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

Stephen E. Kravit
C.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
Telephone: (414) 271-7100
kravit@kravitlaw.com
cjk@kravitlaw.com
bjg@kravitlaw.com
aha@kravitlaw.com
brp@kravitlaw.com

Thomas R. Karrenberg, #3726
Jon V. Harper, #1378
Heather M. Sneddon, #9520
Anderson & Karrenberg, P.C.
50 West Broadway, Suite 700
Salt Lake City, Utah 84101
Telephone: (801) 534-1700
tkarrenberg@aklawfirm.com
jharper@aklawfirm.com
hsneddon@aklawfirm.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

CHARLES M. ROBERTS, an individual, and **KENNETH MCKAY**, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, v. **C.R. ENGLAND, INC.**, a Utah corporation; and **OPPORTUNITY LEASING, INC.**, a Utah corporation; Defendants.	**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT** Civil No. 2:12-cv-00302-RJS-BCW Judge Robert J. Shelby Magistrate Judge Brooke C. Wells

Plaintiffs Charles M. Roberts and Kenneth McKay, by and through their attorneys of record and on behalf of themselves and all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure, hereby move for class certification.

Plaintiffs request that the Court certify a nationwide class as to the following claims during the applicable limitations periods: violations of the Utah Business Opportunity Disclosure Act; violations of the Utah Consumer Sales Practices Act; violations of the Utah Truth in

Advertising Act; negligent misrepresentation; breach of fiduciary duty; and unjust enrichment. Plaintiffs propose certification of a subclass consisting of those Class members who executed a Student Training Agreement, under the claim for breach of contract. Plaintiffs also propose certification of a subclass under the fraud-based claims – violations of RICO and the Utah Pattern of Unlawful Activity Act, as well as common law fraud – consisting of those Class members who purchased the "business opportunity" offered by Defendants during the period when Defendants were using the England Business Guide in marketing their business opportunity. As set forth more fully herein, Plaintiffs have satisfied the numerosity, commonality, typicality and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3), and the notice requirements of Rule 23(c)(2).

Plaintiffs, therefore, respectfully request that the Court certify for class action treatment the federal and state law claims identified above, which Plaintiffs have alleged in the Class Action Third Amended Complaint. Plaintiffs further request that they be appointed as the Class representatives, and that their counsel be appointed as Class counsel.

INTRODUCTION

For nearly 85 years, Defendant C.R. England, Inc. operated as a trucking company earning its money hauling freight in trucks driven by employee drivers. The first of those drivers was Chester Rodney "C.R." England, who founded the company in 1920 and personally hauled milk and produce to market for farmers located in Weber County, Utah. C.R. England was followed into the business by his two sons, Bill and Gene[1], who also worked for years as company drivers before assuming leadership of the company in the early 1970s. During Bill's

[1] Gene (now age 93 and President Emeritus) succeeded his father as President of C.R. England but continued to occasionally drive trucks for the company until he was 80 years old.

and Gene's tenure, C.R. England's annual revenues increased from approximately $1 million in 1965 to more than $544 million in 2005. (Appx. 4033.)[2] Despite its extraordinary success, as the third[3] and fourth[4] generations of Englands prepared to take control of the company, they set their sights even higher. No longer satisfied with the traditional revenues C.R. England and its affiliates generated from freight hauling, they hatched an exploitation scheme to make additional money ***from*** the men and women who drove their trucks rather than ***through*** them.

While company drivers had been the life's blood of C.R. England since the days its founding fathers had driven for it, employing all those drivers was expensive. After analyzing the profitability of its workforce in 2004-05, the new executive team concluded that C.R. England could greatly increase revenues and profits by slashing the number of company drivers and replacing them with independent contractors ("ICs") who leased Defendants' trucks. This shift away from company drivers was a radical one for the England family, who had long referred to themselves as real truckers. But the financial rewards of decreasing their labor costs while, at the same time, creating new revenue streams by shifting the burden of many of their operating expenses onto lease drivers proved too enticing to resist.

In April 2005, Dean England exalted the sweeping changes ahead when he wrote in a company newsletter that "C.R. England may see greater changes in 2005 than in any year since the company began 85 years ago." (Appx. 1028.) He was referring to the "Implementation

[2] All evidentiary citations abbreviated "Appx. __" are to the materials appended to the Declaration of Christopher J. Krawczyk filed herewith. Those materials include paper documents as well as an audio file and certain oversized or excerpted spreadsheets, which are being filed in native electronic format with the Court's permission.

[3] Gene England's sons, Dan and Dean, became the company's Chief Executive and Chief Operating Officers in 2005. In March of 2013, the two were named Co-Chairmen of the company's board of directors. Both Dan and Dean England also hold a Commercial Driver's License ("CDL").

[4] In 2005, Dan England's son, Josh, was the Vice President of the controversial Independent Contractor Division. He served in that role until approximately June 2009 when he moved to England Logistics. (Appx. 3091.) Earlier this year, Josh was elevated to the positions of President and Chief Financial Officer, while Dan's other son, Chad, became the company's CEO.

Plan" Defendants had created to rapidly grow the lease program and all but eliminate company driving positions. (Appx. 6002; Appx. 2366.) And Defendants achieved that goal with frightening efficiency. Between 1998 and 2002, Defendants added [redacted] new truck leases, but under the Implementation Plan, they exceeded that number in just the first nine months of 2006, adding [redacted] new leases. (Appx. 4204.) By [redacted], the number of active truck leases had swelled to [redacted] — approximately 80% of C.R. England's total fleet. (Appx. 4143; Appx. 1087; Appx. 3268.)

Achieving and sustaining that growth was remarkable given that [redacted] of all lease drivers failed within a year and, of those, more than [redacted] didn't last even [redacted] in the program. (Appx. 4202.) Those failures were no surprise to Defendants who knew they were selling a "business opportunity" (hereinafter, the "Driving Opportunity") that was rigged in their favor and not economically viable for the ICs who purchased it. In uniform misrepresentations that were systemically distributed to lease drivers through written literature and scripts, Defendants passed off data that was either outdated or had been cherry-picked from the top 10% of performers as being representative of the IC experience and never mentioned the grim outcomes endured by the overwhelming majority of lease operators.[5] (Appx. 2424; Appx. 3165, 3033-3047; Appx. 561; *see also* Appx. 3205.)

[5] In late 2009, ICs were failing at the rate of [redacted], but Defendants were [redacted]" by [redacted]. (Appx. 4354.) Josh England [redacted] (*Id.*) On [redacted] (Appx. 4089.)

With lease turnover rates hovering in the [redacted] of [redacted] (Appx. 6001; Appx. 4196), Defendants needed [redacted] prospects to keep the pipeline of lease drivers full. Defendants accomplished this by (i) inducing thousands of students to enroll in their driving schools using false promises of employment with C.R. England afterward, and then once enrolled, (ii) coercing those students into buying the Driving Opportunity instead.[7]

Unburdened by the truth or the practical limitations of what they could actually deliver, Defendants were effective in convincing job-seekers to enroll in their driving schools.[8] Between January 1, 2008 and December 19, 2012, a staggering 94,095 students enrolled in Defendants' driving schools. (Appx. 5012-5013, Interrog. No. 2.) And of those, an astonishing 38,524 drivers completed driving school and entered training in Defendants' program. (Appx. 5013-5014, Interrog. No. 3; Appx. 3412.) Defendants admit their objective was to create a "pipeline" of drivers so large it "burst" (Appx. 1053; Appx. 3227), which they then [redacted] and to devastating effect. (Appx. 2543.)

Indeed, after inducing student drivers to enroll in their driving schools with guarantees of a company job, Defendants immediately and systematically bombarded them with manipulative techniques and fraudulent representations specifically designed to also sell them the Driving

[6] "Turnover" is the rate at which C.R. England gains and loses Drivers, i.e., the rate of traffic through the revolving door. Weekly and monthly turnover data maintained by Defendants projected annual turnover in excess of [redacted] at multiple points during the class period. (Appx. 6001; Appx. 4196.) A [redacted] annual turnover means that, for every [redacted] in the Driving Opportunity over a [redacted], there were [redacted].

[7] In a classic "bait and switch," Defendants went so far as to promise a company driver job to anyone who completed their training, even though Defendants were currently in the process of executing a strategic plan ***that called for those positions to be eliminated completely***. (Appx. 69; Appx. 6002; Roberts Dec. ¶¶ 6, 19; McKay Dec. ¶¶ 8, 10; Cavezas Dec. ¶ 4; McClintic Dec. ¶ 3.) After training was completed and there were no positions available, those drivers were persuaded to sign truck leases, which Defendants falsely represented "make more money, faster than company drivers do." (Appx. 749.)

[8] Recruiter Cathy Mattan was required to enroll a minimum of 40 people per week, which was standard for all recruiters. (Mattan Dec. ¶ 9.) According to Ms. Mattan, recruiters intentionally misled candidates in order to meet these requirements and did so with the full knowledge of recruiting directors. (Mattan Dec. ¶ 9.)

Opportunity. Defendants again used uniform written materials and scripts they delivered to accomplish this objective. That information was replete with material misrepresentations regarding the average weekly miles driven and the income earned by lease drivers — all of which Defendants knew to be false and misleading. Defendants' deception successfully coaxed thousands of drivers into the Driving Opportunity and allowed Defendants to shift many of their freight-hauling costs onto lease drivers, leaving Drivers in the untenable position of providing low cost, under-market and in many cases, ***free*** labor for Defendants.

Through this fundamental change to their business model, Defendants took what was once a proud pillar of C.R. England – its employee drivers – and turned them into fungible commodities. Although the human costs of the lease program were depressingly high, the financial rewards to Defendants were, again in their words, "extraordinary." (Appx. 3426.) After taking more than 80 years to surpass $500 million in annual revenue for the first time, the lease program allowed Defendants to [redacted].[9] (Appx. 4228.) In the process, Defendants transformed a decades-old trucking company into an unlawful enterprise focused more on marketing and selling a non-existent business "opportunity" to unsuspecting job-seekers than actually hauling freight. This case seeks redress for the many, mostly knowing, wrongs committed by Defendants in furtherance of their fraudulent scheme on behalf of the thousands who were victimized by it.

[9] According to its audited financials, "C.R. England, Inc. and Related Entities" had combined total revenue of [redacted] in 2012. During what was a challenging economic cycle for most businesses, Defendants increased their revenues by [redacted] between 2005 (the year their plan was set into motion) and 2012.

FACTUAL BACKGROUND

I. Overview[10]

Plaintiffs Charles Roberts ("Roberts") and Kenneth McKay ("McKay") seek certification for trial of a nationwide Class and certain subclasses consisting of consumers (hereinafter "Drivers") who purchased a business opportunity driving big rig trucks that was marketed, advertised, and sold to them by Defendants (the "Driving Opportunity"). Defendants C.R. England, Inc. and Opportunity Leasing, Inc. (d/b/a Horizon Truck Sales and Leasing; hereinafter "Horizon") are affiliated transportation companies headquartered in Salt Lake City, Utah. Both are owned by the England family. (Defendants' Answer to Plaintiffs' Third Amended Complaint and Counterclaim Against Plaintiffs ¶ 2, Dkt. 105.) Defendants operate a fleet of thousands of trucks that carry their customers' goods around the country. (Third Amended Complaint ("TAC") ¶ 2, Dkt 101.) While some of that freight was and continues to be transported by company employees, the vast majority of it since 2005 has been hauled by Drivers who purchased the Driving Opportunity. (*Id.*)

The Driving Opportunity, referred to at various times as the "C.R. England Lease Program," the "C.R. England Independent Contractor Program," and the "Horizon Truck Sales and Leasing Independent Contractor Program," required Drivers to sign two contracts: (1) an "Independent Operator Contractor Agreement" ("ICOA") with defendant C.R. England and (2) a Vehicle Lease Agreement ("VLA") with defendant Horizon. (Appx. 3341; TAC ¶¶ 3, 56, 71,

[10] In order to assist the Court, a glossary of key terms and individuals is attached at Appx. 1-6.

79; Roberts Dec. ¶ 8 and Exh. B and C; McKay Dec. ¶ 18 and Exh. D and E; Cavezas Dec. ¶¶ 21-23; McClintic Dec. ¶¶ 21-23.)[11]

Defendants advertised the Driving Opportunity in uniformly-distributed materials as a proven business in a box, referring to it as a "ready-to-go operation." (*E.g.*, Appx. 1646, 1641.) The basic fundamentals of the Driving Opportunity required Drivers to transport Defendants' customers' goods nationwide in trucks leased from Defendants for more than $450/week[12] plus an additional charge per mile driven.[13] (Roberts Dec. ¶¶ 3, 23 and Exh. A; McKay Dec. ¶¶ 18, 21 and Exh. F; Cavezas Dec. ¶¶ 21, 26 and Exh. C; McClintic Dec. ¶¶ 13, 22 and Exh. C.) Drivers were also required to pay certain other fixed and variable costs, including fuel, insurance, permits, and maintenance. (Roberts Dec. ¶ 3 and Exh. A; McKay Dec. ¶ 18 and Exh. F; Cavezas Dec. ¶ 26 and Exh. C; McClintic Dec. ¶ 13 and Exh. C; Appx. 3257-3259, 3338-3339.) In exchange, Defendants represented that Drivers would get enough freight and miles to earn [redacted] after expenses in their first year of leasing.[14] (*See, e.g.*, Appx. 45-46; Appx. 3165; Appx. 4161.) However, Defendants did not provide anywhere near the number of miles needed for Drivers to approach the lofty uniform income representations made ***in writing*** by Defendants. (*E.g.*, Appx. 4155.) Drivers struggled to cover the high costs with which

[11] ICOAs and VLAs are signed at the same time and only in Salt Lake City, Utah or Burns Harbor, Indiana. (Appx. 3346; TAC ¶ 55.) Both form contracts are non-negotiable. (Appx. 3334; TAC ¶ 55.) More than half the class signed their VLAs and ICOAs in Utah. (Appx. 5011-5012, Interrog. No. 1.)

[12] While the fixed truck payment varied by truck, the exact amount paid by each Driver in the class is readily ascertainable using the detailed data maintained (and recently produced in the litigation) by Defendants.

[13] This charge by which Defendants were unjustly enriched, also known as the variable mileage charge, is discussed at length in Factual Background, Section IV.C., *infra*, and can be easily calculated for each class member using Defendants' data and records. (Mahla Dec. ¶ 13(b).)

[14] Defendants' own analysis indicated that for a Driver to earn [redacted]/week (or [redacted] annually), he or she would need to drive [redacted] paid miles in a week, though Defendants inaccurately claimed that level of income could be achieved on far fewer miles. (Appx. 4193 [redacted].)

Defendants saddled them and often did not, resulting in weeks of "negative pay."[15] (Appx. 6001 [redacted]); Roberts Dec. ¶ 3 and Exh. A; McKay Dec. ¶ 18 and Exh. F; Cavezas Dec. ¶ 26 and Exh. C.) On average, Drivers remained in the lease program for only a few months and earned just a fraction of what Defendants claimed they would.

Defendants were aware of the ugly realities of the Driving Opportunity, but continued to aggressively market and sell it by any means necessary. Defendants flooded their driving schools by advertising "guaranteed" employment with C.R. England as a company driver to anyone who enrolled and completed training. (TAC Exh. A; Roberts Dec. ¶¶ 6, 19; McKay Dec. ¶¶ 8, 10; Cavezas Dec. ¶¶ 4, 11; McClintic Dec. ¶¶ 3-5; Burr Dec. ¶ 11.) Yet from the first day of school, Defendants used scripted presentations and standardized written materials to tout the purported superiority of the Driving Opportunity to students. (TAC ¶ 45; Bilbo Dec. ¶¶ 6-7; Burr Dec. ¶¶ 4-5, 8-10; McKay Dec. ¶¶ 12, 14; McClintic Dec. ¶¶ 9-11, 14; Cavezas Dec. ¶¶ 7, 8, 11, 12; Appx. 1752.) Once students had finished their training and inquired about their guaranteed company job, they were invariably told that none were currently available and that they could wait for an opening — ***or***, they could immediately begin making even "more money" as an IC. (Appx. 740; Roberts Dec. ¶ 21; McKay Dec. ¶¶ 14, 19; Cavezas Dec. ¶ 16; Bilbo Dec. ¶ 9.)

The purported lack of "open" company jobs was just another manipulation. [redacted] (Appx. 1317; Appx. 4219-4221.) [redacted]

[15] Just as it sounds, "negative pay" resulted in a balance due on settlement statements when Drivers owed more to Defendants for expenses than Defendants owed them for driving during a given week. It was a common occurrence in the Driving Opportunity.

[redacted] (Appx. 6002, 6013.) As confirmed by C.R. England's former Director of Business Intelligence, Stephen Brinkman, Defendants' bottom line always came first:

> You know, whenever you make a change and you're showing the financial impact, if you were to show the financial impact on the IC, the question automatically arises, 'What is the impact on the company?' And it's usually equal and opposite. So the idea was to let's not just think of IC compensation but let's think of what the impact would be on the corporation, as well.

(Appx. 3021.)

Between January 1, 2008 and December 19, 2012, 14,708 Drivers purchased the Driving Opportunity. (Appx. 5004-5005, Interrog. No. 1.) Upon signing their VLAs and ICOAs, those Drivers became part of a grossly underpaid labor pool that Defendants exploited for their own financial gain. On the backs of those men and women, Defendants shattered the billion dollar revenue mark, tripled their profits and built what they, themselves, refer to as an "Empire." (Appx. 3095, 3423 ("The empire was a colloquialism that we used to describe C.R. England and related entities, and Opportunity Leasing would be one of those.").)

II. History of the Driving Opportunity

C.R. England is the cornerstone of the "England Empire," which is comprised of businesses owned and controlled by the England family, either individually or through trusts. (*E.g.*, Appx. 2306.) Horizon is part of the Empire, [redacted]

[16] According to retired CFO Keith Wallace, the operating ratio (a profitability metric) for the leasing program in 2011 was "extraordinary." (Appx. 3426; *see also* Appx. 4167 [redacted].)

[17] Financial records produced in the litigation demonstrate how effective Defendants were in profiting from, rather than through, their Drivers. (*See, e.g.*, Appx. 888, 923; Appx. 6003; Appx. 3022, 3120-3125, 3155-3156, 3195-3198, 3255-3256, 3261-3263, 3336, 3413-3418, 3422, 3424-3433.)

(Appx. 2306; Appx. 4224, et seq., 4309, et seq., 4264, et seq.), and the two are governed by a single Executive Committee. (Appx. 3134-3135, 3246-3250, 3253-3254.) Until recently, C.R. England's Vice President of the Independent Contractor Division[18] was in charge of Horizon.[19] (*See, e.g.*, Appx. 1059-1062; Appx. 3071.)

Horizon is a "sales organization" with a mission to sell as many Driving Opportunities as possible. (Appx. 3318, 3136, 3218-3220, 3226, 3159-3162; *see also* Appx. 2426 [redacted].) Horizon has always closely coordinated its activities with those of C.R. England, particularly in their common use of scripted pitches to sell the Driving Opportunity. (*E.g.*, Appx. 1317; Appx. 4219; Appx. 2424; Appx. 3165.)[20]

[redacted]

[18] Throughout the class period there have been only three Vice Presidents of the IC Division: Josh England, Michael Fife, and Mitch England. (Appx. 3094; Appx. 1026, 1059-1069.)

[19] The corporate connection between C.R. England and Horizon is so strong that the latter is actually a department of the former's IC Division. (Appx. 3248-3249, 3253-3254.) Former VP of the IC Division, Michael Fife, testified that calling Horizon a "trusted third party" would be like General Motors calling Chevrolet one. (Appx. 3163.)

[20] Both C.R. England and Horizon are Utah corporations with their principal places of business located in Salt Lake City, Utah. (Defendants' Answer to TAC, Dkt. 105.)

[21] [redacted] Defendants pushed team driving hardest in the Driving Opportunity. Having freight hauled by a team is more efficient because there are two drivers working under DOT time limits instead of one. (*E.g.*, Appx. 3154, 3172; Reeve Dec. ¶ 5.) But the preference for teams made the survival of solo ICs even more difficult — [redacted] (Appx. 1633; *see also* Appx. 3118-3119 (when asked if the company preferred teams as of 2005, Mr. England responded: "Did then. Still does.").)

[22] [redacted]. (Appx. 6002.)

[redacted].

The objectives of the Implementation Plan[23] were to have "All Students Team" by September 1, 2005 and "All New Students Lease" by November 1, 2005. (Appx. 6002; Appx. 2366.) Defendants were so successful in selling the Driving Opportunity that, at one point, 80 percent of its trucks in service were leased. (Appx. 3268; Appx. 1087.) Maximizing Driving Opportunity sales was ***the*** primary objective for Michael Fife when he ran the IC division (Appx. 3167-3173; Appx. 1325), as it was for Horizon (Appx. 3219-3220, 3318) [redacted] (*See gen.*, Appx. 1328, Appx. 2448, 2531; Appx. 6006.)

Defendants were transparent in their motivation to add ICs and eliminate company positions. [redacted]

> … [redacted]

(Appx. 1318 (emphasis added).) [redacted] (*See* Appx. 4009, Worksheet 2011 FY, Row 53 Columns Q, AX-BG.)

[23] The Implementation Plan was announced in the April 2005 RoundTable Newsletter by Dean England, the Chief Operating Officer of C.R. England, in which he wrote that "C.R. England may see greater changes in 2005 than in any year since the company began 85 years ago." (Appx. 1028; *see also* Reeve Dec. ¶ 9 and Exh. C and D.) The RoundTable Newsletter is distributed company wide. (Appx. 3201-3203.)

Defendants' shift away from company positions made it impossible for them to fulfill their promise to Drivers of "guaranteed employment," which they consistently and systematically made in advertisements and confirmed in every Student Training Agreement ("STA") that Defendants required members of the class to sign.[24] (Appx. 3353-3355, 3402, 3407-3408, 3003-3006, 3221; Roberts Dec. ¶ 17 and Exh. D; McKay Dec. ¶ 13 and Exh. C.) The STAs, a uniform contract signed by Drivers who entered the Driving Opportunity between at least December 24, 2007[25] and [redacted], falsely represented that becoming a C.R. England employee was the Driver's choice[27]:

> ***At the completion of Phase 2 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 2 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 mile [sic].
> 4. ***Remain a C.R. England employee with a company truck***.

(TAC ¶¶ 222-223 and Exh. N and O (emphasis added).)

[24] Before enrolling in C.R. England's driving schools, Defendants required prospective students – including both Plaintiffs McKay and Roberts – to sign a Conditional Offer of Employment ("Conditional Employment Offer"), pursuant to which such students accepted an employment offer with C.R. England conditioned upon their completion of a DOT written exam, road test, orientation, pre-hire interview and other requirements. (Appx. 4001, 4002.) Significantly, the Conditional Employment Offer required Plaintiffs and class members to "acknowledge and agree that the venue of litigations that may arise from this employment shall be in the State of Utah," and that "Utah law shall apply exclusively to any such claims or litigation." (*Id.*)

[25] While the requirement of signing the STA may have been introduced earlier, the oldest one signed by a Driver that Defendants have produced in discovery is dated December 24, 2007. (Appx. 4223.) Due to a discovery dispute involving how far C.R. England must reach back for documents and information, Plaintiffs do not know if they have received all prior versions of that document. [redacted] (Appx. 4222.)

[26] Plaintiffs seek certification of a subclass of all Drivers who executed the STA and subsequently purchased the Driving Opportunity. (*See* Argument, Section III.B.5., *infra*.) This subclass numbers in the thousands. (Appx. 5005, Interrog. No. 1.) [redacted] (Appx. 4222.)

[27] Plaintiffs McKay and Roberts accepted Defendants' offer of guaranteed company employment on March 30, 2009 and August 10, 2009, respectively. (TAC Exhs. N and O.)

III. How Defendants Executed Their Scheme[28]

A. Inducing Drivers to Enter the Pipeline through Uniform Online and Recruiter Misrepresentations

The Implementation Plan required Defendants to establish a large pipeline of potential Drivers. [redacted] (*E.g.*, Appx. 823, 1320, 1629, 2302.) [redacted] (Appx. 2544 (emphasis added); *see also* Appx. 3342 (referring to C.R. England as "a training platform company.").)

Monitoring the pipeline was a constant focus of internal communications among the Defendants. (Appx. 3190, 3194, 3222-3225; Appx. 1049, 1053, 1056, 1325, 2303.) Horizon coordinated these efforts and reported them directly to England's Executive Committee. (Appx. 3133, 3246-3250, 3253-3254, 3157-3158, 3090, 3092-3094, 3113, 3187-3189; Appx. 1059-1069.) [redacted]

[28] [redacted] Defendants' headquarters in Utah [redacted] (Appx. 6002; Defendants' Answer to TAC ¶ 2, Dkt. 105.) Thus, the Driving Opportunity's very existence and structure are controlled out of Utah. (*Id.*)

[redacted]

[redacted]"[29] (Appx. 1325.)

1. Uniform Online Misrepresentations

Defendants have a large web presence. They maintain websites at www.crengland.com and www.horizontrucksalesandleasing.com[30], and also run ads for jobs on various job-seeker websites like careerbuilder.com and CDLJobs.com. (TAC Exh. A and B; McClintic Dec. ¶ 3.) Plaintiffs Roberts and McKay reviewed C.R. England's website and the England Business Guide before signing the ICOA and VLA. (Appx. 3391-3398, 3272-3280, 3284-3287.)

The C.R. England and Horizon websites contained false and misleading pro formas during the class period. (Appx. 118, 732, 2307-2316.) For example, on May 26, 2010, the IC lease program page on the C.R. England website contained a pro forma indicating solo IC Drivers received 3,250 miles weekly. (Appx. 2307.) That same mileage representation was contained on the pro forma used on the C.R. England website on July 26 (Appx. 2311) and September 14, 2010. (Appx. 2316.) The Horizon website also contained a 3,250 solo weekly mileage representation on the pro forma it displayed on December 16, 2010. (Appx. 123.) By March 18, 2011, the C.R. England website had switched from pro formas to a substantially similar – but still false – narrative: "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!" (Appx. 732.) [redacted] (Appx. 2449.)[31]

[29] Defendants never disclosed to Drivers that there was a stated corporate goal for converting candidates into lease drivers. (Appx. 3406.)

[30] The Horizon website was taken down for a period of time during the course of the litigation.

[31] [redacted].

When asked to explain the factual basis for the website mileage representations at his deposition, Defendants' corporate designee Josh England admitted that they were based on data culled from only the "**top 10 percent**" of solo and team Drivers. (Appx. 3033-3047; Appx. 729; *see also* Appx. 3205; Appx. 5015-5016, Interrog. No. 7 ("In the study, Respondent analyzed the income for the top ten percent of solo and team drivers . . . .").) Defendants passed off these figures as being representative of the Driver experience in the program and never disclosed that they failed to account for the bottom 90 percent[32] of Drivers. (Appx. 3053-3061; Appx. 729-732.) Again, this was not by accident. As C.R. England's Alisha Garrett testified, Defendants' marketing was not designed to "tell[] you about the person stuck in the mud," even if that person represented 90 percent of all Drivers. (Appx. 3206; Appx. 2449.) During the class period, Defendants' websites never disclosed their significantly high turnover rate or Drivers' low income average.[33] Defendants have since removed the substantive content about their IC program from their websites. (*See* http://www.crengland.com/driver-services/independent-contractors-program, last accessed November 11, 2013.)

2. Uniform Misrepresentations by Recruiters

After a driver candidate's application was submitted, C.R. England recruiters based in Utah or Indiana would follow up with the applicants, primarily by telephone.[34] (Roberts Dec. ¶¶

[32] Defendants intentionally concealed the negative experiences endured by 9 in 10 Drivers in order to maximize sales of the Driving Opportunity. (Appx. 3046-3047.)

[33] The C.R. England website also repeated the promise made in the STA of a guaranteed a job upon successful completion of the driving school. (Appx. 8, 732, 2307-2319; *see also* Roberts Dec. ¶ 6; McKay Dec. ¶ 8; Cavezas Dec. ¶ 3; McClintic Dec. ¶ 4.)

[34] According to Cathy Mattan, because their pay was tied directly to aggregate numbers of individuals brought into the system, "[t]his incentivized … recruiters … to aggressively sell the applicants in as little time as possible to get them to enroll in the driving school. We did this by heavily touting the income and other 'advantages' of coming to C.R. England that were described in the materials as well as the various techniques we were taught to close the applicants." (Mattan Dec. ¶ 8.)

7, 9; McKay Dec. ¶¶ 9, 10; Cavezas Dec. ¶ 3; McClintic Dec. ¶ 3; Mattan Dec. ¶¶ 2, 7.[35]) Defendants mandated [redacted][36] (Appx. 1405; *see also* Mattan Dec. ¶ 6.) From this first contact, recruiters would begin the process of pushing prospects into the Driving Opportunity through carefully choreographed interactions.

The Master Recruiter Training Documents contain a script of what the recruiter is required to communicate to the applicant "verbatim" in every permutation of phone and email scenarios. (Appx. 1405; Mattan Dec. ¶ 5 ("During my training in Salt Lake City, I was trained on how to be a recruiter for C.R. England. I was trained from a recruiting manual and/or guidebook containing talking points and tips to use when talking to an applicant. In the manual, there were scripts and instructions on how to get applicants into the driving schools, what to tell them over the telephone, and how to overcome any objections the applicant might have.").) As part of the pitch, the applicant is baited with the promise of a guaranteed company driver job, but recruiters are also instructed to aggressively promote the Driving Opportunity as a superior "career" option to company employment.[37] (Appx. 1380; Roberts Dec. ¶¶ 6, 19; McKay Dec. ¶¶ 8, 10; Cavezas Dec. ¶ 4; McClintic Dec. ¶ 4.)

[redacted]

[35] Cathy Mattan may have been the only recruiter that worked outside of Salt Lake City, Utah. (Mattan Dec. ¶ 2.)
[36] C.R. England takes the application tracking process seriously to ensure that applicants are promptly contacted. (*E.g.*, Appx. 1332, 1342, 1405.) Defendants maintained goals as high as 4,000 new applicants and 500-plus new students per week. (Appx. 1350, 1364.) In 2012 and 2013, Defendants sought to "hire" 10,000-13,000 new Drivers. (Appx. 3007-3008.)
[37] [redacted] (Appx. 1525.)

[redacted] (Appx. 1405; *see also* Mattan Dec. ¶ 5.) [redacted]

[redacted]"[38] (Appx. 1426; *see also* Appx. 3165 (discussing the Defendants' use of talk tracks, i.e., "a standard script that we want sales reps to follow that is more geared around overcoming objections, helping to clarify, answering questions, things of that nature."); Mattan Dec. ¶¶ 5, 8.) Recruiters are then instructed to close by arranging a date certain for the applicant to arrive, by providing a free Greyhound bus ticket for the applicant to come to school, if necessary. (*E.g.*, Appx. 44, 1342; Roberts Dec. ¶¶ 10, 11; McKay Dec. ¶ 11; Cavezas Dec. ¶ 6; McClintic Dec. ¶ 6; Mattan Dec. ¶ 6.)

Recruiters were consistently instructed to state the average weekly miles for a solo lease operator at between [redacted].[39] [redacted] (Appx. 2680; Appx. 1380, et seq. at 1382.) By [redacted]. (Appx. 45.) [redacted]

(Appx. 1588-1615.) It was likewise reinforced in the Lease Program FAQ's pro forma of 3,250 weekly miles[40] (Appx. 1073, 1330, 1574), which was created on January 12, 2010 and distributed through at least September 13, 2010. (Appx. 1574.) Defendants have conceded in depositions in this case that these pro formas were inaccurate, with Michael Fife testifying that

[38] [redacted]
(*See, e.g.*, Appx. 1435, 1449.)

[39] As one recruiter stated, "I recall that we were instructed not to vary from the script and materials provided and that we were supposed to make consistent income and mileage promises to the applicants in order to avoid having drivers at the schools having heard different things." (Mattan Dec. ¶ 8.)

[40] Deponents have suggested that this presentation was not shown to Drivers, only to recruiters. Either directly or through the recruiters, this information was meant to find its way to prospective Drivers.

the mileage representations in the Lease Program FAQ presentation **"would certainly not give a realtime view of what mileage was in 2010, if that's when it was shown[.]"**[41] (Appx. 3183 (emphasis added).)

Significantly, recruiters never informed prospective students that jobs as company drivers may not be available, nor did Defendants disclose Drivers' high turnover rates or low average income. (Roberts Dec. ¶¶ 8, 27; McKay Dec. ¶ 10; Cavezas Dec. ¶ 4; McClintic Dec. ¶ 5.)

B. Inducing Drivers to Buy the Driving Opportunity through Uniform Misrepresentations in School, Orientation[42] and Training

Defendants established "policies and practices to aggressively push the lease program on students from the very first days they are enrolled in school." (Burr Dec. ¶ 5; Appx. 4195 [redacted].) These policies and procedures included a standard way of selling the Driving Opportunity. (Appx. 2424; Appx. 3165.) In fact, Defendants were highly concerned about uniformly communicating "the right message" to the Drivers. (Appx. 2431; Appx. 3165 ("…a standard script that we want sales reps to follow … [s]o we are all kind of **singing from the same hymn book**, if you will.") (emphasis added).) The core promises used to lure Drivers into the Driving Opportunity were reduced to an actual written script. (*See, e.g.*, Appx. 19, 474; Appx. 3165; Appx. 4161 [redacted]

[41] Exhibit 331 (Appx. 1574) is the same PowerPoint presentation as Exhibit 256 (Appx. 1073; Appx. 3009). Exhibit 331 contains the metadata on the last page and is an easier copy to read, but the contents of the PowerPoint are the same. Mr. Fife's testimony came from review of the version marked as Exhibit 256.

[42] Orientation occurs after students pass their driving test and have secured their CDL and before they begin Phase 1 training. (Burr Dec. ¶ 6; Cavezas Dec. ¶¶ 8-9; McClintic Dec. ¶¶ 10-11.) Every Driver attended Defendants' orientation class. (Appx. 3069, 3028-3030; Burr Dec. ¶ 7; Appx. 4013.)

[redacted].) Despite knowing that the information they were providing was false and misleading, Defendants nevertheless adopted a highly-coordinated, multi-pronged and uniform approach to coerce students into buying the Driving Opportunity through the use of consistent written materials, classroom PowerPoint presentations and scripted oral communications. (Bilbo Dec. ¶ 7; Burr Dec. ¶ 9.)

1. Defendants' instructors made uniform false statements to students.

Defendants' driving school instructors consistently and uniformly promoted the Driving Opportunity and attempted to minimize the appeal of company driving positions. (Roberts Dec. ¶ 15; McKay Dec. ¶ 14; Cavezas Dec. ¶ 7; McClintic Dec. ¶¶ 9-10; Burr Dec. ¶ 10; TAC ¶¶ 36-39, 45.) [redacted]. (Appx. 1312, 1314, 1325.) Relying on Defendants' representations[43], Drivers reasonably believed (while in school and at orientation) they would be able to exercise their choice to become company drivers upon completion of training. (Roberts Dec. ¶¶ 17, 19; McKay Dec. ¶¶ 13, 16; Cavezas Dec. ¶¶ 7, 9, 11, 15-16; McClintic Dec. ¶¶ 15, 17.) Yet it was commonplace for Drivers to later be told that no company positions were available. (Appx. 1049; Roberts Dec. ¶¶ 20, 22; McKay Dec. ¶ 17; Bilbo Dec. ¶ 9; Cavezas Dec. ¶ 16.) As Plaintiff McKay recalls it: "Defendants specifically told me and other Drivers that while trucks for company drivers **were not available**, if I or others signed a two or three-year program, that trucks **were available** and we could begin immediately. Otherwise, Defendants told me and other Drivers that … we would have to wait." (Lead Plaintiff Kenneth McKay's Declaration in Support of Opposition to Defendants' Motion to Dismiss or Transfer ¶

[43] Defendants have admitted that Plaintiffs (and all Drivers) had a right to rely on this information. (*See, e.g.*, Appx. 3325-3329, 3231-3242; 3139, 3367-3387.)

14, Dkt. 22.) Roberts had a similar experience: Defendants "told us that Driving Opportunity purchasers would get trucks right away, along with an immediate $400 signing bonus, whereas company drivers would **have to wait** for a truck." (Lead Plaintiff Charles Roberts' Declaration in Support of Opposition to Defendants' Motion to Dismiss or Transfer ¶ 16, Dkt. 23.)

In short, Defendants' misleading statements about the availability of company trucks[44] and life in the Driving Opportunity induced thousands of drivers[45] to sign the VLA and ICOA.[46] Indeed, Defendants' misleading statements are borne out by the testimony of one of C.R. England's orientation instructors, Vickie Burr: "I was … aware that students at the C.R. England school were being promised jobs when they were going into school. I know this because students told me this. I also know that students did not know that they were going to be steered into the lease driver program. C.R. England told students that they would get a certain amount per mile as well as the mileage fuel surcharge but were never given the accurate information for them to understand what they were really getting into. C.R. England never provided students with accurate information about the lease driver program that would allow them to understand the truth: ***that they were going to make less money than the company driver would, if they made any money at all***." (Burr Dec. ¶¶ 11-12 (emphasis added).)

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[44] [redacted] (*See* Appx. 1317; Appx. 4219.)

[45] Between January 1, 2008 and December 19, 2012, 14,708 Drivers purchased the Driving Opportunity. (Appx. 5005, Interrog. No. 1.)

[46] Drivers were rushed through the contract signing process without adequate time to review the agreements and left to rely on the previous false representations they had heard from Defendants' representatives. (Roberts Dec. ¶ 24; McKay Dec. ¶¶ 19-20; Cavezas Dec. ¶¶ 21-22; McClintic Dec. ¶ 21.) C.R. England's Jim MacInnes, the Director of IC Compliance and Administration in the IC division (Appx. 1059), conceded that "it would be a unique individual that took the time to thoroughly understand the contracts and what he was signing. And the general population didn't do that. And **I'm sure that there was pressure from home to start sending home a paycheck**, for whatever the reason." (Appx. 3267.) Of course, one reason Drivers had pressure to send home a paycheck was that they were paid nothing in school and only a small amount in training while having to keep up with their personal financial obligations. (Roberts Dec. ¶ 22; McKay Dec. ¶ 19; Cavezas Dec. ¶ 17; McClintic Dec. ¶ 19.)

2. Program Brochures touting the Driving Opportunity contained misrepresentations.

Program Brochures describing the Driving Opportunity were another source of uniform misrepresentations distributed by Defendants.[47] (*See, e.g.*, Appx. 111, 118, 2326-2360.) These materials included (i) a cover page touting "the best pay in the industry," "[s]uccessful business plan with mentoring and support staff," and "an average length of haul of 1,500 miles"[48]; (ii) pro formas; and (iii) frequently asked questions and answers thereto. (*See, e.g.*, Appx. 2326, 2332, 2360.) The Program Brochures were left on the reception desk at the Horizon locations. (Appx. 3348-3349.) They were initially created by Bud Pierce in 2000 and, thereafter, were maintained by the IC Division. (Appx. 3347-3348.) Defendants continued producing and making available the Program Brochures into 2011. (Appx. 2326; Appx. 3207-3217, 3117.)

Like so many other[49] of Defendants' written materials about the Driving Opportunity, the Program Brochures misrepresented[50] the miles available to Drivers. For instance, the December 22, 2005 Program Brochure represented solo weekly mileage of 3,330 and team mileage of

[47] Defendants have produced brochures under titles of "The C.R. England Lease Program," "The C.R. England Independent Contractor Program," and "The Horizon Truck Sales and Leasing Independent Contractor Program."

[48] Defendants advertise an average length of haul between 1400 and 1500 miles. (*See* Appx. 44.) This same representation is found in the "C.R. England Master Recruiter Training Documents and Process Outline." (Appx. 1463.) On page 1 of the July-August 2006 RoundTable Newsletter, Mike Leavitt's article states "England has consistently provided a longer average length of haul than other carriers in the industry." (Appx. 4352; *see also* Appx. 1463 ("an average of 1500 miles per trip (the longest length of haul in the industry).").) The length of haul representations are misleading because "[m]iles and trip pay rates paid are based on the total length of the trip and not individual trip segments." (Appx. 1767.)

[49] [redacted] Defendants included written misrepresentations about mileage during the class period in a number of other sources, including in Program Brochures (Appx. 111, 118, 2326-2360); website pro formas (Appx. 118, 732, 2307-2316); the "Miles" graph contained in every version of the EBG and early versions of the Equinox Business Guide, which depicted more than 2,800 miles per week on average (Appx. 142; 1652; 1751; 1761; 1828; 1832; 1834; 1836; 1838; 1840; 1842; 1844; 1846; 1848; 1851; 1854; 1857; 1860; 1863; 2874); similar graphs contained in CAT Modules (Appx. 79; 378; 386; 2083; 2170; 2194; 2239; 2278); Business 101 presentations during phase upgrades in training (Appx. 529, 537, 549, 550, 617, 626, 638, 639, 647-650, 656-658); and the Lease Program FAQ presentation. (Appx. 1073, 1330, 1574.)

[50] The Frequently Asked Questions section of the Program Brochures contains still more misrepresentations. For example, one FAQ in the Program Brochure purports to answer the question of "how much does a lease cost" but fails to include the variable mileage payment (discussed at length in Section IV.C., *infra)* in that explanation. (Appx. 111, 734, 2320-2360.)

5,800. (Appx. 2326.) The March 30, 2009 version contained references to solo mileage of 3,000 per week and 5,500 for teams (Appx. 2360), while the August 19, 2010 version advertised solo mileage of 3,000 per week and 5,100 per week for teams. (Appx. 4004-4005.) [redacted]. (*See, e.g.*, Appx. 1099; Appx. 4168.) The true number of miles being driven by ICs at the time[51] were the ones handwritten on the August 19, 2010 Program Brochure by Alisha Garrett [redacted] (Appx. 3209-3210; *see also* Appx. 4155; Reeve Dec. ¶ 6, "My experience was that a driver would need 'the stars to align' to get to 3,000 miles in a week. I do not recall that being a regular occurrence for any drivers.")[52] As is seen in these examples, Defendants were always aware of the real income, mileage and turnover statistics; they simply refused to share them with Drivers.

3. Misrepresentations in the England Business Guide and Equinox Business Guide[53]

At orientation, Defendants provided the England Business Guide ("EBG") to **every** Driver.[54] (Burr Dec. ¶¶ 8-9; Appx. 3404-3405, 3027-3208 ("The practice was that everybody who went through orientation would receive a Business Guide.").) And all Drivers went through orientation. (Appx. 3029 ("So, yes, generally, anybody who was going to become an independent contractor working with England would go through orientation.").) C.R. England

[51] [redacted] (Appx. 729; Appx. 3210.)

[52] Mr. Reeve also stated, "The most common complaint I heard from lease [drivers] from 2005 to 2007 as well as between 2009 and 2011 was that they were not getting the miles or income that they were promised by C.R. England." (Reeve Dec. ¶ 7.)

[53] Plaintiffs seek certification of a subclass under the RICO, UPUA and fraud claims consisting of Drivers who purchased the Driving Opportunity during the period in which Defendants used the EBG. (*See* Argument, Section III.B.3., *infra*.) Like the STA subclass, this subclass also numbers in the thousands. (Appx. 5005, Interrog. No. 1.)

[54] The EBG's were transmitted to the various schools using FedEx and UPS. (Appx. 3026.)

intended the EBG (as well as Business 101 and the CAT materials) to provide information to the prospective drivers upon which they could rely. (*See, e.g.*, Appx. 3325-3329, 3231-3242, 3140, 3367-3387.)

The EBG uniformly misrepresented mileage and income to the entire putative class between November 2006 and at least July 2010.[55] (Appx. 3027-3028, 3404-3405; Burr Dec. ¶ 8; Cavezas Dec. ¶ 8 and Exh. A; McClintic Dec. ¶ 11 and Exh. B.) One former orientation instructor explained that the "England Business Guide was the main reference material that was used in the orientation instruction that I gave and based on my understanding of England policies and procedures, this was standard in the orientation classes given [at] all of C.R. England's other schools." (Burr Dec. ¶ 9.) The EBG was also "heavily used" in the Business 101 presentations given to trainees who had come in for upgrades. (Bilbo Dec. ¶ 7.) The clear message of the EBG and the Business 101 presentations was that lease drivers earned more money[56] than company drivers. (Bilbo Dec. ¶ 7; Burr Dec. ¶ 9.)

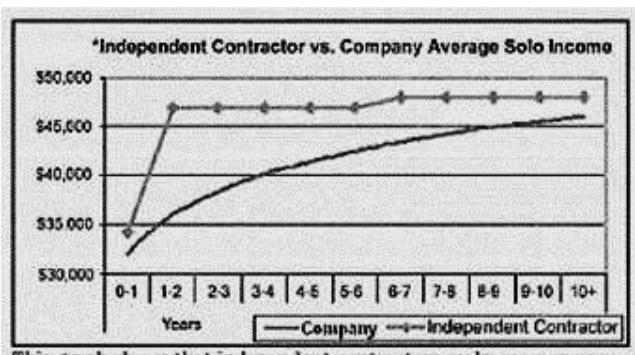
[redacted] (Appx. 1309.) Equinox Owner-Operator Solutions, another England Empire entity, took over responsibility for the EBG and Business 101 courses [redacted] (Appx. 1309; Appx. 3153.) The earliest versions of the Equinox Business Guide contained the same material as the EBG. (*Cf.* Appx. 1640, 1864.)[57] The following graphs containing factual representations

[55] The EBG replaced an earlier version of a guide that apparently was used for similar purposes. (*See, e.g.*, Appx. 270.) Due to a discovery dispute involving how far C.R. England must reach back for documents and information, Plaintiffs do not know if they have received all prior versions of that document.

[56] Defendants consistently represented to prospective Drivers that "studies" of C.R. England ICs show that they "Make more money", "Drive more miles", and "Drive better equipment" in CAT Modules, EBGs, Equinox Business Guides, and Independent Contractor Reference Guides. (*E.g.*, Appx. 78, 1250, 1651, 1760, 2169, 2193, 2278; McKay Dec. ¶ 12 and Exh. A; Cavezas Dec. ¶ 8 and Exh. A.)

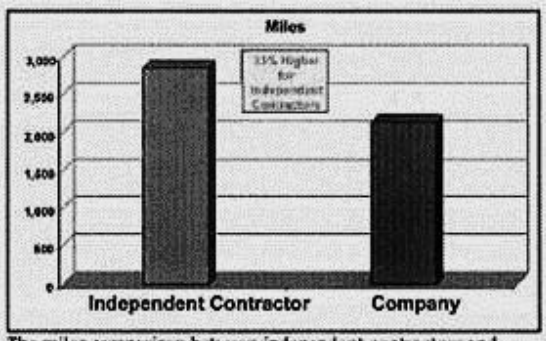
[57] In late 2010, Defendants divided the Equinox Business Guide into two documents – a smaller Equinox Business Guide and one entitled "Running with C.R. England Global Transportation: Independent Contractor Reference Guide" (the "Independent Contractor Reference Guide" or "IC Reference Guide"). (*E.g.*, Appx. 1972, 1231.)

about ICs under the Driving Opportunity as compared to company drivers are found in all 19 versions of the EBG and the early versions of the Equinox Business Guide used between November 2006 through at least November 2010[58]:

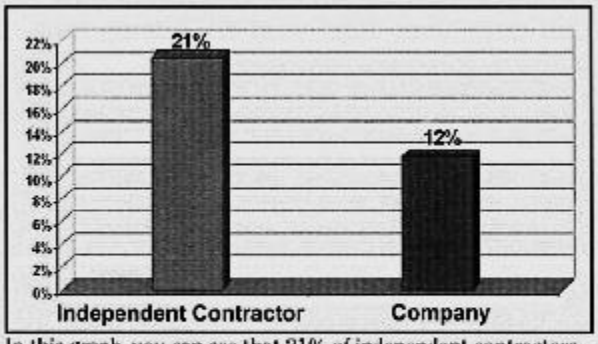


This graph shows that independent contractors make more money, faster than company drivers do.

*(Pre-tax / After Business Expense Figures)



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.



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.

The graphs make factual representations purporting to show average income for solo IC and company drivers, the average weekly solo miles for solo company and IC drivers, and the percent of IC and company drivers earning over $50,000. But the underlying data from which the graphs were formed was badly out of date and depicted a Driver experience that hadn't been realistic or representative ***for years, if at all***. The only study Defendants point to as supporting

[58] The only difference in the presentation of these graphs is the addition of the note "Pre-tax/After Business Expense Figures" beginning in version 5.0 of the England Business Guide. (Appx. 1843; Appx. 3070.)

the factual representations in the graphs is [redacted] (Appx. 6007, [redacted]), which reflects cherry-picked data from 2003. (Appx. 5017-5020, Interrog. Nos. 12-13.)

John Ringer, who oversaw the EBG while employed in the IC Division, testified that he knew the graphs were in need of update, yet Defendants failed to do so in ***eighteen (18) separate revisions***[59] of the EBG between 2006 and 2010. (Appx. 3367-3387; Appx. 1751 and all exhibits referenced therein; Appx. 2026; Mahla Dec. ¶ 13(b).) As Vice President of the IC Division from 2002 through approximately June 2009 (Appx. 3091), Josh England was the person ultimately responsible for the content of the EBG. (Appx. 3072.) At deposition, Mr. England downplayed the importance of the graphs being correct, suggesting that it didn't matter if they were accurate so long as their underlying "point remains valid":

> The statement that these graphs are making – you know, they're making the point. And that point remains valid. And even if the – you know, you look at the miles one, and yet perhaps the – exactly where the bar would have hit the chart would change slightly, over time. I think the overall point that's being made here is that ICs tend to run more miles than company drivers. And that remains true today just as it was then.
>
> In retrospect, could we have – **could we have updated the studies more frequently? Yes.**

(Appx. 3072, *see also* 3367-3387.) First, Mr. England's contention that the IC mileage bar "would change slightly" with updated data is an understatement — the use of updated, accurate data would have resulted in a [redacted] to the IC mileage bar represented in the graph. (Appx. 4168.) Second, his concession that the studies should have been updated "more frequently" is misleading because ***the studies and representations made to Drivers were never***

[59] Defendants made frequent substantive edits to the EBG (Appx. 3361-3366; Appx. 2026), though graphs remained unchanged despite the existence, collection, and repeated analysis of data that clearly showed them to be false. (*See, e.g.*, Appx. 3369-3387, 3319-3324, 3174-3182; Mahla Dec. ¶ 13(b).) Moreover, the source data was collected in 2003 and allegedly last updated in 2005 (Appx. 3074) — before radical changes to the program made those old numbers not only irrelevant but also false.

updated. (Appx. 1752.) And third, the "point" that ICs drive more miles than company drivers cannot be "valid" unless, as is suggested below the graph, "more miles can mean more money" for ICs. As is analyzed in detail in Factual Background, Section IV.A., *infra*, due to the high additional costs borne by ICs, even though they ran more miles than company drivers, they earned less.[60] (*See, e.g.*, Appx. 1129, 2403-2417; Burr Dec. ¶ 12.)

Plaintiffs have tendered evidence that these uniform financial misrepresentations by Defendants carry through all 19 versions of the EBG, early versions of the Equinox Business Guide, and the CAT Training Modules.[61] (Appx. 132, 258, 362-384, 394, 418-462, 740, 1751-1864, 2027-2270.) While Defendants knew or should have known[62] that those representations were false, the graphs (and similar statements) were published and held out as accurate, without update, through at least November 2010. Although Defendants ceased use of the EBG and its misleading graphs, the underlying false representations regarding Driver income and average miles continued during the pendency of this case in Program Brochures, website pro formas and [redacted]. (Appx. 1073, 1330, 1405, 1588-1615.)

(a) Average Income Comparison for Solo Drivers Graph

Looking closer at each of the three graphs, the one depicting a comparison of income between solo ICs and company drivers (the "Solo Income Graph," upper left on page 25 above)

[60] Defendants have consistently misrepresented, both orally and in writing, that Drivers make more money and drive more miles than company drivers. (*E.g.*, Appx. 79, 269 (Question 6); Appx. 748 and all subsequent versions of the EBG; Appx. 1250; Roberts Dec. ¶ 15; McKay Dec. ¶¶ 14, 19; Cavezas Dec. ¶¶ 4, 7, 12; McClintic Dec. ¶¶ 9-10, 18, 23.)

[61] The graphs were also inserted into at least 24 versions of the CAT Training Module (Appx. 2027) that were also provided to each Driver in training prior to purchasing the Driving Opportunity. Although the Average Solo Income graph varied slightly (for a short period) from the one found in the EBG, it was also based on outdated studies and not updated as Defendants published new versions of the CAT Modules. (*See* Appx. 2027 and all referenced CAT Modules.)

[62] Despite the mountain of contrary evidence Defendants had in their possession, Josh England stubbornly maintained during his testimony that "our intention is always to have accurate representations [in the graphs]. And at no time have we felt that those were inaccurate representations." (Appx. 3082.)

is noteworthy for its spike in Driver income between years 1 and 2. Josh England explained that this was the result of ICs moving from a standard lease (the VLA at issue in this case) to a "Premier" lease, which had more favorable terms. (Appx. 3077-3079, 3085-3086.) The EBG fails to disclose that the reason for the sharp increase in year two IC income was not simply a factor of time (as the graph implies), but rather was tied to the more favorable economics of the "Premier" and "Master Premier" leases[63], [redacted] (Appx. 4037 [redacted]) The latter versions of the EBG also did not point out that the "Premier" and "Master Premier"[64] programs ***ended on April 1, 2008***. (Appx. 4353; *see also* Appx. 2704-2710.) Although the program on which that income assumption was based expired over two years earlier and was not an option for Drivers, Defendants continued to use this graph until November 2010.

The origin of the Solo Income Graph appears to be [redacted] (Appx. 6007) and related documents. (Appx. 3075-3076.) The document containing the information depicted in the graph [redacted].[65] (Appx. 4133.) [redacted] (Appx. 4138.) [redacted]

[63] ICs who signed Premier or Master Premier leases are only part of this Class during the period of their standard VLA and not the time of their Premier and/or Master Premier leases.

[64] Another reason that the Solo Income Graph is false and misleading is that it does not account for increases in the variable mileage payment over time. (Appx. 3296, 3303.) "Premier" and "Master Premier" drivers did not pay the variable mileage payment. (Appx. 3304-3305; Appx. 757.)

[65] This document was produced **after** the May 16, 2013 Rule 30(b)(6) deposition on the graphs contained in the EBG. As a result, there has not yet been deposition testimony from Defendants' corporate designee about [redacted] (Appx. 4133-4138.)

[redacted] (Appx. 6007) [redacted][67]

In short, the IC income representations Defendants made in the EBGs from 2006 to 2010 were based on [redacted] Defendants then dropped that data in the form of a graph into their primary written reference book on the Driving Opportunity – the England Business Guide – and over 19 versions and more than four years later, continued to use it to mislead every Driver into thinking that those results, based upon outdated and cherry-picked data, were still achievable.

(b) Weekly Mileage Graph

The Weekly Mileage Graph (upper right on page 25 above) shows Drivers averaging approximately 2,800 miles/week. Josh England confirmed that the data in this graph was pulled either from [redacted] (Appx. 6007) or [redacted] (Appx. 6009). (Appx. 3081.) [redacted] (Income Comparison Worksheet), [redacted] (Average Weekly Solo Miles

[66] [redacted] (Appx. 6007, "Data Lease" sheet.)

[67] This is also seen on the version of the Solo Income Graph found in the March 5, 2007 CAT Training Module. (*See* Appx. 4020.) This booklet came out between Version No. 2 (Appx. 1761) and No. 3 (Appx. 1828) of the EBG, but each contain a Solo Income Graph showing earnings between $45,000 and $50,000 for lease drivers instead of between $50,000 and $55,000 as shown in CAT Training Module (Appx. 4020) [redacted] (Appx. 4018).

graph). [redacted] (*See*, *e.g.*, Appx. 1099; Appx. 3013-3017.)

According to records produced and maintained by Defendants, average weekly solo miles for an IC [redacted] (Appx. 2710; *see also* Reeve Dec. ¶ 6 ("The goal of the operations department was to raise the solo average to 2,500 miles per week, but I do not recall regularly meeting that goal.").) Solo ICs in the National (over-the-road) division averaged [redacted] billed miles and [redacted] empty miles per week in [redacted][68] (Appx. 4187), and an internal presentation on leasing made that same month showed that solo lease operators actually averaged [redacted] miles per week from [redacted] (Appx. 4141.) Nevertheless, Defendants persisted in using the false Weekly Mileage Graph in every version of the EBG and elsewhere.

(c) Percentage of Drivers Earning More Than $50,000 Per Year Graph

This graph (shown below the other two on page 25 above) falsely represents that "21% of independent contractors make more than $50,000 a year." It is based on the same stale data compiled in 2003-04 before Defendants changed their business model. (Appx. 5018-5019, Interrog. No. 13, referencing DEF00066217 (Appx. 6007); Appx. 3081; Appx. 6007-6012; Appx. 2025; Appx. 4134.) To earn $50,000 per year, a driver must make an average of $961.54

[68] [redacted] Former Operations Manager Rob Reeve recalled that approximately 2,000 miles per week was the average for solo lease drivers "from when the lease push began in 2005 through when I left the company in 2007 and again when I was with C.R. England from 2009 to 2011." (Reeve Dec. ¶ 6.)

(rounded) per week over 52 weeks. Defendants' own internal analysis of Driver data reveals that almost no one achieved this level of success in the Driving Opportunity.[69]

[redacted]

[69] This was not a recent development. [redacted]

[71] Josh England said of the $50,000 annual income graph: "I very much believe that that was accurate then, and has been accurate all throughout." (Appx. 3082-3083.) He continued, "we believe that it was an accurate representation at the time. At no time have we felt that that was inaccurate." (Appx. 3083-3084.)

[redacted]

[redacted]

[redacted]

[redacted]

As established above, and contrary to the testimony of Josh England, Defendants' representations in the fifty-thousand dollar earners graph are untrue and have been throughout the class period.

4. Uniform misrepresentations continue in Phase 1 and Phase 2 training and upgrades

Drivers move immediately into Phase 1 training after orientation. (Burr Dec. ¶ 6; Roberts Dec. ¶ 16; McKay Dec. ¶ 12; Cavezas Dec. ¶ 9; McClintic Dec. ¶ 11-12.) While in training, the drivers receive Driver Pay Statements, the same as C.R. England employees. (Appx. 3294-3295.) Phase 1 generally lasts approximately 4 weeks. (Roberts Dec. ¶ 16; McKay Dec. ¶¶ 12-13; Cavezas Dec. ¶ 10; McClintic Dec. ¶ 12.)

In Phase 1 training, the student typically goes over-the-road with an IC in a two-person truck. (Roberts Dec. ¶ 13; McKay Dec. ¶ 12; Cavezas Dec. ¶ 10; McClintic Dec. ¶ 12.) The Defendants' company line is that the program benefits the trainee because they gain experience and learn from a more seasoned driver[72] while the trainer has the benefit of driving team without an even pay split. (*E.g.*, Appx. 1752.) The reality is that the Phase 1 trainer may have only a few weeks more experience than the trainee because a driver who completes training and enters

[72] At times, the trainee actually had more experience than the trainer. (McClintic Dec. ¶ 15.)

the Driving Opportunity is automatically eligible to be a trainer. (Roberts Dec. ¶ 26; McKay Dec. ¶ 22; *see also* Cavezas Dec. ¶ 25 ("I had no desire to be a trainer and did not feel qualified to train other drivers.").) Trainers are also required to present the Driving Opportunity in a positive light to the trainees: "The Trainer must display a positive attitude toward C.R. England, the training program, the C.R. England lease program…." (Appx. 4007.)

Following Phase 1, the trainee comes back to a C.R. England facility for the Phase 1 Upgrade. (Roberts Dec. ¶ 16; McKay Dec. ¶ 13; Cavezas Dec. ¶ 10; McClintic Dec. ¶ 14; Bilbo Dec. ¶ 3.) Defendants continued to push the Driving Opportunity in required "Business 101" presentations to all trainees.[73] (*See, e.g.*, Bilbo Dec. ¶ 5; Appx. 525.) Business 101 involves a scripted PowerPoint presentation and discusses "Your Trucking Company" and the components of your trucking business. (Appx. 561.) Upgrade instructors for the Business 101 presentation "were required to follow the curriculum set by C.R. England and had to follow the PowerPoint slides, which were in essence the script that we had to follow." (Bilbo Dec. ¶ 6.) Instructors "could not add or skip slides during the presentations" and "were not permitted to deviate from the PowerPoint or the books provided to the students like the England Business Guide with the gold cover." (Bilbo Dec. ¶ 6.) Instructors were constantly monitored by C.R. England management to ensure compliance. (Bilbo Dec. ¶ 6.)

Following Phase 1 upgrade, the student trainees head back out on the road with a new trainer for Phase 2. (Roberts Dec. ¶ 18; McKay Dec. ¶ 15; Cavezas Dec. ¶ 13; McClintic Dec. ¶ 15.) In Phase 2 of driver training, trainees are provided with the "CAT" (Career Advancement Training) Modules that they are required to study and to be tested on while on the road in Phase

[73] In addition to attending the Business 101 presentation and hearing the benefits of the IC program while there, trainees had to attend and complete a series of meetings, programs, quizzes, and driving tests to be upgraded into Phase 2. (Roberts Dec. ¶ 17; McKay Dec. ¶ 14; Cavezas Dec. ¶ 11-12; McClintic Dec. ¶ 14.)

2. (Appx. 3031.) These Modules had the same basic graphs and factual representations found in the EBG. (Appx. 2027.)

Defendants required trainees to meet and/or communicate with C.R. England training coordinators or Horizon sales representatives who would try to sell them the Driving Opportunity. (Appx. 3164-3166.) [redacted] *see also* Appx. 3402 (during Phase 2 upgrade "a Horizon rep will talk to you about your options, your independent contractor options[.]").) [redacted]

[redacted]

(Appx. 4144.)

[redacted]. (Appx. 1326.) [redacted] (*Id.*) [redacted] (Appx. 2426.)

[redacted] (Appx. 1049, 2424.)

[redacted] (Appx. 2435.) [redacted] (*Id.*) [redacted] (Appx. 1049.) [redacted] (*Id.*) [redacted] (Appx. 2541.)

Significantly, Phase 2 trainees are paid only $0.12 per mile during the time they are on the trainer truck. (*E.g.*, Roberts Dec. ¶ 18 and Exh. A; McKay Dec. ¶ 15 and Exhs. B, F; Cavezas Dec. ¶ 13 and Exh. B; McClintic Dec. ¶ 16 and Exh. C.)

As part of the design of the scheme, Drivers are brought to either Salt Lake City, Utah or Burns Harbor, Indiana for Phase 2 upgrades regardless of where they began with C.R. England. (Bilbo Dec. ¶ 5.) This is because those are the facilities with Horizon trucks ready to go.[74] (*Id.* ¶ 5.) [redacted] (Appx. 1052.) [redacted]

[74] Horizon only has these two locations. As of at least November 11, 2013, the Horizon Truck Sales and Leasing website (www.horizontrucksalesandleasing.com) no longer references the Burns Harbor, Indiana location.

[redacted] (*Id.*)

In the end, the pressure and precision of Defendants' deceptive and manipulative sales tactics were enough to convince Drivers to abandon their hopes of company employment and cast their lots as ICs. Although it was hardly their "choice" to make, it would have disastrous consequences for Drivers, as is detailed in the following section.

IV. Life in the Driving Opportunity

A. Saddled with Low Pay and High Costs, Drivers Struggle (and Fail) to Survive.

[redacted] (*See, e.g.*, Appx. 19, 474; Appx. 3165; Appx. 4161.) [redacted] (Appx. 3356; Appx. 6006 at Row 67.) [redacted] (Appx. 6006 at Row 71.) [redacted][77], [redacted]

[75] [redacted]

[76] National and Mexico is the largest division for solo drivers and makes up the category known as "Over-the-Road."

[77] [redacted]

[redacted] (Appx. 4088, [redacted].) As one driver manager lamented in 2008: "I personally look at everybody who makes less than three hundred dollars a week as an issue. ***But if we have 20% of our lease operators not making a paycheck week to week, what does that tell ya? One in five is not making a paycheck, that's a high percentage.***" (Appx. 1034 (emphasis added).)

Defendants had uniformly represented for years that ICs earn more than company drivers. (*See e.g.*, Appx. 19, 474; Appx. 3165; Appx. 4161; Roberts Dec. ¶¶ 15, 21; McKay Dec. ¶¶ 14, 19; McClintic Dec. ¶¶ 9-10; Cavezas Dec. ¶¶ 7, 12.) That wasn't true, either. (Roberts Dec. ¶¶ 25-26 and Exh. A; McKay Dec. ¶ 18 and Exh. F; McClintic Dec. ¶¶ 24-27; Cavezas Dec. ¶¶ 26-27; Burr Dec. ¶ 12; *cf.* Appx. 1129, 1633, 2403-2417.) The reasons why ICs fared so poorly in comparison to company drivers are plain: high costs, low pay[78] and insufficient miles. When drivers are company employees, C.R. England pays the truck payment, fuel expenses, insurance, tax withholdings, FICA, truck maintenance, and permits. (Appx. 3257-3259, 3338-3339.) [redacted][79], [redacted]

[redacted] (*See, e.g.*, Appx. 6001 at Rows 102-105; McClintic Dec. ¶¶ 24-27 and Exh. C.) [redacted]

[78] [redacted]

(*See, e.g.*, Appx. 1129, 2403-2417.) [redacted] [redacted].[80]

Defendants do not dispute that the single most important factor in determining Driver income is miles driven.[81] (*E.g.*, Appx. 3266, 3316.) As was discussed in depth in the preceding sections, for years, Defendants represented that solo IC drivers average between [redacted] miles per week (*e.g.*, Appx. 45), though the true numbers were much lower. (*See, e.g.*, Appx. 6001; Appx. 330, 488, 492, 529, 550; Appx. 4168, 4177, 4179, 4181, 4183, 4185, 4187, 4189, 4191; Reeve Dec. ¶ 6.) [redacted] (Appx. 1099; *see also* Appx. 3013-3017.) [redacted]

[80] [redacted]

[81] Despite the significance of miles driven in the Driver income formula, Defendants' approach to calculating it is flawed. Defendants calculate mileage for paying drivers not as the actual distance, but as the distance listed in the Rand McNally Household Mileage Guide (*see, e.g.*, Appx. 1767), which cannot account for common occurrences such as detours that force Drivers to spend extra time (and to burn extra fuel) on the way to their destinations.

[82] [redacted] *see also* Reeve Dec. ¶ 4 ("When there was a choice among trucks to assign a load to, the priority was: 1. Lease teams (trainers with a trainee counted as teams); 2. company teams; 3. lease solo drivers; and 4. company solo drivers.").) [redacted] (Appx. 1732.)

[redacted]

[redacted]

[redacted]

(Appx. 4168[redacted]).) [redacted]

[redacted]

[redacted] (Appx. 1625.)

[redacted]

[redacted]

[redacted]

[redacted]).)

B. Defendants Continue to Sell a "Broken Model."

With the gulf between what Defendants were representing to Drivers and what they knew ICs were actually receiving from the Driving Opportunity widening, some within the Empire began to struggle with how to keep selling it. [redacted]

[redacted]

[redacted]

[redacted]

(Appx. 2449 (emphasis added).) [redacted]

[redacted]

[redacted]

[redacted]

(Appx. 4158.) [redacted]

[redacted]

[83] [redacted]

[redacted]

From [redacted][85] [redacted] as well as their own constant internal tracking of these data points, Defendants knew that neither solo nor team IC drivers were getting enough miles to earn a living in the Driving Opportunity, let alone what was consistently promised. Nevertheless, Defendants failed to correct their false, misleading and deceptive public statements about it. (*E.g.*, Appx. 815, 1011, 1732; Appx. 6001, 6004; Appx. 3252, 3260, 3191-3193, 3199, 3200.) When asked to explain why at deposition, C.R. England's corporate designee Josh England testified that the mileage data had been accurate at one time, ***eight years ago***. Specifically, Mr. England confirmed that the data used to create the mileage graph contained in the EBG and other similar company propaganda about the Driving Opportunity came from [redacted]. (Appx. 6007, 6009; Appx. 3080-3081.) [redacted][86] Defendants were keenly aware of this, which is why they continued to use [redacted] for years after fundamental changes in the program had rendered them meaningless.

[85] [redacted]

C. Adding Insult to Injury: The "Variable Mileage Charge"

In addition to profiting considerably from leasing trucks at a significant mark-up to thousands of Drivers who would then haul Defendants' freight exclusively[87] in exchange for little (or, sometimes, no) money, Defendants tacked on an additional charge for every mile Drivers drove. At 14 cents per mile, the variable mileage payment Drivers are required to make wrings out whatever remaining hope for success may have been left in the Driving Opportunity. While Defendants would have Drivers believe that there was some legitimate purpose for the charge, such as covering the increasing costs of trucks[88], that contention is belied by documents they have produced in this matter as well as by the testimony of their own witnesses. [redacted]

Schedule A of the VLA states as follows with respect to variable mileage:

> "Rental Amount: $467.00 per week (charged in advance) plus fourteen cents ($.14) or net amount after variable mileage payment savings (current: $.14 - $.00 = $.14) for each mile paid YOU under YOUR independent contractor operating agreement ("ICOA"), with first payment due on the above starting date."

[87] In the Driving Opportunity, freight is acquired by C.R. England, not Horizon. In the C.R. England video presentation about the ICOA (under the section on "Frequently Asked Questions), the presenter states: "No you cannot broker your own freight. Once you are signed on to C.R. England, under our Operating Agreement, we have sole control over that vehicle for brokering freight for you." (*See* Appx. 4021.)

[88] Defendants have suggested that the increases to the variable mileage charge over time were due to truck costs going up. "[A]s truck prices were going up our judgment was that it would be a better way to pass on that increase in truck costs to the lease operators through a variable payment increase rather than through fixed. Because then if they had a lower week in mileage, it wouldn't impact them." (Appx. 3126.) Les Oswald's explanation for the 14-cent variable mileage charge in the November-December 2007 RoundTable newsletter is that "[t]ruck costs have risen significantly." (Appx. 2677.) Defendants' public position on this subject is directly contradicted by other company records. [redacted]

(Appx. 212.) This indicates that the duplicative variable mileage charge is another component of the truck rental fee, which was confirmed by Tricia O'Neal during her corporate designee deposition: "It's just an additional payment on the truck, like if you go rent a car, you pay $50 a day and 10 cents a mile." (Appx. 3297.) However, it was described differently in a specialty PowerPoint presentation prepared by Defendants entitled "The *Variable Mileage Payment*: The Definition and Explanation." (Appx. 2367.) This presentation recognized that the additional payment "has been a source of confusion and even contention among our ICs" and went on to clarify that "[t]he Variable Mileage Payment is used to: Partially cover the cost of the truck, Acquisition of freight, Support staffing and other business expenses." (Appx. 2367.)

Even though the presentation's definition had come from him, former Vice President of C.R. England's Independent Contractor Division and current President and Chief Financial Officer of the company, Josh England[89], now states that the definition he previously provided was simply wrong. (Appx. 3127-3129.) Yet the same exact definition was included in a front page article by Les Oswald[90] in the November-December 2007 RoundTable Newsletter (Appx. 2677) and was still being used three years later in the Independent Contractor Reference Guide Defendants distributed to Drivers. (Appx. 1289.)[91]

[89] John Ringer confirmed at his deposition that the definition was drawn from an explanation provided by Josh England. (Appx. 3360.)

[90] In November 2007, Josh England was still the Vice President of C.R. England's IC Division and Les Oswald worked in that division. (Appx. 3114.)

[91] Furthermore, if the variable mileage payment was truly necessary to offset rising truck costs, then Plaintiffs would expect to see some evidence of those rising costs. But Defendants did not actually experience such rising costs due to Horizon's effectiveness in controlling truck prices. As such, Josh England expanded the justification for the charge to include paying for freight acquisition and other expenses. (Appx. 2367.) Again, however, Horizon doesn't acquire freight (Appx. 3128 ("to say that it added to or was used for the acquisition of freight is not accurate, because that's a C.R. England function.")), and the explanation for the variable mileage payment in the VLA states that the variable mileage payment is a ***rental fee*** for the truck leased by the Driver ***from Horizon***.

As the company has expanded, the variable mileage charge has steadily increased. (Appx. 3300-3301; Appx. 1734, 2401; Appx. 6014.) [redacted] (Appx. 6014 [redacted].) [redacted] (Appx. 6014 [redacted]").) [redacted] (Appx. 1734.) Although no one at the company seems to know exactly what they are for, these outsized profits (which now exceed [redacted]) funnel directly to the bottom line of the England Empire. (Appx. 3115-3116.)

V. The Inevitable End: "Death By a Thousand Cuts"

With the financial deck stacked so far against them, most Drivers failed quickly in the Driving Opportunity. While Defendants' documents display a keen focus on their startlingly high turnover, Defendants seemed unfazed by it.[92] The business model they implemented succeeds in spite of astronomically high turnover – indeed, consistently higher than industry averages (Appx. 3148-3149; Appx. 2625) – [redacted] (Appx. 4159; *see also* Mattan Dec. ¶ 8 ("Ms. [Debbie] Roark and Mr. [Steve] Branch gave instructions to me to enroll as many students as possible in C.R. England's truck driving schools. Generally I was required to get at least 40 people per week enrolled in C.R. England's driving schools.").) This is why building and maintaining the pipeline of drivers was so essential to the success of Defendants'

[92] [redacted]

Implementation Plan: turnover rates are practically irrelevant so long as there is always another Driver waiting to take the place of the one who just went bust.

Accurate information on length of tenure and knowledge concerning Defendants' high turnover are material to Drivers' decisions to purchase the Driving Opportunity. (*E.g.*, Roberts Dec. ¶¶ 8, 27; McKay Dec. ¶¶ 10, 23; Cavezas Dec. ¶ 18; McClintic Dec. ¶ 20.) Defendants, however, never informed Drivers of their turnover rate or that the overall average tenure of an IC was only 3 to 6 months. (Appx. 1070; Roberts Dec. ¶¶ 8, 27; McKay Dec. ¶¶ 10, 23; Cavezas Dec. ¶ 18; McClintic Dec. ¶ 20; *see also* Appx. 6001, [redacted] (Appx. 1070.)

Defendants maintain monthly turnover data and have done so since at least 2005. (Appx. 3333.) [redacted] Appx. 4028.) [redacted] Appx. 4029.) [redacted] (*See* Appx. 6001, [redacted]

[93] [redacted]

[redacted] (*See* Appx. 4031.) None of the foregoing information was disclosed to Plaintiffs or to any Driver during the Class Period. (Roberts Dec. ¶¶ 8, 27; McKay Dec. ¶¶ 10, 23; Cavezas Dec. ¶ 18; McClintic Dec. ¶ 20.)

[redacted] (Appx. 1633.) [redacted][94] (*Id.* (emphasis added).)

[redacted]

[redacted]

[redacted]

[94] [redacted] (Appx. 1633.)

(Appx. 4147.)

While Defendants claim to care deeply about driver retention and monitor turnover very closely (Appx. 3306-3308), that appears to stem only from their need to know how many replacement drivers they must maintain in order to keep business clipping along. By planning for it in advance, Defendants were able to experience record turnover and record profits[95] at the same time.

[95] (Appx. 1734.)

VI. C.R. England Maintains Meticulously-Tracked Income and Cost Data for All Drivers

C.R. England has a highly sophisticated system that tracks information for each Driver, including, *inter alia*, each Driver's gross income, payments made to Defendants for the Driving Opportunity, and net income. (Appx. 3015; Mahla Dec. ¶ 13(b).)

Specifically, information maintained on a weekly basis by C.R. England includes the number of empty and loaded miles driven; the rate in dollars and/or cents paid per mile to the driver; the total fuel rebate paid to the driver; the total gross revenue paid to the driver and the total gross revenue per mile paid to the driver; the total number of paid miles driven by the driver; the total variable costs charged to the driver including separate line items for fuel, maintenance and other fees, the cost of "lumper" (loading and unloading the truck), variable mileage payment, and the variable costs per mile; the total fuel cost for the week, as well as the total fuel cost per mile before and after fuel rebates; the number of gallons of fuel used; the number of paid miles per gallon; total fixed costs including separate line items for truck lease payment, insurance, licenses and permits, as well as the total fixed costs per mile; total income for the week calculated as gross revenue less fixed and variable costs; total "elective" deductions including cash advances, student loan repayments, and tax reserve contributions among other items; and the total net check paid to the driver for the week. (Appx. 3015-3016; Mahla Dec. ¶ 13(b).)

Thus, from the information in Defendants' OWNRRE database (Appx. 3014-3015), it is possible to determine exactly how much each Plaintiff or class member paid in costs and expenses and was paid. (Mahla Dec. ¶ 13(b).) Thus, the damages suffered by, and restitution owed to, Plaintiffs and the Class "can be readily calculated under a variety of different damage

theories, including, but not limited to, minimum statutory damages; amount of investment or rescission damages; benefit of the bargain damages; disgorgement and/or restitution damages; and value of labor damages." (Mahla Dec. ¶ 6.)

VII. Notice to Class Members

Plaintiffs' counsel have retained A.B. Data, Ltd. ("A.B. Data"), a firm that specializes in designing, developing, analyzing and implementing large-scale, unbiased, legal notification plans. (Verkhovskaya Dec. ¶¶ 9-18 and Exh. B.)

Plaintiffs understand that Defendants can provide the full names, last known addresses, and Social Security or Federal ID number for substantially all members of the Class based on the contracts signed by those Class members and elsewhere. (*E.g.*, Roberts Dec. ¶ 8 and Exh. B-C; McKay Dec. ¶ 18 and Exh. D-E.) With that, and using the U.S. Post Officer's national change of address database and other databases, A.B. Data confirms that the primary method of notice could be accomplished through individual direct mailers to all reasonably identifiable Class members, with supplemental notice by publication options available. (Verkhovskaya Dec. ¶ 24.) A.B. Data recommends a Class Notice Program in which A.B. Data would develop a specific notice plan and help draft notices, issue a Court-approved press release to major press outlets throughout the country, initialize a toll-free number, mail notice packets, and, if required, post and maintain an approved website and use paid media for further notices and publish such notice. (*Id*. ¶¶ 26-28.)

A.B. Data opines that this nationwide class notice program will provide efficient, adequate and reasonable notice of Class certification to Class members, and fully comport with Rule 23(c)(2). (*Id.* ¶¶ 33-34.)

ARGUMENT

I. GENERAL CLASS ACTION PRINCIPLES.

The federal class action vehicle allows the same core claims of thousands of Drivers to proceed in the aggregate, providing a path to relief where otherwise there may be none, and accomplishing judicial economy by avoiding a multitude of individual actions. As the Supreme Court has observed, "Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981);[96] *see generally* 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1751 (3d ed. 2005). Consumer protection claims, such as the claims asserted in this case, are ideal for class certification. *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997); *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 514 (N.D. Cal. 2007) ("Class action certifications to encourage compliance with consumer protection laws are desirable and should be encouraged.").

Class certification presents a procedural, rather than a merits determination. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). "The party seeking certification bears the burden of establishing that certification is proper." *Ditty v. Check Rite Ltd.*, 182 F.R.D. 639, 641 (D. Utah 1998).

The federal courts have adopted a liberal construction of Rule 23, granting class certification where common questions of fact or law exist. *See Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 794 (10th Cir. 1970) ("[I]f there was to be error on the part of

[96] All emphasis added and all internal citations and quotations are omitted from Plaintiffs' case citations, unless otherwise noted.

allowing or disallowing a class action suit, it should be on the side of allowing class actions to proceed.").[97] Although this Court "must engage in its own 'rigorous analysis' of whether the prerequisites" of Rule 23 have been satisfied, in so doing it "must accept well-pleaded substantive allegations of the complaint as true." *Shook v. El Paso County ("Shook I")*, 386 F.3d 963, 968 (10th Cir. 2004).

II. UTAH LAW APPLIES.

In determining whether certification of a class action with state law claims is appropriate, the Court must first determine which state's laws apply. As outlined below, the Court should apply Utah law to each of Plaintiffs' state law claims on which they seek class certification.

A. The Parties Agreed to the Application of Utah Law.

Prior to entering the Driving Opportunity, Plaintiffs and Class members executed C.R. England's Conditional Offer of Employment (the "Conditional Offer"). The Conditional Offer contains a broad choice-of-law provision: Not only must all "litigations that may arise from [Plaintiffs'] employment" be brought in "the State of Utah," but "***Utah law shall apply exclusively to any such claims or litigation***." (Appx. 4001, 4002 (emphasis added).) Utah state courts have upheld and enforced similar choice-of-law provisions. *See, e.g., Innerlight, Inc. v. Matrix Group*, 2009 UT 31, ¶ 16, 214 P.3d 854; *Jacobsen Constr. Co., Inc. v. Teton Builders*, 2005 UT 4, ¶¶ 6, 12, 106 P.3d 719. Utah federal courts have done the same. *See, e.g., Brahma Group, Inc. v. Benham Constr.*, No. 2:08-cv-970 TS, 2009 WL 1065419, *5-6 (D. Utah Apr. 20,

[97] *See also Esplin v. Leland*, 402 F.2d 94, 99 (10th Cir. 1968) ("But if there is to be an error made, let it be in favor and not against the maintenance of the class action."); *Owner-Operator Independent Drivers Ass'n, Inc. v. C.R. England, Inc.*, 2005 WL 2098919, No. 2:02 CV 950 TS, *6 (D. Utah Aug. 29, 2005) (a trial court faced with straightforward question of whether to certify or not certify a clearly defined class should keep options open by certifying the class and later decertifying if such an action is warranted).

2009) (citing *Boyd Rosene & Assocs. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999)).

Accordingly, the application of Utah law is appropriate here where all claims asserted in this action arise out of Plaintiffs' and Class members' employment with Defendants. Defendants' false misrepresentations and material omissions induced Plaintiffs and the Class to sign the Conditional Offers. While in school, training and/or orientation, Drivers were subjected to further misrepresentations and omissions, which Defendants knowingly or negligently made to entice them into buying the Driving Opportunity and making a fraction of the income (if any at all) that Defendants had represented.

B. Even If the Conditional Offer's Choice-of-Law Provision Was Somehow Unenforceable, a Conflicts Analysis of Plaintiffs' Claims Confirms that Utah Law Applies.

1. Breach of the Student Training Agreement

Plaintiffs' breach of contract claim arises from the form STA they signed. Because courts have consistently recognized that the elements of a breach of contract claim are uniform throughout the nation, no conflict of law exists and application of Utah law is appropriate. Yet even if some conflict existed, Utah law would apply under Utah's "most significant relationship" choice-of-law test.

With this action having been transferred from California pursuant to 28 U.S.C. § 1406(a) as well as 1404(a), the Court is to apply "whatever law it would have applied had the action been properly commenced" in Utah, including Utah's choice of law rules.[98] 17 James Wm. Moore, et

[98] In granting Defendants' motion to dismiss Plaintiffs' prior claim under the California Franchise Investment Law, the district court in the Northern District of California concluded: "Because Plaintiffs have failed to allege a franchise under the CFIL, *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000), does not bar enforcement of the forum selection clauses in the ICOA and Truck Leasing Agreement, and the transfer of this action to the District of Utah is required under 28 U.S.C. § 1406(a). Defendants have also met their substantial

al., MOORE'S FEDERAL PRACTICE §§ 111.02[2][c], 111.38[1] (3d ed. 2013). Indeed, absent a conflict of law issue, the substantive law of the forum state applies. *Clark v. State Farm Mut. Auto Ins. Co*., 433 F.3d 703, 709 (10th Cir. 2005). Thus, the first question is whether a conflict of law actually exists between the laws of any interested states. *Anapoell v. Am. Express Bus. Fin. Corp.*, No. 2:07-cv-198-TC, 2007 WL 4270548, *11 (D. Utah Nov. 30, 2007).

Because "state contract law defines breach consistently such that the question will usually be the same in all jurisdictions," there is no material conflict between Utah law and the law of any other potentially interested jurisdiction. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013) (affirming certification of nationwide class in breach of contract action). In fact, given the uniformity of the elements for breach of contract claims, numerous courts have certified nationwide breach of contract classes. *See, e.g., id.*; *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004) ("claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such"). Given that no conflict of law issue exists, Utah law applies.

Even if a conflict existed, Utah choice-of-law principles would require the Court to apply the "most significant relationship" test under the Restatement to determine which law to apply. *Waddoups v. Amalgamated Sugar Co*., 2002 UT 69, ¶ 14, 54 P.3d 1054. "In contract disputes, courts consider: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Salt Lake*

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burden to demonstrate that transferring this case to Utah is warranted, pursuant to 28 U.S.C. § 1404(a)." (1/25/12 Order Granting Defs.' Mot. to Dismiss Pls.' Claim Under the CFIL and Mot. to Transfer Venue at 10, Dkt. 44.)

Tribune Publishing Co. v. Management Planning, Inc., 390 F.3d 684, 693 (10th Cir. 2004); Restatement (2d) of Conflict of Laws § 188.

Plaintiffs and Class members signed the form STA at a C.R. England facility in Utah, California, Texas, or Indiana. The subject matter of the contract is Plaintiffs' and the Class' student training and employment with C.R. England, a Utah corporation.[99] As a Utah corporation, C.R. England's performance under the STA, and all representations made by C.R. England about the agreement, necessarily emanated from Utah. Accordingly, even under the "most significant relationship" test, application of Utah law is warranted.

2. Statutory and Common Law Tort Claims

Plaintiffs' remaining state statutory and common law tort claims for which they seek class certification are similarly subject to Utah law, as they arise out of and are interrelated with Plaintiffs' VLAs and ICOAs which contain the same, clear choice of law provision: "This Agreement shall be interpreted under the laws of the United States and the State of Utah, without regard to the choice-of-law rules of such State or any other jurisdiction." (Roberts Dec. ¶ 8 and Exh. B-C; McKay Dec. ¶ 18 and Exh. D-E.) Accordingly, the Court need not undertake a separate conflict of laws analysis with respect to each of Plaintiffs' remaining claims, as the foregoing choice of law provision properly applies to all of them.

This Court has previously found that "'when a tort or other claim is closely related to a contract with an express choice of law clause, in the absence of compelling reasons to the contrary, those closely related claims ought to be governed by the same law.'" *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:06-cv-890 TS, 2012 WL 918744, at *1 (D. Utah Mar. 16, 2012)

[99] "[E]very applicant accepted into C.R. England's truck driving school becomes an employee within the first few weeks of commencing school upon meeting state, company, and federal requirements." (Thompson Dec. ¶ 10, Dkt. 16-1.)

(internal citations omitted). In reaching that conclusion, Judge Stewart cited the Restatement (Second) of Conflict of Laws § 187(2), which provides:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. at *1 n.11.[100] *See, e.g., Am. Gen. Life Ins. v. Goldstein*, 741 F. Supp. 2d 604, 611 (D. Del. 2010) (declining to undertake separate choice of law analysis as to each claim under "most significant relationship" test and concluding "[w]here contract and tort claims are intertwined and interdependent, both claims should be analyzed under the law of the same state").[101]

Plaintiffs' statutory and common law claims are interdependent and entwined with their VLAs and ICOAs, which contain a plain Utah choice-of-law provision. Those agreements constitute the bedrock of the "Driving Opportunity". The Driving Opportunity constitutes (a) the consumer sales transaction that is the subject of Plaintiffs' claim under Utah Consumer Sales Practices Act; (b) the business opportunity that is the subject of Plaintiffs' claim under the Utah

[100] *See Jacobsen Constr. Co., Inc. v. Teton Builders*, 2005 UT 4, ¶ 12 & n.2, 106 P.3d 719 (applying Section 187); *Glezos v. Frontier Invsts.*, 896 P.2d 1230, 1234 (Utah Ct. App. 1995) (same).

[101] *See also First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 591 F. Supp. 812, 815 (N.D. Ill. 1984) (appropriate to apply governing law provision in contract to unjust enrichment, tortious interference and other business tort claims where they are "closely related to the parties' contractual relationship"); *Peter Kiewit Sons', Inc. v. Atser, LP*, 684 F. Supp. 2d 1126, 1134, 1135 (D. Neb. 2010) (choice-of-law provision that agreement "shall be construed and enforced in accordance with the substantive laws of the State of Texas" encompassed closely-related claim for misappropriation of trade secrets); *Warren E. Johnson Cos. v. Unified Brand, Inc.*, 735 F. Supp. 2d 1099, 1104-05 (D. Minn. 2010) (recognizing that a "contractual choice of law clause applies not only to contract claims, but also to any tort claims, which are 'closely related' to the terms of the contract, such that the Court would need to interpret the contract in order to resolve the tort claim"); *Express Scripts, Inc. v. Walgreen Co.*, No. 4:08cv1915 TCM, 2009 WL 4574198, *3 (E.D. Mo. Dec. 3, 2009) ("[I]f analysis of a tort claim connected to a contract involves interpretation of that contract, then the contract's choice-of-law provisions apply to the tort claim.").

Business Opportunity Disclosure Act; and (c) the "goods or services" under the Utah Truth in Advertising Act that were falsely advertised and misrepresented by Defendants. The Driving Opportunity likewise serves as the basis for Plaintiffs' fraud and negligent misrepresentation claims because Defendants' misrepresentations and omissions induced Plaintiffs to sign the VLAs and ICOAs. Defendants' conduct also gave rise to a fiduciary duty owed to Plaintiffs with respect to the Driving Opportunity and the obligation to disclose to Plaintiffs its true economics. Finally, the benefit unjustly conferred on Defendants includes the costs and expenses they saved by having lease drivers, rather than company drivers, transport goods to C.R. England customers under the fraudulent Driving Opportunity. Accordingly, because the VLAs and ICOAs are closely connected and substantially entwined with all of Plaintiffs' statutory and common law claims, the Utah choice of law provision in those agreements should apply.

Even if the Court were to engage in a choice-of-law analysis with respect to these claims and conclude that some conflict existed, Utah still bears the "most significant relationship" to the claims and the case, necessitating application of Utah law. In tort actions, the "most significant relationship" test encompasses the following factors: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Restatement (2d) of Conflicts of Law § 145(2); *Anapoell*, 2007 WL 4270548 at *11.[102]

[102] Other factors that the Court is to consider, if relevant, are "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied." Restatement (2d) of Conflicts of Law § 6(2); *see id*. § 145(1); *Waddoups*, 2002 UT 69, ¶ 14.

Consideration of these factors weighs heavily in favor of applying Utah tort law. Defendants are domiciled in Utah. The gravamen of Defendants' misconduct emanated from Utah, including their misleading advertisements, false representations and material omissions — all of which were developed, orchestrated and implemented from Defendants' headquarters in Utah. Plaintiffs and Class members suffered injuries that concern a Utah business opportunity, the very existence and structure of which are controlled from Utah. And Defendants' promise of guaranteed employment with C.R. England would have been redeemed by Plaintiffs in Utah had it been genuinely available. Given the nature of Plaintiffs' injuries (monetary) and the nature of Plaintiffs' claims (e.g., fraud, negligent misrepresentation, false advertising, etc.), the place of Defendants' misconduct carries the most weight. *Anapoell*, 2007 WL 4270548, at *12 (citing Restatement (2d) of Conflict of Laws § 145(2), cmts. e, f). "[A]pplying Utah law to conduct occurring in Utah would advance certainty, predictability and uniformity of result (factor 2(f) under § 6 of the Restatement), particularly when Defendants engage in similar . . . transactions in many different states." *Id.*[103]

Perhaps most significantly, however, Plaintiffs' and the Class' relationship with Defendants is centered in Utah, warranting the application of Utah law. Indeed, between 2010 and 2012, more than half of the Class members signed their VLAs and ICOAs while in Utah. (Appx. 5011-5012, Interrog. No. 1.) Thus, "applying Utah law to [Plaintiffs'] non-contract claims would be consistent with the parties' expectations expressed in the [VLA and ICOA],

[103] Because this action largely implicates conduct regulating laws (e.g., fraud and consumer protection), a court would ordinarily consider where the tort "occurred" in deciding which forum has the greatest interest in applying its laws. *See Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 64 (D.N.J. 2009) (applying New Jersey law where it had "the additional interest of regulating a corporation which is headquartered—and allegedly committed the acts in question—within its borders.") Here, Defendants committed the statutory violations and torts at issue in Utah.

which is a factor ('the protection of justified expectations') to be considered under § 6(2) of the Restatement." *Anapoell*, 2007 WL 4270548 at *12.[104]

III. THE PREREQUISITES OF RULE 23 HAVE BEEN MET.

To certify a class, the Court must analyze the four elements of Rule 23(a)[105] that are preconditions to class certification. *See, e.g.*, *Ammons v. La-Z-Boy, Inc.*, No. 1:04 CV 67 TC, 2008 WL 5142186, *14 (D. Utah Dec. 5, 2008); *see also In re Nature's Sunshine Product's Inc. Secs. Litig.*, 251 F.R.D. 656, 657 (D. Utah 2008). If all of Rule 23(a)'s requirements are satisfied, "[t]he court must then look to the category of class action under Rule 23(b) for additional prerequisites involving certification of a class." *Ammons*, 2008 WL 5142186 at *14 (quoting *Shook I*, 386 F.3d at 968). Plaintiffs seek certification under Rule 23(b)(3),[106] which

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[104] If any question remains as to whether Utah law should apply, the Court need only look to the broad forum selection clause in the VLA and ICOA, in which the parties agreed that any claim or dispute arising from or in connection with those agreements must be brought in the Utah courts. (Roberts Dec. ¶ 8 and Exh. B-C; McKay Dec. ¶ 18 and Exh. D-E.) Importantly, these were also form agreements prepared by Defendants. Thus, Defendants sought to compel each and every Class member to bring any and all claims against Defendants that have any connection to the VLA or ICOA in Utah. Defendants have even enforced this choice of law provision in this case to accomplish its transfer from the Northern District of California. Defendants can hardly suggest now, after forcing Plaintiffs to bring any and all claims against them in a Utah court, that Utah does not bear the most significant relationship to their claims and its law should not apply. *See, e.g.*, *Anapoell*, 2007 WL 4270548 at *12 (as part of conflict of laws analysis, court weighed parties' agreed-upon venue for resolving disputes as part of their "justified expectations" under Restatement (2d) of Conflict of Laws § 6, and applied the chosen venue's laws to plaintiffs' tort claims).

[105] Rule 23(a) provides:

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

[106] Rule 23(b) provides in pertinent part:

> **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
> * * *
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

requires that the questions of law or fact common to class members predominate over individual issues, and that a class action is superior to other methods for adjudicating the controversy. Further, "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 Advisory Committee's Note.

Rule 23(c)(4) and (5) provide that an action may be brought or maintained as a class action with respect to particular issues, and a class may be divided into subclasses. Here, Plaintiffs seek certification of a nationwide class as to the following claims: violation of the Utah Business Opportunity Disclosure Act; violation of the Utah Consumer Sales Practices Act; violation of the Utah Truth in Advertising Act; negligent misrepresentation; breach of fiduciary duty; and unjust enrichment. Plaintiffs propose certification of a subclass consisting of those Class members who executed the STA, under the claim for breach of contract. Plaintiffs also propose certification of a subclass under the fraud-based claims – RICO, UPUA, and common law fraud – consisting of those class members who received the EBG and subsequently purchased the Driving Opportunity when Defendants were using the EBG in its marketing.

A. Rule 23(a)(1)'s Numerosity Requirement Is Satisfied.

A proposed class must be "so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). "There is no precise rule specifying how many class members are necessary to satisfy the numerosity requirement. But, 'some general tendencies can

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(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

be observed … numbers in excess of forty, particularly those exceeding one hundred, have sustained the requirement.'" *Dilley v. Academy Credit, LLC*, No. 2:07 CV 301 DAK, 2008 WL 4527053, *2, (D. Utah Sept. 29, 2008). "Courts use common sense assumptions to support a finding of numerosity." *Ditty v. Check Rite, Ltd.*, 182 F.R.D. 639, 641 (D. Utah 1998). Where at least 14,708 Drivers have purchased the Driving Opportunity since January 1, 2008, numerosity should not be at issue, either with respect to the nationwide class or the two subclasses proposed under the breach of contract and the fraud-related claims, respectively. Each subclass will run into the thousands. (Appx. 5004-5005, Interrog. No. 1.)

B. Common Issues Predominate the Individual Issues in this Case and Satisfy the Commonality and Predominance Requirements.[107]

Commonality is easily met in this case, where Defendants engaged in a common course of conduct, and where breach of a form contract is asserted. "When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected." NEWBERG § 3.10, at 277-78.

"'The threshold of commonality is not high. … [T]he rule requires only that resolution of the common questions affect all or a substantial number of the class.'" *Dilley*, 2008 WL 4527053, *3 (citation omitted). "Moreover, it is not necessary that all questions of law and fact be common – there need be only one issue common to all members of the class." *Id*. (finding commonality to be present where defendants made misleading representations and deficient disclosures regarding services provided). "[E]very member of the class need not be in a situation identical to that of the named plaintiff to meet Rule 23(a)'s commonality or typicality

[107] Because courts in Rule 23(b)(3) cases often apply the Rule 23(a)(2) commonality requirement and the 23(b)(3) predominance tests together, Plaintiffs will analyze those requirements simultaneously. *See* NEWBERG ON CLASS ACTIONS, § 4.22 at 153 (4th ed. 2002) (hereinafter "NEWBERG § __.")

requirements. Factual differences between class members' claims do not defeat certification where common questions of law exist." *Miller v. Basic Research, LLC*, 285 F.R.D. 647, 654-55 (D. Utah 2010) (quotations and citations omitted).

"Predominance ensures that the class is 'sufficiently cohesive to warrant adjudication by representation.'" *Miller*, 285 F.R.D. at 657 (quoting *Amchem*, 521 U.S. at 623). "The critical question is 'whether there is 'material variation' ***in the defendants' posture*** toward the different plaintiffs.'" *Id.* (quoting *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)). Critical to this case, "'[c]ommon issues predominate when the focus is on ***the defendant's conduct*** and not on the conduct of the individual class members.'" *Id.* Cases that arise from an alleged common deceptive scheme affecting a large number of victims in the same way are particularly amenable to class treatment. *See id.*[108]

The commonality and predominance requirements are satisfied in this case because all of Plaintiffs' claims stem from Defendants' common course of conduct and share many common legal issues, and resolution of the common issues will greatly advance this litigation.

1. Plaintiffs' Claim for Violation of the Utah Business Opportunity Disclosure Act Satisfies the Commonality and Predominance Requirements.

Plaintiffs allege that Defendants' scheme to attract Drivers to their driving schools and training program and then sell them the Driving Opportunity constitutes a violation of the Utah Business Opportunity Disclosure Act (the "Business Opportunity Act" or "Act"). Certification

[108] *See also Elias v. Ungar's Food Prods.*, 252 F.R.D. 233, 249 (D.N.J. 2008) (finding predominance where focus is on defendant's representations on whether product is different from what was promised); *Perry v. Fleet Boston Fin. Corp.*, 229 F.R.D. 105, 113 (E.D. Pa. 2005) ("[P]redominance is normally satisfied when plaintiffs have alleged a common course of conduct on the part of the defendant."). Courts frequently find allegations that the defendant engaged in a common course of conduct satisfy the commonality and predominance requirements. *See, e.g., In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 142 (D.N.J. 1984) (finding requirements met where there were common questions concerning whether company's financial statements and prospectus contained material misrepresentations or omissions).

of a nationwide class of all Drivers who purchased the Driving Opportunity during the period in which Defendants sold the opportunity is appropriate.

The purpose of business opportunity statutes is to ensure that prospective purchasers of an assisted marketing plan are provided with information necessary to make an intelligent decision and to safeguard the public against financial hardship from ill-conceived or unscrupulous investment opportunities.[109] Utah's Act defines an assisted marketing plan in pertinent part as "the sale or lease of any products, equipment, supplies, or services that are sold to the purchaser upon payment of an initial required consideration of $500 or more for the purpose of enabling the purchaser to start a business … that will enable the purchaser to derive income from the assisted marketing plan that exceeds the price paid for the marketing plan." Utah Code Ann. § 13-5-2(1)(a). The Act requires the seller to register the plan with the state by providing specific disclosures and other required information (§ 13-5-4), and such disclosures are required to be disclosed to any prospective purchaser in the form of a disclosure statement or prospectus (§ 13-15-5).

Clearly, this claim raises common questions, including whether the Driving Opportunity constitutes a seller-assisted marketing plan,[110] whether Defendants registered the Driving

[109] *See, e.g., Cohen v. Roll-A-Cover, LLC*, 27 A.3d 1, 10 (Conn. Ct. App. 2011) ("Although not widely interpreted by our courts, '[t]he [business opportunity act] was enacted with the purpose of preventing the misrepresentations and fraudulent practices involved in business opportunity investment sales and the financial losses and hardships to investors which result therefrom.'").

[110] The Fourth Circuit's decision in *Tousley v. N. A. Van Lines, Inc.*, 752 F.2d 96, 104 (4th Cir. 1985), is instructive. The case involved the question of whether a truck driving opportunity, virtually identical to the one here, was a "business opportunity" under South Carolina's business opportunity statute. Defendant North American Van Lines' practice was to recruit "owner-operators" to haul cargo for its customers. "Under this scheme, the owner-operator purchases a tractor from North American. North American owns all of the trailers, negotiates hauling agreements, and assigns runs to drivers across the country." *Id.* at 99. Tousley responded to an ad and attended a seminar where representations and written material relating to anticipated earnings were presented by a recruiter. Tousley then paid $400 to attend the North American training school in Fort Wayne, Indiana. During two years of hauling cargo, he "realized considerably less income than the amounts mentioned by the recruiting representative." *Id.* at 99-100. The Fourth Circuit affirmed the finding that North American's practices constituted a "business opportunity."

Opportunity with Utah's Division of Consumer Protection, and whether Defendants provided a disclosure statement or prospectus to prospective lease drivers — all of which can be answered on a class-wide basis, serving to resolve the same issues for all class members. Issues related to liability predominate because there are no individual issues; indeed, there is strict liability for sellers who do not comply with the statute.[111] The Driving Opportunity either does or does not fall within the statutory definitions. *See KE & G, Inc. v. Country Pollo, Inc.*, Case No. 02:08-cv-003DB (D. Utah Dec. 29, 2009) (court's findings that (i) defendant's sales and marketing program constituted an assisted marketing plan under the Business Opportunity Act, and (ii) defendant had not complied with the Act's disclosure requirements were dispositive of case).

Finally, the Act permits a person to recover actual damages or $2,000, whichever is greater, plus reasonable attorney fees and costs and injunctive relief. A simple determination of whether actual damages are greater or less than $2,000 would not make a class action any more unmanageable, and actual damages are capable of measurement on a class-wide basis, as discussed below in Argument, Section III.C., *infra*.[112] Thus, the Court should certify a nationwide class consisting of all Drivers who purchased the Driving Opportunity.

2. Plaintiffs' Claim for Violation of the Utah Consumer Sales Practices Act Satisfies the Commonality and Predominance Requirements.

Plaintiffs allege that Defendants' acts or practices in connection with the Driving Opportunity have violated the Utah Consumer Sales Practices Act (UCSPA). Certification of a nationwide class of all Drivers who purchased the Driving Opportunity is appropriate.

[111] *E.g.*,Utah Code Ann. § 13-15-6(2): "Any purchaser of a business opportunity from a seller who does not comply with this chapter is entitled, in an appropriate court of competent jurisdiction, to rescission of the contract, to an award of a reasonable attorney's fee and costs of court in an action to enforce the right of rescission, and to the amount of actual damages or $2,000, whichever is greater."

[112] The Act also provides for a right of rescission and return of amounts paid by the purchaser if the seller fails to comply with the Act. Utah Code Ann. § 13-15-6(2).

The UCSPA generally "prohibits deceptive or unconscionable acts or practices by a supplier in connection with a consumer transaction." *Wade v. Jobe,* 818 P.2d 1006, 1013-14 (Utah 1991). The UCSPA expressly states that it is to be construed liberally to promote the following policies:

> (1) to simplify, clarify, and modernize the law governing consumer sales practices; (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices; (3) to encourage the development of fair consumer sales practices; (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection; (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

Utah Code Ann. § 13-11-2. A supplier[113] that sells, leases, or offers a product or services commits a deceptive act or practice in violation of the UCSPA when the supplier knowingly or intentionally indicates that the subject of a consumer transaction[114] has uses or benefits it does not have. *See* Utah Code Ann. § 13-11-4(2)(a). Additionally, unconscionable acts or practices violate the UCSPA, whether they occur before, during, or after the transaction, which raise a question of law for the court. Utah Code Ann. § 13-11-5.

It is readily apparent, therefore, that Class members will have to establish many of the same factual and legal issues to establish Defendants' liability under the UCSPA, including whether the sale of the Driving Opportunity constituted a consumer transaction under the Act; whether Defendants' acts or practices – involving a common course of conduct, including allegedly material omissions and deceptive uniform written representations and consistent

[113] "Supplier" is defined as "a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer." Utah Code Ann. § 13-11-3(6).

[114] "Consumer transaction" is defined as a sale, lease or other disposition of goods and services to a person for purposes that relate to a business opportunity requiring expenditure of money by the purchaser and personal services on a continuing basis in which the purchaser has not been previously engaged. *See* Utah Code Ann. § 13-11-3(2)(a).

training materials and scripts[115] – constituted a deceptive act or practice in connection with the sale of the Opportunity; whether Defendants' common course of conduct in connection with the sale of the Opportunity constituted any unconscionable acts or practices; whether Defendants misrepresented the prospects or chances for success of the Opportunity, and/or concealed material information relating thereto; whether Defendants misrepresented and/or concealed facts relating to the availability of company driver positions in connection with its common scheme, and/or whether Defendants knowingly sold too many Driving Opportunities for the market to bear; whether Defendants misrepresented and/or concealed material facts as to what Drivers could reasonably expect to earn as lease drivers; and whether Defendants omitted material information regarding the excessive turnover rate experienced among lease drivers who purchased the Opportunity. The answers to these questions, focusing on Defendants' own conduct, can be answered through generalized proof.

A consumer may seek recovery for a loss under the UCSPA despite the fact that the consumer's actual damages may be *de minimis*, speculative, or too difficult to prove, where the consumer can show that a loss has been suffered as a result of a violation of the UCSPA; "loss," under the UCSPA, embodies a broader concept than damages, which is itself a broader concept than actual damages. *Andreason v. Felsted*, 2006 UT App 188, 137 P.3d 1.

Establishment of individual reliance is not necessary in this action under the UCSPA claim. The Utah Legislature mandated that the UCSPA be interpreted and applied consistently with the FTC Act, which presumes reliance in business opportunity cases like this one:

> A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product. Express claims, or

[115] *See* n.49, *supra*.

> deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material. Here, the undisputed evidence establishes that Defendants made material representations, express or implied, that were likely to mislead reasonably prudent consumers. Defendants violated Section 5 of the FTC Act by making two material misrepresentations: (1) the potential earnings a consumer was likely to achieve by purchasing Defendants' internet kiosks and (2) claims about the availability and procurement of profitable locations for consumers' public access Internet kiosks.

F.T.C. v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1267 (S.D. Fla. 2007). In this case, the question of reliance raises the common issues of whether Defendants concealed material information or made material misrepresentations; whether those misrepresentations were widely disseminated; whether those misrepresentations were used to induce the purchase of the Opportunity; and whether the misrepresentations were likely to mislead reasonably prudent consumers. Those issues can be resolved through generalized evidence and can raise a presumption of actual reliance that predominates over any individual issues. These common issues clearly predominate over individual issues, and their resolution will advance the litigation greatly, focusing nearly exclusively on the nature of the Driving Opportunity and Defendants' common course of conduct, and not on individual conduct.

Finally, the UCSPA explicitly allows for and recognizes the utility of class-wide litigation, permitting a class action for declaratory judgment and injunctive and appropriate ancillary relief against an act or practice that violates the UCSPA (§ 13-11-19(3)), and for the actual damages where the defendant had actual or constructive notice that the conduct might be unlawful under an administrative rule, a judicial decision, or a consent judgment (§ 13-11-19(4)(a)). *See Miller v. Corinthian Colleges*, 769 F. Supp. 2d 1336, 1342 (D. Utah 2011); *Miller v. Basic Research*, 285 F.R.D. at 655 (certifying nationwide class action under UCSPA). Here, Plaintiffs seek class-wide injunctive and declaratory relief regarding Defendants' deceptive and

unconscionable practices, and damages for conduct that violates the Department of Commerce's Division of Consumer Protection Rule 152-11-11(B).[116]

3. Plaintiffs' Claims under RICO and the UPUA,[117] as well as Their Claim for Fraud, Satisfy the Commonality and Predominance Requirements.

Plaintiffs have asserted RICO violations under 18 U.S.C. § 1962(c) and similar violations under the Utah Pattern of Unlawful Activity Act (UPUA), Utah Code Ann. § 76-10-1061, et seq., as well as common law fraud and misrepresentation, all based on Defendants' common fraudulent scheme.[118] The essence of these claims is that Defendants devised and engaged in a common scheme to defraud subclass members by knowingly and deliberately making false representations of material fact and omitting material facts to induce Drivers into purchasing the Driving Opportunity. Defendants allegedly induced them to do so through marketing and sales materials and presentations containing standardized, coordinated, and uniformly deceptive sales representations and omissions. Plaintiffs seek certification of a subclass under these three claims consisting of Drivers who purchased the Driving Opportunity during the period when Defendants used the EBG in marketing that business opportunity.[119]

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[116] In the establishment of a franchise or distributorship (which the Driving Opportunity is under the Rule), Rule 152-11-11 prohibits the following conduct pertinent to Plaintiffs' claim: (i) misrepresenting the prospects or chances for success of the proposed franchise or distributorship; (ii) concealing material facts; (iii) misrepresenting and concealing efforts to saturate the system with more franchises than it could sustain; and (iv) misrepresenting the amount of profits, net or gross, to be expected by the franchisee. *See* Rule 152-11-11(B)(1)-(6).

[117] Because the provisions of the UPUA are nearly identical to those contained in RICO, Utah courts adopt federal courts' interpretations of RICO as Utah law. *State v. Hutchings*, 950 P.2d 425, 430 (Utah Ct. App. 1997) (citing *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty*, 668 P.2d 535, 540 (Utah 1983) ("Identity in language [in Utah and federal statutes] presumes identity of construction, so that we look to federal ... law for guidance."). For purposes of this motion, Plaintiffs will analyze the RICO and UPUA claims jointly.

[118] As noted, courts frequently find allegations that the defendants engaged in a common course of conduct sufficient to satisfy the commonality and predominance requirements. *E.g., Miller v. Basic Research*, 285 F.R.D. at 657.

[119] The evidence developed thus far demonstrates that a version of the EBG, containing the fraudulent earnings and mileage graphs and omitting material information about true earnings, mileage, and tenure and turnover rates, was uniformly distributed to Drivers during the period between November 2006 and July 2010. (Appx. 3027-3028, 3404-3405; Burr Dec. ¶ 8; Cavezas Dec. ¶ 8 and Exh. A; McClintic Dec. ¶ 11 and Exh. B.) These fraudulent misrepresentations may also have been uniformly distributed to Drivers prior to November 2006, but production of such evidence is the subject of a discovery dispute with Defendants.

(a) RICO and the UPUA

There are a multitude of common legal and factual issues that can be resolved on a class-wide basis in litigating Plaintiffs' RICO and UPUA claims, and those common issues predominate over individual issues. To establish a claim under RICO's private right of action, a plaintiff must show (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of § 1962. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 117. To prove a violation of 18 U.S.C. § 1962(c), Plaintiffs must prove that Defendants (1) conducted or participated, directly or indirectly, in the conduct (2) of an "enterprise" (3) through a "pattern" (4) of "racketeering activity." *See, e.g., Tal v. Hogan*, 453 F.3d 1244, 1269 (10th Cir. 2006). Clearly, these elements focus largely on the conduct of Defendants, raising common issues that can be resolved through generalized proof, including whether Defendants were part of an association-in-fact enterprise operating an alleged scheme to defraud subclass members.

The "racketeering activity" alleged in this case is mail and wire fraud. A violation of the mail fraud statute requires proof that Defendants formed a scheme to defraud, using the mails to further the scheme with the specific intent to deceive or defraud. *Miller v. Yokohama Tire Corp.*, 359 F.3d 616, 620 (9th Cir. 2004). "A scheme to defraud 'connotes a plan or pattern of conduct which is intended or is reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *GC Holding Co., LLC v. Hutchens*, No. 11-cv-01012-RBJ-KLM, 2013 WL 798242, *5 (D. Colo. March 4, 2013) (citing *U.S. v. Stewart*, 872 F.2d 957 (10th Cir. 1989)).

In this case, the truth or falsity of the alleged uniform misrepresentations relating to earnings and mileage claims, and the material omissions regarding the high turnover rate and

brief tenure of Drivers in the lease program,[120] can be determined through an objective inquiry on a class-wide basis.[121] Further, these claims are focused not merely on particular misrepresentations and omissions but on a centralized corporate conspiracy to defraud, which can be proven through generalized evidence, and which, absent certification, would have to be re-proven in each individual case.

Plaintiffs and subclass members suffered injury when they purchased a business opportunity that uniformly was not what it was represented to be, *i.e.*, that the earnings and mileage representations were inaccurate, and that subclass members were not purchasing the "ready to go operation" with a "successful business plan" from which they could earn the decent living they were promised. (*E.g.*, Appx. 1646; TAC Ex. D at 2, Dkt. No. 101-4.) Rather than correct the representations that were being made, Defendants continued them so as to keep the pipeline full – even to the point of bursting – while fully aware of the high turnover rate and the low income Drivers were experiencing.[122] Under such circumstances, where the nature of the fraud is uniform, courts find common injury proximately caused by the defendant's racketeering, and proof of actual reliance on an individual basis may be established by common evidence, such as through legitimate inferences based on the nature of the misrepresentations alleged in this

[120] Even if there were proof of a material variance in the representations, that would not defeat certification if these omissions – uniformly absent in the sales, marketing and training materials – were common to all. *See In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 427 (S.D.N.Y. 1986) (observing that "[e]ven proof of a material variance among the representations will not defeat the class if certain omissions, inferred from their absence in the [sales] literature, were common to all.").

[121] *See, e.g., In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 118 (in certifying civil RICO class, court noted that "fraud claims based on uniform misrepresentations to all members of a class are appropriate subjects for class certification because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create no need for a series of mini-trials")(citation and quotation omitted); *Negrete v. Allianz Life Ins. Co. of N.A.*, 287 F.R.D. 590 (C.D. Cal. 2012).

[122] What Drivers found when they entered the Driving Opportunity was a Potemkin village where the only opportunities of value had been reserved by Defendants for themselves. [redacted]

case. *See, e.g.*, *Hutchens*, 2013 WL 798242, at *17 (allowing presumption of reliance to be applied to a civil RICO claim).[123]

The district court in *Negrete v. Allianz Life Ins. Co. of N.A.*, 287 F.R.D. 590 (C.D. Cal. 2012), denied a motion to decertify a class it had certified under RICO, determining that causation could be demonstrated on a class-wide basis because reliance on the insurer's alleged misrepresentations was "common sense" or a "logical explanation" for class members' purchasing decisions. The plaintiffs alleged a fraudulent scheme in violation of RICO where the defendants sought to induce class members to purchase deferred annuities using a "standardized sales program premised upon three key misrepresentations" contained in sales brochures that sales agents were required to provide to prospective purchasers. 287 F.R.D. at 595. Besides finding that the requirements of typicality[124] and commonality[125] were met, the court concluded that common issues predominated over individual reliance issues, reasoning that the annuities were worth less than what class members paid for them at the moment of purchase, giving rise to a "common sense" inference that class members logically relied on the defendant's uniform and targeted misrepresentations – "representations that served no purpose other than inducing them to buy." *Id.* at 613. Here, each subclass member had been guaranteed the choice of a company

[123] *See also Negrete*, 287 F.R.D. at 612 (resort to a "common sense" inference for proving class-wide reliance appropriate when consumers purchased specific products with specific features that were allegedly of less value than defendant's standardized marketing materials promised them); *Waters v. Int'l Precious Metals Corp.*, 172 F.R.D. 479, 505 (S.D. Fla. 1996) (same, noting that policies underlying RICO and the securities acts of protecting investors and other victims of fraud support the use of a presumption); *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 207 (4th Cir. 1988) (extending presumption of reliance to an action for fraudulent breach of contract); *In re Tyco Int'l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *6 (D.N.H. Aug. 15, 2006) (extending presumption to ERISA breach of fiduciary duty action)

[124] Typicality was met because the lead plaintiffs suffered the same alleged injury caused by the same alleged course of wrongful conduct, and their interests in prosecuting the action did not diverge from that of absent class members. *Id.* at 604.

[125] Commonality was met, in part, because representative litigation would generate a common answer to the existence of a scheme to defraud, and because the plaintiffs presented multiple common questions capable of common resolution centered around the three alleged misrepresentations that formed the core of the lawsuit. *Id.* at 602.

driver position, and logically they chose to purchase the Driving Opportunity as a result of the uniform misrepresentations contained in the EBG that lease drivers earned more than company drivers**.** In reality, the opposite was true. Company drivers – who were not saddled with the same high costs and received company benefits that lease drivers did not (unless they paid for the benefits themselves) – earned more on average than lease drivers. If the truth had been disclosed, it would have been illogical for subclass members to purchase the Driving Opportunity. Instead, they purchased a business opportunity that was not what it had been represented to be and about which Defendants concealed highly material information.

Plaintiffs have demonstrated that the form and causation of the alleged injury was sufficiently uniform to be susceptible to class-wide proof. Additionally, while the amount of damages may vary among class members, there are nevertheless reasonable means of computing each Class member's damages using Defendants' OWNRRE database. *See* Argument, Section III.C., *infra*.

(b) Fraud

Plaintiffs also assert a claim for fraud based on Defendants' common scheme and the material omissions and standardized misrepresentations to which all subclass members were subjected in the process of being sold the Opportunity. To state a claim for fraud under Utah law, a plaintiff must allege: (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the defendant either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of the falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. *Pace v. Parrish*, 247 P.2d 273, 274–75

(Utah 1952). Defendants also can be liable for fraudulent omissions if they failed to disclose material facts of which they had knowledge, as well as a legal duty to disclose – a question of law for the Court. *See Smith v. Frandsen*, 2004 UT 55 ¶ 11, 94 P.3d 919 (to establish fraudulent concealment, a plaintiff must prove the non-disclosed information is material, the party failing to disclose had knowledge of the information, and a legal duty to communicate); *Moore v. Smith*, 2007 UT App 101, 158 P.3d 562.[126] Like the RICO and UPUA claims, the issues raised by these elements focus largely on the conduct of Defendants, can be resolved through generalized proof, and predominate over any issues requiring individualized proof.

There are not individual issues relating to materiality because misrepresentations and omissions relating to earnings are presumed to be material.[127] While there were oral representations made by recruiters and trainers, Defendants extensively trained its recruiters, orientation instructors and trainers to make uniform oral representations that served only to reinforce Defendants' standardized written misrepresentations.[128] Indeed, Defendants

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[126] Utah courts have adopted Restatement (Second) of Torts § 551, which states that a duty to disclose exists in the following situations:

> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

First Sec. Bank of Utah N.A. v. Banberry Dev. Corp., 786 P.2d 1326, 1330 (Utah 1990).

[127] *See Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (even though advertisements did not guarantee the stated level of earnings, they made express claims regarding the earnings potential of the programs, and such claims are presumed to be material, i.e., likely to affect a consumer's choice or conduct regarding a product); *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd on other grounds*, 791 F.2d 189 (D.C. Cir. 1986).

[128] Defendants truly thought of everything — and had a script or canned response prepared for any question or bit of resistance that a Driver might put to them. From the top down, the system was designed for a singular purpose: bring in candidates and turn out lease drivers. Defendants did this by utilizing sets of uniform misrepresentations

acknowledge that they ensured that "the right message" was given out and that the message was consistent and uniform "[so] we were all singing from the same hymn book."[129] Thus, Defendants' oral misrepresentations do not present individualized issues that predominate over common ones. *See Smith v. MCI Telecommc'ns Corp.*, 124 F.R.D. 665, 678 (D. Kan. 1989) (while there were oral misrepresentations, the basic message giving rise to the fraud claim was uniform through written plans and addenda, and the common issue of misrepresentation through the plans themselves predominated over any individualized issue of oral misrepresentations).

As to proving that subclass members acted reasonably and relied on the alleged misrepresentations, again that inquiry is an objective one common to the entire class. *Smith v. MCI Telecommc'ns Corp.*, 124 F.R.D. at 678-79 (certifying fraud claims). Here, for example, Defendants admitted not only that the EBG was designed to provide information to prospective Drivers, but that Defendants intended for prospective Drivers to rely upon that information. (Appx. 3325-3329, 3231-3242, 3139, 3367-3387.) Furthermore, the Court can conclude, like in *Smith v. MCI, supra*, that the subclass members' reasonable reliance on Defendants' earnings misrepresentations is demonstrated simply by their becoming lease drivers, i.e., they acted in a manner consistent with reliance, and that it is "implausible" that subclass members did not rely on the false earnings representations and presentations they received in the EBG.[130] Thus, reliance in this action presents common, rather than individual, questions.

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and inducements at every turn, from the time Drivers entered the pipeline (usually in pursuit of a company driver) to the time they exited it as a new (and often unexpected) purchaser of the Driving Opportunity.

[129] *See, e.g.*, Appx. 3165; Appx. 2424; Burr Dec. ¶¶ 5-10 (clear message of mandatory orientation presentations, which used the EBG as its guide, was that lease drivers were paid more than company drivers); Bilbo Dec. ¶¶ 4-7.

[130] *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 516 (D.N.J. 1997) ("reliance may be presumed for fraud-based common law claims when the alleged omissions and misrepresentations are uniform and material and the class members acted in a manner consistent with reliance"); *Hutchens*, 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 loan application would not consider those facts to be important in the making of their decision.").

Finally, like a RICO claim, causation and damages are also susceptible to class-wide proof.[131] All subclass members were subjected to similar, standardized misrepresentations when they were sold the Driving Opportunity and allegedly were induced to act and injured in the same way when they purchased the fraudulent business opportunity.

4. Plaintiffs' Claim for Negligent Misrepresentation Satisfies the Commonality and Predominance Requirements.

Plaintiffs also seek certification of a nationwide class[132] of Drivers who purchased the Driving Opportunity on their alternative claim for negligent misrepresentation based on Defendants' omissions of material fact and uniform misrepresentations. As with fraudulent concealment, Defendants also can be liable for their alleged material omissions where there is a duty to disclose, which is a question of law for the Court. *See Smith v. Frandsen*, 2004 UT 55 ¶ 11, 94 P.3d 919 ("in addition to affirmative misstatements, an omission may be actionable as a **negligent misrepresentation** where the defendant has a duty to disclose."); *Moore v. Smith*, 2007 UT App 101, ¶ 36 & n.2, 158 P.3d 562 (the only difference between claim for fraudulent concealment and a claim for negligent misrepresentation based on failure to disclose is that to prove the latter, a plaintiff only need establish the lesser mental state that the defendant acted carelessly or recklessly).

Defendants can be liable for misrepresentations or omissions when (1) Class members reasonably relied on Defendants' misrepresentations; (2) the representations constitute a careless or negligent misrepresentation of material fact; (3) Defendants had a pecuniary interest in the

[131] *See* Fed. R. Civ. P. 23(b)(3) Advisory Committee Note ("a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.").

[132] Regardless of the form or timing of the uniform misrepresentations in Defendants' marketing materials, Defendants never disclosed accurate earnings, mileage or turnover information to Drivers in connection with the sale of the Driving Opportunity.

transaction; (4) Defendants were in a superior position to know the material facts; and (5) Defendants should have reasonably foreseen the Class members were likely to rely on the misrepresentations. *See Andersen v. Homecomings Fin., LLC*, 2:11-cv-332-TS, 2011 WL 3626828 (D. Utah Aug. 17, 2011). Like the common issues raised by the RICO, UPUA and fraud claims, the issues raised by these elements focus largely on the conduct of Defendants, can be resolved through generalized proof, and predominate over any issues requiring individualized proof. For the reasons discussed above in connection with fraud, the common issues relating to Defendants' conduct, knowledge and deceptive scheme predominate over individual issues relating to materiality, oral representations, and reasonable reliance. Similarly, there are common issues relating to Defendants' relationship with Class members and whether Defendants owed Class members an independent duty to disclose.

Finally, like the RICO, UPUA and fraud claims, causation and damages are also susceptible to class-wide proof. All subclass members were subjected to similar, standardized misrepresentations and omissions, and were injured in the same way when they purchased the fraudulent business opportunity.

5. Plaintiffs' Claim for Breach of Contract Satisfies the Commonality and Predominance Requirements.

Plaintiffs allege that Defendant C.R. England breached the standard form STA, which promised Plaintiffs and other subclass members that, upon completion of C.R. England's training program, they could choose to "[r]emain a C.R. England employee with a company truck." C.R. England breached the STA through its failure to make company trucks available for its drivers and otherwise impeding or preventing Drivers from exercising their right to become a company

driver. Under this claim, Plaintiffs seek certification of a subclass of all Drivers who executed the STA and subsequently purchased the Driving Opportunity.

"The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, 20 P.3d 388, 392. In class actions arising out of breaches of contracts, "the common predominating question focuses on whether [the Defendants] fulfilled [their] obligation[s]" as set forth in the contract. *Gray v. Hearst Commc'ns, Inc.*, 444 F. App'x 698, 702 (4th Cir. 2011) (rejecting argument that individual issues relating to specific class members would predominate in breach of contract case); *see also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 123-26 (holding that issue of whether defendant's actions constituted breach would predominate over potential individual issues).

The question of whether C.R. England failed to fulfill its contractual obligations to subclass members by choosing not to make company trucks available and otherwise preventing subclass members from receiving the fruits of their bargain presents common questions of law and fact that predominate over potential individual issues. As the reasonable expectations of subclass members are measured objectively, and each subclass member signed an STA containing identical guarantees of company driver employment, the determination of whether C.R. England prevented subclass members from becoming company drivers upon completion of Phase II training is particularly well-suited to class-wide determination because it focuses on C.R. England's course of conduct with respect to all subclass members rather than any individual questions related to specific subclass members. And damages can be determined on a class-wide basis. *See* Argument, Section III.C., *infra*.

6. Plaintiffs' Claim for Unjust Enrichment Satisfies the Commonality and Predominance Requirements.

Plaintiffs assert an alternative claim for unjust enrichment based on the benefits they and other Drivers have conferred on Defendants as a result of Defendants' wrongful conduct in connection with the Driving Opportunity. Certification of a nationwide class of all Drivers who purchased the Driving Opportunity is appropriate.[133]

Specifically, a claim for unjust enrichment requires proof that (1) there was "a benefit conferred on one person by another," (2) "the conferee must appreciate or have knowledge of the benefit," and (3) "there must be the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Desert Miriah, Inc. v. B & L Auto, Inc.*, 2000 UT 83, ¶ 13, 12 P.3d 580. Through the Driving Opportunity, Defendants effectively passed off many of the costs and expenses they would have had to pay if the leased trucks had been operating as company trucks. Even worse, Defendants tacked on the additional per-mile variable mileage charge for every mile driven. The variable mileage charge started at "three and a half cents and went to four and eight, 12 and 14." (Appx. 3300-3301.) Defendants claimed that there was some legitimate purpose for the charge, such as covering the increasing costs of trucks, but that was false.[134] In truth, the charge was imposed and increased over time simply to squeeze more money out of the Drivers. The amount of the variable mileage charges paid by each class member is identifiable and easily

[133] Numerous federal district courts have certified nationwide unjust enrichment classes. *See, e.g., Miller v. Basic Research, supra* (certifying RICO, UPUA, consumer fraud and unjust enrichment claims); *Mercedes-Benz Antitrust Litig., supra* (certifying consumer fraud and unjust enrichment claims); and *West Ways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 238-40 (C.D. Cal. 2003) (liability on unjust enrichment clams can be made from common class-wide proof).

[134] [redacted]

calculated from Defendants' own data, which includes detailed information with respect to both total miles driven and variable mileage payments collected from every Driver in the Class. (Mahla Dec. ¶ 13(b).)

Once again, the focus of this claim is on the conduct of Defendants, and these elements give rise to common issues that can be proven through general or standardized proof without the need for individual analyses, satisfying both the commonality and predominance requirements.

7. Plaintiffs' Claim for Breach of Fiduciary Duty Satisfies the Commonality and Predominance Requirements.

Plaintiffs also seek certification of a nationwide class for the breach of fiduciary claim, consisting of all Drivers who purchased the Driving Opportunity. A breach of fiduciary duty is a breach of a legal duty arising from the relationship of the parties. 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. *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1990). It has been recognized that "[i]nherent in a franchise relationship is a fiduciary duty." *Arnott v. Am. Oil Co.*, 609 F.2d 873, 881 (8th Cir. 1979) (upholding breach of fiduciary finding between franchisee and franchisor).

Plaintiffs have alleged that Defendants had certain advantages over the Drivers, not the least of which was exclusive access to the true economics of the Driving Opportunity. As alleged, 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. At a time when class members had placed their trust in and were dependent on Defendants for their financial survival, and when Defendants should have treated class members with the utmost good

faith and undivided loyalty, Defendants took adverse action that caused class members to be unduly vulnerable to Defendants, thus enabling Defendants to take undue advantage.

Under these circumstances, common factual and legal issues, including whether Defendants were in a fiduciary relationship with class members, and if so, whether they breached their fiduciary obligations, predominate over any potential individual issues.

8. Plaintiffs' Claim for Violation of the Utah Truth In Advertising Act Satisfies the Commonality and Predominance Requirements.

It is likewise appropriate to certify a nationwide class consisting of all Drivers who purchased the Driving Opportunity under Plaintiffs' claim for violation of the Utah Truth in Advertising Act (UTIAA). The purpose of the UTIAA is to prevent deceptive, misleading, and false advertising practices and forms. Utah Code Ann. § 13-11a-1. Plaintiffs assert that Defendants' acts or practices in the course of marketing the Driving Opportunity to Plaintiffs and Class members nationwide constitute deceptive advertising practices in violation of the UTIAA.

Plaintiffs allege that Defendants misrepresented the characteristics, uses, benefits, or qualities of the Driving Opportunity (§ 13-11a-3(e)); advertised the opportunity with intent not to sell it as advertised (§ 13-11a-3(i)), and not to supply a reasonable expectable public demand (§ 13-11a-3(j)), i.e., by advertising the guarantee of a job with C.R. England as a company driver, fully aware that Defendants would not make sufficient company driver positions available, intending to convert Drivers to lease drivers under the Driving Opportunity; and engaged in conduct that similarly creates a likelihood of confusion or misunderstanding (§ 13-11a-3(t)).[135]

In addition to the overriding common issue of whether Defendants' conduct constitutes deceptive trade practices, the underlying issues focus entirely on Defendants' conduct, including

[135] Complainants under the UTIAA need not prove actual confusion or misunderstanding. Utah Code Ann. § 13-11a-3(7).

whether Defendants' methods of advertising and their alleged misrepresentations in their written marketing materials, constitute "advertisements" under the statute;[136] whether the sale of the Driving Opportunity constitutes the sale, lease or other written or oral transfer or disposition of "goods or services" under the statute;[137] and the truth or falsity of Defendants' "advertisements" guaranteeing employment. The questions raised can be answered through generalized proof and predominate over the individual issues, if any.

Further, as with the Business Opportunity Act, this statute allows recovery of actual damages sustained or $2,000, whichever is greater (Utah Code Ann. § 13-11a-4(2)(b)), and both statutory and actual damages can be modeled and calculated based on data maintained by Defendants, as discussed in Argument, Section III.C., *infra*.

C. Both the Fact and Amount of Damages May Be Determined on a Class-Wide Basis in this Action.

1. The Fact of Damages Is the Same for All Class Members.

The fact of damages is part of causation; a plaintiff must show that his alleged damages were caused by the defendant's conduct, and not some other source. *Stevens-Henager College v. Eagle Gate College*, 2011 UT App 37, 248 P.3d 1025. To establish the fact of damages, "'[t]he evidence ... must give rise to a reasonable probability that the plaintiff suffered damage." *Id.* Here, Plaintiffs allege that all Class members were harmed in the same manner: they were induced to purchase a business opportunity that was not what Defendants had represented it to

[136] "Advertisement" is defined to include "any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business." Utah Code Ann. § 13-11a-2(1).

[137] "Goods and services" is defined as "all items which may be the subject of a sales transaction." Utah Code Ann. § 13-11a-2(4). "Sales transaction" includes "a sale, lease … or other written or oral transfer or disposition of goods, services , or other property, both tangible and intangible (except securities and insurance), to a person or business, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, and any performance of an agreement with respect to any of these transfers or dispositions." Utah Code Ann. § 13-11a-2(15).

be. The entire Class will rely on the same evidence to prove the fraudulent nature of the scheme, and therefore class treatment of damages would be very conducive to the efficient resolution of Plaintiffs' and Class members' claims.[138]

2. The Amount of Damages Will Be Readily Calculable on a Class-Wide Basis for All of Plaintiffs' Theories.

(a) Minimum Statutory Damages for the Utah Business Opportunity Disclosure Act and the Utah Truth in Advertising Act.

Under Utah's Business Opportunity Disclosure Act, persons that have purchased a business opportunity from a seller that has not complied with the act are entitled to "the amount of actual damages or $2,000, whichever is greater." Utah Code Ann. § 13-15-6. Similarly, Utah's Truth in Advertising Act allows class members to recover the greater of their actual damages or $2,000 "in addition to remedies otherwise available for the same conduct under state or local law." Utah Code Ann. § 13-11a-4. The minimum statutory damages are easily calculable on a class-wide basis without the need for individual inquiry or analysis. (*See* Mahla Dec. ¶¶ 6, 12(a), 13(a).)

(b) Class Certification Is Appropriate Even If Monetary Awards to Plaintiffs and Class Members Must Be Calculated Individually.

Even though there may be individual differences in monetary relief for individuals who are entitled to more than the statutory minimums, that does not prevent class certification. Importantly, "the wrongdoer, rather than the injured party … should bear the burden of some uncertainty in the amount of damages." *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d at 334. Accordingly, while "there still must be evidence that rises above

[138] Even if the fact of damages were not subject to class-wide proof, class certification would still be appropriate. *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (rejecting argument that class certification was inappropriate because some potential members of a class, all of whom suffered from wood rot in their structures, might not be able to prove that the defendant caused their wood rot).

speculation," notably, "'the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages.'" *Id.* Here, Defendants' own database contains more than sufficient information to "determine with reasonable certainty the amount of [monetary relief]." *TruGreen Cos. v. Mower Bros., Inc.*, 2008 UT 81, ¶ 15, 199 P.3d 929. (*See* Mahla Dec. ¶¶ 6, 13(b).)

(c) There Is Sufficient Information to Determine Damages Under a Benefit of the Bargain Theory.

One measure of damages for Plaintiffs' statutory, breach of contract and fraud claims will be the "benefit of the bargain" approach. *Anesthesiologists Assocs. v. St. Benedict's Hosp.*, 852 P.2d 1030, 1036 (Utah Ct. App.1993) (damages for breach of contract are measured by "the lost benefit of the bargain," i.e., "the amount necessary to place the non-breaching party in as good a position as if the contract had been performed."); *Dugan v. Jones*, 615 P.2d 1239, 1247 (Utah 1980); *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001) (plaintiff in RICO action may recover "lost profits or lost value damages if proximate cause is shown").

Where earnings are at issue, it is quite easy to calculate a measure of damages as the difference between what a Driver actually made and what was promised. For example, the fact-finder could choose to compensate Drivers as if they had been average Drivers making the average amount represented in the fraudulent earnings graphs. The damages would then be easily calculated on a class-wide basis by determining for each Driver the difference between what the Driver actually made and what Defendants represented a company driver makes.

Alternatively, it would be easy to calculate the difference between what Drivers would have made if Defendants had paid them at the rate per mile that Defendants' mileage pay scales show company drivers are paid and what the Drivers actually made. Or, it is possible to

accurately estimate the number of hours each Driver drove and the hourly rate the Driver made, based on the amount the Driver actually made, and then determining the difference between what the Driver would have made at some reasonable hourly rate. (*See* Mahla Dec. ¶¶ 6, 13(b).) Under either scenario, the calculations could be done readily on a class-wide basis. (*See* Mahla Dec. ¶ 13(b).)

(d) Relief for Unjust Enrichment Also Is Readily Calculable on a Class-Wide Basis.

Plaintiffs allege that they have conferred a benefit on Defendants through their payments and undercompensated work, that Defendants knew of the benefit, and that it would be unjust for Defendants to maintain the benefit. The amount Defendants benefitted from each Driver in the class could be readily calculated, based on the difference between the net amount Defendants paid to a class member and what they would have paid to a company driver. (*See id.*)

(e) Monetary Relief under a Theory of Rescission or Restitution Also Is Readily Calculable.

Plaintiffs and Class members could also seek restitution or rescission on their statutory and fraud and misrepresentation claims.[139] "Rescission is a restitutionary remedy designed, to the extent possible, to restore the parties to the position they occupied before the fraud or transaction." *Borghetti v. Syst. & Computer Tech., Inc.*, 2008 UT 77, ¶ 20, 199 P.3d 907. The amount to be paid to each class member for rescission would be readily calculable, using the information in C.R. England's database regarding amounts it received and what it paid to a class member. (*See* Mahla Dec. ¶¶ 6, 13(b)(whatever measure of damages is determined appropriate,

[139] *See* Utah Code Ann. § 13-15-6(2) (purchaser of business opportunity from a seller who does not comply with the Business Opportunity Act is entitled, *inter alia*, "to rescission of the contract"); *Miller v. Celebration Mining Co.*, 2001 UT 64, ¶ 10, 29 P.3d 1231 (fraudulent or material misrepresentation is grounds for rescinding contract); *see also F.T.C. v. Nat'l Bus. Consultants*, 781 F. Supp. 1136, 1143 (E.D. La. 1991).

such calculation can be made with a relatively high degree of precision because of Defendants' data).)

(f) Monetary Relief for Negligent Misrepresentation Is Likewise Readily Calculable.

The measure of damages for a negligent misrepresentation claim "is that necessary to compensate the plaintiff for the pecuniary loss to him [for] which the misrepresentation is the legal cause." *Alta Health Strategies, Inc. v. CCI Mech. Serv.*, 930 P.2d 280, 286 (Utah Ct. App. 1996). "Examples of what these damages may include are: (a) the difference between the value of what [the plaintiff] has received in the transaction and its purchase price or other value given and (b) pecuniary loss suffered ... as a consequence of the plaintiff's reliance upon the misrepresentation." *Id.* at 286 n.2. Here, the loss each class member suffered may be determined using the information in Defendants' database.

D. The Plaintiff Representatives' Claims Are Typical of Those of the Other Class Members.

Typicality under Rule 23(a)(3) "is satisfied if the named plaintiffs' claims arise from the same events or practices giving rise to the claims of other class members and are based on the same law." *Miller v. Basic Research*, 285 F.R.D. at 656. "[A] plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative." NEWBERG § 3.13, at 325.

"'The interests and claims of Named Plaintiffs and class members need not be identical to satisfy typicality.'" *Miller*, 285 F.R.D. at 656. "As long as the claims of the Named Plaintiffs and class members 'are based on the same legal or remedial theory, differing fact situations of

the class members do not defeat typicality.'" *Id.*[140] Thus, typicality is easily met in most cases, "when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is met." *Dodge v. Cambrex*, No. 03-cv-4896 (PGS), 2007 WL 608365, *5 (D.N.J. Feb. 23, 2007). "Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996).

The claims asserted in this litigation are based on and arise out of Defendants' common course of conduct in marketing, advertising and selling the Driving Opportunity. These claims give rise to similar remedies; namely, injunctive or equitable relief, damages and/or treble damages, restitution and disgorgement and/or such orders or judgments as may be necessary to restore to the Drivers any money that may have been acquired by means of Defendants' practices.[141] Each of the Plaintiffs have the same incentive as other Class members to prove Defendants' wrongful conduct, and the relief sought by Plaintiffs is similar to that sought by the absent Class members. Finally, in order to prosecute their own claims, each Class member would be obliged to make similar arguments to establish Defendants' liability. Therefore, the typicality requirement of Rule 23(a)(3) is easily satisfied here.

[140] *See also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988); *In re Prudential*, 962 F. Supp. 450, 518 (D.N.J. 1997) (finding of typicality necessitates simply that there is "a strong similarity of legal theories, or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant.").

[141] "Individual damage issues should not, except in extraordinary situations, have any adverse effect on the propriety of aggregate class judgments as a proper means for determining the defendant's liability to the class." NEWBERG § 10:2; *see also Gold Strike*, 436 F.2d at 796.

E. Adequacy.

Rule 23(a)(4)'s requirement that "the representative parties will fairly and adequately protect the interests of the class" looks to answer the question will "the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Owner-Operator*, 2005 WL 2098919, at *4. Adequacy of representation is measured by two standards. First, class counsel must be qualified, experienced, and generally able to conduct the litigation. Second, the class members must not have interests that are antagonistic to one another. *Dilley*, 2008 WL 4527053, at *5. The party challenging representation ultimately bears the burden to prove that representation is not adequate. *See Sala v. Nat'l R.R. Passenger Corp.*, 120 F.R.D. 494, 498 (E.D. Pa. 1988). "Doubts concerning the adequacy of a class representative are resolved in favor of certification." *Weikel v. Tower Semiconductor, Ltd.*, 183 F.R.D. 377, 394 (D.N.J. 1998).

Both prongs of the adequacy requirement are satisfied by these representatives. First, Plaintiffs have retained counsel who are experienced and qualified to prosecute this action. Plaintiffs' attorneys include seasoned class action and trial attorneys who are more than capable of competently conducting this litigation as a class action. These counsel have conscientiously and vigorously represented Plaintiffs and the interests of the proposed Class in this litigation, and will continue to do so. They have successfully prosecuted numerous class actions and/or complex cases throughout the United States, and have extensive experience in the successful prosecution of this type of litigation. (*See* Krawczyk Dec., Ex. UU and VV (copies of law firm resumes); Boulter Dec. ¶¶ 5-6.) Counsel are qualified and satisfy the adequacy requirement.[142]

[142] *See also Owner-Operator*, 2005 WL 2098919, at *4 (finding adequacy where counsel has spent considerable time and resources on particular case and understands issues); *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 129 (3d Cir. 1987) ("an assurance of vigorous prosecution" and "competence and experience of counsel" define "adequate representation").

Second, Plaintiffs are adequate class representatives because their claims are essentially identical to those of the rest of the Class and subclass members they seek to represent, and thus there is no antagonism or conflict of interest between them. Their interests are coextensive with the interests of other Class members in that they share the same objectives; namely, proving Defendants' wrongful conduct and establishing Defendants' liability for relief.

F. Superiority.

"The superiority requirement is grounded in the idea that the litigation is to be carried out as efficiently and as fairly as possible for all parties." *Dilley*, 2008 WL 4527053, at *8. The requirement "directs the court's attention to 'the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to plaintiffs.'" *Id.* Rule 23(b)(3) sets forth four factors to guide the determination of whether a class action is superior to other methods to adjudicate the controversy:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.

These factors are to be viewed nonexclusively. *See Esplin*, 402 F.2d at 98 n.7.

It is neither economically feasible, nor judicially efficient, for the many thousands of Class members to pursue their claims on an individual basis. Individual prosecution is impractical because the cost of litigating a single case would greatly exceed the potential return. A class action is appropriate when the "size of each claimant's alleged loss is undoubtedly too

small to be economically litigated at all outside of a class action" and when "the relatively small amount at stake for each claimant vitiates any argument that each has an interest in controlling the prosecution of the case." *Mercedes-Benz Antitrust Litig.*, 213 F.R.D. at 191 (size of each claimant's loss was too small to be economically litigated outside a class action when "the evidence supported a preliminary presumption that an alleged illegal overcharge would range from a few hundred to a few thousand dollars at most."). *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (neither feasible nor efficient for thousands of Class members to pursue individual claims).

Plaintiffs' action was filed in May 2011. Plaintiffs are not aware of any competing cases that have been filed since then. Concentrating this litigation in a single forum in this District will allow the litigation to proceed in an efficient manner without risk of inconsistent outcomes while conserving resources, including judicial resources. Indeed, litigation must be concentrated in this forum under the VLA and ICOA. The ability to concentrate the litigation in a given forum "eliminates duplicative discovery; prevents inconsistent pretrial rulings, especially with respect to class certification; and conserves the resources of the parties, their counsel and the judiciary." *Prudential,* 962 F. Supp. at 518. Thus, the second and third factors point to the superiority of the class action.

Finally, and significantly, this action is manageable, presenting no issues "that would not otherwise be present in any case with numerous, but small individual claims." *Elias*, 252 F.R.D. at 252. Plaintiffs have submitted a proposed Trial Plan to help demonstrate manageability. (Krawczyk Decl., Ex. WW.) As shown in the Trial Plan, the claims will be established with generalized evidence based largely on the standardized materials and training scripts directed at

Class members. The proof to establish the various claims is consistent among all Class members, making class certification ideal.

Ultimately, "the superiority requirement asks a district court 'to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication.'" *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 309 (3d Cir. 2005) (quoting *Amchem*, 83 F.3d at 632). Class treatment is the only available alternative here, as the cost of individual litigation would far exceed the value of any judgment rendered for any individual Class member.

IV. NOTICE TO THE CLASS

Following certification, this Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Miller v. Basic Research*, 285 F.R.D. at 658.[143] Plaintiffs have retained A.B. Data, Ltd. ("A.B. Data"), a firm that specializes in designing, developing, analyzing and implementing large-scale, unbiased, legal notification plans. (Declaration of Anya Verkhovskaya ("Verkhovskaya Dec.") ¶¶ 7-10.) Based upon information available from Defendants, and utilizing available databases, A.B. Data has proposed a nationwide class notice program that will provide efficient, adequate and reasonable notice of Class certification to Class members, and fully comport with Rule 23(c)(2). (*Id.* ¶¶ 29-31.) The proposed notice program is similar to programs approved by district courts upon class certification. *See, e.g., Miller v. Basic Research*, 285 F.R.D. at 658.

[143] *Accord* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed. 2004)

CONCLUSION

Plaintiffs have satisfied the numerosity, commonality, typicality and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3) and the notice requirements of Rule 23(c)(2). Plaintiffs respectfully request that the Court certify for class action treatment the claims asserted in the Class Action Third Amended Complaint under the following federal and state laws: Utah Business Opportunity Disclosure Act; Utah Consumer Sales Practices Act; RICO; Utah Pattern of Unlawful Activity Act; fraud and misrepresentation; breach of contract; unjust enrichment; breach of fiduciary duty; and Utah Truth in Advertising Act, and that the Court appoint Plaintiffs as the class representatives and their counsel as Class counsel for the nationwide class and the two proposed subclasses.

DATED: November 12, 2013

ANDERSON & KARRENBERG, P.C.

/s/ Jon V. Harper
Thomas R. Karrenberg
Jon V. Harper
Heather M. Sneddon

- and -

KRAVIT, HOVEL & KRAWCZYK, S.C.
Stephen E. Kravit
C.J. Krawczyk
Benjamin J. Glicksman
Aaron H. Aizenberg
Benjamin R. Prinsen

LAW OFFICES OF ROBERT S. BOULTER
Robert S. Boulter

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2013, I caused a true and correct copy of **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT [FILED UNDER SEAL PURSUANT TO STIPULATED PROTECTIVE ORDER]** to be served via hand delivery to the following:

James S. Jardine
Scott A. Hagen
David B. Dibble
Ray, Quinney & Nebeker
36 S. State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

/s/ Jon V. Harper