria: (i) have executed [an ICOA] on or after May 27, 2005; (ii) have executed [a VLA] on or after May 27, 2005; and (iii) have driven an Opportunity or Horizon leased truck as an independent contractor for C.R. England for at least one day." (Response to Interrogatory No. 6 (England to McKay), 3/22/13 Moss Decl. [Dkt. 120] ¶ 4 and Exh. C.) Between January 1, 2008 and the present, 14,708 individuals signed VLAs and ICOAs and drove (or continue to drive) as independent contractors for C.R. England and are therefore alleged to be members of the putative class.[6] (2/15/13 Opportunity Second Amended Response to Interrogatory No. 3, Roberts Interrogatories (Set One) to Opportunity, Boulter Decl. ¶ 5 and Exh. B; 12/19/12 England Amended Response to Interrogatory No. 1 McKay's Interrogatories (Set One), Boulter Decl. ¶ 6 and Exh. C; Response to Interrogatory No. 6 (England to McKay), 3/22/13 Moss Decl. [Dkt. 120] ¶ 4 and Exh. C.)

[6] The January 1, 2008 date constitutes a discovery compromise. (Boulter Decl. ¶ 7.) The England Defendants contend a two-year contractual limitation contained in the VLA and ICOA is enforceable and sought to limit discovery to that two-year period. (Boulter Decl. ¶ 7.) Plaintiffs believe the applicable limitations period is six years prior to their filing this lawsuit on May 27, 2005. (Boulter Decl. ¶ 7.) Plaintiffs' position is based upon applicable statutory limitations periods on the claims asserted in the TAC as well as their position that the contractual limitation periods set out in the ICOA and VLA are voidable due to the fact that those agreements were induced by fraud and/or contravene unwaivable statutory provisions. (Boulter Decl. ¶ 7.) During the "meet and confer" process, the parties compromised on the discovery look-back period and mutually agreed to the January 1, 2008 date. (Boulter Decl. ¶ 7.) Plaintiffs do intend to raise enforceability of the contractual limitations defense with the Court at a later time. (Boulter Decl. ¶ 7.) Depending on how Judge Shelby ultimately resolves the issue, the size of the putative class could be larger or smaller than the 14,708 class members. (Boulter Decl. ¶ 7.) For class certification purposes, a putative class of 14,708 drivers more than satisfies the numerosity requirement of Fed. R. Civ. P. 23(a)(1). (Boulter Decl. ¶ 7.)

Many members of the putative class executed these agreements after obtaining a Commercial Driver's License ("CDL") through the C.R. England truck driving school and completing "Phase I" and "Phase II" training with C.R. England (classroom training followed by over the road training followed by additional classroom work). (TAC, ¶¶ 36-40, 46-64; 8/26/11 Roberts Decl. [Dkt. 23] ¶¶ 1-27; McKay Decl. [Dkt. 22] ¶¶ 1-25.) The England Defendants tell us that 9,810 Drivers (out of the 14,708) attended a C.R. England truck-driving school, completed Phase II training, and then went on to become independent contractors with C.R. England between January 1, 2008 and the time of answering the interrogatories. (2/15/13 C.R. England Second Amended Response to Interrogatory No. 5, McKay Interrogatories (Set Two) to C.R. England, Boulter Decl. ¶ 5 and Exh. B.) Drivers with CDLs and/or over-the-road experience ended up at a C.R. England facility based on the same uniform and fraudulent website and marketing representations, omitted material facts, false recruiting scripts, and other inducements that lured the novice Drivers. (TAC, ¶¶ 35-40, 45-52.)

Plaintiffs assert that the England Defendants use common deceptive tactics to solicit students to come to a C.R. England-owned facility for training and falsely promise trainees that a "guaranteed job" with C.R. England as company drivers will be waiting for them when they complete training. (TAC, ¶¶ 25-35, 41-43; Roberts Decl. [Dkt. 23] ¶¶ 5-9; McKay Decl. [Dkt. 22] ¶¶ 5-6.)

The England Defendants make numerous false statements and misleading omissions in their website, advertising, form documents, and scripted recruiter presentations about income potential and about the miles Drivers will receive from C.R. England. One of the most significant distortions is revealed in the deposition of C.R. England's corporate designee, who admitted that [redacted]

. (12/6/12

Josh England Dep. 266-303; Boulter Decl. ¶ 8 and Exh. D.) Needless to say, the website contained no disclosure advising potential Drivers that the statistics had been cherry-picked and were a highly distorted representation of the true facts.

All these misstatements are part of an effort to "[redacted]," as C.R. England itself put it, with potential candidates for ultimate (but secret) goal of "[redacted]" students to the Driving Opportunity. (TAC, ¶¶ 25-52, Roberts Decl. [Dkt. 23] ¶¶ 5-9; McKay Decl. [Dkt. 22] ¶¶ 5-6; Qualifying Team Implementation Plan, Leitner Decl. ¶ 2 and Exh. A.) The England Defendants never disclose that the promise of guaranteed employment with England is illusory because their secret goal is to have 65 percent or more of England's truck driving school graduates purchase the Driving Opportunity.[7] (TAC, ¶¶ 8, 33, 43, 123-124, 144-145; Shepherd Dep. 186-87, Boulter Decl. ¶ 9 and Exh. E.)

The England Defendants' school program materials also contained misrepresentations and misleading statements designed to induce students' purchase of the Driving Opportunity. For example, between November 2006 and at least February 2010, the England Defendants used the "England Business Guide" to fraudulently sell the Driving Opportunity by factually misrepresenting the economics and other information about the Driving Opportunity as well as concealing material information about the extremely high failure rate of Drivers and the fact that most Drivers failed only months after signing leases. (TAC, ¶¶ 36-40.) C.R. England gave every Driver (experienced or otherwise) a copy of that guide in its orientation course, which

[7] The England Defendants financially incentivize their employees throughout the process to pressure students toward the lease conversion goal and to further their scheme. For example, "[redacted] (Driver Manager Survey, DEF00076350, Leitner Decl. ¶ 3 and Exh. B.) (Emphasis supplied.) The England Defendants also reprimand their employees for not leasing enough trucks. For example, the entire C.R. England leasing department has a goal of leasing a certain number of trucks per week and are censured for not meeting those goals.

immediately followed classroom training for new Drivers and was the start of the C.R. England experience for more seasoned Drivers. (12/6/12 Josh England Dep. 43-46, Boulter Decl. ¶ 8 and Exh. D.)

The England Defendants admit that driver turnover at England ranges from 100-225% annually.[8] (TAC, ¶ 132 and Exh. K.) Plaintiffs contend that the high attrition in the independent contractor ranks results because the Driving Opportunity is designed to be economically unviable, contrary to the uniform misrepresentations of success and high pay made in the England Defendants' publications and scripted presentations. (TAC, ¶¶ 5-9, 26-31, 75-100.) C.R. England's own employees support this position. As one "Driver Manager" tells it: [redacted] (Driver Manager Survey, DEF00076338, Leitner Decl. ¶ 3 and Exh. B.) (Emphasis supplied.) As another stated in the same Driver Manager Survey:

[redacted]

(Driver Manager Survey, DEF00076344, Leitner Decl. ¶ 3 and Exh. B; emphasis added.)

These statements are not merely snarky comments by cynical C.R. England employees. Indeed, C.R. England's own data demonstrate the realities of extremely low average Driver

[8] This citation is to a publicly-stated turnover problem by C.R. England's Dan England as reported in USA Today. [redacted]

compensation.[9] For example, a graph called [redacted] (Chart on Adjusted Net Income by Division-Solo, DEF00118602, Leitner Decl. ¶ 4 and Exh. C.) This [redacted] weekly income equates approximately to an annual net income in late 2011 of [redacted] (*Id*.) To put this in perspective, in 2011 an average Driver in a household of two—who had been promised a "career" driving for C.R. England (TAC, ¶ 27)—was apparently making just [redacted] more a year than the federal poverty threshold issued by the Department of Health & Human Services. (*See* "Poverty Thresholds for 2011 by Size of Family and Number of Related Children Under 18 Years" as found at http://aspe.hhs.gov/poverty/12poverty.shtml (then hyperlink to "Poverty thresholds since 1973 (and for selected earlier years)") or see printed copy attached at Boulter Decl. ¶ 10 and Exh. F.) Against this background, we note that the England Business Guide distributed (until at least February 2010) to all Drivers before they signed the VLA and ICOA states that the average solo lease driver earned more than $46,000 per year.

Lest Plaintiffs be accused of cherry-picking the figures relied on, the first worksheet in DEF00118602 is the data sheet (the "Data Sheet") from which the graph on [redacted]. (Leitner Decl. ¶ 14 and Exh. M.) The Data Sheet shows the [redacted] by week for the nearly one-year period between December 6, 2010 and November 28, 2011 in Rows 170-175.[10] (*Id*.) Row 171 is for [redacted] in England's [redacted], which are made up of over-the-road drivers. (*Id*.) [redacted]

[9] C.R. England pays Drivers by the mile. Not only is the per-mile pay the near-exclusive revenue source for independent contractors, C.R. England also has total control over the miles assigned to each of the Drivers. If the miles achieved by independent contractors do not generate sufficient revenue to cover expenses, much less earn a living, Drivers are under water from the start.

[redacted]. (*Id.*) [redacted]. (*Id.*) [redacted]. (*Id.*) Row 175 of the Data Sheet shows the average for all Solo Lease Drivers at C.R. England regardless of division. [redacted]. (*Id.*) Of greater note, however, is the comment in cell B170-175 (a single merged cell). (Leitner Decl. ¶ 15 and Exh. N.) [redacted]. (*Id.*) In short, the England Defendants have the ability to craft queries of their database to make conclusions about Driver economics.

Likely because they know the economic realities of leasing are a principal cause of high turnover, the England Defendants fight the astronomical attrition rate by churning students through C.R. England's truck driving school to ensure a continual supply of "warm bodies" to bear the expenses of driving C.R. England's freight. (TAC, ¶¶ 5-6, 27-31, 40, 45, 132.) A staggering 38,524 drivers have attended C.R. England's truck driving school since January 1, 2008. (2/15/13 England Second Amended Response to Interrogatory No. 3, McKay's Interrogatories (Set Two), Boulter Decl. ¶ 11 and Exh. G.) Because the England Defendants know that thousands of drivers per year will fail before they complete their lease, they need to have thousands of students in their truck driving school to serve as replacements. (TAC, ¶¶ 5-6, 27-31, 40, 45, 132.)

The need for a reserve army of Drivers may explain why, as C.R. England planned the roll-out of the Driving Opportunity in January 2005, the England Defendants decided to [redacted]." (Qualifying Team Implementation Plan, Leitner Decl. ¶ 2 and Exh. A.; emphasis supplied.) Indeed, the goal [redacted]

[10] Note that "Income" is calculated before Elective Deductions are removed. (Roberts' Settlement Statement, Exh. 128, Boulter Decl. ¶ 34 and Exh. FF.)

[redacted] (*Id.*) Students entering the school, of course, did not know these facts, nor that the England Defendants had specific goals [redacted]

B. The Motives for Offering the Driving Opportunity.

It is expensive to haul freight in the United States; C.R. England knows that to make money in the trucking industry, it must control costs. (TAC, ¶¶ 8-11, 143-144.) Plaintiffs claim that the England Defendants use several different communication channels to engage in systematic, fraudulent, and deceptive trade practices that have the end effect of transferring ***their cost and risks*** of hauling freight for C.R. England's customers to the independent contractors in the putative class. (TAC, ¶¶ 8-11, 26-29, 36-39, 47-52, 62-64, 143-144.) A C.R. England [redacted], issued around the time Plaintiffs believe the England Defendants formalized their plans for the Driving Opportunity on [redacted], suggests a motive for pushing drivers into the Driving Opportunity: [redacted].

Plaintiffs intend to prove that the England Defendants aggressively and fraudulently promoted the Driving Opportunity because they made immense profits by having as many lease drivers as possible in the system. (TAC, ¶¶ 62-64, 75-100, 143-144.) After all, under the Driving Opportunity, C.R. England contracts to haul freight directly with its customers and

naturally receives all of the revenue from those contracts—but it does so without having to incur all of the expenditures associated with employee drivers (wages, payroll taxes, costs of acquiring and maintaining a fleet of thousands of tractors and trailers, fuel costs, employee benefits, etc.) and in addition turns a high profit on providing equipment and services to the putative class at exorbitantly high prices. (TAC, ¶¶ 123-124, 144-145.) And even though Opportunity or Horizon are leasing the equipment to putative class members, the England Defendants run only nominal credit risk, because the entire cost of providing the equipment is built into the rate that C.R. England charges its customers—and those costs are deducted by C.R. England from the Drivers' pay before they see a dime. (TAC, ¶¶ 9-11, 75-100, 143-144.) Assuming C.R. England carefully selects creditworthy companies as customers for its freight-hauling business, the only risk it runs in the Driving Opportunity program is the costs of recovering a truck when a Driver goes broke on the road and justifiably decides to abandon or turn in the vehicle before the lease expires. (TAC, ¶¶ 9-11, 75-100.) All the defendants need to do is get another new graduate into the seat and the cycle starts again. (TAC, ¶¶ 132, 143-144.)

C. The Putative Class's Economic Injury.

By acting as alleged in the TAC, the England Defendants are alleged to have caused significant financial harm to at least 14,708 class members using systematic, fraudulent, and deceptive means. For example, Roberts made a total of ***$360.04*** in net earnings over the 7-month period he drove for C.R. England as an independent contractor. (8/26/11 Roberts Decl. [Dkt. 23], ¶ 23.) This meager level of income [redacted]) is far below the $4600/month and $9800/month that England claims on its website its solo and team independent contractors, respectively earn under the Driving Opportunity. (TAC, ¶ 29.)

While it is premature for Plaintiffs to present their damages case now (as it will depend on, among other things, whether class certification is obtained, and will be subject to expert testimony), some perspective is warranted due to the England Defendants' apparent contention that the stakes in this case do not justify imposing significant discovery obligations on them. (*See e.g*, 1/23/13 Jardine Email, Boulter Decl. ¶ 12 and Exh. H) (citing Fed. R. Civ. P. 26(b)(2)(C) for the proposition that discovery not be had if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

There are multiple ways to calculate Plaintiffs' damages, including using a benefit of the bargain model, lost profits analysis, a disgorgement of profits calculus, a rescission model, or some mixture of all or certainly other approaches. (Boulter Decl. ¶ 13.) For example, Roberts states in his Fed. R. Civ. P. 26(a)(1) initial disclosures that his damages are at least $83,000 for the seventh-month period he drove for England. (2/8/13 First Supplemental Rule 26(a)(1) Disclosures, pgs. 28-30, Boulter Decl. ¶ 13 and Exh. I.) Assuming damages of only $25,000 for each class member, this case's value could reach $368 million if the class remained at 14,708 members. Even a more conservative estimate—$2,000 for each violation of Utah's business opportunity statute—would result in $29 million in damages. Plaintiffs do not engage in this factual summary to saber rattle. We simply offer these theoretical underpinnings in anticipation of what we expect the England Defendants to argue in opposition to this motion to compel—namely that the discovery not be had because the case is not worthy of the trouble.[11]

[11] We also point out that the C.R. England and Opportunity served 45 interrogatories on Plaintiffs on February 12, 2013. On March 22, 2013, Plaintiffs provided their initial responses to those interrogatories and moved the Court to defer answering 22 of them due to their contention-based nature. Many of those interrogatories themselves ask Plaintiffs to describe or identify information in the hands of the England Defendants. Plaintiffs cannot fully address those interrogatories without seeing and analyzing the information sought in this motion.

D. Data Maintained by the England Defendants on the Economics.

C.R. England pays Drivers based on a written reconciliation process that accounts for revenues earned and expenses incurred. (O'Neal Dep. 28-29, 32-37, Boulter Decl. ¶ 4 and Exh. A; Roberts Settlement Statements (Exh. 128), Boulter Decl. ¶ 34 and Exh. FF.) Drivers employed by C.R. England (either as a company driver or student) receive what C.R. England calls a "Driver Pay Statement." In contrast, independent contractors (including members of the putative class) receive what C.R. England calls an "Independent Contractor Settlement Statement." (O'Neal Dep. 32-33, Boulter Decl. ¶ 4 and Exh. A.) The data contained on these statements is derived from drivers submitting "Trip Packs" to England for processing at the conclusion of a trip (e.g. the specific raw data for a given trip). (O'Neal Dep. 34-35, Boulter Decl. ¶ 4 and Exh. A.) Once the statements are completed, C.R. England distributes them to the drivers using various methods, including facsimile, website delivery (via a secured log-in), E-Mail, Qualcomm (the radio unit in each truck), or U.S. Mail (for final statements for drivers who have stopped driving for C.R. England). (O'Neal Dep. 35-37, Boulter Decl. ¶ 4 and Exh. A.)

The "Independent Contractor Settlement Statements" contain seven general categories: (i) Revenue; (ii) Variable Costs; (iii) Fixed Costs; (iv) Income; (v) Elective Deductions; (vi) Net Check/Balance Due; and (vii) Reserves and Special Deductions.[12] (*See e.g.*, DEF00000777-778 (Exh. 128), Boulter Decl. ¶ 34 and Exh. FF.) To determine "net income" (which is distinguished from "net pay") to the driver, C.R. England starts with the revenue obtained by the driver and subtracts the variable and fixed costs that England imposes pursuant to the VLA and ICOA. (O'Neal Dep. 104, Boulter Decl. ¶ 4 and Exh. A.) From there, C.R. England further reduces the

[12] "Net Check" is, at times, replaced with "Balance Due." (*Cf.* 8/26/11 Roberts Decl. [Dkt. 23], ¶ 23 and Exh. A and DEF00000777-778 (Exh. 128), Boulter Decl. ¶ 34 and Exh. FF.) Either way, that line represents what the Driver has achieved financially for the given settlement statement—either pre-tax net pay or a debt.

driver's income by applying "elective deductions" which refers to "deductions that aren't mandatory" or "voluntary expenses."[13] (O'Neal Dep. 105, Boulter Decl. ¶ 4 and Exh. A.)

The settlement statement information can be searched and aggregated electronically. (O'Neal Dep. 159-160, Boulter Decl. ¶ 4 and Exh. A.) In fact, England "can isolate and put fields in and capture whatever is in the computer that would match [the] definitions of [the] search queries." (O'Neal Dep. 160, Boulter Decl. ¶ 4 and Exh. A.) Further information could be culled from the computer files maintained by the England Defendants on each driver. (7/18/12 Pierce Dep. 19-20, 206-207, 230, Boulter Decl. ¶ 35 and Exh. GG.) Indeed, the England Defendants use "analysts" to extensively track and analyze driver data maintained in the ordinary course of the England Defendants' business. (7/17/12 Shepherd Dep. 42, 47, 107-109, 120-121, 160, 199-200, 221, 258-259, 260, Boulter Decl. ¶ 9 and Exh. E.) This is established by, among other things, projects pursued by the England Defendants themselves, who have used the power of their computer system to study data and draw conclusions about average driver income and miles achieved in order to generate income representations for use on England's website.[14] (12/6/12 Josh England Dep. 266-303, Boulter Decl. ¶ 8 and Exh. D.)

C.R. England is a data-driven enterprise. For example, the England Defendants regularly prepare what is called "School and Training Weekly Reports". An example from January 17, 2011 demonstrates that [redacted]

[13] The notion that the elective deductions are truly voluntary is in dispute. For example, C.R. England calls cash advances made on future income voluntary deductions. We suggest that there is nothing voluntary about the literal need to survive. As Roberts tells it: "Many weeks I had to live on the road off of a $100 weekly cash advance the Defendants provided me. I could not afford to eat in truck stops and lived mostly on Chicken of the Sea tuna fish and Chef Boyardee products." (8/26/11 Roberts Decl. [Dkt. 23], ¶ 24.) This issue is obviously beyond the scope of the present motion. The point is that the settlement statements account for the revenue earned by each class member and all of the expenses and associated deductions that the England Defendants deduct from that revenue. They provide the single best way to understand how class members were charged, how much revenue they achieved, what their mileage was, and what their income and net pay were during their involvement in the Driving Opportunity. In short, the settlement statements may be the most relevant documents in the case.

[14] Plaintiffs have already established the falsity of the income representations that C.R. England generated and then published on its website. (*See* pg. 8 *supra*; *see also* 12/6/12 Josh England Dep. 266-303, Boulter Decl. ¶ 8 and Exh. D.)

[redacted]. (1/17/11 School and Training Weekly Reports, Leitner Decl. ¶ 6 and Exh. E.) We cannot discuss in detail here all the documents proving the England Defendants' capability to generate and analyze Driver data of the kind sought in this motion, but we have presented the Court with a few striking examples: (i) 9/4/12 C.R. England Turnover Bible, DEF00077898, Leitner Decl. ¶ 7 and Exh. F; (ii) January 2010-March 2011 Income Deciles Worksheets, DEF00125942, Leitner Decl. ¶ 8 and Exh. G; (iii) Accountability Reports (Monthly), DEF00124660, Leitner Decl. ¶ 9 and Exh. H; (iv) Phase II Average Pay for Whole Weeks Worked Worksheets, DEF00120422, Leitner Decl. ¶ 10 and Exh. I; and (v) Average IC Paid Miles Worksheet (2007 to 2010), DEF0011815, Leitner Decl. ¶ 11 and Exh. J. The record shows that the England Defendants can produce and/or analyze all kinds of data—when it suits ***their*** purpose.[15]

E. Procedural Status of Litigation.

Plaintiffs filed this lawsuit on May 27, 2011 in the United States District Court for the Northern District of California. On March 29, 2012, that court transferred the case to this Court.[16] Initially, the case in Utah came before the Honorable Ted Stewart, who held a Rule 16 conference on May 15, 2012 [Dkt. 84]. The Court entered a Scheduling Order on May 30, 2012, giving Plaintiffs until January 10, 2013 to file their motion for class certification [Dkt. 85]. The case was reassigned to the Honorable Robert J. Shelby on October 4, 2012 [Dkt. 107].

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[15] This fact is further borne out in indexes produced by the England Defendants of certain directories maintained on their computer servers. (Leitner Decl. ¶ 13.) For example, those indexes demonstrate the existence of files with names such as

which demonstrate the current existence of records containing data that likely would answer Plaintiffs' questions. (Excerpts of Public File Indexes, Leitner Decl. ¶ 13 and Exh. L.) (Emphasis in original.) The entire index produced by the England Defendants is 44,037 pages long. (Leitner Decl. ¶ 13.) We supply in support of this motion only certain of the pages from the index and highlight a few file names to demonstrate our point.

[16] This is because of a forum selection clause contained in the ICOA and VLA, which the England Defendants sought to enforce. The CFIL prohibits enforcement of such venue clauses; once the California court dismissed that

On October 23, 2012, the parties jointly moved the Court to extend certain dates in Judge Stewart's Scheduling Order, including the filing deadline for the motion for class certification [Dkt. 109]. This resulted primarily from the magnitude of discovery at issue in the case, the conscientious approach the parties have taken to attempting to resolve discovery disputes, and the need to complete key depositions before Plaintiffs file their motion for class certification. (Boulter Decl. ¶ 14.) The Court granted the motion on October 31, 2012 and entered a Second Amended Scheduling Order [Dkt. 110]. On February 15, 2013, the parties moved again to modify the schedule in the case due to, among other things, the scope, complexity, and timing of discovery [Dkt. 115]. The England Defendants have just completed their production of documents as to which there is no dispute and Plaintiffs have 20 days set aside over the coming months to complete depositions of key defense witnesses. (Boulter Decl. ¶ 14.) The Court entered a Third Amended Scheduling Order on March 22, 2013 [Dkt. 119] and Plaintiffs now have until August 23, 2013 to file their motion for class certification.

F. The General Status of Discovery.

On September 14, 2011, Plaintiffs served the following written discovery on the England Defendants while the case was pending in California: (i) Plaintiff Charles Roberts' First Set of Interrogatories to Opportunity Leasing, Inc.; (ii) Plaintiff Charles Roberts' First Set of Interrogatories to C.R. England, Inc.; (iii) Plaintiff Kenneth McKay's First Set of Interrogatories to Opportunity Leasing, Inc.; (iv) Plaintiff Kenneth McKay's First Set of Interrogatories to C.R. England, Inc.; (v) Plaintiff Kenneth McKay's Second Set of Interrogatories to C.R. England, Inc.; and (vi) Plaintiff Charles Roberts' First Request for Production of Documents to Defendant C.R. England. (Boulter Decl. ¶ 15 and Exhs. J-O.)

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claim, the England Defendants were free to enforce the forum clause and have the case transferred to Utah. The Counterclaim filed by the England Defendants seeks to recoup the costs of defending the case in California.

On October 17, 2011, C.R. England served its initial response to McKay's First Set of Interrogatories. (Boulter Decl. ¶ 16 and Exh. P.) The England Defendants responded to the document requests and the other sets of interrogatories on November 8, 2011. (Boulter Decl. ¶ 17 and Exhs. Q-U.) The England Defendants produced documents for the first time on January 23, 2012. (Boulter Decl. ¶ 18.) They replaced that production (due to technical issues) on March 9, 2012. (Boulter Decl. ¶ 18.) By that time, the case was in the process of being transferred to this Court for disposition. (Boulter Decl. ¶ 18.)

On July 17-18, 2012, Plaintiffs took the depositions of Aaron Shepherd and A.L. "Bud" Pierce, their first depositions in the case. (Boulter Decl. ¶ 20.) The England Defendants then deposed Plaintiffs in San Francisco on August 20-23, 2012. (Boulter Decl. ¶ 19.) On August 24, 2012, Plaintiffs sent a comprehensive "meet and confer" letter to the England Defendants which served as the starting point for significant and productive discussions between counsel about Plaintiffs' initial discovery concerns. (Boulter Decl. ¶ 19.) At this point, the parties appear to have resolved initial issues concerning electronic mail, because the England Defendants have since collected, reviewed, and produced email in response to Plaintiffs' document requests. (Boulter Decl. ¶ 20.)

Sensitive to complying with the deadlines in Judge Stewart's May 30, 2012 Scheduling Order, Plaintiffs pushed ahead with discovery despite the incomplete nature of the document production drawn from what Plaintiffs originally served on September 14, 2011. (Boulter Decl. ¶ 21.) On August 2, 2012, Plaintiffs served their Second Request for Production of Documents, which the England Defendants responded to on September 5, 2012. (Boulter Decl. ¶ 21 and Exhs. T and U.) On October 3, 2012, Plaintiffs served their Third Request for Production of Documents in relation to a then-scheduled Fed. R. Civ. P. 30(b)(6) deposition that occurred over two days on December 6-7, 2012. (Boulter Decl. ¶ 22 and Exh. X.) The England Defendants

responded to the third request on November 5, 2012. (Boulter Decl. ¶ 22 and Exh. Y.) On November 26, 2012, Plaintiffs served their Fourth Request for Production of Documents, which the England Defendants responded to on December 31, 2012. (Boulter Decl. ¶ 23 and Exhs. Z and AA.)

To enable a focused search of responsive documents, the parties worked cooperatively on establishing a "Keyword Search Term List" and a "Custodians List." (Boulter Decl. ¶ 24.) On October 17, 2012, the parties agreed on the names to be included on the Custodians List; on November 6, 2012, the parties agreed to the terms to be included on the Keyword Search Term List. (Boulter Decl. ¶ 24.) At various times since October 31, 2012, the England Defendants have supplemented their March 9, 2012 document production. (Boulter Decl. ¶ 25.) The parties agreed to a rolling production of documents and the England Defendants have stated that their production is now generally complete as of March 20, 2013. (Boulter Decl. ¶ 25.) Through March 15, 2013, the England Defendants have produced more than 137,954 pages of documents as well as many video, audio, MS-Excel, database, and MS-PowerPoint files. (Boulter Decl. ¶ 25.)

Plaintiffs identified concerns with the England Defendants' initial interrogatory responses in Plaintiffs' August 24, 2012 letter and in a subsequent "meet and confer" call on November 14, 2012 dedicated to the interrogatory issues. (Boulter Decl. ¶ 26.) As a result of that discussion, the parties agreed that the England Defendants should amend what they thought they could amend and otherwise state their position on those interrogatories that still proved troublesome from their perspective. (Boulter Decl. ¶ 26.) In accordance with this agreement, on December 19, 2012 (and then again on February 15, 2013 as to certain interrogatories) the England Defendants served the following amended interrogatory responses to all five sets of Plaintiffs' September 14, 2011 interrogatories: (i) Defendant C.R. England Inc.'s Amended Responses to

Plaintiff Charles Roberts' Interrogatories (Set One); (ii) Defendant C.R. England Inc.'s Amended Responses to Plaintiff Kenneth McKay's Interrogatories (Set One); (iii) Defendant C.R. England Inc.'s Amended Responses to Plaintiff Kenneth McKay's Interrogatories (Set Two); (iv) Defendant Opportunity Leasing, Inc.'s Amended Responses to Plaintiff Charles Roberts' Interrogatories (Set One); and (v) Defendant Opportunity Leasing, Inc.'s Amended Responses to Plaintiff Kenneth McKay's Interrogatories (Set One). (Boulter Decl. ¶¶ 5-6, and 27-29 and Exhs. B-C and BB-DD.)

The parties held their last "meet and confer" phone session on January 3, 2013. (Boulter Decl. ¶ 30.) Plaintiffs raised concerns in that call with the December 19, 2012 amended interrogatory responses served by the England Defendants. (Boulter Decl. ¶ 30.) In particular, Plaintiffs raised issues with the apparent continued refusal of the England Defendants to answer the data-driven interrogatories focused on the historical economic experience of the putative class. (Boulter Decl. ¶ 30.) The England Defendants, for their part, reiterated previous statements made to Plaintiffs in the "meet and confer" process that it would unduly burdensome to require the England Defendants to answer the interrogatories seeking various elements of economic data relating to members of the putative class. (Boulter Decl. ¶ 30.)

Plaintiffs have repeatedly offered to the England Defendants (as they did again on January 3, 2013) to deflect the asserted burden by accepting as business records under Fed. R. Civ. P. 33(d) electronically searchable copies of the settlement statements for the putative class. (Boulter Decl. ¶ 30.) Plaintiffs will put in the time and effort to analyze the settlement statement data, completely negating the burden objection. (*Id*.) However, the England Defendants have refused to produce the data to Plaintiffs. (*Id*.)

We know the England Defendants have the capacity to capture and transfer the settlement statements in an electronically searchable format because they did just that when they were

working with a consultant helping them analyze the economics of driver compensation and the independent contractor program based in substantial part on settlement statement data (much like Plaintiffs wish to do here). Specifically, the England Defendants retained accounting firm PricewaterhouseCoopers, LLP ("PwC") in 2005 and 2007 to conduct what PwC called a "Driver Compensation Statistics Presentation" and a "CR England Independent Contractor Analysis." (Compensation Studies, Leitner Decl. ¶ 12 and Exh. K.) To facilitate PwC's work, the England Defendants provided PwC with 20,479 electronic copies of driver settlement statements for the period between January 2005 and May 2005. (Boulter-Senger-Dibble Email Exchange, Boulter Decl. ¶ 36 and Exh. HH.)

Between January 4, 2013 and January 15, 2013, the Plaintiffs and the England Defendants exchanged multiple letters and emails which clarified and attempted to resolve as many of the remaining discovery disputes as possible. (Boulter Decl. ¶ 31.) On January 16-17, 2013, the parties exchanged emails which focused primarily on scheduling depositions that Plaintiffs seek to take before they move for class certification. (Boulter Decl. ¶ 31.) The England Defendants sent Plaintiffs' Counsel their second amended responses to McKay's Interrogatories to Defendant C. R. England Inc. (Set One) and Roberts' Interrogatories to Defendant Opportunity Leasing, Inc. (Set Two) on February 15, 2013. (Boulter Decl. ¶¶ 5, 11 and Exhs. B, G.)

G. Specific Discovery Matters in Dispute.

1. Driver Data and Settlement Statements for the Putative Class.

Seeking information that might help them prove the existence of commonality and typicality as required by Fed. R. Civ. P. 23(a)(2) and (3), as well as explore the existence and extent of class members' economic harm, many of Plaintiffs' September 14, 2011 interrogatories focused on critical data maintained by the England Defendants about the actual economics of the

Driving Opportunity for the putative class. (Boulter Decl. ¶ 15.) In the January 3, 2013 "meet and confer" call, Plaintiffs relayed their concerns with the England Defendants' December 19, 2012 amended interrogatory responses, particularly the continued absence of any information bearing on driver economic data for the putative class. (Boulter Decl. ¶ 30.) Despite the service of the amended responses (which admittedly did cure certain of Plaintiffs' stated concerns with the original interrogatory responses from October 17, 2011 and November 8, 2011), the England Defendants continue to refuse to answer the following interrogatories—all of which seek a specific answer to a specific question based on historic data that the England Defendants maintain on their computer system and can easily access (Boulter Decl. ¶ 32):

Plaintiff Charles Roberts' Interrogatories to C.R. England, Inc. (Set One)

4. State the total number of weeks putative class members were lease drivers for you.

5. State the average length of time, in weeks, that putative class members were lease drivers for you.

6. State the average weekly revenue per mile, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Total Revenue Per Mile."

7. State the average weekly miles driven, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Miles."

8. State the average weekly paid miles per gallon, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Paid miles per gallon."

9. State the average weekly total revenue, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Total Revenue."

10. State the average weekly Transaction Fees, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Transaction Fees."

11. State the average weekly Total Variable Costs, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Total Variable Costs."

12. State the average weekly Total Fixed Costs, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Total Fixed Costs."

13. State the average weekly income, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Income."

14. State the average weekly net pay, by class period year, for putative class members as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Net Check."

15. State the average weekly fuel cost, by class period year, for putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Fuel Cost."

16. State the average weekly gallons of fuel, by class period year, used by putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Gallons."

17. State the total legal fees, by class period year, charged to the putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Legal Fees."

18. State the percentage of putative class members, by class period year, that paid for legal fees as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Legal Fees."

19. State the total Opportunity Financial Services Consulting Service fees, by class period year, charged to the putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Ofs Consulting Service."

20. State the percentage of putative class members, by class period year, that paid for "Ofs Consulting Service" fees as reflected on the C.R. England Inc. Independent Contractor Settlement Statements.

21. State the total Opportunity Financial Services' fees, by class period year, charged to the putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Ofs-bkng."

22. State the percentage of putative class members, by class period year, that paid for "Ofs-bkng" fees as reflected on the C.R. England Inc. Independent Contractor Settlement Statements.

23. State the total Dsc Card fees, by class period year, charged to the putative class members as reflected on the C.R. England Inc. Independent Contractor Settlement Statements line item for "Ofs-bkng."

> 24. State the percentage of putative class members, by class period year, that paid for "Dsc" fees as reflected on the C.R. England Inc. Independent Contractor Settlement Statements.

Plaintiff Kenneth McKay's Interrogatories to C.R. England, Inc. (Set Two)

> 22. State the cumulative total number of weeks putative class members had any balance due as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Balance Due."
>
> 23. State the cumulative total amount of putative class members' balances due as reflected on C.R. England Inc. Independent Contractor Settlement Statements line item for "Balance Due."

(Boulter Decl. ¶¶ 15(b), 15(e) and Exhs. K and N.)

In addition to raising their aforementioned statute of limitations defense (Boulter Decl. ¶ 7), the England Defendants object to answering these data-driven interrogatories due to the alleged burden associated with being able to calculate what Plaintiffs have asked the England Defendants to calculate as well as relevancy. (Boulter Decl. ¶¶ 12, 33 and Exhs. H and EE.) The purported burden relates to what the England Defendants call "anomalies" in the data and the inability to account for them in their analysis without undue burden. (Boulter Decl. ¶¶ 12, 33 and Exh. H.) To this end, a recent letter from the England Defendants suggests that their position on the issue "is not that the requested information cannot be obtained but that it is very burdensome for [them] to do so." (1/15/13 Jardine Letter, Boulter Decl. ¶ 33 and Exh. EE.) The relevancy objection also lacks specific facts to support it:

> You raise the issue of our objection to what you describe as "data-driven interrogatories" and characterize it as solely on burdensome grounds. If you look at both our objections and my letter (specifically paragraphs 6 and 7 of that letter), you will see that we object on both relevancy and burdensomeness grounds. Given the tremendously disproportionate and asymmetrical nature of this discovery process, we think burdensomeness is a reasonable and appropriate objection. But it becomes more especially when coupled with a relevancy objection. *See* Fed. R. Civ. P. 26(b)(2)(C) (providing that the court must limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues"); *see also Bonnet v. Harvest (US) Holdings, Inc.*, 2012 U.S. Dist. LEXIS 41061, *24

> (Mar. 23, 2012) (acknowledging "the requirement for proportionality imposed by the discovery rules"). As we have previously explained, we decline your proposal that we provide you with a broad data set relating to independent contractors and their settlement statements both because it would contain large amounts of information not relevant to any claim in this matter and because this case already seems to us to be one where there is an ever changing complaint in search of facts to support a legal theory.

(1/23/13 Jardine Email, Boulter Decl. ¶¶ 12, 33 and Exh. H and EE.)

2. Document Requests Focused on Driver Expenses And The England Defendants' Costs And Profits.

In a series of document requests, Plaintiffs sought information documenting the costs and expenses associated with being a "lease driver" for C.R. England—both the average and total costs of various line item expenses and C.R. England's costs of delivering those items charged through as expenses to the independent contractors. (Boulter Decl. ¶ 37.) The expenses charged to Drivers is an integral part of the alleged deception. In the "meet and confer" process, the England Defendants have specifically challenged the idea that Plaintiffs' case involves the expenses charged to Drivers and the underlying cost structure to the England Defendants in passing along those expenses to the Drivers. (Boulter Decl. ¶ 37.) To them, anything relating to expenses incurred by members of the putative class is irrelevant. (1/23/13 Jardine Email, Boulter Decl. ¶¶ 12, 33 and Exhs. H, EE.)

The TAC contains express allegations directly challenging the economic structure of the Driving Opportunity, including how Drivers achieve revenues and the severe negative impact the contractually-mandated expense structure has on bottom line driver income. (TAC, ¶¶ 53–100.) Moreover, the TAC explicitly asserts that the England Defendants minimized the true costs of becoming a Driver, exaggerated Drivers' likely income, and price-gouged the Drivers in the bargain:

> 123. Defendant ENGLAND participated in the conduct of the ENGLAND Truck Leasing Enterprise through inducing the purchase of the Driving Opportunity by Plaintiffs and thousands of other Drivers by knowingly

> misrepresenting and omitting material facts about: (i) ENGLAND's policies and procedures; (ii) the actual availability of employment directly with ENGLAND driving a company-owned truck; (iii) the weekly mileage that ENGLAND made available to independent contractors who purchased the Driving Opportunity; (iv) ***the costs of operating as an independent contractor***; (v) the express goal to compel at least 65% of those who satisfactorily completed driving school into purchasing the Driving Opportunity; and (vi) ***the net revenues and profit margins that purchasers of the Driving Opportunity could expect to receive, as alleged more specifically in paragraphs 3-6, 26-29, 36-39, and 47-52*** of this Third Amended Complaint.
>
> 124. Defendants HORIZON and OPPORTUNITY participated in the conduct of the ENGLAND Truck Leasing Enterprise by inducing or otherwise assisting the purchase of the Driving Opportunity by Plaintiffs, and thousands of other Drivers; by providing financing or otherwise assisting in providing financing for Plaintiffs and thousands of other Drivers to lease trucks; and by knowingly misrepresenting and omitting material facts about: (i) ***the costs of operating*** *as an independent contractor;* (ii) ***the net revenues and profit margins*** that purchasers of the Driving Opportunity could expect to receive; (iii) by entering into the Lease Agreements, ***the terms of which made it virtually impossible for Plaintiffs and those similarly situated to earn any net revenues at all, let alone enough to make the amounts represented by HORIZON and OPPORTUNITY in order to induce the purchase of the Driving Opportunity***, as alleged more specifically in paragraphs 3-6, 26-29, 36-39, and 47-52 of this Third Amended Complaint; and ***(***iv) by collecting payments from the Drivers ***for the exorbitantly priced Lease Agreements***.

(TAC, ¶¶ 123-124.) (Bold and italics supplied.)

The particular document requests subject to this motion which relate to the expense issue and which the England Defendants objects to answering are as follows (Boulter Decl. ¶ 38):

Plaintiff Charles Roberts' First Request for Production of Documents to C.R. England, Inc.

> 9. Documents concerning the determination of the weekly truck lease fees charged the putative class and any formulas related thereto.
>
> 10. Documents concerning the determination of the weekly truck insurance fees charged the putative class and any formulas related thereto.
>
> 11. Documents concerning payments to any insurer and/or broker for truck insurance charged to the putative class including invoices.
>
> 12. Documents reflecting actual payments from you to Horizon and/or Opportunity of the weekly truck lease fees charged to the putative class.
>
> 13. Documents reflecting actual payments from you to any other person of the weekly truck insurance fees charged to the putative class.

14. All audited and/or unaudited financial statements including balance sheets, income statements, statements of cash flows, and accountants' notes, for each of the Defendants for the period January 2005 to present.

16. All audited and/or unaudited financial statements including balance sheets, income statements, statements of cash flows, and accountants' notes, for Eagle Atlantic Financial Services, Inc. for the period January 2005 to present.

19. Documents reflecting the total amount of legal fees charged by you to the putative class.

24. Documents concerning any accounting and/or disbursements and/or use of the variable mileage payments paid to you by the Plaintiffs and the putative class.

25. Documents concerning any accounting and/or disbursements and/or use of the license/permit payments paid to you by the Plaintiffs and the putative class.

26. Documents reflecting the amount you paid per gallon of fuel sold to the Plaintiffs under the England Fuel cap program.

Plaintiffs' Second Request for Production of Documents to Defendants

10. For the period May 27, 2005 to the present, all Documents and Communications relating to the following topics:

(aa) The amount(s) to charge drivers under the Lease Agreement for the items collectible by HORIZON under the agreement's terms, including, without limitation, the rental amount, the amount of the variable mileage payment, and the amount to be charged for maintenance and repairs;

(bb) The amount to pay drivers under the Contractor Agreement for the items payable by ENGLAND under the agreement's terms, including, without limitation, base mileage compensation, stop pay, and pay for loading and unloading; and

(cc) The costs for the insurance sold by ENGLAND to the drivers in connection with the Driving Opportunity, including, without limitation, the cost to the drivers and Defendants' costs to obtain the coverage on their behalf.

(Boulter Decl. ¶¶ 15(f), 17, 21, 38 and Exhs. O, U-W.)

3. Interrogatories Focused on Expense Data.

In conjunction with these expense-related document requests, Plaintiffs have also interposed a number of interrogatories that touch on expense-related issues (Nos. 10-12, 15, 17-24 (Roberts to C.R. England) and No. 23 (McKay to C.R. England)). (Boulter Decl. ¶ 32.) In

addition, the England Defendants also refuse to answer Interrogatory No. 20 from McKay's Second Set of Interrogatories to C.R. England. (Boulter Decl. ¶ 39.) That interrogatory asks C.R. England to "[s]tate the number of putative class members that signed promissory notes for driver school tuition with Eagle Atlantic Financial Services." (Boulter Decl. ¶ 15(e) and Exh. N.) This is another expense-related to the issue of expenses incurred by independent contractors. C.R. England charged certain class members tuition to attend its truck driving school. (TAC, ¶ 7.) While students can pay less tuition if they pay cash, many students opt to finance their tuition which is done through Eagle Atlantic. (TAC, ¶ 76.) The promissory notes are repaid each week out of earnings and thus directly affect the bottom line net pay of the drivers in the putative class. (TAC, ¶ 7.) We ask the Court to compel England to answer Interrogatory No. 20 so that Plaintiffs can test commonality and typicality against their own experience in signing promissory notes with Eagle Atlantic. (*See* Roberts Decl. [Dkt. 23] ¶ 10; McKay Decl. [Dkt. 22] ¶ 7.)

4. Complete Identification of Persons with Knowledge.

The final issue on this motion is the failure of the England Defendants to abide by the following instruction included with Plaintiffs' interrogatories served on September 14, 2011:

> Identify (with respect to persons). When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this paragraph, only the name of that person need be listed in response to subsequent discovery requesting identification of that person.

(Boulter Decl. ¶ 15 and Exhs. J-N.) In Interrogatory No. 1 of McKay's Interrogatories to England (Set One), Interrogatories Nos. 15-19 of McKay's Interrogatories to England (Set Two), Interrogatory No. 1 to Roberts' Interrogatories to England (Set One), and Interrogatories Nos. 1 and 18 of Roberts' Interrogatories to Opportunity (Set One), Plaintiffs asked the England

Defendants to identify certain individuals with discoverable information about matters in the case. (Boulter Decl. ¶ 15 and Exhs. J-N.)

In their November 8, 2011 initial responses, the England Defendants refused to identify ***any*** individuals. (Boulter Decl. ¶¶ 16-17 and Exhs. P, Q, S and U.) On December 19, 2012, as a result of the "meet and confer" process, the England Defendants (at long last) provided names of the requested individuals. (Boulter Decl. ¶¶ 27-31 and Exhs. BB-FF.) Despite this fact, the England Defendants failed to comply with the instruction for identifying individuals and withheld the full name and current or last known address of the identified individuals. (Boulter Decl. ¶¶ 5-6, 27-29, 40 and Exhs. B, C and BB-DD.) A January 15, 2013 letter from the England Defendants further resisted Plaintiffs' request suggesting that it would be too burdensome to do so. (Boulter Decl. ¶ 41.) Plaintiffs responded on January 16, 2013 with this proposal:

> As to the individuals identified on December 19, 2012, produce the contact information (full name, last known address, and last known phone number) for those (i) who are former employees; and (ii) as to instructors, only those who taught in classrooms (not those in the trucks). If this compromise is unacceptable, then we will move to compel.

(1-16-13 Goode Email, Boulter Decl. ¶ 41 and Exh. II .) The England Defendants refused this modest compromise. (Boulter Decl. ¶ 41.)

ARGUMENT

I. THE BASIC RULES GOVERNING DISCOVERY WEIGH STRONGLY IN FAVOR OF REQUIRING THE ENGLAND DEFENDANTS TO PRODUCE THE INFORMATION THEY ARE WITHHOLDING.

There is a strong presumption favoring broad discovery. "[T]he scope of discovery under the federal rules is broad, and . . . 'discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.'" *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995), (*quoting Oppenheimer Fund, Inc. v. Sanders*, 437

U.S. 340, 351 (1978)). Therefore, "[a]s a general rule, '[r]elevancy is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.'" *Yeager v. Fort Knox Security Products, Inc*., No. 2:11-CV-00091-TS, 2012 WL 1898876 at *2 (D. Utah, May 23, 2012), (*quoting Smith v. MCI Telecomm*., 137 F.R.D. 25, 27 (D. Kan. 1991)). In short, "[a] request for discovery should be allowed 'unless it is clear that the information sought can have no possible bearing' on the claim or defense of a party." *Owens v. Sprint/United Management Co*., 221 F.R.D. 649, 652 (D. Kan. 2004) (footnote omitted).

Once the proponent of discovery has crossed this undemanding initial threshold for demonstrating relevancy, the party opposing discovery has an affirmative burden to show that the information sought is in fact not relevant, or that one or more of the limitations set forth in Fed. R. Civ. P. 26(b)(2)(C) applies. *See Yeager*, 2012 WL 1898876 at *2. The opponent cannot satisfy this obligation by reciting vague generalities; instead, it must specify specifically how and why responding to the discovery would impose an undue burden on it. Generalized, "boilerplate" statements without specific facts substantiating the nature and extent of the alleged burden are not enough. *E.g., Greystone Constr. v. Nat'l Fire & Marine Ins. Co*., No. 07-CV-00066-MSK-CBS, 2008 WL 795815 at *5 (D. Colo. March 21, 2008); *Western Resources, Inc. v. Union Pacific R.R. Co.*, No. 00-2043-CM 2001 WL 1718130 at *4 (D. Kan. Nov. 26, 2001) (requiring "sufficient detail and explanation about the nature of the burden in terms of time, money and procedure which would be required to provide the requested information").

Finally, it is important to recognize that discovery is wide open on all subjects in this case; the scheduling order does not bifurcate merits discovery from class certification discovery, *cf. Allen v. Mill-Tel, Inc.*, 283 F.R.D. 631 (D. Kan. 2012), nor liability discovery from damages discovery, *see Yeager*, 2012 WL 1898876 at *3. And even before the Supreme Court expressly

authorized district courts to entertain some merits-related issues at the class certification stage, *see Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), the Tenth Circuit allowed limited consideration of the merits at class certification. *Shook v. Board of County of Commissioners of County of El Paso*, 543 F.3d 597, 612 (10th Cir. 2008). The fact that discovery is underway on all factual issues in this case, and the equally important fact that a wide range of those issues is certain to be implicated by one or more of Plaintiffs' motion for class certification, expert reports on damages and other issues, or a likely motion for summary judgment on some or all of Plaintiffs' claims, places another thumb on a judicial scale already heavily weighted in favor of disclosure.

II. THE SETTLEMENT STATEMENT DATA MUST BE PRODUCED.

Of all the issues presented by this motion, compelling disclosure of the putative class members' settlement statements might be the easiest to resolve. The reason is simple: when it served their interests to do so, the England Defendants sent approximately 20,500 electronic settlement statements to PricewaterhouseCoopers ("PwC") in order to facilitate a detailed analysis of the economics of the Driving Opportunity (Compensation Studies, Leitner Decl. ¶ 12 and Exh. K; Boulter-Senger-Dibble Email Exchange, Boulter Decl. ¶ 38 and Exh. HH)—***and Plaintiffs need that same information for the very same purpose***. Plaintiffs want the statements for a much longer period than the five months' worth supplied to PwC, true, but this is the digital age and the England Defendants have offered no reason to believe it will be burdensome for them to use the extensive information technology skills they have at their disposal (*see* O'Neal Dep. 159-160, Boulter Decl. ¶ 4 and Exh. A) to copy for Plaintiffs the part of the database that contains the settlement statements onto a number of compact discs or even an external hard drive.

The relevancy of the settlement statements to issues raised by Plaintiffs' claims likewise cannot seriously be contested. The statements contain week-by-week breakdowns of each putative class member's mileage driven, pay per mile, fixed costs such as truck lease payment and insurance charges, variable costs such as fuel and the inexplicable 14-cents-per-mile "variable mileage charge," and what the England Defendants deem "elective" deductions – in short, all of the income Drivers receive and all of the deductions subtracted from that income are on the settlement statements. No wonder they were the data source to which the England Defendants and PwC turned when England wanted a detailed analysis of Driver compensation during the early years of the Driving Opportunity. Plaintiffs are entitled to nothing less.

In addition to its obvious utility on damages issues, the data contained in the settlement statements is likely to help Plaintiffs establish the commonality and typicality requirements for class certification. Although the astronomical independent contractor turnover rate alone suggests to Plaintiffs that their own economic demise shares a common root in the form of England Defendants' material omissions and deceptive misrepresentations, Plaintiffs are entitled to dig into the economic data that the England Defendants possess concerning their fellow purchasers of the Driving Opportunity. Without the empirical data from the settlement statements, Plaintiffs are in a poorer position to compare their claims with those of absent class members for purposes of meeting the commonality and typicality requirements under Rule 23(a)(2) and (3). Given these three strong reasons for compelling production of the settlement statements, there can be no valid reason for the England Defendants to continue withholding them.

Alternatively, if the Court is dead set against requiring the England Defendants to produce the settlement statements, at the very least it must order them to answer Interrogatories Nos. 4-24 of Roberts' Interrogatories to England (Set One) and Interrogatories Nos. 22-23 of

McKay's Interrogatories to England (Set Two). The PwC project demonstrates that the England Defendants have the capacity to perform sophisticated data analyses using the very same information that they refuse to provide in raw form. That is all it would take to provide answers to these interrogatories.

III. THE ENGLAND DEFENDANTS' COST AND PROFIT DATA IS DIRECTLY RELEVANT TO KEY LIABILITY AND DAMAGES ISSUES AND MUST BE PRODUCED.

The second broad category of information that the England Defendants are withholding is more economic data, here data that would provide explanations of the England Defendants' costs of providing goods (such as the leased trucks) or services (such as the insurance or vehicle licenses and permits) for which the England Defendants took deductions from putative class members' pay, as well as the basis for the calculation of the amounts that are actually deducted from putative class members' pay. This information, whether sought by interrogatory or document request, is directly relevant to prove the England Defendants' motive in developing and implementing the fraudulent scheme to sell the Driving Opportunity. If Plaintiffs are right and the England Defendants are reaping substantial profits from the truck leases, the "variable mileage charge," and other items that they have the capacity to mark up, there is a direct link between the profits being generated by the Driving Opportunity and the deceptive statements and omissions that are used to entice putative class members into the Driving Opportunity; the more people who believe the lies, the more profit reaped by the England Defendants. (TAC, ¶¶ 83-100.) Plaintiffs expressly allege that the truck leases imposed terms that "made it virtually impossible to earn any net revenues at all" and were "exorbitantly priced" (TAC ¶ 124) and because the only conceivable place they can get discovery to help them prove that allegation is from the party imposing the terms and doing the pricing, the England Defendants should be required to disclose that information.

Similarly, several of Plaintiffs' claims implicate disgorgement as a damages remedy, and Plaintiffs cannot prepare any evidence at all to support this theory unless Plaintiffs have a basis for calculating the point where the England Defendants should have to start to disgorge. The Tenth Circuit has expressly left open the question whether disgorgement is an appropriate remedy for RICO claims. *U.S. v. Rx Depot, Inc.*, 438 F.3d 1052, 1059 (10th Cir. 2006). Similarly, under the Utah Consumer Sales Practice Act, Utah Code § 13-11-19(3), "[w]hether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and ***appropriate ancillary relief*** against an act or practice that violates this chapter." (Emphasis added.) A branch of this Court enforcing the Federal Trade Commission Act has concluded that when it has found a deceptive trade practice, it may award "***ancillary relief***, including monetary relief in the form of ***either restitution or disgorgement***." *FTC v. LoanPointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304 at *11 (D. Utah Sept. 16, 2011) (emphasis added). Certainly in the discovery stage of this case, "ancillary relief" under the Utah statute should be construed to include disgorgement of the England Defendants' ill-gotten gains, particularly because the Utah Legislature has decreed that the Utah Consumer Sales Practice Act "shall be construed liberally . . . to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection." Utah Code § 13-11-2(4). Because disgorgement cannot be calculated without knowing the full extent of the England Defendants' profits from the Driving Opportunity and how those profits are generated on a line-item basis, Plaintiffs' motion to compel must be granted.

IV. THE ENGLAND DEFENDANTS MUST BE REQUIRED TO PROVIDE ADDRESSES FOR WITNESSES WHOSE NAMES THEY HAVE ALREADY DISCLOSED.

The third subject of the motion to compel is the England Defendants' inexplicable refusal to provide Plaintiffs with last known addresses of persons who are former employees and who are or were classroom instructors in the truck driving schools ***whom the England Defendants have already identified by name as having knowledge of discoverable matters relating to the case***. Plaintiffs are willing to do the leg work of using address information to locate the people identified and the strategic work of interviewing them to see whether they actually have any relevant information.

And it is not as if the England Defendants don't have the information; they have made clear that they possess address information for at least some of the individuals in question, but are withholding it. (Boulter Decl., ¶¶ 27-31, 42-43, and Exhs. BB-FF.) Courts routinely order discovery of address information for witnesses. *See, e.g., Chapman v. Carmike Cinemas, Inc.*, No. 2:06-CV-00948 TS DN, 2007 WL 1302754 at *3 (D. Utah May 2, 2007); *Gianzero v. Wal-Mart Stores, Inc*., No. 09-CV-00656-REB-BNB 2011 WL 2683066 at *1 (D. Colo. Jul. 8, 2011); *U.S. ex rel. Smith v. Boeing Co.*, No. 05-1073-WEB 2009 WL 2777278 at *6 (D. Kan. Aug. 27, 2009) (denying Rule 30(b)(6) deposition because "the names and last known addresses of potential witnesses can be obtained more conveniently and with less expense through a simple interrogatory"). The case is even stronger where the party resisting disclosure has already admitted that the individuals in question have relevant information.

CONCLUSION

Based on the foregoing, plaintiffs Charles Roberts and Kenneth McKay, individually and on behalf of all others similarly situated, respectfully request that the Court enter an order against

defendants C.R. England, Inc., Opportunity Leasing, Inc., and Horizon Truck Sales and Leasing, LLC as follows:

(i) An order compelling the England Defendants to either answer Interrogatories Nos. 4-24 of Roberts' Interrogatories to England (Set One) and Interrogatories Nos. 22-23 of McKay's Interrogatories to England (Set Two) or, alternatively, to aggregate and produce in an electronic and searchable format the settlement statement data sought for the 14,708 drivers who signed Vehicle Lease Agreements and Independent Contractor Operator Agreements since January 1, 2008 to the present;

(ii) An order compelling the England Defendants to produce the expense related documents requested in Document Request Nos. 9-14, 16, 19, and 24-26 of Roberts' Request for Production (Set One) and Document Request Nos. 10(aa), 10(bb), and 10(cc) of Plaintiffs Second Set of Requests for Documents;

(iii) An order compelling the England Defendants to provide the last known address, phone number, and full name of each individual identified in their December 19, 2012 amended responses to Interrogatory No. 1 of McKay's Interrogatories to England (Set One), Interrogatories Nos. 15-19 of McKay's Interrogatories to England (Set Two), Interrogatory No. 1 to Roberts' Interrogatories to England (Set One), and Interrogatories Nos. 1 and 18 of Roberts' Interrogatories to Opportunity (Set One); and

(iv) An order compelling the England Defendants to pay the reasonable expenses incurred in bringing this motion to compel (including attorneys' fees) as provided in Fed. R. Civ. P. 37(a)(5)(A).

Dated this 27th day of March, 2013

KRAVIT, HOVEL & KRAWCZYK S.C.

s/ Joseph S. Goode

Joseph S. Goode
Mark M. Leitner
Benjamin J. Glicksman
825 N. Jefferson Street, 5th Floor
Milwaukee, WI 53202
Telephone: (414) 271-7100
E-Mail: jsg@kravitlaw.com
E-Mail: mml@kravitlaw.com
E-Mail: bjg@kravitlaw.com
Attorneys for Plaintiffs

ROBERT S. BOULTER, ESQ.
Robert S. Boulter
Attorneys for Plaintiffs
1101 Fifth Avenue, Suite 310
San Rafael, CA 94901
Telephone: (415) 233-7100
E-Mail: rsb@boulter-law.com
Attorneys for Plaintiffs

PIA ANDERSON DORIUS REYNARD & MOSS, LLC
Brennan H. Moss
222 S. Main St.
Suite 1800
Salt Lake City, UT 84101-2194
Telephone: (801) 350-9000
E-Mail: bmoss@padrm.com
Attorneys for Plaintiffs