No. 21-1295

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FRANKLIN MERRILL, *et al.*,
Plaintiffs-Appellants,

v.

PATHWAY LEASING LLC, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 16-CV-02242, Hon. Kristen L. Mix)

BRIEF FOR APPELLANTS

Matthew Cushing
Counsel of Record
Edwin Bruns
Aurora Lee Marsh
Patricia Rodríguez
Elizabeth Stonehill
UNIVERSITY OF COLORADO LAW SCHOOL APPELLATE ADVOCACY PRACTICUM
2450 Kittredge Loop Drive
Boulder, CO 80309
(303) 735-6554
matthew.cushing@colorado.edu

Counsel for Appellants

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STATEMENT OF PRIOR OR RELATED APPEALS

Plaintiffs-Appellants Franklin Merrill *et al.* previously filed two appeals in related cases. The first was dismissed upon agreement of the parties. *Franklin Merrill, et al. v. Contract Freighters, Inc.*, Case No. 20-1279, 2020 WL 8463618 (10th Cir. Oct. 1, 2020). The other was dismissed without prejudice on jurisdictional grounds. *Franklin Merrill, et al. v. Contract Freighters, Inc.*, Case No. 20-1374, 2020 WL 9218076 (10th Cir. Dec. 11, 2020).

STATEMENT OF JURISDICTION

Plaintiffs brought this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, for, as is relevant to this appeal, failure to pay minimum wage. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and entered a final judgment after trial on July 21, 2021. (Final Judgment, Vol. 2, 1273-75).[1] The notice of appeal was timely filed in the district court on August 18, 2021. (Notice of Appeal, Vol. 2, 1276). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Citations to "Vol. X" are to volumes 1 through 4 of the appellate record, ECF No. 24.

STATEMENT OF THE ISSUES

1. Whether the lower court erred by not conducting a threshold joint employer analysis before analyzing whether the Plaintiffs were "employees" for purposes of the FLSA?
2. Whether the lower court erred in finding that the Plaintiffs were not "employees" for purposes of the FLSA?

INTRODUCTION

Truck driving is a vital industry in the United States, transporting 71.6% of the goods shipped in this country. Companies like XPO Logistics Truckload Inc. ("XPO")[2] coordinate the transportation of these goods, and drivers like Mr. Merrill and his co-plaintiffs (the "Lease Drivers") move these items from point A to point B using semi-trucks. These semi-trucks are the backbone of the industry—no other vehicle offers comparable cargo capacity and flexibility. Industry-wide, carrier companies like XPO own

[2] Because of a series of acquisitions, XPO is referred to throughout the record as, variously, XPO, Con-way Truckload Inc., and Transforce, Inc. Although XPO was a named defendant in this case, the Lease Drivers' claims against XPO are now being decided in compelled arbitration. *See* Order on Partial Motion to Dismiss and to Compel Individual Arbitration, *Merrill v. Pathway Leasing LLC*, 16-cv-02242, ECF. 164, at 10 (D. Colo. Oct. 5, 2017).

approximately one-third of semi-trucks and employ company drivers to operate them. Leasing companies or individuals own the remainder.

Capitalizing on the structure of the trucking industry, Defendants Pathway Leasing LLC and its president Matthew Harris, (together, "Pathway") implemented a scheme with XPO whereby they could offload maintenance and repair risk by leasing used trucks to Lease Drivers under the pretense that the drivers would become autonomous, profitable owner-operators: they would drive for XPO, pay off their loans to Pathway, and ultimately own their own semi-truck.

Although the Lease Drivers worked exceptionally hard, the deck was stacked against them from the beginning. Pathway leased heavily used trucks to the Lease Drivers, often without giving them an opportunity to inspect the trucks before signing a contract. Almost inevitably, the trucks would require repairs hundreds of thousands of miles ahead of schedule, and instead of XPO or Pathway footing the bill, the Lease Driver was responsible for payment. The Lease Drivers needed their trucks to earn income, and Pathway needed the Lease Drivers to earn income to ensure repayment. As a result, Pathway would issue promissory notes to a Lease Driver—sometimes up to a

dozen—to loan the driver enough money to pay for the repairs. As a result of the increasing debt loads, Lease Drivers would haul XPO loads thousands of miles a week across the country but only take home a fraction of their earnings after Pathway's share was remitted. Because their roles were practically indistinguishable from Company Drivers and they earned far less than minimum wage, the Lease Drivers commenced this action against Pathway and XPO for, among other things, violations of the FLSA's minimum wage provision.

After a full trial, but without considering first whether Pathway and XPO were joint employers, the lower court held that the Lease Drivers were not employees of Pathway. That was erroneous, and the lower court should be reversed, for two reasons. First, the lower court failed to conduct the threshold inquiry whether Pathway and XPO were joint employers. Without that analysis, the lower court used an incomplete set of facts in determining whether the Lease Drivers were "employees" for purposes of the FLSA. Second, even looking only at Pathway, the lower court made legal and factual errors under the six-factor test for determining whether the Lease Drivers were "employees."

The lower court's decision should be reversed.

STATEMENT OF THE CASE

I. Congress intended that the FLSA cover a "broad swath" of workers and employers.

Congress passed the FLSA in 1937 to prevent employers from paying employees too little and working them too much. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017). The FLSA applies to most employers and includes (1) a federal minimum wage, 29 U.S.C. § 206(a), and (2) mandatory overtime pay for covered employees who work more than 40 hours per week, 29 U.S.C. § 207(a).

Congress had two concerns when passing the FLSA: it wanted to bring "a broad swath of workers within the [FLSA's] protection," *Salinas*, 848 F.3d at 133, and it wanted to prevent employers from finding loopholes to escape the FLSA's requirements, Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 Cornell L. Rev. 557, 571-72 (2019).

Congress addressed both concerns by drafting the FLSA with "the broadest definition [of employee] that has ever been included in one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting SEN. REP. NO. 75-884, at 6). The statute applies to "any individual" that an employer of a certain size "suffer[s] or permit[s] to

work." 29 U.S.C. § 203(e)(1); 29 U.S.C. § 203(g).[3] Congress intended that this broad definition be "'comprehensive enough' to include 'working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'" *Scantland v. Jeffry Knight*, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013) (quotation omitted).

II. Employers commonly misclassify employees as independent contractors to evade the FLSA.

Because the FLSA applies only to "employees," employers are incentivized to misclassify workers as independent contractors—or, in the trucking industry, as "owner-operators." The U.S. Department of Labor estimates that 30% of all employees are misclassified. LALITH DE SILVA ET AL., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS i-iv (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf; Brief of Int'l Brotherhood of Teamsters et al. as *Amici Curiae* Supporting Respondents, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (No. 17-340) (hereinafter "Teamsters Comment"). As a result, federal and state governments are

[3] To "suffer or permit to work" was a term of art taken from child labor laws, as discussed below. *Rutherford Food Corp. v. McComb*, 331 U.S. 772, 728 (1947).

deprived "of billions of dollars in tax revenue" and "millions of workers [are deprived of the labor law protections] to which they are entitled." *Dynamex Operations W., Inc. v. Superior Ct.*, 4 Cal. 5th 903, 913 (Cal. 2018). In trucking, misclassified drivers earn significantly less than employee-drivers. *See* Teamsters Comment at 9 ($18,783 annual net earnings for independent contractors, $35,000 for employees).

III. Pathway exerted significant influence over the Lease Drivers' work.

While they were Company Drivers, the Lease Drivers were inundated with messaging from XPO and Pathway via email, QUALCOMM communications, and advertisements at XPO headquarters, telling them that they could prosper as owner-operators. (Vol. 1, 331; Vol. 3, 38:18-25; 973:5-18). When Lease Drivers succumbed to the advertising, they leased used trucks from Pathway and transported freight as part of XPO's hauling business. (Findings of Fact, Conclusions of Law, and Order of Judgment ¶ 1 [hereinafter "Order"],[4] Vol. 2, 1228-1272). Each Lease Driver had an "Equipment

[4] Citations to the Order are to the paragraph (for findings of fact) or page number (for conclusions of law) of that Order, not to the equivalent page of the Record.

Lease Agreement" with Pathway, which concerned the leased truck and shifted maintenance costs to the Lease Driver, and a "Contract Hauling Agreement" with XPO, which concerned the transportation of goods. (*Id.*¶¶ 3, 24).

Additionally, there was a "Carrier Agreement" between XPO and Pathway, which outlined key terms of the partnership between the two companies. (*Id.*). That agreement required XPO to deduct Lease Drivers' payments to Pathway directly from their paychecks and remit the money to Pathway. (Trial Tr., Vol. 3, 543:2-11).[5] XPO gave Pathway insight into the Lease Drivers' workloads; Pathway would then ask XPO to give more lucrative assignments to Lease Drivers who were not earning enough to pay off their debts to Pathway. (Vol. 3, 921:21-922:6; 923:17-22).

While leasing a truck should have moved the Lease Drivers from being XPO Company Drivers to being owner-operators, that was not the reality. (Order ¶ 10). In theory, owner-operators are permitted to pick

[5] All citations to Volume 3 of the Record are citations to the trial transcripts. Citations to trial transcripts in the Record will use the following format: Appellate Record Volume #, Appellate Record Volume Page #: Trial Transcript Line #.

and choose which loads they accept, what routes they drive, and when they work. (Vol. 3, 291:6-17). They are often paid as a percentage of the cost of the freight they haul. (Vol. 3, 867:2-22). By contrast, Company Drivers are assigned a load by XPO, which they must accept, and are paid per mile driven. (Order ¶ 16; Vol. 3, 201:8-10).

But Lease Drivers were more like Company Drivers than owner-operators. Lease Drivers could only haul for XPO or "one or two [carrier] companies" with which Pathway had a preexisting remittance arrangement. (Vol. 3, 267:21-268:16, 909:6-11). Lease Drivers were only allowed to take assignments from other carrier companies after they paid off their truck—something less than half of all lessees accomplished. (Vol. 3, 834:8-9; 943:9-10). Lease Drivers who refused loads from XPO were penalized with less favorable jobs that resulted in fewer miles driven. (Vol. 3, 679:10-13). And Lease Drivers were paid like Company Drivers, on a per-mile basis. (Vol. 3, 853:22-24). As a result, Lease Drivers accepted any XPO load assigned to them by default. (Vol. 3, 83:16-22; 84:16-17). But even ambitious Lease Drivers were unable to get ahead this way, because Pathway penalized drivers $0.09 per mile driven above 30,000 miles in a three-month period. (Vol.

3, 850:11-13; 182:7-21).

Aside from work assignments and compensation, Lease Drivers also performed similar duties, with similar levels of discretion, as Company Drivers. (Order ¶¶ 2-7). Indeed, Lease Drivers only had to be Company Drivers for six months before qualifying as owner-operators. (Vol. 3, 500:5-8). Even then, nothing about the Lease Drivers' day-to-day changed: as one noted, "I was under the impression I was supposed to be my own boss, but I was still getting dispatching and everything else like a company driver through [XPO]." (Vol. 3, 81:15-17).

One of the only differences between Company Drivers and Lease Drivers was that Lease Drivers were responsible for their leased trucks' maintenance and repairs. (Order ¶ 7). However, many Lease Drivers were not permitted to test drive the heavily-used trucks they leased before signing their Equipment Lease Agreements, and thus had no insight into how many repairs those trucks might need. (Vol. 3, 560:20-21; 647:8-9; 695:3-4; 904:18-20). Some trucks needed major repairs, such as a $25,000 drivetrain fix, nearly 800,000 miles ahead of schedule. (Vol. 3, 390:16-391:15). Pathway would often tell the Lease Drivers what to repair and when, and then would add the cost of repairs

to the Lease Driver's outstanding debt. (Vol. 3, 230:12-18; 391:5-9).

In the end, some drivers paid more than $100,000 for the total cost of a used truck. (Vol. 3, 323:2-3; 770:5-6). A Lease Driver who made $200,000 in earnings took home only $36,000 after the debt payments taken out by Pathway. (Vol. 3, 757:2-7). He earned more as a Company Driver than a Lease Driver. (Vol. 3, 756:25-757:2). Few Lease Drivers ever completed their leases with Pathway; those that did often regretted it. (Vol. 3, 323:4-6).

IV. The Lease Drivers sought just compensation from Pathway and XPO.

The Lease Drivers brought this action seeking, among other things, backpay from Pathway and XPO for their below-minimum-wage pay. (Fourth Am. Compl., Vol. 1, 86). At summary judgment, the Lease Drivers argued that Pathway and XPO were joint employers under the FLSA. (Pls.' Mot. Partial S.J., Vol. 1, 142-60). Because this Court has never decided the appropriate test for joint employer status, the lower court adopted the Fourth Circuit's *Hall-Salinas* test, but deferred resolution of that test until trial. (Order Mot. S.J., Vol. 2, 758-59, 765).

However, after a seven-day bench trial (*see* Vol. 3), the lower court skipped the *Hall-Salinas* joint employer test and proceeded directly to

analyze whether the Lease Drivers were "employees" under the FLSA, (Order at 26). The lower court held that the Lease Drivers were not, and thus not entitled to the FLSA's protections. (Order at 32-33).

SUMMARY OF THE ARGUMENT

The lower court's opinion should be reversed for two reasons.

First, the lower court erred by not determining at the outset whether Pathway and XPO were joint employers under the *Hall-Salinas* test. If they were, then the inputs considered by the lower court in determining whether the Lease Drivers were "employees" for purposes of the FLSA would have included Pathway and XPO's combined influence over the Lease Drivers' work. And that would have caused the lower court to find that the Lease Drivers were employees under the FLSA. Therefore, this Court should affirm that *Hall-Salinas* is the proper test for joint employment in the Tenth Circuit, and remand to the lower court to apply that test. *See* Part I.

Second, even putting aside the threshold error that resulted in the lower court looking at an incomplete set of facts, the lower court's decision should be reversed because under the totality of the circumstances the Lease Drivers were "employees" of Pathway. *See*

Part II. Each of the six factors this Circuit considers in determining whether a worker is an "employee" under the FLSA weighs in favor of finding that the Lease Drivers were "employees": Pathway exerted significant control over the Lease Drivers' work; the drivers had little meaningful opportunity for profit or loss; their investment was insignificant relative to Pathway's large investments; their relationship with Pathway was indefinite; being a Lease Driver did not require any specialized skills; and they were integral to Pathway's business.

ARGUMENT

I. The lower court erred by not first deciding whether Pathway and XPO were joint employers.

The lower court erred by not determining whether Pathway and XPO were joint employers before analyzing if the Lease Drivers were "employees" under the FLSA.[6]

There is a two-step framework for determining whether a worker is an "employee" of more than one entity. *Hall v. DIRECTV, LLC*, 846 F.3d 757, 767 (4th Cir. 2017). First, the court determines if the entities are "joint employers." *Id.* If so, the entities' relationship with and

[6] (Order at 26-27). This Court reviews legal conclusions *de novo*. *Fowler v. Incor*, 279 F. App'x 590, 592-93 (10th Cir. 2008).

influence over the worker is considered together as if they were a single entity. *Id.* Second, the court analyzes six factors to determine whether the worker is economically dependent upon that single combined entity, and thus is an "employee" for purposes of the FLSA. *Id.* at 767, 769.

Courts must consider these steps sequentially because the outcome of the first step—whether two entities are joint employers—determines the factual universe considered in the second step. *See, e.g.*, *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 307 (4th Cir. 2006). If two entities are joint employers, then the court will consider additional facts relating to their *combined* influence over the worker in determining the second step: whether that worker is an "employee." *Hall*, 846 F.3d at 767. This change in the inputs to the second step often changes the output as well: a worker "may not amount to an 'employee' protected by the FLSA when his relationship to each entity is considered separately, but may come within the statutory definition of an 'employee' when his relationships to all of the relevant entities are considered in the aggregate." *Id.* at 768. Thus, the order of this two-step sequence is critical. *Id.* at 767-69 (holding that lower court erred by not first determining joint employer status).

This Circuit has never decided the appropriate joint employer test to apply at the first step. Other circuits take two main approaches: Under the Fourth Circuit's *Hall-Salinas* test,[7] courts examine the relationship between the putative joint employers to determine whether they codetermined essential terms of the worker's job. *Hall*, 846 F.3d at 767. The Ninth Circuit's *Bonnette* test, by contrast, examines the level of control that each entity in isolation exerts over the worker, and ignores the relationship between the entities. *See, e.g.*, *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). *See infra* Part I.1.

Here, the lower court correctly found that *Hall-Salinas* is the

[7] The *Hall-Salinas* test was created by the Fourth Circuit in two cases, *Hall v. DIRECTV, LLC*, 846 F.3d 757 (4th Cir. 2017), and *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), as a response to the weaknesses of the Ninth Circuit's *Bonnette* test and to better map onto Congress's goals in passing the FLSA. As one part of the Fourth Circuit's determination that a new test was necessary, it looked to Department of Labor guidance relating to joint employment. That guidance was recently rescinded for not being sufficiently protective of workers. *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939-01, at 40954 (July 30, 2021). Needless to say, that has no impact on the validity of the *Hall-Salinas* test itself, as joint employment has long been a part of the FLSA. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973) (holding that two or more entities may be joint employers under the FLSA).

appropriate test for joint employment. *See* Part I.1. However, the lower court committed two errors when it subsequently skipped to step two—the "employee" status question—without conducting the threshold joint employer inquiry using the *Hall-Salinas* factors that it adopted. (*See* Order at 26-27). First, conducting the two-step analysis out of order is error as a matter of law. *See* Part I.2.A. Second, had the lower court conducted the *Hall-Salinas* inquiry first, it would have found that Pathway and XPO were joint employers, and thus would have considered Pathway and XPO as a combined entity in step two. *See* Part I.2.B. This, in turn, would have changed the inputs and outcomes of at least three factors of that analysis. *See* Part I.2.C.

1. The lower court properly adopted the joint employment test from *Hall-Salinas*.

This Court, like the lower court, should adopt the Fourth Circuit's *Hall-Salinas* test to determine whether two entities are joint employers under the FLSA. Only the *Hall-Salinas* test consistently reaches the outcome Congress intended in passing the FLSA: to protect large numbers of workers by preventing employers from shirking their responsibilities through the artful use of intermediaries and middlemen. *See* p.5, *supra* (discussing purpose of the FLSA).

Child labor law cases are instructive, because the FLSA explicitly adopted the child labor laws' definition of "employment" in order to reach as many workers as possible. *See Salinas*, 848 F.3d at 133. Child labor laws defined "employ" as "to suffer or permit to work," and thus "imposed liability . . . on 'businesses that used middlemen to illegally hire and supervise children'" under the theory that those businesses, despite not directly hiring or supervising, were nevertheless suffering or permitting those children to work. *Id.*; *see also Rutherford*, 331 U.S. at 728 n.7. For example, in *Sheffield Farms*, a milk sales company hired drivers to deliver milk, and those drivers, in turn, hired children as their assistants to prevent the theft of milk. *People ex. Rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 475 (N.Y. 1918). The milk company was held liable for child labor violations because, although its rules prohibited its drivers from hiring anyone, it knew that this rule was often broken and it failed to prevent the employment of the children. *Id.* at 475, 477. The failure to act, by itself, "was a sufferance of the work." *Id.*

Only the *Hall-Salinas* test results in the broad outcomes, like the finding of liability in *Sheffield Farms*, that Congress intended with the

FLSA. It does this by focusing on the "nature of the relationship between the putative joint employers," looking to six non-exhaustive factors: (1) the shared or allocated "power to direct, control, or supervise the worker;" (2) the shared or allocated "power to . . . hire or fire the worker or modify the terms . . . of the worker's employment;" (3) the length and permanency of the relationship of the employers; (4) whether one putative employer is controlled by the other; (5) the use of shared workspaces; or (6) the shared or allocated responsibility for traditional employer functions. *Salinas*, 848 F.3d at 140-42.

Where two entities jointly determine a worker's tasks, assess the quality of a worker's product, and maintain a permanent relationship with the worker, the entities are joint employers—regardless of the formalities of the relationship. *Hall*, 846 F.3d at 770 ("[T]he FLSA does not require that an entity have unchecked—or even primary—authority over all—or even most—aspects of a worker's employment for the entity to qualify as a joint employer. Rather, the entity *must only play a role* in establishing the key terms and conditions of the worker's employment." (emphasis added)). The inquiry thus links all parties involved in a worker's employment to determine if potential joint

employers "suffer or permit" a worker to work. *See generally Salinas*, 848 F.3d at 136. In doing so, the *Hall-Salinas* test does not allow one employer to hide behind the shield of another employer's formal relationship with the workers.

Other tests, conversely, focus on form over substance by looking to the terms of the relationship between each putative employer and the worker, and ignoring the relationship between the putative employers. *See, e.g.*, *Bonnette*, 704 F.2d at 1470 (evaluating whether each putative employer has authority to hire and fire; controls work schedules or conditions of employment; determines the rate and method of payment; and maintains employment records). Consequently, courts applying other tests often find that two entities were not joint employers, even when they codetermined many elements of the workers' day-to-day jobs, because only one of the companies had, for instance, the contractual ability to hire and fire. *See infra.* By focusing on the relationship between each employer and the worker, these other tests "do not squarely address the 'joint' element of the 'joint employer' doctrine." *Salinas*, 848 F.3d at 138. Worse, they get the focus backwards: as the child labor law cases indicate, Congress wanted courts hearing FLSA

cases to focus on substance, not form, to protect as broad a swath of the working public as possible.

A comparison of two cases arising out of similar facts but applying different tests illustrates the point. *Compare Hall*, 846 F.3d at 774 (applying *Hall-Salinas* and finding joint employment, regardless of DIRECTV's contracting structures), *with Roslov v. DIRECTV Inc.*, 218 F. Supp. 3d 965 (E.D. Ark. 2016) (applying *Bonnette* and finding no joint employment, despite similar facts as *Hall*, based largely on formalities of DIRECTV's contracting structure). Both cases involved DIRECTV's practice of contracting with service providers, who in turn contract with service technicians to install or repair DIRECTV's set-top boxes and other hardware for their satellite TV service.

In *Hall*, the plaintiff service technicians worked for service providers that contracted with DIRECTV to service DIRECTV customers, and alleged that DIRECTV and the service providers were joint employers. *Hall*, 846 F.3d at 761-62, 772. DIRECTV allegedly required plaintiffs to "hold themselves out as representatives of the company, . . . and to display the company's logo on their vehicles when performing work for the company." *Id.* Moreover, DIRECTV set

qualification criteria, used a centralized system for assigning work, and shared authority with its service providers over the technicians' compensation. *Id.* at 773. Applying *Hall-Salinas*, the Fourth Circuit looked past the formalities of the DIRECTV contracting scheme: for instance, it concluded that although DIRECTV did not have "formal" firing authority, it could "effectively terminate technicians by ceasing to assign them work." *Id.* Based on these facts, the court concluded that there were sufficient allegations to claim that the entities were joint employers. *Id.* at 774.

By contrast, in another DIRECTV lawsuit with similar facts, a district court applying the *Bonnette* test came to the opposite conclusion based on the formalities of the contractual relationships. *See Roslov*, 218 F. Supp. 3d at 972-74. Although the court acknowledged that DIRECTV exerted control over almost every aspect of the technicians' work, it nevertheless found that DIRECTV and the service provider company were not joint employers because it was the service providers who, e.g., hired and fired technicians and direct deposited their paychecks. *See id.* at 973-74.

Based on the FLSA's roots in child labor laws, Congress clearly

intended the result in *Hall*, where two companies who co-determined the essential terms and conditions of employment were held jointly liable as joint employers, and not *Roslov*, where the business escaped liability by using a middleman to contract with the technicians. *See, e.g.*, *Sheffield Farms*, 121 N.E. at 475 (holding both business and middleman liable for violations of child labor laws).

* * *

To preserve the FLSA's purpose, this Court should favor substance over form and adopt *Hall-Salinas*. It is the only test that answers the "fundamental question" of joint employment—whether entities "formally or informally, directly or indirectly" codetermined "essential terms and conditions of the worker's employment." *Hall*, 846 F.3d at 769.

2. The lower court erred by skipping the joint employer analysis.

The lower court committed reversible error as a matter of law when it skipped the threshold question of whether Pathway and XPO were joint employers. *See* Part I.2.A. Determining that two entities are joint employers changes the "inputs" examined in the analysis of whether a worker is an employee under the FLSA—and different inputs

leads to different outcomes. *See Hall*, 846 F.3d at 768 ("[A worker] may not amount to an 'employee' . . . when his relationship to each entity is considered separately, [but may when] his relationships to all of the relevant entities are considered in the aggregate").

Here, had the lower court conducted the *Hall-Salinas* analysis, it would have found that Pathway and XPO were joint employers. *See* Part I.2.B. That would have changed the inputs the lower court examined in the six-factor analysis of whether the Lease Drivers were "employees" protected by the FLSA, which, in turn, would have changed the outcome of at least three of those factors. *See* Part I.2.C.

A. The lower court erred as a matter of law for skipping the Hall-Salinas *analysis.*

Skipping the joint employer inquiry is reversible error. *Hall*, 846 F.3d at 769 ("[T]he district court's inversion of the two-step [joint-employer] framework *alone* would warrant reversal" (emphasis added)). The test for employment under the FLSA asks if a worker was economically dependent on his putative employer. But without first conducting the joint employer analysis, a court cannot know which putative employer to look at (i.e., two companies considered jointly, or a single putative employer) in determining dependence. Thus, whether a

worker was an employee "depends in large part upon the answer to" the preliminary inquiry of whether the two companies exerted combined influence over the worker. *Id.* at 767.

For example, in *Schultz*, the district court found that the plaintiffs were not "employees" for purposes of the FLSA "without first determining whether a joint employment relationship existed." 466 F.3d at 309. There, a Saudi Prince hired security guards through an agency. *Id.* at 302. The guards worked under the direct and strict supervision of the Prince with little oversight by the agency. *Id.* The lower court found that the guards were not employees because it considered only the minor degree of control that the agency exercised over the guards, without considering the significant control exerted by the Prince. *Id.* at 305.

The Fourth Circuit reversed, finding that the agency and Prince were joint employers, and thus their combined degree of control should have been considered instead. *Id.* And there, when the FLSA employment test was applied "to this joint employment arrangement, the inescapable legal conclusion [was] that the agents were employees,

not independent contractors." *Id.*[8]

Here, the lower court erred by not addressing the joint employment issue first. Had it done so, numerous "inputs" into the test for whether a worker is an employee under the FLSA would have changed, altering the outcome of the analysis. *See* Parts I.2.B-C.

B. Pathway and XPO were joint employers under Hall-Salinas.

If the lower court had applied *Hall-Salinas*, it would have found that Pathway and XPO were joint employers. Although a single factor "can serve as the basis for finding that two or more persons or entities" are joint employers, *Salinas*, 848 F.3d at 142, here all six *Hall-Salinas* factors weigh in favor of finding that Pathway and XPO were joint employers.

First, through formal and informal means, Pathway and XPO shared or allocated between them "the power to direct, control, or supervise the [Lease Drivers]." *Salinas*, 848 F.3d at 141. In *Salinas*,

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[8] Although *Schultz* predates *Hall-Salinas*, it created the two-step framework—first, determine whether the companies were joint employers, then apply the six factors to determine employee status—that *Hall-Salinas* used. *See Hall*, 846 F.3d at 767 ("We addressed the proper order of analysis in FLSA joint employment actions in *Shultz*.").

this factor weighed in favor of finding that a general contractor and subcontractor were joint employers of the subcontractor's workers, because the general contractor supervised the workers and provided feedback while the subcontractor bolstered the general contractor's authority by communicating its instructions to the workers. *Id.* at 146-47. Here, XPO provided Pathway information on driver performance, mileage, and status, and Pathway in turn would ask XPO to allocate additional work to Lease Drivers whose output was dropping. (Vol. 3, 776:4-12; 921:21-922:6; 923:17-21). Additionally, Pathway and XPO jointly controlled access to the Lease Drivers' maintenance accounts. (Email between Connie Anderson, XPO and Pathway Leasing, Vol. 1, 527). XPO would also find and recommend used trucks for Pathway to purchase and pre-select Lease Drivers for those trucks. (Vol. 3, 998:12-999:7). Jointly, Pathway and XPO supervised, directed, and controlled the terms of the Lease Drivers' employment.

Second, Pathway and XPO each controlled whether the Lease Drivers continued their employment with XPO. Companies that share the ability to "hire or fire" or otherwise "modify the terms . . . of the worker's employment" are more likely to be joint employers. *Salinas*,

848 F.3d at 141. In *Salinas*, this factor weighed in favor of finding that the general contractor and subcontractor were joint employers, because the general contractor, "in consultation with others, dictated Plaintiffs' hours," "at times, required Plaintiffs to work additional hours or on additional days," and helped decide how the workers were paid. *Id.* at 147. Here, when Pathway signed on a Lease Driver, that driver became ineligible for re-hire at XPO as a Company Driver. (Oral and Videotaped Dep. Of T.J. Hunt 2 (June 28, 2018), Vol. 2 at 876, 21:3-14). When maintenance costs exceeded a Lease Driver's ability to pay, Pathway issued promissory notes—effectively deciding whether the Lease Driver could continue hauling freight. (Vol. 3, 482:18-24). And those notes left Lease Drivers so indebted that they felt they could not turn down XPO loads—effectively dictating when the Lease Drivers would work. (Vol. 3, 565:18-566:7). Finally, as in *Salinas*, Pathway and XPO also consulted on payment rates. (Vol. 3, 876:7-13).

Third, Pathway and XPO were operating within a lasting partnership. The more permanent or durable "the relationship between the putative joint employers," the more likely they are joint employers. *Salinas*, 848 F.3d at 141. Here, Pathway and XPO held themselves out

as partners (Vol. 3, 1012:6-12), and their joint venture was of indefinite duration, (Vol. 1, 331). Their partnership was successful, involving dozens of drivers, and was permanent enough to warrant long-term advertising by Pathway at XPO headquarters. (Vol. 3, 973:5-18).

Fourth, Pathway exerted uncommon influence over XPO. When one company acts on behalf of or for the benefit of the other, the companies are more likely to be joint employers. *Salinas*, 848 F.3d at 141. The record is replete with such examples. For instance, XPO would acquiesce to Pathway's requests to get struggling Lease Drivers more paying work. (Vol. 3, 923:17-21). Pathway also had XPO look for and gather information on potential vehicles for Pathway to invest in. (Vol. 3, 998:1-9).

Fifth, Pathway and XPO shared business resources. Companies are more likely to be joint employers when one company uses the other's property in connection with workers' jobs. *Salinas*, 848 F.3d at 141. In *Salinas*, the plaintiffs worked at locations controlled by the general contractor and had to sign in and out of the site with the general contractor, which weighed in favor of joint employment. *Id.* at 147. Here, Pathway had drivers sign Pathway lease contracts at XPO's

facility in Joplin, Missouri, and XPO employees facilitated the signing of those agreements for Pathway. (Vol. 3, 167:24-168:2; 540:19-23). Pathway trucks with advertising were kept on XPO's property without charge. (Vol. 3, 973:5-18). Newly leased Pathway trucks were branded on XPO property. (Vol. 3, 768:12-18). Indeed, Pathway and XPO resources were so intermixed that the Lease Drivers sometimes struggled to differentiate Pathway and XPO from one another. (Vol. 3, 255:9-13; 389:23-24).

Sixth, Pathway and XPO often shared administrative functions. Two companies are more likely to be joint employers if they share administrative functions typically performed by an employer. *Salinas*, 848 F.3d at 141. Here, XPO handled payroll, which included remittance of debt payments to Pathway, before disbursing the remainder to the Lease Drivers. (Vol. 3, 543:2-11). Pathway did not directly provide any training prior to leasing vehicles, but XPO *de facto* trained Pathway lessees via Pathway's requirement that lessees be a Company Driver for six months. (Vol. 3, 500:5-8).

* * *

Had the lower court conducted the *Hall-Salinas* analysis, it would

have found that Pathway and XPO are joint employers.

C. A finding that Pathway and XPO were joint employers would have changed the inputs into and outcome of the test for whether the Lease Drivers were "employees."

Considering Pathway and XPO as joint employers would sway at least three of the factors in favor of the Lease Drivers being employees under the FLSA. Thus, the lower court's failure to conduct the *Hall-Salinas* test was harmful error.

On the first factor of the FLSA employment test—the degree of control exerted by the employer over the worker—the lower court concluded that the Lease Drivers' "judgment" to decline loads "without needing Pathway's permission" indicated that the Lease Drivers were not employees. (Order at 27). However, because the lower court did not consider Pathway and XPO as a joint employer, it did not consider that Lease Drivers who rejected loads would receive fewer offers from XPO as a consequence of declining loads. (*See, e.g.*, Vol. 3, 663:5-13). The Lease Drivers could not switch carriers to compensate for this lost income: Pathway did not allow the Lease Drivers to switch carriers without its approval, which was contingent upon the new carrier agreeing to pay Pathway directly. (Vol. 3, 933:10-15). Taken together,

Pathway and XPO's control, via deterrents and contractual barriers, dwarfed any "judgment" the Lease Drivers could exercise to reject loads.

Similarly, the lower court cited minor discretionary decisions that Lease Drivers were able to make, like where to fuel their trucks, in concluding that Pathway did not control the Lease Drivers. (Order at 27). But if the lower court had considered the combined influence of Pathway and XPO, it would have found that they controlled the Lease Drivers' entire ability to continue working. For example, Pathway issued promissory notes for repairs based in part on Lease Drivers' performance for XPO. (Vol. 3, 990:21-25, 991:1-3). Without these notes, the Lease Drivers would not be able to afford repairs. (Vol. 3, 564:3-15). Additionally, XPO set up escrow accounts (controlled by Pathway) for truck maintenance. (Vol. 2., 214-215; Vol. 3, 158:13-16, 807:1-2). XPO even had a tire discount program for Lease Drivers that worked for XPO. (Vol. 3, 932:15-932:1-6). These repair items controlled by Pathway and XPO went beyond regular maintenance, like fueling and oil changes, and instead impacted the continued working condition of the trucks (the backbone of XPO's and Pathway's business). (Vol. 3, 121:10-25; 122:1-4). XPO also assigned specific trucks to drivers. (E-

mail from Susi Killinger to Matthew Harris, Vol. 1, 534). And XPO required that Lease Drivers display the XPO logo on their truck. (Vol. 3, 393:13-394:7). Lease Drivers could not otherwise decorate their trucks. (*Id.*)

Thus, had the lower court first found that Pathway and XPO were joint employers, it would have weighed the first factor in favor of finding that Lease Drivers were employees under the FLSA.

On the second factor, the worker's opportunity for profit or loss, the lower court relied on the fact that XPO paid an additional $0.03 per mile exceeding 11,000 miles in a month as support for finding that the Lease Drivers could control their ability to profit. (Order at 28). But if the lower court had analyzed this factor after finding joint employment, it would have seen that this opportunity for profit would never materialize: Pathway charged a $0.09 penalty per mile when the mileage on the truck exceeded 30,000 miles in a three-month period (i.e., an average of 10,000 miles per month). (Vol. 1, 180, 72:1-3). In other words, a Lease Driver would net *lose* $0.06 per additional mile driven over an average of 10,000 miles per month. Had the lower court analyzed the combined influence of Pathway and XPO, this factor would

have weighed in favor of finding that the Lease Drivers' opportunity for profit or loss depended on Pathway and XPO giving them more work—the hallmark of an employee. *See* Part II, *infra*.

Finally, in analyzing the extent to which the work is an integral part of the business, the lower court compared Pathway's and XPO's business in finding that this factor was neutral because the Lease Drivers did not do direct work for Pathway (i.e. they did not haul freight for Pathway), despite the lower court recognizing that Pathway could not stay in business without the Lease Drivers. (Order at 32). But if it had conducted the joint employer test first, the lower court would have recognized that Pathway and XPO's combined business, truck leasing and freight hauling, could not exist without the Lease Drivers. Thus, this factor would have weighed in favor of a finding of employment.

* * *

The lower court erred as a matter of law in failing to conduct the *Hall-Salinas* joint employer test. Since Pathway and XPO would have been joint employers under *Hall-Salinas*; and since the inputs to the six-factor FLSA employee analysis would have changed had the test been conducted first, the lower court's error was harmful. This Court

should adopt *Hall-Salinas* and remand for the lower court to conduct the *Hall-Salinas* test in the first instance.

II. The lower court's decision should be reversed because Lease Drivers are employees under the FLSA.

In addition to the threshold error discussed above, the lower court erred in finding that the Lease Drivers were not "employees" of Pathway. Workers are considered "employees" under the FLSA when, under the totality of the circumstances, the worker "is economically dependent on the business to which he renders service." *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998). As such, the inquiry is "as a matter of economic reality what [the workers] actually *do*," not what they "*could* have done," *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 833 (5th Cir. 2020), nor what job titles they are given by their employer, *Henderson v. Inter-Chem Coal Co., Inc.*, 42 F.3d 567, 570 (10th Cir. 1994).

This Court looks to six factors to determine whether a worker is an employee under the FLSA:

> (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill

> required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.

Henderson, 42 F.3d at 570. No one factor is dispositive. *Dole v. Snell,* 875 F.2d 802, 805 (10th Cir. 1989) (citing *Rutherford*, 331 U.S. at 730); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235-39 (10th Cir. 2018) (workers were employees even where "control" and "integral part of the employer's business" factors favored a finding of independent contractor status).[9]

Here, each factor weighs in favor of finding that the Lease Drivers were employees under the FLSA.[10]

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[9] "[T]he existence and degree of each factor is a question of fact" reviewed for clear error, "while the legal conclusion to be drawn from those facts—whether workers are employees or independent contractors—is a question of law" reviewed *de novo*. *Dole*, 875 F.2d at 802. The lower court addressed this issue. (Order at 25-33).

[10] Lease Drivers should be considered employees under the FLSA when looking to either Pathway alone or to Pathway and XPO as joint employers. The lower court concluded that its analysis would result in the same outcome "regardless" of whether Pathway is considered as a sole employer or whether XPO and Pathway "are considered collectively as joint employers." (Order at 26). Despite this blanket conclusion, the lower court never employed a consistent analytical structure whereby it considered Pathway independently and then XPO and Pathway jointly to see that the outcome was indeed the same. Instead, the lower court employed several different analytical structures: for some factors, it considered facts related to Pathway and XPO separately, but never

1. Pathway exerted significant control over the Lease Drivers' work.

Pathway controlled who the Lease Drivers could work for; what assignments they worked on; and what equipment and support they could use to get the job done. When viewed in the totality, this indicates that the Lease Drivers were employees. *See* Part II.1.A. In analyzing this factor, the lower court applied the wrong legal test and overlooked critical facts in the record. *See* Part II.1.B.

A. Pathway exerted significant control over critical elements of the Lease Drivers' daily jobs.

When a company exercises a degree of control that substantially outweighs the worker's discretion as to meaningful elements of that worker's job, the worker is an employee, not an independent contractor. *See Lewis v. ASAP Land Express, Inc.*, 554 F. Supp. 2d 1217, 1223 (D. Kan. 2008) (citing *Dole*, 875 F.3d at 808). The key inquiry is the degree

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together. (*See* Order at 32 (addressing the sixth factor)). For other factors, it gave undue weight to facts bearing on the Lease Drivers' relationship with one entity and discounted facts bearing on the relationship to the other. (*See* Order at 26-30 (addressing the first through third factors)). For the sake of clarity, this portion of the brief analyzes facts that bear on the Lease Drivers' relationship with Pathway to show that Lease Drivers are employees under the FLSA. Still, it addresses the lower court's treatment of XPO-related facts where necessary, and notes where inclusion of XPO as a joint employer would further bolster a finding that the Lease Drivers were employees.

of autonomy enjoyed by the worker: employees perform the work the employer desires and receive compensation dictated by that employer, while independent contractors operate with a "degree of independence" that normal employees do not enjoy. *Dole*, 875 F.2d at 806-08. One hallmark of this independence is the ability to work for other employers: employees generally cannot, while independent contractors can. *See Acosta*, 884 F.3d at 1235; *see also Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998).

In *Lewis*, for example, a delivery company entered into an independent contractor agreement with a delivery driver, and that agreement stated that the delivery company had "no right to control or direct the details, manner or means by which [the plaintiff driver would] accomplish the results of the services performed." 554 F. Supp. 2d at 1220. Several circumstances, however, suggested that the plaintiff driver was not autonomous: the driver's regular shift schedule prevented him from obtaining outside employment; the company required that the driver make deliveries using a vehicle of certain specifications; and the company reserved the right to approve any substitute driver proposed by the driver. *Id.* The court found that the

company's degree of control over the more meaningful aspects of the driver's job (despite the contrary contractual terms) prevented the court from finding that the driver was an independent contractor. *Id*.

Similarly, in *Dole*, a bakery argued that its cake decorators were independent contractors because they had flexible work schedules and the freedom to choose and decorate their cakes as they wished. 875 F.2d at 806. Acknowledging the bakery's argument, this Court nevertheless found that the control factor weighed in favor of finding that the decorators were employees because they were not "free to offer their services to third parties while working for the" bakery. *Id*. at 808.

Here, Pathway exerted substantial control over the Lease Drivers' day-to-day work. First, like in *Lewis* and *Dole*, Pathway controlled the Lease Drivers' ability to work for any carrier besides XPO. (*See* Vol. 3, 933:10-15). If Lease Drivers wanted to switch carriers, they had to select a carrier who would send the Lease Drivers' paychecks directly to Pathway first. (Vol. 3, 909:6-11).[11] Pathway's veto power left Lease

[11] While Lease Drivers could switch to a carrier that would pay them directly, they could only do so if they paid off any outstanding debts and put down "a lot more money" on the truck—an unrealistic condition, considering a Lease Driver like Mr. Dennis was so indebted

Drivers with "maybe one or two [carrier] companies" to drive loads for besides XPO. (Vol. 3, 268:6-23). Unlike true independent contractors, Lease Drivers could not freely haul for any company.

That, in turn, meant that the Lease Drivers had limited discretion to decline XPO loads. The record is replete with evidence that drivers who refused loads suffered "consequences," like "get[ting] lower miles" on subsequent XPO hauls. (Vol. 3, 679:10-13). This pattern would not trouble a truly independent contractor, who could compensate by picking up work elsewhere. But Lease Drivers felt that they had "no choice but to take what they give you" because they were "locked into [XPO]" by the limitations on working for other carriers discussed above. (Vol. 3, 84:3-17). Because Lease Drivers felt pressured to accept XPO loads, they did not have discretion to set their own work hours.[12]

Third, Pathway controlled the Lease Drivers' essential piece of equipment—the truck. Similar to the company's requirement in *Lewis*

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that he "spent most of [his] time paying promissory notes for a whole year." (Vol. 3, 939:6-13; 909:6-11; 600:21-25).

[12] This is an example where the lower court overlooked the combined influence of Pathway and XPO because it failed to conduct the joint employer analysis first.

that drivers maintain vehicles with certain specifications, here Pathway controlled the specifications and maintenance of the Lease Drivers' trucks. Pathway selected the trucks made available to the Lease Drivers, primarily based on fuel economy. (Vol. 3, 807:24-808:1). Several Lease Drivers were unable to test drive the truck that Pathway selected before signing the Equipment Lease Agreement. (Vol. 3, 560:18-21; 647:8-9; 904:17-20). When the trucks needed repairs, Lease Drivers had to pay out-of-pocket and present Pathway with a receipt before they could access funds set aside for maintenance. (Vol. 3, 489:17-21). And when things went really wrong with a truck, like when Ms. Austin's truck completely broke down, it was Pathway who identified the replacement truck and who "demanded" that Ms. Austin promptly travel from Utah to Missouri to pick up the replacement. (Vol. 3, 171:8-172:12).[13]

[13] XPO controlled the trucks in a way that draws further parallels to *Lewis*. XPO assigned specific trucks to drivers. (E-mail from Susi Killinger to Matthew Harris, Vol. 1, 534). Lease Drivers dispatched by XPO were required to display an XPO logo on their truck, and Lease Drivers could not otherwise decorate their trucks. (Vol. 3, 393:13-394:7). These facts would have been significant in the lower court's analysis of this factor had it looked to the "combined influence" of Pathway and XPO under a joint employer analysis.

* * *

Pathway controlled who the Lease Drivers worked for, what loads were assigned to them, and how they maintained their trucks. Under these circumstances, the control factor weighs in favor of finding that the Lease Drivers were employees.

B. The lower court applied an incorrect legal test for control and overlooked critical facts.

The lower court found that the control factor weighed in favor of finding that the Lease Drivers were not employees. (Order at 26).[14] In reaching that conclusion, the lower court made two errors.

First, it applied the wrong legal test for control. The lower court cited a single case, *Acosta*, as supporting the conclusion that the control factor could "weigh in favor of independent contractor status" based solely on two elements of a worker's discretion: that he "'could set his own hours and determine how best to perform his job within broad parameters.'" (Order at 28 (quoting *Acosta*, 884 F.3d at 1235)). That is a misreading of *Acosta*, which turned, in part, on the fact that the

[14] In making this finding, the lower court analyzed the control exerted by both the "[Pathway] Defendants and/or XPO" over the Lease Drivers. (Order at 27).

worker in that case "could work for other employers." 884 F.3d at 1235.

As demonstrated above, the proper control inquiry in this Circuit is broader, and includes (as *Acosta* did) whether the Lease Drivers were "free to offer their services to third parties." *Dole*, 875 F.2d at 808*; see also Acosta*, 884 F.3d at 1235. Thus, the lower court erred in only considering two minor ways in which the Lease Drivers exercised discretion, and ignoring that the Lease Drivers in effect could not work for other carriers.

Second, the lower court made clear factual errors in finding that the Lease Drivers "used their own business judgment to determine whether to decline loads." (Order at 27). That finding is contradicted by the terms of the Equipment Lease Agreement, which vested in Pathway the right to deny the Lease Drivers' request to drive for any carrier besides XPO. *See* Part II.1.A, *supra* (citing Vol. 3, 933:14-15). Had the lower court considered the Equipment Lease Agreement, it could not have found that the Lease Drivers' decision to reject assigned loads came down to business judgment—rather than fear of negative repercussions—and thus this factor would weigh in favor of finding that the Lease Drivers were employees. *See Hobbs*, 946 F.3d at 830 (workers

who cannot refuse assignments without repercussion are more likely employees).

2. Lease Drivers did not have a meaningful opportunity for profit or loss because they exercised few, if any, managerial skills.

The Lease Drivers' opportunity for profit or loss depended almost solely on the number of jobs they were assigned and their fuel efficiency in completing those jobs. Because profitability did not require managerial skill, this factor weighs in favor of finding that the Lease Drivers were employees. *See* Part II.2.A. In analyzing the profit or loss factor, the lower court applied the wrong legal test and overlooked critical facts in the record. *See* Part II.2.B.

A. The profit or loss factor indicates the Lease Drivers were employees.

The second factor looks at whether a worker's opportunity for profit or loss depends on his own managerial skill, or on increasing the amount of work he performs. *See Rutherford*, 331 U.S. at 730. A job does not involve managerial skill if its profitability depends on "being more technically proficient" or "complet[ing] more jobs than assigned." *Scantland*, 721 F.3d at 1316-17 (finding workers were employees where the opportunity for profit was limited by the number and types of jobs

assigned to the workers)*; see also Dole*, 875 F.2d at 810.

In *Dole*, for instance, cake decorators who worked for a bakery were paid per cake; they made more money by simply decorating more cakes. 875 F.2d at 809. This Court reasoned that earning more merely by working more was not an opportunity for profit, because profitability turned on "[the employer's] need for their work" rather than the workers' own "judgment or initiative." *Id.* at 810.

Similarly, in *Collinge*, drivers could earn profit by maximizing their efficiency; this meant declining low-paying jobs and "minimiz[ing] the costs, or maximiz[ing] the revenue, of getting from point A to point B." *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-CV-00824 JWS, 2015 WL 1299369, *4 (D. Ariz. Mar. 23, 2015). The drivers' profits earned through efficiency, however, were "limited" by the company's discretion over which deliveries the drivers received. *Id.* The court concluded that the profit or loss factor weighed in favor of finding that the drivers were employees because their profitability depended "more upon the jobs to which [the company] assign[ed] [the drivers] than on their own judgment and industry." *Id.*

Just like in *Dole* and *Collinge*, here the Lease Drivers did not

depend on their own managerial initiative and skill to realize profits. Even Pathway recognized the extent to which Lease Drivers' success depended upon the loads offered by XPO—if a Lease Driver's miles were lagging, Pathway asked XPO if it could "give attention" to that Lease Driver. (Vol. 3, 32:8-10; 923:19-22). Pathway also obtained information from XPO about Lease Driver performance to determine why a particular Lease Driver might be struggling and to inform what Pathway could do to help the Lease Driver improve his or her bottom-line. (Vol. 3, 921:21-922:6).

As in *Collinge*, the Lease Drivers' pay was also effectively capped. While XPO offered a $0.03 per-mile incentive for each mile driven in excess of 11,000 miles per month, Pathway assessed a *penalty* of $0.09 per-mile driven in excess of an average of 11,000 miles per month. (Harris Dep., Vol. 1, 180, at 71:19-72:16; Vol. 1, 742). Lease Drivers seeking to maximize profits would thus never earn the XPO incentive. (*See* Vol. 3, 182:18-21).[15]

[15] Pathway's Equipment Lease Agreement with Ms. Austin stipulated that the excess mileage penalty applied to any miles driven in excess of an average of 10,000 miles per month. (Vol. 3, 182:18-21). Even if a Lease Driver like Ms. Austin maximized the bonus and

This left fuel efficiency as the primary means for earning profit, just like the employee drivers in *Collinge*. With profitability coming down to fuel efficiency and the number and types of loads offered to the Lease Drivers, Defendant Harris said it best when he acknowledged that the "two keys" to succeeding as a Lease Driver were "hard work and discipline"—traits from which the notion of managerial judgment is notably absent. (Vol. 3, 879:1-2).

* * *

The Lease Drivers' profit or loss was determined primarily by their ability to drive more miles—but not too many miles—more efficiently. That is not managerial skill. Thus, the profit or loss factor weighs in favor of finding that the Lease Drivers were employees.

B. The lower court applied an incorrect legal test for the profit or loss factor and overlooked critical facts.

The lower court found that the profit or loss factor weighed in favor of finding that the Lease Drivers were not employees because the

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minimized the excess mileage penalty to zero (in other words, drove 30,000 miles in a single month and zero miles the other two months of a quarter), she could earn no more than an extra $570 each quarter—hardly an amount that could spell the difference between failure and success.

Lease Drivers' "opportunities for profit or loss were largely within their own control." (Order at 29). In so finding, the court erred in two ways.

First, the lower court emphasized just two facts: that (1) seven of the fifteen Lease Drivers had successfully completed their leases, and (2) Lease Drivers could maximize their earnings by driving more miles more efficiently. (Order at 28). But under this Court's precedent, the proper analysis considers whether realizing profit involved *managerial skill*—an analysis the lower court did not perform. *See* Part II.2.A. And as noted above, neither driving more miles nor driving more efficiently involve managerial skill. *See Dole*, 875 F.2d at 809; *Scantland*, 721 F.3d at 1316-17. By focusing only on these two aspects of the Lease Drivers' financial success, the lower court's inquiry on this factor was too narrow.

In addition to making a legal error, the lower court also made a factual one: the lower court found that pay differences between Lease Drivers and Company Drivers were due to XPO offering a monthly incentive for Lease Drivers to drive more miles. (Order at 28). But as demonstrated above, the lower court ignored the three-times-higher penalty in Pathway's Equipment Lease Agreement that ensured the

Lease Drivers would never reach the XPO incentives. *See* Part II.2.A.

Had the lower court considered this evidence, it could not have found that the Lease Drivers could maximize profits by driving more miles, thus undermining its conclusion that this factor weighed in favor of finding that the Lease Drivers were not employees.[16]

3. Lease Drivers' investments in their own trucks were insignificant compared to the total capital invested by Pathway.

The lower court found that the investment factor weighed in favor of finding that the Lease Drivers were not employees because it looked at the Lease Drivers' investments in a vacuum, not in comparison to Pathway's own investments. (Order at 29). But in determining this factor, courts must compare the investments made by the putative employer "in the overall operation" against the "individual investment" made by the worker. *Baker*, 137 F.3d at 1442. In the trucking industry in particular, when the costs of a driver's use and maintenance of his own vehicle are outweighed by the company's investments in its

[16] This fact would have been apparent to the lower court had it assessed Pathway and XPO's "combined influence" under a joint employer analysis. There is no clearer example of the importance of looking at the combined influence of two joint employers than the way in which Pathway's per-mile penalty dwarfed XPO's per-mile bonus.

business, this factor weighs in favor of finding that the driver is an employee. *Herman*, 161 F.3d at 304 (holding that, even considering maintenance, driver's investment in vehicle not significant in comparison to company's investment); *see also Dole*, 875 F.2d at 810 (fact that worker supplies his own tools is insufficient).

In *Herman*, for example, the transportation company did not provide drivers with any equipment. 161 F.3d at 303. Rather, drivers had to purchase or lease all "necessary tools of the trade," including their vehicle, insurance, and a two-way radio. *Id.* The drivers were responsible as well for fuel and maintenance of their vehicles. *Id.* Nevertheless, the Fifth Circuit concluded that the investment factor weighed in favor of finding that the drivers were employees, because the company's investments in the business were comparatively greater: it had two office locations, purchased the equipment that it leased to drivers, and paid the salaries of its own full-time employees. *Id.* at 304.

Similarly, here, Pathway's investments were comparatively greater than the Lease Drivers' investments. Pathway owned each truck and carried risk on that truck until a Lease Driver completed his or her lease. (Vol. 3, 873:6-15). In leasing out each truck, Pathway was

exposed to "a lot of risk" because, as the actual truck owner, it was subject to the "ups and downs, peaks and valleys" of the used truck market. (*Id.*) If a Lease Driver defaulted, Pathway had to re-sell the truck, potentially taking a loss. And before it could re-sell a truck, Pathway was on the hook for thousands of dollars in repossession and repair costs. (Vol. 3, 875:5-7). The scale of this investment risk dwarfed any of the Lease Drivers' own costs: at the time of trial, Pathway was leasing out 210 trucks and possessed 7 trucks in its inventory. (Vol. 3, 874:3-6). By comparison, each Lease Driver was responsible and exposed to risk for the single or, in a few instances, a handful of trucks that he was leasing.[17] In addition, Pathway paid salaries to full-time employees and leased office space. (Vol. 3, 864:23-865:4; 883:16-18). There can be no dispute that Pathway's investments in the overall business were greater than the individual investments made by the Lease Drivers. Thus, this factor weighs in favor of finding that the Lease Drivers were employees.

[17] XPO, for its own part, owned the trailers and communication units attached to each Lease Driver's truck. (Hunt Dep., Vol. 1, 273, at 55:24-56:6; 277 at 70:18-24). This fact, if looked to as part of Pathway and XPO's "combined influence" over the Lease Drivers, would tip the investment scale even further in favor of the Lease Drivers.

4. There was a sufficient degree of permanency because Pathway expected the employment relationship to continue indefinitely.

The permanency factor weighs in favor of finding that the Lease Drivers were employees.

Employees usually work for one employer on a continuous and indefinite basis, while independent contractors have fixed employment periods and "transfer from place to place as particular work is offered to them." *Dole*, 875 F.2d at 811. When a company deducts advanced payments from a worker's paycheck, that can indicate that the relationship has a degree of permanence. *See Ingram v. Passmore*, 175 F. Supp. 3d 1328, 1337 (N.D. Ala. 2016). In *Ingram*, the plaintiff drivers worked "at-will," but the transportation company allowed the drivers to incur debt and pay it off over time through paycheck deductions. *Id.* The court concluded that the permanency factor did not favor either party because of the drivers' "at-will" status. *Id.* But it reasoned that the transportation company's debt repayment scheme suggested that it "expected a degree of permanency in the working relationship." *Id.*

Similarly, here, Pathway frequently provided Lease Drivers with

advance payments for repairs, which Pathway deducted from future earnings. (Vol. 3, 979:5-21). For instance, if there were insufficient funds in Mr. Jurcak's maintenance account, Pathway lent him money which it later deducted from his XPO paycheck. (Vol. 3, 542:16-543:11). And, unlike the drivers in *Ingram* who were "at-will" workers and could leave at any time, Lease Drivers who owed debt to Pathway were not allowed to change carriers until their debts were paid off. (Vol. 3, 566:4-10).

The lower court found that the permanency factor weighed "slightly" in favor of finding that the Lease Drivers were not employees, because the Lease Drivers' agreements with both XPO and Pathway were fixed in duration. (Order at 30). But the fact that the contracts had a duration is irrelevant: permanency is assessed within the confines or time constraints of that job. *See, e.g.*, *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (analysis of permanency was within the time constraints of the single harvest season for which migrant workers had been hired).

For the duration of their lease with Pathway—even if the Equipment Lease Agreement was of fixed duration—the Lease Drivers'

relationship with Pathway was expected to continue until all debts were paid off. Thus, this factor favors a finding that the Lease Drivers were employees.

5. Lease Drivers were not required to have specialized skills to perform the job.

The lower court found that the fifth factor—the degree of skill required for Lease Drivers to drive their trucks—"weighs slightly in favor of a finding of independent contractor status" because Lease Drivers needed specialized "business acumen and financial proficiency skills to be profitable" whereas Company Drivers did not. (Order at 31). But the specialized skills factor is not about the degree of skill required to *profit* from the job; it is concerned only with the degree of skill required to *perform* the job. The lower court thus erred in concluding that this factor did not favor "employee" status.

Specialized skills are skills beyond those that any successful employee must have to perform the job itself. *Acosta*, 884 F.3d at 1237; *Lauritzen*, 835 F.2d at 1537-39 (pickle harvesters were employees, even though they developed skills to decide when and how to pick plants, where the development of such skills did not distinguish pickle harvesters from other workers). In the trucking context, the degree of

skill required for "performance of the job itself" is the degree of skill required to drive a commercial truck. *Flores v. Velocity Express LLC*, 250 F. Supp. 3d 468, 490 (N.D. Cal. 2017); *see also Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 995 (9th Cir. 2014) (skill factor supported a finding that FedEx drivers were employees where the drivers needed "no experience to get the job in the first place" beyond the ability to drive); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1104 (9th Cir. 2014) (job did not require specialized skill where drivers needed only to have a driver's license, to sign an agreement, and to pass a physical examination and drug test to drive).

For example, the *Flores* court held that truck drivers who owned their trucks and operated under "independent contractor" agreements were employees of the defendant trucking company under the FLSA. *Flores,* 250 F. Supp. 3d at 490. There, the court looked to the degree of skill required to drive trucks and found that this factor supported employee status. *Id.* Performance of the job itself did not require specialized skill because the truck drivers, though owner-operators, "did not need to have any particular level of education, specialized training, or special license to be a driver" for the company. *Id.* Instead, to drive

a commercial truck, the plaintiffs needed only to meet minimum age requirements, speak English, own a cargo van or truck, and pass background screenings. *Id.* Because the employer required only basic qualifications rather than any particular level of education, specialized training, or specialized licensing to perform the job, the court held that the skill factor supported employee status. *Id.*

Here, like in *Flores*, this factor supports a finding of employee status because performance of the job itself—driving a truck—requires only minimal qualifications rather than specialized skills. Profitability does not define the "success" of a truck driver in an industry that measures success as safely transporting a load from point A to point B.[18] Instead, workers had to be Company Drivers for only six months before they could become Lease Drivers. (Vol. 3, 500:5-8). Moreover, as the lower court already recognized, "many of the work duties performed by [Lease Drivers, such as maintaining the trailer, securing the load,

[18] Without explanation, the lower court measured job success in terms of profit rather than in terms of safe transport. (*See* Order at 31). This arbitrary metric conflates a Lease Driver's likely concept of ultimate success—profit—with what the employer requires for job success: safe transport of freight. (*See, e.g.*, Vol. 3, 45:15-18; 46:14-18; 85:14-17; 259:6-10).

and competing pre-trip inspections] were the same as those performed by [C]ompany [D]rivers" and thus are not "specialized." (Order at 31). Because the Lease Drivers here do not need any "specialized" skills to perform the job itself, this factor favors a finding of employee status.

While the lower court emphasized the skills required to be "profitable" from the job, the proper inquiry instead focuses on the skills required to perform the day-to-day responsibilities of the job. *See Acosta*, 884 F.3d at 1237. And in the trucking industry, the job is driving—something done by both Lease Drivers and Company Drivers. *See Flores,* 250 F. Supp. 3d at 490. Accordingly, this factor weighs in favor of finding that the Lease Drivers were employees.

6. The hauling work that Lease Drivers perform is integral to the employer's business.

Finally, the lower court found the sixth factor—the extent to which work is integral to business—to be "neutral." (Order at 32). It arrived at this conclusion by comparing the extent to which Lease Drivers were integral to Pathway's business as compared to XPO's business. (*Id.*) Under a proper analysis, this factor supports a finding of employee status.

Courts consider whether the type of work performed by the worker

is an integral part of the defendant's business. *Dole*, 875 F.2d at 811. With respect to vital or integral parts of the business, courts presume that an employer will "prefer to engage an employee rather than an independent contractor" in order to retain control and compel consistent attendance. *Lewis*, 554 F. Supp. 2d at 1225 (internal quotations omitted).

Here, rather than looking to whether the Lease Drivers' performance was integral to Pathway, the lower court improperly compared the necessity of the Lease Drivers' hauling to XPO versus to Pathway. (*See* Order at 32). The lower court stated that "on the one hand, it is obvious that Defendant Pathway could not remain in business without [Lease Drivers] performing the hauling work for which trucks are required." (*Id.*) But, it nonetheless found the factor to be neutral because, "on the other hand, the actual freight hauling done by [Lease Drivers] was performed for XPO, and no work was performed directly for Pathway beyond the requirements necessary to fulfill lease obligations." (*Id.*) The lower court thus placed the performance for Pathway on one side of the scale and the performance for XPO on the other. But the proper inquiry is not a balance of the Lease Drivers'

work for XPO in comparison to Pathway—it is whether the Lease Drivers were integral to Pathway's business.

There can be no doubt that they were.[19] As the lower court noted, "it is obvious that Defendant Pathway could not remain in business without [Lease Drivers] performing the hauling work for which trucks are required." (*Id.*) Where a business cannot stay afloat without the services performed by workers, this factor supports a finding of employee status. *See Lewis*, 554 F. Supp. 2d at 1225 (the employer "could not function" without its delivery drivers); *Ruiz,* 754 F.3d at 1105

[19] This factor would even more strongly favor a finding of employee status if Pathway and XPO were considered as joint employers. *See* Part I.2.C. Analysis of this factor, which asks whether a worker is integral to a business, surely changes depending on whether the "business" refers to Pathway, or to Pathway and XPO jointly. But the lower court did not consider Pathway and XPO jointly when it analyzed this factor. (*See* Order at 32). If it had, it would have concluded that the Lease Drivers' work of hauling freight is the very core of the joint freight hauling business. *Flores*, 250 F. Supp. 3d at 492-93 (finding that owner-operator truck drivers performed work "undoubtedly" integral to the trucking company's regular business); *see also Ingram*, 175 F. Supp. 3d at 1337 (favoring employee status of tow truck drivers where the bulk of the employer's revenue came from its towing division and the employer relied on tow truck drivers to perform core towing operations); *Lewis*, 554 F. Supp. 2d at 1225 (reasoning that delivery drivers were vital to the delivery service's business the employer "cannot function without delivery drivers"). This underscores the importance of conducting the joint employment analysis first, as a finding of joint employment would have been dispositive to this factor.

("[W]ithout drivers, [the employer] could not be in the home delivery business[.]"). Thus, the lower court erred in finding this factor to be "neutral" rather than favoring employee status.

* * *

The lower court erred in its findings on the underlying factors used to determine whether a worker is an employee under the FLSA. As such, considering the ultimate legal question of employment status *de novo*, this Court should find that Lease Drivers are employees.

The Court's final task is to consider the degree to which workers are economically dependent on their employer. *Lauritzen*, 835 F.2d at 1538. "Economic dependence is more than just another factor. It is instead the focus of all the other considerations[;] . . . it is *dependence* that indicates employee status." *Id.* If workers, as a matter of economic fact, depend on the "[employer's] business for the opportunity to render service," they are employees. *Baker*, 137 F.3d at 1443. The dependence at issue is "dependence on that job for income to be continued and not necessarily for complete sustenance." *Id.*

Here, Lease Drivers are employees because they were economically dependent on Pathway for the opportunity to haul

freight.[20] For one, subject to Pathway's control and without meaningful discretion, Lease Drivers depended on Pathway to approve of the carrier companies for whom they could haul freight. *See* Part II.1. Because Pathway routinely denied Lease Drivers the opportunity to haul freight for carrier companies not in association with Pathway, Pathway effectively required Lease Drivers to haul freight within Pathway's oversight—relegating Lease Drivers to an ultimate position of dependence. *Id.* Because Pathway also retained control over load assignments and truck maintenance, Lease Drivers were even more economically dependent on Pathway to haul freight. *Id.* Additionally, Lease Drivers were economically dependent because they relied on

[20] Adding XPO into the mix, it is even more clear that Lease Drivers are economically dependent upon both Pathway and XPO as a combined entity. XPO controlled what loads were offered to Lease Drivers, and the Lease Drivers depended on the number and type of loads offered by XPO to make enough money to satisfy their obligations to Pathway. *See* Parts II.1-2. XPO controlled the essential tools, other than the truck, at each Lease Driver's disposal, such as the communication unit in the Lease Driver's cockpit. *See* Part II.3. There was even some indication that XPO matched specific Lease Drivers with specific trucks offered by Pathway. *See* Part II.1. And, ultimately, driving for XPO as a putative independent contractor was a sink-or-swim situation: Pathway required that the Lease Drivers work for XPO indefinitely, and should Lease Drivers "fail" as independent contractors, they had limited exit options because XPO refused to take them back on as full-time company drivers. *Id.*

Pathway for income. *See* Part II.2. Lease Drivers could only achieve nominal financial success by driving more miles more efficiently—in reality, Pathway's pervasive oversight regarding available loads and Lease Drivers' performance was the controlling force. *Id.* Lease Drivers also relied on Pathway for income, as payments were remitted to Pathway for final disbursal to drivers. *Id.* Put simply, Lease Drivers could not choose when, where, and for whom to haul freight—they depended on Pathway to make these decisions and thus were economically dependent under the totality of the circumstances.

In conclusion, the Lease Drivers are employees under the FLSA.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the lower court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the issues presented in this appeal, counsel believes that the Court's decisional process will be significantly aided by oral argument.

Respectfully submitted,

/s/ Matthew R. Cushing

Matthew R. Cushing

November 4, 2021

Edwin Bruns
Aurora Lee Marsh
Patricia Rodríguez
Elizabeth Stonehill
UNIVERSITY OF COLORADO
LAW SCHOOL APPELLATE
ADVOCACY PRACTICUM
2450 Kittredge Loop Drive
Boulder, CO 80309
(303) 735-6554
matthew.cushing@colorado.edu
Counsel for Appellants

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November 4, 2021 *Counsel for Appellants*

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November 4, 2021 *Counsel for Appellants*

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/s/ Matthew R. Cushing
November 4, 2021 *Counsel for Appellants*

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/s/ Matthew R. Cushing
November 4, 2021 *Counsel for Appellants*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kristen L. Mix

Civil Action No. 16-cv-02242-KLM

FRANKLIN MERRILL,
et al.,

Plaintiffs,

v.

PATHWAY LEASING LLC, a Colorado limited liability company,
MATTHEW HARRIS, an individual,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF JUDGMENT

I. Background

Plaintiffs filed their initial Complaint [#1][1] on September 6, 2016. In that pleading, they asserted that they leased trucks from Defendants Pathway Leasing LLC ("Pathway") and its owner, Matthew Harris ("Harris"), "believing they could operate those trucks as independent contractors and improve their lives through the exercise of entrepreneurial spirit." *Complaint* [#1] at 2; *see also Fourth Am. Compl.* [#82] at 2. Nevertheless, they claimed that Defendants "controlled every aspect" of their work and willfully misclassified them as independent contractors instead of employees, in violation of the Fair Labor Standards Act, 29 U.S.C. § 216, et seq. ("FLSA"). *Fourth Am. Compl.* [#82] at 2. They

[1] "[#1]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this document.

asserted that Defendants are their "joint employers" along with certain former-party carrier companies for whom Plaintiffs used their trucks to deliver goods. *Id.* at 14.

Plaintiffs brought a collective action on behalf of themselves and other similarly-situated individuals under the FLSA to recover money damages as a result of Defendants' alleged failure to pay them minimum wages, as well as damages based on purportedly unlawful retaliation under the FLSA. *Id.* at 20-21, 24. They also sought to rescind or void their leases and other agreements with Defendants based on Defendants' alleged material misrepresentations about the condition of the leased trucks and about the purpose of the agreements. *Id.* at 21-22. Finally, they brought claims under state law for "unjust enrichment and restitution" and "quantum meruit," seeking to disgorge "all amounts paid" by them under their various agreements with Defendants, including the leases. *Id.* at 22-24. Meanwhile, on March 20, 2017, Defendants asserted two counterclaims: (1) setoff against any damages obtained by Plaintiffs to cover "all amounts lawfully due and payable under each Plaintiff's respective lease agreement," and (2) breach of contract against fifteen Plaintiffs regarding their Equipment Lease Agreements and against nine of those Plaintiffs regarding promissory notes. *Counterclaims* [#95] at 41-42. On June 19, 2017, Plaintiffs' FLSA minimum wage claims were conditionally certified as a collective action. *Order* [#115].

After significant pretrial proceedings, a bench trial was held in this matter on June 25-26, July 2-3, and July 5-6, 2018. *See* [#268, #269, #270, #271, #272, #273, #274]. Fifteen named Plaintiffs and thirty opt-in Plaintiffs remained in the case at the time of trial. The named Plaintiffs were Eric Ard, Anthony Dennis, Ronald Dennis, Anthony Glover, Zigmund Gutowski, Keith Herring, Tim Hollingsworth, Joseph Horion, Larry Jurcak, Rodney

Lacy, Franklin Merrill, Sami Nasr, James Newberry, Tami Potirala, and Craig Williams. The following claims were tried:

(1) the fifteen named Plaintiffs' and the thirty opt-in Plaintiffs' FLSA minimum wage claims against Defendants, *see* [#264] at 26 ¶ 6;

(2) Plaintiff Larry Jurcak's claim for unlawful retaliation in violation of the FLSA against Defendants, *see id.* at 26 ¶ 7 (citing *Order* [#242] at 30);

(3) the fifteen named Plaintiffs' individual Colorado state law claims for rescission of their leases with Defendant Pathway, *see id.* at 26 ¶ 8;

(4) the fifteen named Plaintiffs' individual Colorado state law claims for unjust enrichment against Defendants, *see id.*;

(5) the fifteen named Plaintiffs' individual Colorado state law claims for quantum meruit against Defendants, *see id.*;

(6) Defendants' counterclaims for breach of contract against Ronald Dennis, Anthony Glover, Zigmund Gutowski, Keith Herring, Joseph Horion, Franklin Merrill, James Newberry, Tami Potirala, and Craig Williams, *see* [#264] at 27 ¶¶ 10 & 10 n.9; and

(7) Defendants' counterclaims for setoff against all Plaintiffs, *see id.* at 27 ¶ 10. *See also* [#266] at 2-3 (discussing remaining claims).

After the trial, on July 27, 2018, Defendants filed a Motion to Decertify 29 U.S.C. § 216(b) Collective Action [#275]. After briefing and a hearing, the Court granted the decertification request and dismissed the thirty opt-in Plaintiffs' claims, which consisted solely of FLSA minimum wage claims made via the collective action. *Response* [#285]; *Reply* [#288]; *Hearing Minutes* [#304]; *Order* [#333]. In light of this ruling, the remaining named Plaintiffs were given the opportunity to move for a new trial, including one narrowly

tailored to address the taking of "additional testimony" pursuant to Fed. R. Civ. P. 59(a)(2), but they chose not to do so. *See Order* [#333] at 11, 11 n.7, 18.

Over the course of post-trial proceedings, the Court has permitted the parties leave to file amended proposed findings of fact and conclusions of law. Plaintiffs' Second Revised Proposed Findings of Fact and Conclusions of Law [#336] and Defendants' Third Amended Proposed Findings of Fact and Conclusions of Law [#350] are the most recent such filings by each side. *See Pls.' Brief* [#348] at 17 (declining to file a Third Revised Proposed Findings of Fact and Conclusions of Law).[2]

II. Findings of Fact

A. General Background Facts

1. In general, a commercial truck driver can choose to work for a freight company as a company driver, or choose to become an owner-operator[3] and sell hauling and delivery services as he or she desires. Plaintiffs are commercial truck drivers who are also owner-operators. They entered into agreements with Defendant Pathway Leasing ("Pathway") to lease a truck or trucks. Defendant Matthew Harris is the President of Pathway. Plaintiffs also entered into agreements with XPO, Con-Way

[2] The Court also asked the parties to address in post-trial briefing the impact, if any, of a new Department of Labor rule on this case, and both sides timely submitted such briefs. *Pls.' Brief* [#348]; *Defs.' Brief* [#349]. Ultimately, however, the Court's rulings rest on unrelated legal grounds.

[3] The Court notes that the parties and witnesses tended to use the phrases "owner-operator" and "independent contractor" interchangeably. *See, e.g.*, Depo. of Hunt [#284-1] at 37:17-22 ("Q. And I apologize. So I've sometimes been referring, and I think you have too, to drivers as independent contractors and sometimes as owner/operators. Do you understand and are you using those terms as one in [sic] the same? A. Yes, sir." Throughout the "Findings of Fact" section, the Court uses the phrase "owner-operator". The legal issue regarding which Plaintiffs, if any, are independent contractors for purposes of the FLSA is reserved for the "Conclusions of Law" section below.

and/or CFI (collectively, the "Carrier"),[4] known as Contract Hauling Agreements, to haul freight. *See, e.g.*, Vol. I [#276] at 39, 118, 194; Vol. III [#278] at 67 Trial Ex. 128; Trial Ex. 129.

2. Plaintiffs made their own decisions about whether to drive their truck or trucks individually, as a team, or to hire others to haul freight for them. Vol. III [#278] 553:6-13 (testimony by Plaintiff Ronald Dennis that he "decided to drive as part of a team" with a friend and then later "decided [he] wanted to switch to a solo lease with Pathway"); Depo. of Thomas J. Hunt [#284-1] at 30:16-21 (testimony by XPO's former Senior Manager of Operations that XPO could not force drivers to drive solo or as a team and could not force drivers to hire other(s) to drive the trucks for them). Drivers who elected to drive a team had the flexibility to drive more miles for more pay than they otherwise would have been able to earn as solo drivers. Trial Ex. 45.

3. In the commercial trucking business, the frequency and rates of pay for owner-operators and company drivers are different. Depo. of Melinda Creed [#336-2] at 20:4-7 (testimony by CFI employee Melinda Creed that company drivers are paid bi-weekly and owner-operators are paid weekly), 21:23-22:2 (stating that CFI pays owner-operators $0.97 per mile plus a fuel surcharge), 22:5-23:2 (stating that CFI pays company drivers employee benefits, a potential safety bonus, and a per-mile rate which varies by experience level); Depo. of Hunt [#284-1] at 15:9-20 (stating that XPO has different pay rates for company drivers versus owner-operators

[4] There is no dispute among the parties that XPO, Con-Way, and CFI all refer to the same entity. *See, e.g.*, Vol. I [#276] at 8:10-13 (Plaintiffs' counsel's statement), 12:10-11 (Defendants' counsel's statement). Throughout these Findings of Fact, the Court has identified the Carrier by the language used by each witness during his or her testimony.

because owner-operators pay their own expenses, including fuel costs and truck maintenance, in addition to their lease payments, while company drivers are paid a flat wage regardless of their efficiency, and CFI/XPO pays all other costs), 53:17-54:2 (stating that a "fuel surcharge" is connected to a rate table in the Contract Hauling Agreement which shows compensation provided to owner-operators when fuel prices rise above a certain threshold).

4. Before deciding to become owner-operators, Plaintiffs conducted, or had the opportunity to conduct, their own independent evaluations regarding whether to lease or purchase their trucks and whether to lease their trucks from Pathway or a different leasing company, including the opportunity to contact other leasing companies and compare lease terms if they chose to do so. Vol. V [#280] at 831:6-832:5 (testimony by Plaintiff Nasr that, when discussing whether he would come back to XPO as an owner-operator or a company driver, XPO gave him the names of several leasing companies, only one of which was Pathway; Plaintiff Nasr specifically rejected one leasing company, Long Mountain, due to the amount of money required for a down payment on a truck); Vol. I [#276] at 186:11-190:16 (testimony by driver Becky Austin that, before signing a lease with Pathway, she did her due diligence by talking to other drivers, researching the type of truck she wanted, and calling at least three other leasing companies).

5. As owner-operators, Plaintiffs were exposed to a risk of monetary loss based on a number of factors relating to fuel efficiency. Vol. V [#280] at 837:8-12 (testimony by Plaintiff Nasr that drivers could spend more money on fuel in a week than could actually be earned, "if you don't know what you are doing").

6. As owner-operators, Plaintiffs needed business acumen and financial proficiency to make a profit, because they controlled whether to drive solo or as a team, which loads to accept from carriers, which routes to take, how to manage their fuel efficiency and maintenance, and when to work. Vol. I [#276] 50:3-9 (testimony by Plaintiff Merrill that drivers were responsible for following Department of Transportation regulations), 119:10-14 (stating that it was the driver's responsibility to determine how to load or secure cargo); Depo. of Hunt [#284-1] at 36:8-37:24 (stating that owner-operators "could take time off anytime they wished," unlike company drivers); Vol. V [#280] at 833:4-8 (testimony by Plaintiff Nasr that the decision to take time off for vacation was up to him, "like any other business owner"), 833:20-835:16 (stating that it was his decision as an owner-operator where to drive and whether to decline loads based on "business sense" relating to profitability of runs, including such considerations as the cost of fuel and meals and the length of the haul), 835:17-836:4 (stating that he had to make business decisions regarding whether to take a load based on its profitability); Vol. I [#276] at 71:22-72:8 (testimony by Plaintiff Merrill that Pathway "didn't tell me what to do," despite the fact that he would sometimes get calls from Defendant Harris if he was running behind on lease payments or staying home too long); Vol. II [#277] at 301:23-302:14 (testimony by Plaintiff Lacy that it was his decision where not to drive, including places with lots of mountains, it was his decision not to haul freight over a certain weight, and he did not know any company drivers who owned their own trucks), 302:24-303:8 (stating that Pathway did not establish rules or requirements regarding drivers' meal, rest, or sleeping breaks); Vol. III [#278] at

502:2-23 (testimony by Plaintiff Williams that it was his decision to turn down a load that would not be profitable enough based on considerations like weight, mileage, and safety); Vol. IV [#279] at 613:13-22, 626: 13-21 (testimony by Plaintiff Anthony Dennis that it was his decision where to haul and whether to haul heavy loads, despite advice from Defendant Harris that he should not restrict his runs in such ways), 615:25-616:9 (stating that Pathway did not establish any rules or requirements for drivers regarding meal or sleep breaks); Vol. IV [#279] at 642:1-3 (testimony by Plaintiff Potirala that it was her decision whether to decline a load for "pretty much" any reason that she wanted to); Vol. V [#280] at 833:20-835:21 (Depo. of Hunt [#284-1] at 37:23-40:2 (stating that it was the owner-operators' responsibility to decide how and when to maintain their trucks); Depo. of Garcia [#284-3] at 134:24-135:2 (stating that it was his decision where to fuel and which route to take because he paid for the fuel); Vol. V [#280] at 901:14-24 (testimony by Defendant Harris that Pathway did not control its clients' driving routes, refueling timing or location, or meal, rest, or sleep breaks); Trial Ex. 50 at 2-4, ¶¶ 7, 13, 15 (Pathway leases indicating that Plaintiffs were responsible for managing insurance, repairs, maintenance, and accounting for excess mileage charges relating to their trucks).

7. Many of the work duties performed by owner-operators were the same as those performed by company drivers. Vol. I [#276] I at 57:13-19 (testimony by Plaintiff Merrill that "you're still doing everything that you do as a company driver, everything"), 58:1-59:14 (stating that both company drivers and owner-operators had to "move freight from Point A to Point B," "maintain the trailer," "secure the load," "complete pre-trip inspections," "communicate," "babysit the load if there was

a breakdown," and "fuel"); Vol. I [#276] at 161:12-162:24 (testimony by driver Becky Austin that she was "doing the same job" as an owner-operator and as a company driver, including driving the truck, taking care of the freight, sweeping the trailer, and doing 72-point pre-trip inspections); Vol. I [#276] at 248:22-250:5 (testimony by Plaintiff Lacy that he felt like "a glorified company driver" and that he did the "[e]xact same thing" as an owner-operator that he had done as a company driver, including ensuring that there were proper seals on loads, going into weigh stations, and paying traffic tickets, if received); Rule 30(b)(6) Depo. of Hunt on behalf of CFI, Inc. [#336-1] at 41:2-12 (stating that both company drivers and owner-operators haul freight within the CFI network), 97:6-13 (stating that, from a customer's point of view, nothing distinguishes a company driver from an owner-operator while at the customer's property).

8. Defendant Harris testified that, in his sixteen years of industry experience, he could not predict what or when something might go wrong with any truck. Vol. V [#280] at 872:18- 873:5 (testimony by Defendant Harris that, despite testing and performing preventative maintenance, it is impossible to know whether or when a particular truck will break down, especially when adding in such variables as how the driver is driving the truck, in what kind of conditions the truck is being driven, the weights of loads being hauled, and the type and quality of maintenance done on the truck after it leaves Defendant Pathway's lot).

9. There is "a direct correlation" between how a truck "is maintained and driven as to its longevity and reliability over the course of time." Depo. of Hunt [#284-1] at 49:7-14, 50:1-3 (stating that "[e]ven a new piece of equipment will start going

downhill pretty quick if it's not taken care of properly").

B. Facts Bearing on Relationship Between Plaintiffs and Carrier

10. Plaintiffs were required to secure a lease or own a truck to perform work for XPO. Depo. of Hunt [#284-1] 11:8-19 (stating that an owner-operator who contracted with CFI/XPO either owned his/her own truck or used his/her own financing to lease a truck from an entity of his/her choice).

11. As of mid-2018, about thirty of Pathway's clients had contracts with XPO, but that number varied over time. Vol. V [#280] at 855:4-22 (testimony by Defendant Harris that the number varies based on market forces, lease completions, and driver decisions whether to remain with CFI or switch to a different motor carrier).

12. XPO's owner-operators lease trucks from a number of different companies in addition to Defendant Pathway. Depo. of Leslie Killinger [#284-4] at 39:21-40:19 (naming lessors Lone Mountain, Arkansas Equipment Leasing, Wholesale Truck and Finance, LRM, Cure Truck Leasing, Quality Truck Leasing, Bush Truck Leasing, Schneider Finance, One Leasing, and Mission Financial); Depo. of Hunt [#284-1] at 10:13-11:7 (noting that "[t]here were a variety of leasing companies that had drivers on at CFI/XPO" and that "XPO would take a driver and tractor that met the qualifications from any number of companies with the exception of two that they no longer did business with" due to certain business practices by those companies), 11:8-22 (stating that an owner-operator who contracted with CFI/XPO could lease a truck from an entity of his/her choice, only one of which was Pathway), 11:23-12:6 (stating that, "[a]t the peak size of the fleet, which would have been 550 trucks in the contractor fleet, roughly 120 to 130 of those would have been . . . leased through

Pathway"); Vol. V [#280] at 831:6-832:5 (testimony by Plaintiff Nasr that XPO gave him the names of several leasing companies, one of which was Pathway, and that he believed he could lease a truck through any of them).

13. Drivers who wanted to haul freight for the Carrier were required to enter into written agreements with the Carrier to do so. *See, e.g.*, Vol I [#276] at 118-19, 194; Vol. III [#278] at 116-17. XPO's Contractor Hauling Agreement provides for a fixed period of two years and can be terminated by either party, with or without cause, by giving ten days' written notice. Trial Ex. 128 at 14, ¶ 30.

14. Pursuant to the terms of their Contractor Hauling Agreements with XPO, Plaintiffs are responsible for "hiring, setting the wages, hours and working conditions and adjusting the grievances of, supervising, training, disciplining, and firing all drivers, driver's helpers, and other workers necessary for the performance of [Plaintiffs'] obligations." Trial Ex. 128 at 4, ¶ 7A.

15. As owner-operators, Plaintiffs use their own business judgment to determine whether to decline loads from XPO based on profitability considerations such as the weight of the freight and fueling costs. Plaintiffs further set their own restrictions on where they will drive, the routes they will travel, and other conditions, all without needing or obtaining the Carrier's or Pathway's permission. Vol. II [#277] at 301:23-302:17 (testimony by Plaintiff Lacy that he chooses not to drive in mountainous regions, that he chooses not to haul freight over a certain weight, and that he chooses the routes he drives); Vol. III [#278] at 502:2-23 (testimony by Plaintiff Williams that he can decline to take a load if it would not be profitable enough based on considerations such as weight, mileage, and safety risks, and that

those decisions are honored without risk of the agreements being terminated); Vol. IV [#279] at 613:13-22 (testimony by Plaintiff Anthony Dennis that he ultimately decides whether to refuse loads despite "get[ting] harassed about it" and that he self-imposes certain restrictions such as avoiding the East Coast, primarily running loads in the South, and avoiding heavy loads because they use more fuel and create more maintenance needs based on wear and tear—even though Defendant Harris calls and speaks with him about these choices); Vol. IV [#279] at 641:8-642:15 (testimony by Plaintiff Potirala that she can decline a load for practically any reason, including destination, mileage, pay, and waiting-time considerations, without first having to seek Pathway's permission); Vol. V [#280] at 830:7-19 (testimony by Plaintiff Nasr implying that, as an owner-operator, he does not have others telling him where to go or when to work), 833:20-834:13 (stating that he is able to tell Con-Way that he does not want to drive in certain areas such as the Northeast, which he characterizes as a business decision because of operating costs there, like the cost of fuel and meals, and because the likelihood that short runs will not make enough money to justify the hauls), 834:14-23 (stating that he told Con-Way that he did not want to drive in the Northwest or Northern California because of the chain requirement and the expense of buying those chains), 834:24-835:1 (stating that he never talks to Pathway about his self-imposed restrictions), 835:2-21 (stating that he has the right to decline loads and will do so when they do not make business sense, such as when his income would mostly only cover fuel costs); Depo. of Hunt [#284-1] at 37:23-40:2 (stating that company drivers do not have any financial responsibility for their trucks, but that owner-operators are required to maintain their

own trucks); Depo. of Jose Garcia [#284-3] at 134:24-135:2 (stating: "And I say, 'I'm glad I'm an owner. I work my own route.' Because that's part of the freedom. I can fuel where I want because I pay for the fuel, and I can route myself where I want.").

16. Company drivers for XPO are subject to "forced dispatch," i.e., they cannot decline loads under most circumstances except for reasons like illness. Vol. I [#276] at 71:7-18 (testimony by Plaintiff Merrill that company drivers have the right to refuse loads for only limited reasons such as an emergency or having the truck under repair); Vol. I [#276] at 248:2-12 (testimony by Plaintiff Lacy that company drivers cannot refuse freight and have to go wherever the company tells them to go); Vol. III [#278] at 554:7-14 (testimony by Ronald Dennis that "forced dispatch" means that, when he was a company driver, he had to go wherever the company told him to go); Depo. of Hunt [#284-1] at 31:15-32:8 (stating that "forced dispatch" applies only to company drivers and means that, if they can permissibly drive under Department of Transportation regulations, they are required to do so).

17. Unlike owner-operators, company drivers are required to follow certain fueling requirements. Depo. of Hunt [#284-1] at 35:17-37:12 (stating that company drivers are only permitted to fuel at company-approved fuel stops with pre-negotiated fuel discounts, but that owner-operators can fuel anywhere that will take their credit cards).

18. Company drivers are required to follow a "driver handbook" that does not apply to owner-operators. Depo. of Hunt [#284-1] at 28:13-29:1 (stating that XPO does not provide company handbook or policies to owner-operators because they are only subject to the terms of their Contract Hauling Agreements).

19. Unlike owner-operators, company drivers are not responsible for managing regular truck maintenance in order to maintain profitability in connection with variables like fuel efficiency. Depo. of Hunt [#284-1] at 37:23-40:2.

20. As owner-operators, Plaintiffs are not subject to forced dispatch. Vol. III [#278] at 436:20-24 (testimony by Plaintiff Ard that, as an owner-operator, he is free to accept or reject assignments from the carrier), Vol. III [#278] at 502:21-503:1 (testimony by Plaintiff Williams that owner-operators have more freedom and can independently decide whether to follow suggested routes, but, if a company driver does not follow a specific route, the driver is charged for using extra fuel); Depo. of Hunt [#284-1] at 32:9-22 (stating that "forced dispatch" does not apply to owner-operators and that the Contract Hauling Agreement protects this right by stating that contractors have the right to accept or decline freight).

21. As owner-operators, Plaintiffs are subject to no contractual or policy restrictions on when or how much time they take off. Vol. V [#280] at 833:4-8 (testimony by Plaintiff Nasr that owner-operators do not earn vacation time and that, "like any other business owner," they can take time off but do not earn paid time off); Vol. V [#280] at 899:18-20 (testimony by Defendant Harris that owner-operators do not seek Pathway's permission to take time off for any reason); Depo. of Hunt [#284-1] at 36:8-37:12 (stating that owner-operators can take time off whenever they want for any reason, unlike company drivers).

22. XPO pays solo owner-operators an additional $.03 per mile once the driver exceeds 11,000 miles in a month as an incentive to drive more miles. Depo. of Creed [#265-1] at 32:17-33:4 (further stating that owner-operators who drive as a team receive

an additional $.06 per mile for trips after driving 18,000 miles in a month).

23. Pursuant to written agreements between Plaintiffs, Pathway and the Carrier, some Plaintiffs occasionally receive bonuses and equipment deposits from XPO which XPO is permitted to remit to Pathway rather than to Plaintiffs. Vol. II [#277] at 337:11-340:15; Trial Ex. 136 at 14, 24, 27, 46, 48 50, 60 ("Other Damages Sought as Part of Claim for Unpaid Wages"); Trial Ex. 50 at 23 ("This letter shall serve as Franklin Merrill's authorization and direction to remit to Pathway Leasing each and all settlement compensation and other amounts, less chargebacks, Franklin Merrill is owed pursuant to its [sic] independent contractor agreement with Con-Way Truckload." (emphasis added)). These amounts were applied by Pathway to equipment lease payments, promissory notes, maintenance escrow, and back lease payments. Vol. V [#280] at 769:18-771:10.

C. Facts Bearing on Relationship Between Plaintiffs and Pathway

24. Each Plaintiff executed an "Equipment Lease Agreement" with Pathway which contains the terms and conditions of his or her truck lease with Pathway. Trial Ex. 50; Vol. I [#276] at 5:12-23 (counsel stipulating that all such agreements are materially similar). Each Plaintiff also executed a separate "Contractor Hauling Agreement" with XPO defining the terms and conditions of his or her freight hauling services for XPO. Trial Ex. 128; Trial Ex. 129; Vol. I [#276] at 5:12-23 (counsel stipulating that all such agreements are materially similar). Pathway and XPO executed a "Carrier Agreement" in May 2013 to govern their relationship. Trial Ex. 127.

25. Each Plaintiff who wanted to lease a truck from Pathway had the option to sign

either a single-person or a team lease with Pathway. Trial Ex. 50 at 4, ¶ 13(c); Vol. V [#280] 846:11-847:10 (testimony by Defendant Harris discussing differences between driving solo versus driving as a team). Similarly, Plaintiffs were not required by XPO to drive the truck themselves but were instead permitted to hire their own drivers or work as a team. Trial Ex. 128 at ¶ 19.

26. Some Pathway clients, including Steven Kortman, Joey Brown, and Melanie Brown, drove as a team with their spouses. Trial Ex. Z6.

27. Plaintiff Hollingsworth chose to drive as a team. Vol. VI [#281] at 938:17-22 (testimony by Defendant Harris that Plaintiff Hollingsworth "started off as a solo, transitioned into a team operation. The team driver that he was running with, Ethan Thrasher, once they stopped running as a team—and this was this year—Ethan then leased a truck from us . . . .").

28. Plaintiff Hollingsworth hired his own contractor for his team, a man he knew "like a son," paying him a percentage of his net profit after fuel and lease expenses instead of a fixed or hourly wage. Vol. V [#280] at 760:4-10, 14-25.

29. Seven of the fifteen Plaintiffs (Eric Ard, Anthony Dennis, Ronald Dennis, Tim Hollingsworth, Larry Jurcak, Rodney Lacy, and Sami Nasr) as well as some other Pathway clients (including Andre Ellis, Paula Horion, Steven Kortman, Jaime Parrales, Eric Robertson, Eduardo Sustaita, Gerord Thomas, and Earnest Ward) successfully completed their leases and purchased their trucks from Pathway. *See* Trial Exs. C, G, K, W, Z, T1, H2, K2, M3, S3, S4, B5, V5, A6, H6.

30. The seven Plaintiffs who successfully completed their leases then had the opportunity to earn substantially more than their peers, in addition to owning their

trucks. Vol. II [#277] at 294:16-295:23 (testimony by Plaintiff Lacy that he took ownership of his truck in October 2015 after finishing his lease early, that he grossed over $200,000 in 2014, over $170,000 in 2015, and over $155,000 in 2016, and that, as of mid-2018, he was still driving the same truck); Vol. III [#278] at 492:13-24 (testimony by Plaintiff Williams that he made more money as an owner-operator than he did as a company driver); Vol. III [#278] at 555:16-556:4 (testimony by Plaintiff Ronald Dennis that, although by mid-2018 he had no further business relationship with Pathway, he had purchased and taken ownership of his truck and was still driving and making money off of his investment); Vol. V [#280] at 759:17-24 (testimony by Plaintiff Hollingsworth that he completed his lease with Pathway in March of 2018 and purchased the truck, which he was still driving and earning money from as of mid-2018); Vol. V [#280] at 830:20-831:5 (testimony by Plaintiff Nasr that, at one point, he had two trucks and hired a driver to drive one of them, and that he ran, and continues to run, those trucks as a business).

31. For at least one driver, Pathway provided the best economic option to be an owner-operator. Vol. I [#276] at 186:23-187:19 (testimony by driver Becky Austin that she had a high credit score and enough money for a down payment on a new truck, but that she decided instead to lease a truck from Pathway).

32. As of June 2018, thirty-eight drivers (nearly twenty percent of Pathway's lessees) were leasing their second truck from Pathway. Vol. VI [#281] at 936:2-937:14 (testimony by Defendant Harris identifying drivers who completed their payments and other lease obligations relating to their first truck from Pathway and who then chose to lease another truck from Pathway, something which was generally

uncommon in the industry).

33. Pathway's repossession rate is lower than that of many other companies in the truck leasing business. Vol. V [#280] at 925:3-926:6 (testimony by Defendant Harris that Defendant Pathway's repossession rate in 2017 was just under twenty percent and in 2016 was just under twenty-six percent); Depo. of Hunt [#284-1] at 19:4-13 (stating that it was more common for Pathway's lessees to complete the lease and take ownership of the truck than it was for the lessees of the other leasing companies with which XPO did business).

34. Pursuant to their leases with Pathway, Plaintiffs are responsible for truck payments, maintenance and repairs, fuel costs, business liability insurance, and taxes. Trial Ex. 50 at 2-4, ¶¶ 7, 13, 15; Vol. II [#277] at 306:20-307:10 (testimony by Plaintiff Lacy that he "invested too much money to turn around and give" the truck back to Pathway).

35. Pursuant to their leases with Pathway, Plaintiffs are responsible for paying their own business-related taxes. Trial Ex. 50 at 5, ¶ 20; Vol. IV [#279] at 596:12-19 (testimony by Plaintiff Anthony Dennis that he retains his own business records for tax purposes).

36. Some of Pathway's clients established and registered their own companies. Vol. I [#276] at 194:23-195:2 (testimony by driver Becky Austin that she owned Cherokee Nomad Express prior to becoming a lessee with Pathway and that she still owned the company as of mid-2018); Vol. IV [#279] at 687:19-21 (testimony by Plaintiff Horion that he started his own business account and obtained his own business license from the State of Texas, although he later had to close the account); Vol. V

[#280] at 833:9-19 (testimony by Plaintiff Nasr that, just prior to leasing a truck with Pathway, he started an entity for his business called Nasr Transportation LLC).

37. As Pathway's business grew and the freight market adapted to changing economic conditions and new technologies, Pathway's clients contracted with an increasing number of carriers, of which XPO is only one. Vol. V [#280] at 849:10-850:22 (testimony by Defendant Harris that in 2016 clients contracted with carriers numbering in the "low twenties to high teens," that in 2017 the number was in the "upper twenties," and as of mid-2018 the number was "over 30").

38. The Carrier Agreement between the Carrier and Pathway permits either the Carrier or Pathway to terminate the parties' relationship with 120 days' notice. Trial Ex. 127 at 3. At the same time, Pathway's leases provide for a fixed term, although several drivers, including Plaintiff Hollingsworth, negotiated changes to their lease terms. Trial Ex. Z6 (listing lease terms of all Plaintiffs by number of months). Plaintiffs have the option of completing their leases before expiration of the term by purchasing their trucks. Trial Ex. 50 at 10 ("Option to Purchase").

39. Once drivers buy their trucks, Pathway has no further interaction with them unless the drivers want to lease another truck from Pathway, which occurred with approximately twenty percent of Pathway's clients. Vol. VI [#281] at 935:20-937:25 (testimony by Defendant Harris that clients who complete their leases generally have no further formal business relationship with Pathway).

40. Some Plaintiffs whose contracts were terminated by XPO, or who asked to switch carriers, continued to lease from Pathway while driving for other carriers. Vol. VI [#281] at 942:5-944:24 (testimony by Defendant Harris that XPO has sometimes

terminated a particular Contractor Hauling Agreement with one of Pathway's clients, and that Pathway had no role in that decision-making process but would continue to work with the client to find a favorable path forward).

41. Similarly, Plaintiffs who complete or buy out their leases often continue to drive for XPO, even though they no longer have a relationship with Pathway. Depo. of Hunt [#284-1] at 19:4-20:16 (stating that once a driver owned his/her truck outright, a new Contractor Hauling Agreement is signed with XPO to change and correct details such as titles, entity names, and tractor numbers, but the terms of the agreement otherwise remain the same); Vol. II [#277] at 295:24-296:12 (testimony by Plaintiff Lacy that after he completed his lease, he had no further relationship with Pathway but continued to drive for XPO); Vol. III [#278] at 447:5-448:23 (testimony by Plaintiff Ard that he had no further relationship with Pathway after he bought the truck, and that he continued to drive for XPO for another year-and-a-half while he paid off his private bank loan); Vol. IV [#279] at 583:2-20 (testimony by Plaintiff Anthony Dennis that he traded his Pathway truck into a dealership, thereby ending his relationship with Pathway, but continued to drive his newly-purchased used truck for CFI for an unspecified period); Vol. V [#280] at 755:12-19 (testimony by Plaintiff Hollingsworth that after he bought his truck and ended his relationship with Pathway, he drove for CFI for about a month longer before moving to another company); Vol. V [#280] at 828:21-829:6 (testimony by Plaintiff Nasr that, after he purchased his truck, his formal business relationship with Pathway ended, but that he continues to earn income from driving his truck).

42. Plaintiffs were able to review Pathway's Equipment Lease Agreements before

signing them. Vol. III [#278] at 500:24-501:12 (testimony by Plaintiff Williams that he entered into an equipment lease agreement with Pathway in May 2016, that he browsed through the agreement before signing it, that no time limit was put on him to review the agreement, that he did not talk to anyone at Con-Way about the agreement before signing it, and that he did not have any concerns about the agreement before signing it); Vol. IV [#279] at 601:24-602:4 (testimony by Plaintiff Anthony Dennis that he had the opportunity to review the entire lease if he wanted to, because it was on his phone).

43. Plaintiffs knew and understood that the Equipment Lease Agreements constituted contracts. Vol. I [#276] at 190:17-19 (testimony by driver Becky Austin that she understood that the Equipment Lease Agreement was a contract); Vol. III [#278] at 439:21-440:4 (testimony by Plaintiff Ard that he understood that the Equipment Lease Agreement was a contract, that it set out the terms for leasing a truck through Pathway, and that signing a contract means agreement to the terms of the contract); Vol. IV [#279] at 602:5-9 (testimony by Plaintiff Anthony Dennis that he knew that he was signing a contract when he signed the Equipment Lease Agreement).

44. The Equipment Lease Agreement signed by Plaintiffs states that Pathway makes no representations or warranties regarding the condition or fitness of the leased trucks and makes clear that the lessee accepts the truck "AS IS, WHERE IS, AND WITH ALL FAULTS." Trial Ex. 50 at 1, ¶ 2 and 5, ¶ 21.

45. Under the Equipment Lease Agreements, and subject to Pathway's limited service contracts, Plaintiffs agreed that they are solely responsible for covering the cost of truck repairs and maintenance during the lease term. Trial Ex. 50 at 2-3, ¶ 13(f) and

24 ("Truck Acceptance Form").

46. The Equipment Lease Agreements contain a limited service contract for a defined period of time and/or mileage, which Plaintiffs refer to as a "warranty." Trial Ex. 50 at 18-20; Vol. III [#278] at 445:23-446:1 (testimony by Plaintiff Ard that he believes he has a warranty through the limited service contract part of the lease agreement). This provision sets forth repairs that are covered by Pathway, and the terms and conditions governing Pathway's and Plaintiffs' obligations with respect to repairs. Trial Ex. 50 at 18-20.

47. The Equipment Lease Agreements state that the agreements, "together with the other documents maintained herein or executed contemporaneously herewith, constitute[] the entire agreement of the parties and Lessor shall not be charged with any agreement or representation not contained in a writing executed by it as provided in this section." Trial Ex. 50 at 5, ¶ 26.

48. Although some Plaintiffs testified about what they "thought" they were getting when they leased a truck from Pathway, no Plaintiff testified about any specific promise or misrepresentation made by either Defendant with respect to a truck or the Equipment Lease Agreement. Vol. I [#276] at 55:3-17 (testimony by Plaintiff Merrill that he thought the warranty covered the vehicle by helping the driver keep the truck "up and working").

49. Not all Plaintiffs fully understood all portions of the Equipment Lease Agreement. Vol. I [#276] at 39:20-40:16 (testimony by Plaintiff Merrill that he took a day off to read the agreement, but that he did not read it through all the way and signed it even though he did not understand "parts of it," because he felt that he needed to

get back to work and make money). However, no Plaintiff testified as to which portions of the lease he or she did not understand.

50. Pathway gave no verbal warranties or assurances to Plaintiffs about the condition of their leased trucks. Vol. VI [#281] at 961:19-962:4 (testimony by Defendant Harris that Pathway does not make verbal warranties to clients, although they "do discuss the make-ready process that [they] put trucks through," and that any issues which do not meet Department of Transportation standards are addressed).

51. When entering into a working relationship with Pathway, some Plaintiffs were handed a lease, told where to sign, and directed to a truck without the opportunity to take a test drive. Vol. I [#276] at 230:15-16 (testimony by Plaintiff Lacy that he "kind of got forced into signing" the contract), 234:10-13 (stating that Defendant Harris told him that he "couldn't test drive the truck," that Plaintiff Lacy "had to . . . sign the contract that afternoon," and that he was "faxed the contract at the dealership"), 240:9-13 (stating that "whoever" sent the contract to him had it highlighted where he needed to initial and sign); Vol. III at 485:1-13 (testimony by Plaintiff Williams that he reviewed the paperwork before signing it, he understood only some of it, including that he was signing a contract and that he was going to be an owner-operator for CFI); Vol I [#276] at 46:17-21 (testimony by Plaintiff Merrill that he had to sign the lease before he got the truck or the keys to the truck and that he was not allowed to inspect the truck ahead of time).

52. Some Plaintiffs testified that they were more comfortable taking on the risk of leasing a commercial truck because they thought the truck came with a warranty that would cover major repairs. Vol. V [#280] at 740:11-17 (testimony by Plaintiff

Glover that, when he signed the lease, he thought that he was going to get a warranty and that he did not know that he was going to be held responsible for "any type of repairs or anything dealing with that truck" while he was under the lease, because "most companies you lease from . . . are responsible for everything until you actually purchase the vehicle").

53. Defendants offered Plaintiffs loans documented by promissory notes on an as-needed basis to cover repair costs for which the Plaintiffs had responsibility under the leases, and some Plaintiffs received little take-home pay after making payments on the notes. Vol. IV [#279] at 585:4-25 (testimony by Plaintiff Anthony Dennis that, "[a]fter the warranty went out," he spent most of his time paying promissory notes for a whole year, that "[a] promissory note is if you don't have the money and you borrow the funds from Pathway Leasing, they will send you a promissory note which will charge you interest to pay them back," and that he might only get $100-$900 a week from his paycheck after making that payment); Vol. IV [#279] at 661:21-662:4 (testimony by Plaintiff Gutowski that, in September 2016, he could not afford to take out any more promissory notes because he could not pay his bills after making the payments on the notes).

54. Several Plaintiffs defaulted on their lease obligations to Pathway, resulting in Pathway's repossession of their trucks. Trial Ex. T6; Vol. VI [#281] at 940:25-942:1 (testimony by Defendant Harris that Trial Exhibit T6 accurately reflects repossessions except that Pathway agreed to release Plaintiff Williams from his lease obligations).

55. Excluding Plaintiff Williams, the outstanding balances owed by each Plaintiff whose

truck was repossessed by Pathway are set forth in Trial Exhibit T6. Vol. VI [#281] at 1032:7-17 (testimony by Defendant Harris regarding Trial Exhibit T6 that the "Repo Cost" column includes repossession costs, repair costs, and past-due rent), 1031:24-1033:16 (stating that proceeds from sale of a truck are deducted from what is owed by the driver, and that the chart does not account for whether a truck was re-leased), 1034:9-18 (stating that "N/A" or "not applicable" under the Sale Proceeds column means that the vehicle was re-leased, although the chart does not indicate the date of re-leasing or the amount of the new lease payments).

56. Excluding Plaintiff Williams, no direct evidence was presented by Plaintiffs listed on Trial Exhibit T6 disputing that they defaulted on their Equipment Lease Agreements or contesting the amounts owed.

III. Conclusions of Law

A. Plaintiffs' FLSA Minimum Wage and Retaliation Claims

Among other things, the FLSA establishes minimum wage standards and retaliation protections in certain employment situations. 29 U.S.C. § 206(a)(1)(C) (minimum wage); 29 U.S.C. § 215(a)(3) (retaliation). A threshold issue is whether Plaintiffs were employees, hence covered by the FLSA, or independent contractors who are not covered by the FLSA.

The FLSA defines "employee" as "any individual employed by an employer," so long as the individual does not fall under an exemption. 29 U.S.C. § 203(e)(1). The economic realities test is used to determine whether a person is an employee and therefore covered by the FLSA. *Baker v. Flint Eng's & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998). Courts generally look at six factors in connection with this test: "(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or

loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business." *Id.* The Court must use a "totality-of-the-circumstances approach," because no one factor alone is dispositive. *Id.* at 1441.

> In deciding whether an individual is an employee or an independent contractor under the FLSA, a district court acting as the trier of fact must first make findings of historical facts surrounding the individual's work. Second, drawing inferences from the findings of historical facts, the court must make factual findings with respect to the six factors set out above. Finally, employing the findings with respect to the six factors, the court must decide, as a matter of law, whether the individual is an "employee" under the FLSA.

Id. at 1440. As outlined below, the Court finds that Plaintiffs were independent contractors, regardless of whether Defendant Pathway is considered independently as an employer or whether XPO and Defendant Pathway are considered collectively as joint employers.

Regarding the first factor, i.e., the degree of control exerted by the alleged employer over the worker, the Court finds that this factor weighs heavily in favor of finding independent contractor status. Each Plaintiff had the option to sign either a single-person or a team lease. Finding of Fact #2. Plaintiffs were not required to drive the leased trucks themselves but were instead permitted to hire their own drivers or work as a team. Findings of Fact #2; #25. Neither Defendants nor XPO could decide for Plaintiffs whether they drove individually, drove as a team, or hired their own employees to drive the leased trucks. Findings of Fact #2, #25. For example, some clients of Pathway drove as teams with their spouses. Finding of Fact #26. Plaintiff Hollingsworth chose to drive as a team by hiring his own contractor, a man he knew "like a son," paying him a percentage of his net profit after fuel and lease expenses were covered rather than a fixed or hourly wage.

Finding of Fact #27. Drivers who elected to drive as part of a team had the flexibility to drive more miles for more pay than they otherwise would have been able to earn as solo drivers. Finding of Fact #2. Pursuant to the terms of their Contractor Hauling Agreements, Plaintiffs were responsible for "hiring, setting the wages, hours and working conditions and adjusting the grievances of, supervising, training, disciplining, and firing all drivers, driver's helpers, and other workers necessary for the performance of [Plaintiffs'] obligations." Finding of Fact #14.

Further, as owner-operators, Plaintiffs used their own business judgment to determine whether to decline loads based on profitability considerations such as the weight of the freight and fueling costs, and further set their own restrictions on where they would drive, the routes they would travel, and other conditions, all without needing Pathway's permission. Finding of Fact #15. In contrast, company drivers were subject to "forced dispatch," i.e., they could not decline loads under most circumstances except for reasons like illness. Finding of Fact #16. Similarly, unlike owner-operators, company drivers were required to follow certain fueling requirements. Finding of Fact #17. As owner-operators, Plaintiffs were subject to no contractual or policy restrictions on when or how much time they took off. Finding of Fact #21. Finally, company drivers were required to follow a "driver handbook" which does not apply to owner-operators. Finding of Fact #18. Considered as a whole, these facts demonstrate a relatively low degree of control exerted by Defendants and/or XPO over Plaintiffs, and the Court therefore finds that this factor weighs in favor of finding that Plaintiffs were independent contractors, not employees. *See, e.g.*, *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018) (finding that this factor weighed in favor of independent contractor status where the worker "could

set his own hours and determine how best to perform his job within broad parameters," despite the requirement that he periodically report to the company).

Regarding the second factor, i.e., the worker's opportunity for profit or loss, the Court finds that this factor weighs in favor of finding independent contractor status. Seven of the fifteen Plaintiffs as well as other Pathway clients successfully completed their leases and purchased their trucks from Pathway. Finding of Fact #29. The seven Plaintiffs who successfully completed their leases could earn substantially more than their peers, in addition to owning a valuable asset in the form of their trucks. Finding of Fact #30. Plaintiffs and those who leased trucks from Pathway conducted, or at least had the opportunity to conduct, their own independent evaluations of (1) whether to lease or purchase their trucks and (2) whether to lease their trucks from Pathway or a different leasing company. Finding of Fact #4. For some, Pathway provided the best economic lease option for owner-operators. Finding of Fact #31. In fact, as of June 2018, thirty-eight drivers (nearly twenty percent of Pathway's lessees) were leasing a second truck from Pathway, which had a repossession rate much lower than that of many other companies in the truck leasing business. Findings of Fact #32, #33.

Further, the frequency and rates of pay for owner-operators differed from that for company drivers. Finding of Fact #3. XPO paid solo owner-operators an additional $.03 per mile once the driver exceeded 11,000 miles in a month as an incentive to drive more miles. Finding of Fact #22. Unlike owner-operators, company drivers were not responsible for managing regular truck maintenance in order to maintain profitability. Finding of Fact #19. Plaintiffs, on the other hand, were exposed to the risk of monetary loss based on a number of factors concerning their decision-making as related to fuel efficiency. Finding

of Fact #5. Considered as a whole, these facts demonstrate that Plaintiffs' opportunities for profit or loss were largely within their own control, and the Court therefore finds that this factor weighs in favor of finding independent contractor status. *See Baker*, 137 F.3d at 1441 (noting that having opportunity for profit or loss is "consistent with the characteristics of being [an] independent businessm[a]n"); *see, e.g.*, *Acosta*, 884 F.3d at 1236 (finding that this factor weighed in favor of employee status because the worker was "paid only a flat fee" and "could not increase or decrease his profit based on how well he did his job").

Regarding the third factor, i.e., the worker's investment in the business, the Court finds that this factor weighs in favor of finding independent contractor status. Plaintiffs were required to secure a lease or own a truck to perform their work for XPO. Finding of Fact #10. Plaintiffs were responsible for truck payments, maintenance and repairs, fuel costs, workers compensation and business liability insurance, and tax and accounting services. Finding of Fact #34. Plaintiffs were responsible for paying their own business-related taxes. Finding of Fact #35. In addition, as owner-operators, some of Pathway's clients established and registered their own hauling companies. Finding of Fact #36. Considered as a whole, these facts demonstrate that Plaintiffs substantially invested in their chosen business, and the Court therefore finds that this factor weighs in favor of finding independent contractor status. *See Acosta*, 884 F.3d at 1236 (noting that "[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors; rather the relevant 'investment' is 'the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself'"); *see id.* (finding that employee status was indicated where the supplies and equipment were provided by the company, and where the worker's only expense (supplying buckets for

families who had not brought buckets) was negligible), *id.* at 1236 n.8 (implying that a worker supplying his own truck could justify independent contractor status where that worker does not later obtain reimbursement from the company for use of the vehicle).

Regarding the fourth factor, i.e., the permanence of the working relationship, the Court finds that this factor weighs slightly in favor of a finding of independent contractor status. Seven of the fifteen Plaintiffs and several other Pathway clients successfully completed their leases and purchased their trucks from Pathway. Finding of Fact #29. As Pathway's business has grown and the freight market has adapted to changing economic conditions and new technologies, Pathway's clients have contracted with an increasing number of carriers, of which XPO is only one. Finding of Fact #37. As of mid-2018, approximately thirty of Pathway's clients had contracts with XPO, a number which varies over time. Finding of Fact #11. XPO's owner-operators lease trucks from a number of different companies in addition to Pathway. Finding of Fact #12. The Carrier Agreement permits either XPO or Pathway to terminate the parties' relationship with 120 days' notice; at the same time, Pathway's leases provide for a fixed term, although several drivers negotiated changes to their lease terms. Finding of Fact #38. Plaintiffs had the option of completing their leases earlier than the fixed term by purchasing their trucks. Finding of Fact #38. Once drivers buy their trucks, Pathway has no further interaction with them unless the drivers want to lease another truck from Pathway, which occurred with approximately twenty percent of Pathway's clients. Finding of Fact #39. XPO's Contractor Hauling Agreement provides for a fixed period of three years and could be terminated by either party, with or without cause, by giving ten days' written notice. Finding of Fact #13. Plaintiffs whose contracts were terminated by XPO, or who asked to switch carriers,

continued to lease from Defendant Pathway while driving for other carriers. Finding of Fact #40. Similarly, Plaintiffs who completed or bought out their leases often continued to drive for XPO, even though they no longer had a relationship with Pathway. Finding of Fact #41. Considered as a whole, these facts demonstrate impermanence in the working relationship between the drivers and Pathway, based primarily on completion of the lease, and the Court therefore finds that this factor weighs slightly in favor of a finding of independent contractor status. *See Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989) (stating that "'[i]ndependent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration").

Regarding the fifth factor, i.e., the degree of skill required to perform the work, the Court finds that this factor weighs slightly in favor of a finding of independent contractor status. Many of the work duties performed by owner-operators were the same as those performed by company drivers. Finding of Fact #7. However, in addition to the required skills both company drivers and owner-operators possessed with respect to driving commercial trucks, Plaintiffs needed business acumen and financial proficiency to be profitable, because they controlled whether to drive solo or as a team, what loads to accept, what routes to take, how to manage their fuel efficiency and maintenance, and when to work. Finding of Fact #6. Although these skills were required for those in Plaintiffs' position to be successful (measured in terms of profit), there was no evidence regarding whether these were skills that company drivers possessed as well but simply did not need to utilize given the parameters of their work. In other words, it is unclear whether Plaintiffs possessed skills not possessed by company drivers which they needed to have

to perform their work. Nevertheless, taken as a whole, these facts demonstrate that certain additional skills were required to perform Plaintiffs' work, as compared to the skills required for company drivers, and the Court therefore finds that this factor weighs slightly in favor of a finding of independent contractor status. *See Acosta*, 884 F.3d at 1237 (stating that "we consider whether the job contains a 'requirement of specialized skills'; if such a requirement exists, the worker is more likely to be considered an independent contractor" and that "[t]hese specialized skills are distinct from general 'occupational skills' that 'any good employee in any line of work must [have]'"); *see, e.g.*, *id.* (holding that employee status was indicated where there were no specialized skills needed to attend to day-to-day operations of a pecan grove, provide security, perform general maintenance, and clean debris out of the nuts).

Regarding the sixth factor, i.e., the extent to which the work is an integral part of the alleged employer's business, the Court finds this factor to be neutral. Neither party presented adequate evidence regarding this factor. On the one hand, it is obvious that Defendant Pathway could not remain in business without Plaintiffs performing the hauling work for which trucks are required. On the other hand, the actual freight hauling done by Plaintiffs was performed for XPO, and no work was performed directly for Pathway beyond the requirements necessary to fulfill lease obligations. Regardless, in the absence of a sufficient evidentiary showing by the parties here, the Court finds this factor to be neutral.

In sum, the Court finds that application of the six-factor test results in the conclusion that Plaintiffs were not Defendants' employees for purposes of the FLSA. Considering the totality of the circumstances, the Court finds that Plaintiffs acted with a "degree of independence" which "set[s] them apart from what one would consider normal employee

status." *Baker*, 137 F.3d at 1436. In other words, Plaintiffs were "in business for [themselves]." *Id.* at 1443. Because the Court finds that Plaintiffs' status precludes them from coverage under the FLSA, the Court concludes that judgment must enter in favor of Defendants on Plaintiffs' FLSA minimum wage claims and Plaintiff Jurcak's FLSA retaliation claim.

B. Plaintiffs' Rescission Claims

Plaintiffs seek rescission of their leases based on a theory of misrepresentation by Defendants. *See, e.g.*, *Pls.' Brief* [#336] at 41-42. Where "one seeks rescission by reason of misrepresentation," one "need not prove that the seller had knowledge of the falsity of the representations or was utterly indifferent to their truth or falsity." *Bassford v. Cook*, 380 P.2d 907, 910 (Colo. 1963). Instead, Plaintiffs must prove: (1) Defendants made a fraudulent misrepresentation of material fact; (2) Plaintiffs relied upon the misrepresentation; (3) Plaintiffs were justified in doing so; and (4) the reliance resulted in damages.[5] *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). Whether a party seeking rescission has a right to rely on the misrepresentation is a question of fact. *Id.* (citing *Bassford*, 380 P.2d at 907) (holding a contract is voidable if the plaintiff is justified in relying on the misrepresentation).

Rescission may be available even after full performance of a contract. *See, e.g.*, *Jacobson v. XY, Inc.*, No. 07-cv-02670-WYD-BNB, 2009 WL 4267950, at *5 (D. Colo. Nov. 20, 2009) (allowing rescission of contracts several years after full performance). "Where the general rule is that a party seeking to rescind a contract must return the opposite party

[5] The parties agree that Colorado law governs the state law claims. *See* [#336] at 42-44; [#350] at 9, 78.

to the position in which he was prior to entering the contract, this is not a technical rule, but an equitable one . . . The standard used is substantial restoration of the status quo." *Id.* (citing *Smith v. Huber*, 666 P.2d 1122, 1124 (Colo. App. 1983)).

Plaintiffs assert that Defendants' "primary material misrepresentation" is that Plaintiffs "thought they were going to [be] true independent contractors or owner operators," and that "was never [going] to be true." *Pls.' Brief* [#336] at 48. However, the Court finds that, as to each and every Plaintiff, this claim fails on the first element, i.e., whether Defendants made a fraudulent misrepresentation of material fact. *See M.D.C./Wood, Inc.*, 866 P.2d at 1382.

First, as fully discussed above, the Court finds that Plaintiffs were indeed independent contractors for purposes of the FLSA, and there is no argument that any different standard regarding independent contractor status should be applied for purposes of the rescission claims.

Second, there is a decided lack of evidence regarding any specific material misrepresentations made by Defendants. Findings of Fact #48, #50. Although Plaintiffs may have believed that work as owner-operators would be better than work as company drivers, or their lives as owner-operators would somehow be better than their lives as company drivers, there is a lack of evidence that this misunderstanding was based on particular material misrepresentations by Defendants. Findings of Fact #48, #50.

Third, regarding the Equipment Lease Agreement, although there is a noticeable lack of evidence about which parts of the contract any given Plaintiff did not understand, there is simply no evidence that any particular Plaintiff did not realize he or she was signing a contract. Findings of Fact #42, #43, #49. Some Plaintiffs testified vaguely about feeling

time-pressured to sign their agreements, but there was no evidence that Plaintiffs could not take the time to review, ask questions, and understand the leases had they chosen to do so. Findings of Fact #42, #43, #49. A few Plaintiffs' testimony that they were not permitted to test drive the trucks before signing leases (Finding of Fact #51) fails to establish that any Defendant made a fraudulent misrepresentation of a material fact. Moreover, ignorance of the contents of an agreement admittedly signed by a party does not constitute fraud, absent circumstances demonstrating a level of duress which was not present here. *Platt v. Winnebago Indus., Inc.*, 960 F.3d 1264, 1275-76 (10th Cir. 2020) ("Under Colorado law, however, 'in the absence of fraud or concealment, a party signing a contract without reading it cannot deny knowledge of its contents and is bound by what she [or he] signed." (quoting *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289, 294 (D. Colo. 1993))); *Motto Franchising, LLC v. McCabe*, No. 19-cv-02103-CMA-STV, 2021 WL 662306, at * (D. Colo. Feb. 19, 2021) ("Although the concept of duress has expanded since the days of common law, not all coercive business practices amount to duress.") (citing *Cooper v. Flagstaff Realty*, 634 P.2d 1013, 1015 (Colo. App. 1981)).

Fourth, the Equipment Lease Agreement contains a limited service contract for a defined period of time and/or mileage, which Plaintiffs referred to as a "warranty," and which sets forth repairs that would be covered by Pathway, as well as the terms and conditions governing Pathway's and Plaintiffs' obligations with respect to repairs. Finding of Fact #46. The Equipment Lease Agreement states that Pathway made no representations or warranties regarding the condition or fitness of the leased trucks and makes clear that Plaintiffs accepted the trucks "AS IS, WHERE IS, AND WITH ALL FAULTS." Finding of Fact #44. The Equipment Lease Agreement states that the

agreement, "together with the other documents maintained herein or executed contemporaneously herewith, constitute[] the entire agreement of the parties and [Pathway] shall not be charged with any agreement or representation not contained in a writing executed by it as provided in this section." Finding of Fact #47. Plaintiffs agreed that, under the lease agreements, and subject to Pathway's limited service contracts, they would otherwise be solely responsible for covering the cost of truck repairs and maintenance during the lease term. Finding of Fact #45. Defendant Harris testified that, in his sixteen years of industry experience, he could not predict what or when something might go wrong with any vehicle, and there is "a direct correlation" between how a truck "is maintained and driven as to its longevity and reliability over the course of time." Findings of Fact #8, #9. Although some Plaintiffs testified that they were more comfortable in taking on the risk of leasing a commercial truck because the truck was supposed to come with a warranty that would cover major repairs, they have not directed the Court's attention to any specific misrepresentations made by Defendants in this regard. Finding of Fact #52. Defendants offered Plaintiffs optional loans evidenced by promissory notes to cover repair costs, and often Plaintiffs received little take-home pay after paying on the notes, but, again, there is no evidence of any specific misrepresentations made to any particular Plaintiff in connection with these loans. Finding of Fact #53.

In short, despite the evidence that Plaintiffs thought that their working lives would generally improve after signing their truck leases, there is no evidence that this was based on any material misrepresentation(s) by either Defendant to any particular Plaintiff. Accordingly, the Court finds that judgment must enter in favor of Defendants on Plaintiffs' rescission claims.

C. Plaintiffs' Quantum Meruit and Unjust Enrichment Claims

In Colorado, a claim for unjust enrichment is the same as a claim for quantum meruit. *Dudding v. Norton Frickey & Assoc.*, 11 P.3d 441, 444 (Colo. 2000) ("Application of the doctrine of quantum meruit, also termed quasi-contract or unjust enrichment, does not depend upon the existence of a contract, either express or implied in fact."); *see also Cahey v. Intel Bus. Maces. Corp.*, No. 20-cv-00781-NYW, 2020 WL 5203787, at *11 (D. Colo. Sept. 1, 2020) (stating that, "[i]n Colorado, the doctrine of quantum meruit is synonymous with the doctrine of unjust enrichment," and therefore addressing the claims together).

"Quantum meruit is an equitable doctrine that invokes an implied contract where the parties either have no express contract or have abrogated it." *Matter of Gilbert*, 346 P.3d 1018, 1023 (Colo. 2015). "The doctrine does not depend on the existence of a contract, either express or implied in fact, but rather applies where a need arises to avoid unjust enrichment to a party in the absence of an actual agreement to pay for the services rendered." *Id.* "That is, the equitable doctrine of quantum meruit seeks to restore fairness when a contract fails by ensuring that the party receiving the benefit of the bargain pays a reasonable sum for that benefit." *Id.* (internal quotation marks omitted).

"To recover in quantum meruit, a plaintiff must demonstrate that: (1) the defendant received a benefit, (2) at the plaintiff's expense, and (3) it would be unjust for the defendant to retain that benefit without paying for it." *Id.*; *cf. City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth.*, 403 P.3d 609, 616 (Colo. 2017) ("To recover under an unjust-enrichment theory, a plaintiff must prove three elements: (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for

the defendant to retain the benefit without commensurate compensation." (internal quotation marks omitted)). "Whether retention of the benefit is unjust is a fact-intensive inquiry in which courts look to, among other things, the intentions, expectations, and behavior of the parties." *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012).

Under most circumstances, a party may not recover under a theory of quantum meruit or unjust enrichment when there is an express contract addressing the subject of the alleged obligation to pay. *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. App. 2003). The only exceptions are if (1) "the express contract fails or is rescinded," or (2) "the claim covers matters that are outside of or arose after the contract." *Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n Inc.*, 382 P.3d 821, 833 (Colo. 2016). Here, given the Court's judgment in favor of Defendants on Plaintiffs' rescission claims, any recovery under quantum meruit or unjust enrichment must hinge on the second exception, i.e., the claims must cover matters outside of or arising after the contracts. *See id.*

Plaintiffs contend that Defendants were "unjustly enriched by the amount of the lease payments that the Plaintiffs made because the Plaintiffs could not fulfill the terms of their leases given the conditions of the truck or other things that were beyond their control[.]" Vol. VII [#282] at 1067:12-17. Plaintiffs also contend that conduct outside of the contract includes "when the Plaintiffs experienced . . . a need for a repair that they could not pay for, that was not covered by the express terms of the contract, and when they sought help from Pathway[ ] Leasing in getting that repair paid for" and Defendant Pathway agreed to loan money for the repair as long as the driver would sign a promissory note. *Id.*

at 1077: 7-15. In addition, Plaintiffs' purported damages include bonuses and equipment deposits which XPO remitted to Defendants rather than to Plaintiffs, because (according to Plaintiffs) the Equipment Lease Agreement allegedly did not permit XPO to do that. Finding of Fact #23.

The difficulty with Plaintiffs' unjust enrichment claims is that the matters which form the basis of the claims are not "outside of" the contracts at issue. Essentially, each of Plaintiffs' contentions regarding why Defendants were unjustly enriched relates unequivocally to circumstances that are governed by their written agreements with Defendants. For example, Plaintiffs assert that Defendants were unjustly enriched by the lease payments Plaintiffs made because Plaintiffs weren't always able to drive the trucks due to breakdowns. But the leases between Plaintiffs and Defendant Pathway expressly provide that Plaintiffs accepted the trucks "AS IS," that certain repairs would be made by Pathway for a certain period of time, but that ultimately other repairs would be the financial responsibility of Plaintiffs. In other words, pursuant to the parties' agreement, Plaintiffs assumed the risk that they would have to make lease payments despite the fact that they might not be able to drive their trucks due to the need for repairs that they had to pay for themselves. The parties' contract expressly so provides. Trial Ex. 50 at PATHWAY000003-PATHWAY000004. Because the contract signed by Plaintiffs clearly governs these circumstances, an unjust enrichment claim based on Plaintiffs' continuing obligation to make lease payments despite breakdowns is not tenable.

Likewise, Plaintiffs' contention that Pathway was unjustly enriched by their agreements to borrow money from the company for repairs, their execution of promissory notes in exchange and their payments on those notes according to their terms also lacks

merit. Just like the Equipment Leases, the promissory notes at issue are likewise "contracts" to which Plaintiffs are bound; hence, these circumstances are also expressly governed by the parties' contracts. *See, e.g.*, Trial Ex. 72 (Promissory Note signed by Plaintiff Merrill). As discussed above, no evidence has been provided to suggest that the contracts are unenforceable. Because the parties' express written agreements govern these circumstances, an unjust enrichment claim based on Plaintiffs' obligation to repay promissory notes is not tenable.

Finally, Plaintiffs' assertion that Pathway was unjustly enriched by the Carrier's payment of driver bonuses and equipment deposits to Pathway also relates to conduct which is squarely governed by the parties' leases, and thus cannot be said to fall "outside of" their contracts. Trial Ex. 50 at PATHWAY000023. By executing the leases, Plaintiffs expressly agreed to allow XPO to make these payments to Pathway on their behalf, in further reduction of their lease obligations. An unjust enrichment claim is therefore also untenable in these circumstances. Moreover, it is difficult for the Court to discern how these payments made to Pathway by XPO were "at the plaintiffs' expense," as the evidence established that the payments were used to reduce Plaintiffs' lease obligations, and thus benefitted Plaintiffs. Finding of Fact #23.

The Court finds that Plaintiffs' claims for unjust enrichment all relate to financial obligations they undertook as parties to legally enforceable contracts. As indicated above, no evidence has been presented to invalidate or rescind these agreements. Plaintiffs' lack of understanding of the full extent of their obligations, although regrettable, does not void the contracts and give them the right to get their money back. Nor does it give rise to viable claims for unjust enrichment, when the circumstances complained of are governed

by their written agreements, to which both parties are bound. *Great N. Ins. Co. v. 100 Park Homeowners Assoc., Inc.*, No. 16-cv-02009-CMA-KLM, 2021 WL 2660778, at *2 (D. Colo. June 29, 2021) ("In general, a party cannot recover for unjust enrichment by asserting a quasi-contract when an express contract covers the same subject matter because the express contract precludes any implied-in-law contract." (quoting *Interbank Invs., LLC*, 77 P.3d at 816)). Accordingly, the Court finds in favor of Defendant and against Plaintiffs on their unjust enrichment claims.

D. Defendants' Breach of Contract Claims

At the outset, the Court notes that, during trial, Defendant Harris testified that Plaintiff Williams has been released from his lease obligations. Finding of Fact #54. *See also Defs.' Brief* [#350] at 86 (stating that Plaintiff Williams does not owe the balance set forth in Trial Exhibit T6); Vol. VII [#282] at 1100:8-14 (Defendants' counsel conceding during closing argument that Defendants "are not seeking any affirmative relief" from Defendant Williams on the breach of contract claim). Moreover, Plaintiffs Ronald Dennis and Tami Potirala completed their leases. Finding of Fact #29; Vol. IV [#279] at 632:15-633:4, 635:1-6. Thus, the Court's discussion below pertains only to Plaintiffs Anthony Glover, Zigmund Gutowski, Keith Herring, Joseph Horion, Franklin Merrill, and James Newberry.

A prima facie case for breach of contract requires: "(1) the existence of a contract; (2) performance by the [counter-]plaintiff[s] or some justification for nonperformance; (3) failure to perform the contract by the [counter-]defendant; and (4) resulting damages to the [counter-]plaintiff[s]." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted).

At trial, the Court asked Plaintiffs' counsel: "[F]or those [Plaintiffs] who did not complete their lease, they are not really contending that they didn't breach the contract. Right? They're simply contending that they have an alternative basis as a defense to breach of contract which is their restitution/rescission claim. Right?" Vol. VII [#282] at 1072:14-19. Plaintiffs' counsel responded: "Yeah, they are contending they are excused from performance in that manner, yes, Your Honor." *Id.* at 20-21. Thus, based on this concession and the Court's judgment in favor of Defendants on Plaintiffs' rescission claims, the only issue here as to each Plaintiff against whom this claim is made concerns damages. Finding of Fact #54, #56.

"Proof of actual damages is not an essential element of a breach of contract claim," and "[w]hen a [party] establishes breach, but does not prove actual damages, the [party] is entitled to nominal damages." *Interbank Invs., LLC*, 77 P.3d at 818. Damages flowing from a breach of contract must be established with "reasonable certainty by a preponderance of the evidence." *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1381 (Colo. 1993).

The six Plaintiffs at issue on this claim argue that Defendants' Trial Exhibit T6, which lists Defendants' damages calculations, is unreliable when considered with Defendant Harris's testimony about the document. *Pls.' Brief* [#336] at 44-45. Plaintiffs argue that the figures are unreliable because they do not include offsets for whether a repossessed truck was re-leased, because the column for "repossession costs" includes truck repair costs and past-due rent, and because there is no date or amount listed in connection with any truck that was leased again after repossession. *Id.* However, Plaintiffs have not explained why combining truck repair costs and past-due rent into an overall "repossession costs" number

makes that number unreliable. Findings of Fact #54, #55. Plaintiffs have also not explained why, under the terms of the Equipment Lease Agreements, whether a repossessed truck is re-leased (and when and for how much) is relevant here. Findings of Fact #54, #55. In the absence of any clearly-developed argument to explain why Defendant's calculations are unreliable or inaccurate, the Court finds that Defendants have sufficiently proven their damages as reflected in the Total Outstanding Balance column of Trial Exhibit T6.

Accordingly, the Court enters judgment on Defendants' breach of contract claims as follows:

(1) in favor of Defendants and against Plaintiff Glover in the amount of $15,971.41;

(2) in favor of Defendants and against Plaintiff Gutowski in the amount of $28,018.60;

(3) in favor of Defendants and against Plaintiff Herring in the amount of $24,917.59;

(4) in favor of Defendants and against Plaintiff Horion in the amount of $12,348.15;

(5) in favor of Defendants and against Plaintiff Merrill in the amount of $10,794.18;

(6) in favor of Defendants and against Plaintiff Newberry in the amount of $6,612.05; and

(7) in favor of Plaintiffs Williams, Potirala, and Ronald Dennis and against Defendants.

E. Defendants' Set-off Claims

"Setoff is a right grounded in concepts of fairness and equity." *In re Myers*, 362 F.3d 667, 672 (10th Cir. 2004) (citing *G.S. Omni Corp. v. United States*, 835 F.2d 1317, 1318 (10th Cir. 1987)). "The right of setoff 'allows entities that owe each other money to apply

their mutual debts against each other, thereby avoiding the "absurdity of making A pay B when B owes A."'" *Myers*, 362 F.3d at 672 (quoting *Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995)). "By definition, setoff is a 'common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" *Myers*, 362 F.3d at 672 (quoting *Gratiot v. United States*, 40 U.S. 336, 370 (1841)).

Defendants concede that if Plaintiffs are entitled to no damages on their claims, then their claim for set-offs automatically fails. *See Defs.' Brief* [#350] at 10 ("Pathway alleges that *if* Plaintiffs are entitled to any damages, the amounts must be set off by the amounts they still owe Pathway under their lease agreements." (emphasis added)); *id.* at 87 ("Pathway also asserts a counterclaim for setoff against all Plaintiffs *presuming* they are entitled to damages under the FLSA." (emphasis added)).]

In short, the asserted basis for these setoff claims, as summarized by Defendants in their Counterclaim [#95] is that, if Defendants are found liable under the claims asserted by Plaintiffs in the Amended Complaint [#6], then Defendants are "entitled to a setoff which represents all amounts lawfully due and payable under each Plaintiff's respective lease agreement, in amounts to be determined at trial." *Counterclaim* [#95] 42 ¶ 35; *see also id.* 41-42 ¶¶ 25-34. In light of the Court's findings against Plaintiffs and in favor of Defendants on Plaintiffs' claims, Defendant's set-off claim fails. *See, e.g.*, *Myers*, 362 F.3d at 672 (noting that set-off only applies where each side owes money to each other).

IV. Order of Judgment

Based on the foregoing,

IT IS HEREBY **ORDERED** that judgment shall enter in favor of Defendants and

against Plaintiffs on Plaintiffs' claims under the FLSA regarding minimum wages.

IT IS FURTHER **ORDERED** that judgment shall enter in favor of Defendants and against Plaintiff Jurcak on Plaintiff Jurcak's claim under the FLSA regarding retaliation.

IT IS FURTHER **ORDERED** that judgment shall enter in favor of Defendants and against Plaintiffs on Plaintiffs' claims regarding rescission.

IT IS FURTHER **ORDERED** that judgment shall enter in favor of Defendants and against Plaintiffs on Plaintiffs' claims regarding quantum meruit and unjust enrichment.

IT IS FURTHER **ORDERED** that judgment shall enter in favor of Defendants and against Plaintiffs Anthony Glover, Zigmund Gutowski, Keith Herring, Joseph Horion, Franklin Merrill, and James Newberry, in the amounts set forth above on Defendants' claims regarding breach of contract.

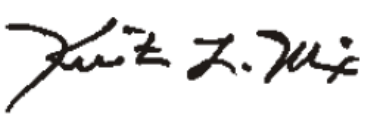
IT IS FURTHER **ORDERED** that judgment shall enter in favor of Plaintiffs Ronald Dennis, Tami Potirala, and Craig Williams and against Defendants on Defendants' claim regarding breach of contract.

IT IS FURTHER **ORDERED** that judgment shall enter in favor of Plaintiffs and against Defendants on Defendants' claims regarding set-off.

IT IS FURTHER **ORDERED** that the Clerk of Court shall **CLOSE** this case after entry of judgment as set forth above.

Dated: July 21, 2021

BY THE COURT:



Kristen L. Mix
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-002242-KLM

FRANKLIN MERRILL ET. AL.,

Plaintiffs,

v.

PATHWAY LEASING LLC, a Colorado limited liability company, and MATTHEW HARRIS, an individual,

Defendants.

FINAL JUDGMENT

THIS MATTER was tried on June 25-26, July 2-3, and July 5-6, 2018 before the Honorable Kristen L. Mix, United States Magistrate Judge, on the fifteen named Plaintiffs' and the thirty opt-in Plaintiffs' FLSA minimum wage claims against Defendants, Plaintiff Larry Jurcak's claim for unlawful retaliation in violation of the FLSA against Defendants, the fifteen named Plaintiffs' individual Colorado state law claims for rescission of their leases with Defendant Pathway, the fifteen named Plaintiffs' individual Colorado state law claims for unjust enrichment against Defendants, the fifteen named Plaintiffs' individual Colorado state law claims for quantum meruit against Defendants, Defendants' counterclaims for breach of contract against Ronald Dennis, Anthony Glover, Zigmund Gutowski, Keith Herring, Joseph Horion, Franklin Merrill, James Newberry, Tami Potirala, and Craig Williams and Defendants' counterclaims for setoff against all Plaintiffs.

Pursuant to and in accordance with the Findings of Fact, Conclusions of Law, and Order of Judgment [ECF 355] entered by United States Magistrate Judge Kristen L. Mix on July 21, 2021, and incorporated herein by reference, it is

ORDERED that judgment shall enter in favor of Defendants and against Plaintiffs on Plaintiffs' claims under the FLSA regarding minimum wages.

IT IS FURTHER ORDERED that judgment shall enter in favor of Defendants and against Plaintiff Jurcak on Plaintiff Jurcak's claim under the FLSA regarding retaliation.

IT IS FURTHER ORDERED that judgment shall enter in favor of Defendants and against Plaintiffs on Plaintiffs' claims regarding rescission.

IT IS FURTHER ORDERED that judgment shall enter in favor of Defendants and against Plaintiffs on Plaintiffs' claims regarding quantum meruit and unjust enrichment.

IT IS FURTHER ORDERED that judgment shall enter in favor of Defendants and against Plaintiffs Anthony Glover, Zigmund Gutowski, Keith Herring, Joseph Horion, Franklin Merrill, and James Newberry, in the amounts set forth above on Defendants' claims regarding breach of contract.

IT IS FURTHER ORDERED that judgment shall enter in favor of Plaintiffs Ronald Dennis, Tami Potirala, and Craig Williams and against Defendants on Defendants' claim regarding breach of contract.

IT IS FURTHER ORDERED that judgment shall enter in favor of Plaintiffs and against Defendants on Defendants' claims regarding set-off.

IT IS FURTHER ORDERED that the Clerk of Court shall CLOSE this case after entry of judgment as set forth above.

Dated July 21, 2021, at Denver, Colorado.

FOR THE COURT:
Jeffrey P. Colwell, Clerk

By: s/L. Galera
Deputy Clerk