CASE 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
The Honorable Magistrate Judge Kristen L. Mix
Civil Action No. 16-CV-02242

APPELLEES' BRIEF

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Oral Argument is Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees make the following disclosures. Pathway Leasing LLC does not have a parent corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF PRIOR OR RELATED APPEALS

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

GLOSSARY

APPELLATE RECORD

Brief for Appellants	AB
Record on Appeal (Volumes 1 – 4)	Vol. __
Supplemental Appendix	Supp. App. __

ABBREVIATIONS, CONTRACTS, AND PARTIES

Carrier Agreement (between Pathway Leasing, LLC and XPO)	Carrier Agreement
Contract Hauling Agreements (between Plaintiffs and XPO)	Hauling Agreements
Department of Transportation	DOT
Equipment Lease Agreements (between Plaintiffs and Pathway Leasing, LLC)	Lease Agreements
Pathway Leasing, LLC and its President, Matthew Harris	Pathway
XPO Logistics Truckload, Inc., Transforce, Inc., Con-way Truckload, Inc., and Contract Freighters, Inc.	XPO

INTRODUCTION

Plaintiffs are long-haul truck drivers. They leased or owned their own trucks, decided whether to drive themselves or hire their own employees or contractors, chose whether, when, and where to carry freight, set their own work and vacation schedules, earned profits or suffered losses based on their business acumen, made substantial investments in leasing, maintaining, and repairing their trucks, and had temporary contractual relationships with both Pathway and XPO.

After a multi-day trial, where it heard from numerous witnesses and reviewed copious documents, the district court determined that plaintiffs were independent contractors, not employees, of Pathway. It found that, of the six factors courts must consider in making such a determination, five favored independent contractor status, and one was neutral.

On appeal, plaintiffs maintain that the district court erred by failing to first decide whether Pathway and XPO were joint employers before deciding whether plaintiffs were misclassified as independent contractors. But they disregard the court's ruling that plaintiffs were independent contractors *regardless* of whether Pathway and XPO were joint employers. They thus fail to acknowledge that in making fact findings on misclassification, the court considered both Pathway's and XPO's relationships with plaintiffs, addressed the evidence of their collective

involvement with plaintiffs, but still ruled that plaintiffs were independent contractors.

The district court's findings of fact are well-grounded in the evidence. And its ultimate ruling that plaintiffs were independent contractors is consistent with those of numerous federal courts, which have repeatedly held that freight haulers who lease or own their own trucks are in business for themselves, and thus, are independent contractors, not employees. This Court should affirm that sensible conclusion.

STATEMENT CONCERNING JURISDICTION

Pathway agrees with Plaintiffs' statement concerning jurisdiction.

ISSUES PRESENTED

1. Was the district court's decision to forego a joint employment analysis proper, not prejudicial, and at most, harmless error, when the court assumed Pathway and XPO were joint employers, considered plaintiffs' relationships with both entities, but still ruled in Pathway's favor on misclassification?

2. Did the district court properly rule that, even assuming Pathway and XPO were joint employers, plaintiffs were independent contractors under the *Baker* test, when five of six *Baker* factors weighed in favor of independent contractor status, and one factor was neutral?

STATEMENT OF THE CASE

A. The Relationships Among Plaintiffs, Pathway, and XPO

Plaintiffs are over-the-road, long-haul truck drivers who perform freight-carrying services for carrier companies. Vol. 2, 1231, ¶ 1. In general, the drivers can elect to work for a carrier as a company driver or become an owner-operator who contracts with a carrier to sell hauling and delivery services. *Id.* To be an owner-operator, a driver must possess his or her own truck(s). *Id.* at 1237, ¶ 10.

Plaintiffs are owner-operators who leased their trucks from Pathway. Vol. 2, 1231, ¶ 1. Each plaintiff executed an Equipment Lease Agreement with Pathway. *Id.* at 1242, ¶ 24; Supp. App. 51-72. Under their Lease Agreements, plaintiffs are responsible for truck payments, maintenance and repairs, fuel costs, business liability insurance, and taxes. *Id.* at 1245, ¶ 34. Pathway's leases are for a fixed term; however, plaintiffs may complete their leases before the term expires by purchasing their trucks. *Id.* at 1246, ¶ 38; Supp. App. 58.

Owner-operators who want to haul freight for a carrier company must enter into a written agreement with the carrier. Vol. 2, 1238, ¶ 13. Plaintiffs chose to execute Contract Hauling Agreements with XPO. *Id.* at 1231-32, ¶ 1; Supp. App. 78-131. The Hauling Agreements define the terms of plaintiffs' freight-hauling services for XPO. Supp. App. 78-131. As of June 2017, XPO employed approximately 2,400 company drivers and contracted with roughly 540 owner-

operators to haul freight. Vol. 2, 969 (39:20-40:1).[1] Some of XPO's contracted owner-operators leased trucks from Pathway. *Id.* at 1237, ¶ 12. At the peak size of XPO's contractor fleet of about 550 trucks, roughly 120 to 130 trucks were leased through Pathway. *Id*.

Pathway and XPO entered into a Carrier Agreement to govern their limited relationship. Vol. 2, 1242, ¶ 24; Supp. App. 73-77. Under that agreement, Pathway agreed to implement a leasing and service program to meet XPO's interests. Supp. App. 73-74. Among other things, Pathway agreed to consider XPO's reasonable preferences as to which types of trucks to lease, and XPO agreed to separately enter into hauling agreements with Pathway's lessees. *Id.*

The Carrier Agreement, however, did not guarantee that Pathway lessees would contract to haul for XPO or that XPO would contract exclusively with Pathway lessees. *See* Supp. App. 73-77. Thus, when XPO terminated some plaintiffs' Hauling Agreements or plaintiffs switched carriers, plaintiffs continued to lease their trucks from Pathway while driving for other carriers. Vol. 2, 1246, ¶ 40. And XPO contracted with owner-operators who leased trucks from a variety of other companies. *Id.* at 1237, ¶ 12.

[1] Pathway cites trial transcripts in the Record as follows: Vol. #, Page #:Line #. Pathway cites condensed transcripts of depositions that were read at trial as follows: Vol. #, Page # (Transcript Page #:Line#).

B. Facts Relating to Whether Plaintiffs Were Independent Contractors

1. Degree of control

Pathway leased trucks to plaintiffs. *See* Vol. 2, 1242-43, ¶ 25. Pathway did not provide freight for plaintiffs to haul. *See* Vol. 3, 322:3-5; 864:19-22. Instead, they had to enter into separate hauling contracts with carriers. *See* Vol. 2, 1238, ¶ 13. Although Pathway's lessees could drive for many carriers, *id.* at 1246, ¶ 37, plaintiffs chose to haul freight for XPO under XPO's Hauling Agreements, *see id.* at 1231-32, ¶ 1.

Plaintiffs could select and switch carriers during the terms of their leases, subject to Pathway's approval. *See* Vol. 2, 1246-47, ¶ 40. Several did so. *See* Vol. 3, 593:22-594:24 (Plaintiff Anthony Dennis switched from another carrier to XPO while leasing a Pathway truck); 731:17-25 (Plaintiff Herring also switched from another carrier to XPO while leasing a Pathway truck). Over 57 Pathway lessees switched carriers in 2017, and in 2018, by the time of trial, over 40 lessees had switched carriers. *Id.* at 984:1-11. Pathway could not require a lessee to switch carriers. *Id.* at 935:5-16.

It was up to plaintiffs whether to drive their trucks individually or as a team, or to hire others to haul freight for them. Vol. 2, 1232, ¶ 2. Accordingly, plaintiffs had the option of entering into single-person or team leases with Pathway. *Id.* at 1242-43, ¶ 25. XPO's Hauling Agreement similarly gave plaintiffs control over

the decision to work as a team or hire other drivers, affording plaintiffs the right and responsibility for "the selection, training, hiring, . . . disciplining, discharging, setting of hours, wages and salaries, providing for unemployment insurance, state and federal taxes, fringe benefits, workers' compensation, . . . and all other matters relating to or arising out of [plaintiffs'] use or employment of drivers and laborers[.]" Supp. App. 92, ¶ 32; *see id*. at 81, ¶ 7A; *see also* Vol. 2, 1238, ¶ 14.

Plaintiff Hollingsworth elected to drive with a team. Vol. 3, 776:4-6. He hired his own contractor, someone he knew "like a son." *Id.* at 776:7-10. Instead of paying a fixed salary or hourly wage, Hollingsworth paid his contractor a percentage of his net profit after fuel and lease expenses. *Id.* at 776:14-25. Plaintiff Ronald Dennis drove as a team with his friend. *Id.* at 569:6-10. Owner-operators who elected to drive as teams could drive more miles and earn more than solo drivers. Vol. 2, 1232, ¶ 2; Supp. App. 49-50. Neither XPO nor Pathway could dictate whether plaintiffs drove solo, drove with a team, or hired their own employees or contractors; it was plaintiffs' decision. Vol. 3, 569:6-13; Vol. 2, 878 (30:16-21).

Under the Hauling Agreements, XPO paid owner-operators like plaintiffs a fixed rate per mile plus a fuel surcharge, Vol. 2, 1232, ¶ 3, and it was up to plaintiffs to rely on business acumen and financial proficiency to succeed as owner-operators, *id.* at 1234, ¶ 6. Plaintiffs were free to accept or reject loads

offered by XPO based on their own profitability considerations. *Id.* at 1238, ¶ 15. Plaintiffs were unlike company drivers for XPO, who were subject to "forced dispatch," which meant they could not decline loads unless they were ill. *Id.* at 1240, ¶ 16; *see id.* at 878 (31:15-32:8) ("forced dispatch" means "if [company drivers] have the [Department of Transportation] DOT hours to pick up and deliver a load on time, they are required to do so as part of their job"); Vol. 3, 570:11-12 (as a company driver, you must "go where they told you to go").

Plaintiffs also set their own restrictions on where they would drive, where they would purchase fuel, the routes they would travel, the size and weight of the loads they would accept, and when they would work. Vol. 2, 1238-40, ¶ 15. They did not need or obtain Pathway's (or XPO's) approval for setting these restrictions. *Id.* Plaintiffs also decided when and where they would take meal, rest, or sleeping breaks. *Id.* at 1234, ¶ 6; *see also* Vol. 3, 134:15-135:24 (Pathway had no rules related to meals or rest); 318:24-319:5 (same).

Conversely, XPO and other carriers told company drivers what routes to take and where to refuel. Vol. 2, 1241, ¶ 20; *see id.* at 903 (company drivers are required to take certain routes and fuel up at certain locations); Vol. 3, 518:24-519:1 (if a company driver didn't follow a required route, the driver would be charged for extra fuel). Company drivers were also required to follow XPO driver handbook protocols. Vol. 2, 877 (28:16-20), 1015 (19:13-15).

Plaintiffs were not subject to any contractual or policy restrictions imposed by Pathway or XPO on when or how much time to take off. Vol. 2, 1241, ¶ 21. They did not earn vacation time or paid time off; rather, "like any other business owner," they decided when to take time off. Vol. 3, 849:4-8. Pathway had no say in plaintiffs' work schedules or in their decisions on taking take time off. *Id.* at 915:18-919:21. Pathway could not terminate a lease on the ground that a plaintiff took too much time off. *Id.* at 916:14-18.

Unlike company drivers, who are not responsible for regular truck maintenance, Vol. 2, 880 (37:23-38:5), 1241, ¶ 19, plaintiffs managed the maintenance for their trucks, *id.* at 1234-35, ¶ 6; Supp. App. 52-53, ¶ 13. It was "entirely" up to owner-operators to decide how and when to maintain their trucks. Vol. 2, 880 (39:22-40:2); Vol. 3, 821:13-17. Pathway's maintenance consultant provided recommended preventive maintenance plans to Pathway's lessees, Vol. 3, 806:8-11, but the maintenance plans weren't mandatory, *id.* at 818:24-25; 822:9-14. In addition, Pathway did not require plaintiffs to use specific maintenance and repair shops or advise Pathway when maintenance or repairs were being performed. *Id*. at 229:20-23; 819:1-23; 929:11-20.

Pathway set up a maintenance escrow account to help plaintiffs save money for future maintenance and repairs, Vol. 3, 929:21-930:15; but it was up to plaintiffs whether to use those escrow funds. *See id.* at 323:14-324:11 (Plaintiff

Lacy preferred not to use his maintenance escrow funds); 931:24-932:4 (when escrow funds were depleted, plaintiffs could pay for maintenance or repairs with personal funds, credit cards, personal loans, or loans from Pathway secured by promissory notes). Pathway never refused access to plaintiffs' escrow funds for repairs. *Id.* at 819:15-17; *see also id.* at 521:24-522:1.

2. Opportunity for profit or loss

Because plaintiffs could control how to operate their trucks, they controlled their profits or losses. Vol. 2, 1234, ¶ 6. Plaintiffs decided 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 truck maintenance, when to take meal and rest breaks, and when to work. *Id.*

For example, Plaintiff Nasr testified that it was his decision as an owner-operator where to drive and whether to decline loads based on his "business sense" relating to the profitability of runs. Vol. 3, 849:20-851:16. His profitability analysis was based on considerations such as the cost of operating in certain regions of the country, fuel and meal costs, the length of the haul, and the load's size affecting wear and tear on his truck. *Id.* If a load didn't make "business sense," he would decline it. *Id.* at 851:17-852:4; *see also id*. at 518:2-11 (Plaintiff Williams assessed profitability based on load weight, mileage, and delivery location).

On the other hand, inexperienced or less savvy owner-operators could suffer losses on loads based on several factors, such as load weight and fuel efficiency. Vol. 2, 1233, ¶ 5; Vol. 3, 853:8-12. Plaintiffs were also exposed to the risk of loss by turning down too many loads, taking too much time off, or not properly maintaining their trucks. *See* Vol. 3, 1043:12-24.

Profitable owner-operators could ultimately complete their Pathway leases and own their trucks, which are valuable assets. *See* Vol. 2, 1243-44, ¶¶ 29-30. Seven of fifteen plaintiffs, as well as other Pathway lessees, successfully completed their leases and purchased their trucks from Pathway. *Id*. at 1243, ¶ 29. Owner-operators who own their trucks debt-free have substantially more earning capacity than their peers who lease trucks or drive as company drivers. *Id.* at 1243, ¶ 30. Conversely, some plaintiffs defaulted on their lease obligations, and Pathway repossessed their trucks. *Id.* at 1251, ¶ 54. In some cases, those plaintiffs were responsible for repossession costs, repair costs, and past-due lease payments. *Id.* at 1251-52, ¶ 55.

3. Worker's investment in the business

To become owner-operators, plaintiffs were required to own or lease a truck. Vol. 2, 1237, ¶ 10. Under their Lease Agreements, they were responsible for lease payments, maintenance and repairs, fuel costs, workers compensation and business

liability insurance, and tax and accounting services. *Id.* at 1245, ¶ 34; Supp. App. 51-54, ¶¶ 4, 13, 15.

The maintenance and repair costs for commercial trucks can be costly. *See*, *e.g.*, Vol. 3, 390:21-24 (Plaintiff Ard paid $25,000 for a repair); 772:21-25 (Plaintiff Hollingsworth paid over $35,000 for a repair); 838:17-839:3 (Plaintiff Nasr paid $10,816.41 for a repair). And fuel costs can be so high that inexperienced drivers could spend more money on fuel in a week than they could earn from hauling freight. Vol. 2, 1233, ¶ 5.

Plaintiffs who completed their leases and owned their trucks paid approximately $100,000 or more in lease payments, maintenance, and repairs. *See* Vol. 3, 616:2-5 (Plaintiff Anthony Dennis paid Pathway $95,940.10); 758:1-5 (Plaintiff Hollingsworth paid Pathway $122,302.32); 840:17-21 (Plaintiff Nasr paid Pathway $124,937.44).

4. Permanence of the working relationship

Plaintiffs' Lease Agreements with Pathway were for fixed terms. *See* Vol. 2, 1246, ¶ 38; Supp. App. 51 (40-month term). In some instances, plaintiffs decided they no longer wished to lease their trucks, gave the keys back to Pathway, and walked away from their leases. *See, e.g.,* Vol. 3, 477:18-479:16 (Plaintiff Newberry was released from his lease when his wife's health prevented them from living on the road); 677:15-678:16 (Plaintiff Gutowksi decided to walk away from

his truck rather than take another loan to pay for a repair); 734:1-17 (Plaintiff Herring decided to walk away from his truck); 761:10-762:12 (Plaintiff Glover turned his truck in rather than paying for his next repair).

When some plaintiffs walked away from their trucks, they did so despite owing Pathway money for loans they took from Pathway for maintenance and repair costs, which were secured by promissory notes. *See* Supp. App. 48 (listing outstanding promissory note balances for Plaintiffs Newberry, Gutowski, Glover, and Herring). Pathway did not take legal action against plaintiffs who defaulted on their leases, aside from occasionally sending amounts owed to collections. Vol. 3, 1056:4-10; *see also id.* at 1096:20-1097:6 (district court observing that Pathway asserted counterclaims for breach of leases only after plaintiffs filed this action, not based on Pathway's desire to collect unpaid lease amounts).

Plaintiffs also had the option of completing their leases early and purchasing their trucks. Vol. 2, 1246, ¶ 38; Supp. App. 58. Some plaintiffs successfully completed their leases by paying them off with profits earned driving for XPO. *See* Vol. 3, 310:16-311:3 (Plaintiff Lacy paid off his truck six months early by working hard); 944:5-945:9 (explaining Plaintiff Lacy's successful completion of his lease and payoff process). Two plaintiffs ended their leases with Pathway early by obtaining third-party financing to purchase their trucks from Pathway. *See* Vol. 3, 462:24-463:14 (Plaintiff Ard secured private financing to purchase his truck);

599:2-17 (Plaintiff Anthony Dennis traded his truck in to a third-party dealer, who financed another used truck in exchange).

Once plaintiffs' leases terminated—because they returned the truck, defaulted on their lease, or successfully completed their lease—their relationship with Pathway ended. *See* Vol. 3, 121:10-122:8 (Plaintiff Merrill's relationship with Pathway ended when his truck was repossessed); 311:24-312:9 (Plaintiff Lacy's relationship with Pathway ended when he bought his truck early); 599:2-17 (Plaintiff Anthony Dennis's relationship with Pathway ended when he traded in his truck to a dealer); 771:12-16 (Plaintiff Hollingsworth's relationship with Pathway ended when he bought his truck at the end of his lease). Pathway had no further interactions with them unless they sought to lease another truck from Pathway. Vol. 2, 1246, ¶ 39. Plaintiffs who completed or bought out their leases often continued to haul freight for XPO, even though they no longer had relationships with Pathway. *Id.* at 1247, ¶ 41.

XPO's Hauling Agreements with Plaintiffs were for fixed, two-year terms that could be terminated by either party with ten-days' notice. Vol. 2, 1238, ¶ 13; Supp. App. 91, ¶ 30. XPO could terminate a Hauling Agreement with a Pathway lessee, but Pathway played no role in that decision. Vol. 2, 1246-47, ¶ 40.

5. Degree of skill required

Over-the-road, long-haul truck drivers, whether company drivers or owner-operators, generally perform the same duties and use the same skills when hauling freight, including when performing pre-trip safety inspections, securing the load, and safely driving freight from point A to point B. Vol. 2, 1235-36, ¶ 7. However, in addition to the ability to drive a commercial truck, to be profitable and successful owner-operators, plaintiffs needed business acumen and financial proficiency. *Id.* at 1234, ¶ 6; *see also* Vol. 3, 851:2-852:4 (Plaintiff Nasr explaining his ability to assess the profitability of loads is the reason why he's still in business).

Plaintiffs needed "business sense" to evaluate which loads to accept from a carrier based on profitability. Vol. 2, 1234, ¶ 6. They had to consider which routes to take, how to manage fuel efficiency and maintenance, which loads to accept, and when to work. *Id.*; *see also supra* § B.2. For instance, Plaintiff Hollingsworth testified that owner-operators must prioritize keeping fuel costs down, and he knew from experience that he must drive his truck at a certain speed to maximize fuel mileage. Vol. 3, 778:1-8. Plaintiff Nasr explained that, as an owner-operator, if "you don't know what you're doing" and "you weren't careful in terms of the loads you were looking at or taking," you can spend more on fuel than you earn in income in a week. *Id.* at 853:8-18.

Company drivers do not have the same profitability considerations; carriers pay them the same rate regardless of efficiency. Vol. 2, 1233, ¶ 3. Former opt-in plaintiff Jose Luis Garcia explained that managing his speed to increase fuel mileage did not matter as a company driver, but it became important for saving money and increasing profitability as an owner-operator. *Id.* at 903 (135:18-136:23).

6. Integral part of the business

Plaintiffs performed freight hauling services for XPO but performed no work and provided no services for Pathway. *See* Vol. 2, 1238, ¶ 13; Vol. 3, 322:3-5; 864:19-22. Pathway's business was to lease trucks to drivers who wished to become owner-operators. *See* Vol. 2, 1242-43, ¶ 25. Pathway's business revenue comes from lessees' down payments on trucks and the collection of payments specified in the Lease Agreements. Vol. 3, 864:8-13. Pathway's success is tied to the lessees' success as owner-operators and their ability to make lease payments and complete their leases. *See id.* at 921:3-7; 941:5-12.

Though plaintiffs perform freight hauling services for XPO, XPO relies primarily on company drivers, who are subject to forced dispatch, for its freight hauling business. *See* Vol. 2, 969 (39:20-40:1) (as of June 2017, XPO employed about 2,400 company drivers and contracted with roughly 540 owner-operators); 1240, ¶ 16 (finding company drivers are subject to "forced dispatch").

C. Response to Plaintiffs' Unsupported Allegations and Extra-Record Evidence.

In their Introduction and Statement of the Case, plaintiffs level a number of unsupported accusations at Pathway. Contrary to their hyperbole:

- There was no evidence of any "scheme" to cheat drivers. AB 3. In fact, plaintiffs conducted independent evaluations of whether to lease a truck from Pathway or another company. Vol. 2, 1233, ¶ 4. And plaintiffs brought misrepresentation-based claims to rescind their leases, but the court rejected their claims due to "a decided lack of evidence" of material misstatements. *Id.* at 1261-62. Plaintiffs do not appeal those findings.
- The possibility of becoming a successful owner-operator was *not* a mere "pretense." AB 3. Seven of fifteen plaintiffs completed their leases, own their trucks, and are still making money off their investments. Vol. 2. 1243-44, ¶¶ 29-30. These findings are unchallenged.
- Plaintiffs never "succumbed to advertising." AB 7. Pathway doesn't advertise. Vol. 3, 890:6-23. Lessees generally find Pathway via its website or word-of-mouth referral. *Id.* at 889:19-890:5. Some plaintiffs received messages from XPO about leasing opportunities through onboard communications devices, *see id.* at 559:4-12, 673:19-

674:2, but Pathway was unaware that XPO was sending those messages and had no input into them, *id.* at 891:7-18, and there was no evidence that the messages were false or misleading.

- Drivers were not "penalized" for refusing loads. AB 9. Pathway had no control over loads, Vol. 3, 319:16-19, and plaintiffs were free to accept or reject loads offered by XPO, Vol. 2, 1238, ¶ 15. Some plaintiffs testified that if they refused a load, other loads might not be immediately available. *See* Vol. 3, 83:11-22, 319:20-320:8, 487:14-488:12. That was simply a matter of logistics and timing, not punishment.

Finally, plaintiffs cite a variety of statistical evidence relating to long-haul trucking. AB 2, 6-7. The Court should strike, or at least disregard, these statistics because (i) they were not offered at trial, (ii) they were presented for the first time on appeal, (iii) plaintiffs made no request for this Court to take judicial notice of them, and (iv) judicial notice would be inappropriate even if they had asked, given that the statistics either lack attribution, *see* AB 2, or involve multiple hearsay, *see* AB 6-7 (citing statistics cited in a Teamsters amicus curiae brief). *See W. Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1156 (10th Cir. 2009) (granting motion to strike and declining to take judicial notice of statistical evidence not presented to district court).

D. Course of Proceedings

Plaintiffs brought a putative collective action against Pathway and XPO under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. Vol. 1, 62-63; Vol. 2, 1228-29. They alleged that Pathway and XPO are joint employers, intentionally misclassified them and other owner-operators as independent contractors, and failed to pay plaintiffs and others the statutorily required minimum wage for each hour worked. Vol. 1, 63-64, 78; Vol. 2, 1229. Plaintiffs also brought state law claims for rescission of their leases, unjust enrichment, restitution, and quantum meruit. *See* Vol. 1, 82-85. Pathway asserted two counterclaims: (1) breach of contract under certain plaintiffs' Lease Agreements; and (2) setoff. Vol. 1, 128-29.[2]

The district court conditionally certified plaintiffs' FLSA claims. Vol. 2, 1229. The parties then engaged in significant pretrial proceedings. Among other things, they filed cross-motions for summary judgment on whether Pathway and XPO were joint employers for purposes of analyzing misclassification under the FLSA. Vol. 1, 132-61, 865-81. The district court denied both motions, finding that genuine issues of material fact precluded summary judgment for either plaintiffs or Pathway under the six *Hall-Salinas* factors. Vol. 2, 748-68; *see Hall*

[2] The court later granted XPO's motion to compel arbitration of plaintiffs' claims against it. *See* Vol. 1, 32 (ECF # 164).

v. DIRECTV, LLC, 846 F.3d 757, 769-70 (4th Cir. 2017); *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017).

The court presided over a bench trial on June 25-26, July 2-3, and July 5-6, 2018. Vol. 2, 1229-30. Fifteen named plaintiffs and thirty opt-in plaintiffs remained in the case at the time. *Id.* at 1229. After trial, however, the court granted Pathway's Motion to Decertify and dismissed the opt-in plaintiffs' claims. *Id.* at 1230. The court then gave the named plaintiffs an opportunity to move for a new trial, including one narrowly tailored to taking additional testimony under Fed. R. Civ. P. 59(a)(2), but they chose not to do so. *Id.* at 1230-31.

At the district court's request, the parties submitted extensive, proposed findings of fact and conclusions of law on all issues. Vo1. 2, 908-1227. The court then issued its 45-page Findings of Fact, Conclusions of Law, and Order of Judgment. *Id.* at 1228-72. It ruled in Pathway's favor on plaintiffs' FLSA and state-law claims, and on Pathway's breach of contract counterclaims against six plaintiffs. *Id.* at 1272.

Critically, the court assumed without deciding that Pathway and XPO were joint employers but still ruled against plaintiffs on misclassification. As the court explained, "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." Vol. 2, 1253.

The court then applied the six-factor test set forth in *Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998), found that five of six favored independent contractor status and one was neutral, and ruled that plaintiffs were independent contractors. Vol. 2, 1253-60. In the process, it made detailed findings on each *Baker* factor, referred to and incorporated its findings of historical fact, and comprehensively addressed plaintiffs' relationships with both Pathway and XPO and those entities' joint involvement with plaintiffs. *See id.* The court ultimately concluded that plaintiffs were "in business for [themselves]," *id.* at 1260 (quoting *Baker*, 137 F.3d at 1443), and entered judgment for Pathway.

SUMMARY OF ARGUMENT

1. The district court's decision to forego a joint-employment analysis was not improper, did not prejudice plaintiffs, and at most, constituted harmless error. In arguing to the contrary, plaintiffs omit that the court *assumed* Pathway and XPO were joint employers, addressed their relationship with plaintiffs, and concluded that plaintiffs were nonetheless independent contractors. The court thus did not prejudice plaintiffs in any way; it gave them the benefit of the doubt on joint employment but still ruled against them on misclassification. Therefore,

unless this Court were to reverse the district court's decision on misclassification, there is no basis or necessity for a remand on joint employment.

2. The district court properly ruled that plaintiffs were independent contractors of Pathway and XPO. This ruling is consistent with those of many other federal courts, which have consistently held that long-haul truck drivers who owned or leased their own rigs were independent contractors—in business for themselves.

The court found that five of the six *Baker* factors favored independent contractor status and one factor was neutral. Overwhelming evidence supported these careful findings. Plaintiffs do not directly challenge the findings, and they ignore the record evidence supporting them. Instead, they cherry-pick evidence favorable to their case. But this is not a valid method or basis to overturn fact findings, which are reviewed for clear error. The district court's findings, and its ultimate conclusion that plaintiffs were independent contractors, should be affirmed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION TO ASSUME RATHER THAN DECIDE JOINT EMPLOYMENT WAS NOT IMPROPER, DID NOT PREJUDICE PLAINTIFFS, AND AT MOST, WAS HARMLESS ERROR.

Plaintiffs insist the district court committed reversible error by failing to decide on joint employment before deciding on misclassification. AB 13-34. But

their lengthy argument suffers from an overarching flaw: The court *assumed* Pathway and XPO were joint employers, considered plaintiffs' relationships with both putative employers, but still ruled in Pathway's favor. Vol. 2, 1253. In urging that the court prejudiced them by skipping the joint-employment analysis, plaintiffs ignore this critical ruling. *See* AB 13-34. They mention it for the first and only time in a footnote to their misclassification argument. AB 35, n.10.

Plaintiffs repetitively contend that, had the court determined Pathway and XPO were joint employers, this ruling would have changed the "inputs" to the *Baker* factors, and the court would have ruled for them on misclassification. *See* AB 4, 12, 30-33. Not so. Because the court assumed the two were joint employers, the court did, in fact, address the evidence of plaintiffs' relationship with both alleged employers. This Court should reject plaintiffs' unfounded contentions, decline their plea for a remand, and affirm the district court's ruling that plaintiffs were independent contractors.

A. Standard of Review

An error is harmless "unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect." *United States v. Merritt*, 961 F.3d 1105 (10th Cir. 2020) (citation omitted). Harmless error analysis applies in civil cases. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 660 (10th Cir. 2006).

B. The District Court's Choice to Assume Pathway and XPO Were Joint Employers Did Not Prejudice Plaintiffs, and Any Error in Foregoing a Joint Employment Analysis Was Therefore Harmless.

Where a court impliedly assumes that an issue has been resolved in appellant's favor, any possible error in foregoing an analysis of the issue is harmless. *See Koch v. Koch Indus*., 203 F.3d 1202, 1234 (10th Cir. 2000) (alleged error in failing to instruct jury that defendants had a fiduciary duty to plaintiffs was harmless, where verdict form impliedly assumed defendants had a fiduciary duty, but jury found they didn't breach it.). That is demonstrably the case here.

As noted above, the Court denied the parties' cross-motions for summary judgment on joint employment. *See* Vol. 2, 748-68. The court decided to apply the six *Hall-Salinas* factors. *Id.* at 753-59. It then determined that the parties had provided conflicting evidence as to all six factors and concluded that unresolved issues of material fact precluded summary judgment for either side. *Id.* at 759-68. The parties proceeded to trial, presented evidence on joint employment, and submitted proposed findings and conclusions relevant to joint employment. *Id.* at 908-29, 1147-67.

The district court nonetheless decided it need not reach the issue, because even assuming joint employment, plaintiffs were independent contractors. It determined 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." Vol. 2, 1253.

Consistent with that determination, in making fact findings on misclassification, the court addressed plaintiffs' relationship with both entities. It repeatedly referred to both Pathway and XPO, made detailed findings on plaintiffs' relationship with both companies, recited testimony of witnesses from both Pathway and XPO, addressed plaintiffs' hauling work for XPO, and considered plaintiffs' Lease Agreements with Pathway, their Hauling Agreements with XPO, and the Carrier Agreement between Pathway and XPO. *See id.* at 1253-60.

Plaintiffs' reliance on *Hall* is therefore badly misplaced. AB 23. In *Hall*, the district court *inverted* the analysis, first assessing whether workers were employees or independent contractors of each individual entity *before* assessing whether the entities were joint employers. 846 F.3d at 763, 767-69. Here, by contrast, the court assumed Pathway and XPO were joint employers, considered the evidence of their collective relationship with plaintiffs, but still decided that plaintiffs were independent contractors. Vol. 2, 1253-60.

In other words, the court addressed the issues in the right sequence. It addressed joint employment first. It simply assumed, rather than decided, that Pathway and XPO were joint employers before addressing whether they had misclassified plaintiffs.

Consequently, plaintiffs' contention that the court's decision to forego a joint-employer analysis prejudiced them is baseless. A joint-employer analysis would not have "changed the inputs," when the court assumed joint employment and considered plaintiffs' relationships with both Pathway and XPO but still ruled against them. Any error in skipping a joint-employment analysis was thus harmless.

C. A Remand is Neither Necessary nor Warranted, Unless the Court Were to Reverse the District Court's Ruling that Plaintiffs Were Independent Contractors of Pathway and XPO.

For the reasons discussed below, *see infra* Argument § II, the district court (i) did not commit any clear error in finding that five of six *Baker* factors weighed in favor of independent contractor status and one factor was neutral, and (ii) correctly concluded that plaintiffs were independent contractors. Again, the court did so after assuming joint employment and discussing plaintiffs' relationships with Pathway and XPO. As a result, there is no need for this Court to decide whether to adopt the *Hall-Salinas* test or some other test for joint employment, and no necessity for a remand so the district court can apply the test.

In the unlikely event the Court concludes that the district court erred in applying the *Baker* factors, it should not decide the joint employment issue in the first instance. Joint employment "is highly fact-dependent." *Hall*, 846 F.3d at 770; *accord Grenawalt v. AT&T Mobility LLC*, 642 F. App'x 36, 37 (2d Cir. 2016)

("determining joint employment is 'fact-intensive'") (citation omitted); *Ward v. Express Messenger Sys.*, 2018 U.S. Dist. LEXIS 56242, at *15 (D. Colo. Apr. 3, 2018) (whether putative employers are joint employers "is a fact-intensive and individualized inquiry"). And this Court does not find facts; that's a function "reserved for the district courts." *Davis v. United States*, 192 F.3d 951, 961 (10th Cir. 1999); *see Sabol v. Snyder*, 524 F.2d 1009, 1011 (10th Cir. 1975) ("It is obviously not the function of the appellate court to try the facts or substitute for the trial court in the determination of factual issues.").

Here, the district court never analyzed plaintiffs' relationship with Pathway as a separate employer. In conducting that inquiry, the "inputs" plainly *would* change. Therefore, if the Court reverses the ruling that plaintiffs were independent contractors of Pathway and XPO, it should remand for fact findings on joint employment. But as shown next, the evidence of independent contractor status was overwhelming, and the district court did not err.

II. THE DISTRICT COURT PROPERLY RULED THAT PLAINTIFFS WERE INDEPENDENT CONTRACTORS.

A. Standard of Review

Whether plaintiffs proved they were misclassified as independent contractors under the FLSA turns on application of this Court's six-factor test. *See Baker*, 137 F.3d at 1440. In reviewing the district court's ruling that plaintiffs were independent contractors, this Court reviews two types of fact findings—

findings of historical fact and findings as to the six factors—for clear error. *Id.* at 1441. The clearly erroneous standard is highly deferential to the district court's findings:

> A finding of fact is "clearly erroneous" if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made. On appeal, [the Court] view[s] the evidence in the light most favorable to the district court's ruling and must uphold any district court finding that is permissible in light of the evidence.

Manning v. United States, 146 F.3d 808, 812-13 (10th Cir. 1998) (citation and internal quotation marks omitted). Once the Court applies the clearly erroneous standard to the fact findings, the "ultimate determination of whether an individual is an employee or an independent contractor" is reviewed de novo. *Baker*, 137 F.3d at 1441.

Here, plaintiffs make no attempt to show how the district court's findings were clearly erroneous, *i.e.*, to view all the evidence in a light most favorable to Pathway and determine whether the court's findings were permissible in light of that evidence. Instead, they cherry-pick discrete evidence favorable to them and overlook both evidence on which the court relied and other record evidence favorable to Pathway. A proper application of the clearly erroneous standard compels affirmance.

B. The Court Properly Applied the Six *Baker* Factors and Its Findings Were Well-Supported by the Evidence.

The FLSA defines "employee" as "any individual employed by an employer," and defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to any employee." 29 U.S.C. §§ 203(d), (e)(1). In determining whether an individual is an employee, "the economic realities of the relationship govern." *Baker*, 137 F.3d at 1440. In discerning those realities, courts generally consider six factors: "(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*.

No one factor is dispositive; instead, "the court must employ a totality-of-the-circumstances approach." *Id.* at 1441. "[T]he plaintiff has the burden of proving that he performed work for which he was not properly compensated." *Brown v. ScriptPro, LLC,* 700 F.3d 1222, 1230 (10th Cir. 2012) (unpaid overtime case).

Plaintiffs fell far short of meeting their burden. The district court made well-supported findings, properly applied the six *Baker* factors, and concluded that

plaintiffs were independent contractors.[3] The court's conclusion dovetailed with those of other federal courts, which have consistently held that long-haul truckers who, like plaintiffs, leased/owned and operated their own rigs, were independent contractors. *See Derolf v. Risinger Bros. Transfer, Inc.*, 259 F. Supp. 3d 876, 880-84 (C.D. Ill. 2017) (finding first five factors of economic realities test favored independent contractor status, and granting motion to dismiss misclassification claim); *Mikhaylov v. Y & B Transp. Co.*, 2019 U.S. Dist. LEXIS 59203, at *11-*22 (E.D.N.Y. Mar. 31, 2019) (finding all but one factor showed drivers were not employees and granting putative employer's summary judgment motion); *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 607-11 (E.D.N.Y. 2012) (finding all but one factor favored independent contractor status and granting summary judgment to alleged employer on misclassification claim); *see also Nichols v. All Points Transp. Corp. of Mich., Inc.*, 364 F. Supp. 2d 621, 631-34 (E.D. Mich. 2005) (applying economic realities test in FMLA context, finding five of six factors favored independent contractor status, and ruling drivers were independent contractors). The Court should affirm this sound conclusion.

[3] Though the district court made findings regarding six *Baker* factors under the heading "Conclusions of Law," that label is irrelevant for purposes of appeal, and this Court is not bound by it. *See Nelson v. United States*, 915 F.3d 1243, 1254-55 (10th Cir. 2019). Instead, the Court treats those findings as what they are—findings of fact. *See id.*

1. The "degree of control" factor heavily favored independent contractor status.

The district court found that the degree-of-control factor "weighs heavily in favor of finding independent contractor status." Vol. 2, 1253. This finding was amply supported by both caselaw and the record.

Federal courts have found that where freight-haulers didn't have to perform the work themselves but could hire others to do so, the degree-of-control factor favored independent contractor status. *See Derolf*, 259 F. Supp. 3d at 880 ("The Court is unaware of any instances where an employee can contract with a third party to perform the actual work of the employer."); *Browning*, 885 F. Supp. 2d at 601 ("Plaintiffs could hire their own additional workers to assist with their operations. In fact, several of the Plaintiffs did so. Thus, this freedom allowed them to further work at their own convenience.").

So too here, as the district court observed, plaintiffs "were not required to drive the leased trucks themselves but were instead permitted to hire their own drivers or work as a team." Vol. 2, 1253. The court added, "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." *Id.* And it noted that several plaintiffs and other Pathway lessees drove as a team or hired others to drive. *Id.* Plaintiffs, not Pathway or XPO, were responsible for hiring, setting the working conditions, training, and disciplining their employees. *Id.* at 1254.

These findings have ample record support. *See* Statement of the Case § B.1; *see also* Supp. App. 81, ¶ 7A; 92, ¶ 32; Vol. 3, 776:4-25 (Plaintiff Hollingsworth hired a contractor to drive for him, who was paid a percentage of Hollingsworth's net profit after fuel and lease expenses).

Furthermore, when long-haul truckers and delivery drivers have discretion to set their own work days and hours, decide which loads to carry or reject, and determine which routes to take, courts deem the alleged employer's degree of control to be weak. *See Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (degree-of-control factor pointed towards independent contractor status because, among other things, delivery drivers set their own hours and days of work and could reject deliveries without retaliation); *Derolf*, 259 F. Supp. 3d at 880 (weak control where truckers could decide when and how to perform maintenance, select routes, and "decide all meal, rest, and refueling stops"); *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *11-*13 (defendants had little control where long-haul drivers could create their own schedules, choose their routes, and decline work without penalty).

Here, plaintiffs likewise had to "use[] their own business judgment to determine whether to decline loads based on profitability considerations," and chose what route they traveled, when they took time off, and other working conditions. Vol. 2, 1254. These findings enjoy ample record support. *See*

Statement of the Case §§ B.1-B.2. For example, Plaintiff Nasr confirmed that he remains in business because he can assess profitability of loads based the cost of operating in certain regions of the country, the cost of fuel and meals, the length of the haul, and the load's size. Vol. 3, 849:20-851:16. If a load didn't make "business sense," he would decline it. *Id.* at 851:17-852:4; *see also id.* at 518:2-11 (Plaintiff Williams similarly assessed profitability based on load weight, mileage, and delivery location).

In contesting this factor, plaintiffs rely on off-point cases. *See* AB 36-38. *Lewis v. ASAP Land Express, Inc.*, 554 F. Supp. 2d 1217, 1223 (D. Kan. 2008), involved drivers for a courier service, not long-haul drivers, and the putative employer exercised significant control over their work schedules and routes. And *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989), is even further off base. There, cake decorators (i) worked in one location, (ii) punched a time clock when they arrived, took breaks, and left work, (iii) had to stay until all cakes were finished, and (iv) needed the owner's permission for special work schedules and vacations. *Id.* at 806-08.

Plaintiffs also chide the district court for relying on *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225 (10th Cir. 2018). AB 41-42. In fact, the court properly relied on *Acosta* for the principle that where, as here, "the worker 'could set his own hours and determine how best to perform his job within broad

parameters,'" the degree-of-control factor militates in favor of independent contractor status. Vol. 2, 1254-55 (quoting *Acosta*, 884 F.3d at 1235).

Finally, and in contrast to owner-operators like plaintiffs, XPO company drivers were subject to forced dispatch, meaning they could not decline loads, and they were required to follow refueling requirements and the work conditions set forth in a driver handbook. Vol. 2, 1254. These findings had record support. *See id.* at 877 (28:16-20) (company drivers must follow XPO's driver handbook protocols); 878 (31:15-32:8) ("forced dispatch" means if company drivers have available hours under DOT regulations to deliver a load, "they are required to do so as part of their job"); 903 (134:10-23) (company drivers must take certain routes and fuel up at certain locations); 1015 (19:13-15) (company drivers were given the handbook during orientation); Vol. 3, 518:24-519:1 (if a company driver didn't follow a required route, the driver would be charged for extra fuel); 570:11-12 (company drivers must "go where they told you to go").

In arguing to the contrary, Plaintiffs assert—with no record support—that "Pathway controlled who Lease Drivers could work for; what assignments they worked on; and what equipment and support they could use to get the job done." AB 36. These statements are simply not true. *See* Statement of the Case §§ B.1-B.2.

In sum, the district court's finding that the degree of control factor weighed heavily in favor of independent contractor status was sound, and certainly permissible, based on the record evidence. There was no clear error.

2. Plaintiffs had significant opportunities for profit and loss.

The court found that the second factor, opportunity for profit and loss, likewise weighed in favor of independent contractor status. Vol. 2, 1255. This finding is unassailable.

Courts have repeatedly held that owner-operators like plaintiffs have significant opportunities for profit and loss. *See Derolf*, 259 F. Supp. 3d at 882 (profit-and-loss factor favored defendant where drivers could accept or decline loads, increase profit by hauling more freight, and haul for other carriers with permission); *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *13-*15 (this factor favored defendant because, among other things, drivers could increase profitability by driving solo, had discretion to drive more or less hours in any given day, and could choose their own routes); *Browning*, 885 F. Supp. 2d at 608 (hauling agreements didn't guarantee freight drivers a certain amount of work, and some drivers operated at a loss in certain years); *see also Herman*, 161 F.3d at 304 (delivery drivers' ability to profit or loss was determined largely by their "skill, initiative, ability to cut costs, and understanding of the courier business").

Here, as the district court found, plaintiffs, as owner-operators, had both the ability to earn more than company drivers and the ability to suffer losses, which a company driver need not fear. Vol. 2, 1233, 1255-56. The court noted that seven of fifteen plaintiffs completed their leases and purchased their trucks from Pathway, and thus, in addition to owning valuable trucks, they could earn substantially more than their peers. *Id.* at 1255. And for many owner-operators, leasing from Pathway provided the best economic opportunity. *Id.* These findings had record support. *See* Statement of the Case §§ B.2-B.3; *see also* Vol. 3, 201:11-202:19 (former opt-in plaintiff Becky Austin evaluated purchasing a truck before leasing with Pathway but the down payment to purchase was too large); 310:16-311:3 (Plaintiff Lacy paid off his truck six months early); 508:13-19 (Plaintiff Williams made more money as an owner-operator than as a company driver); 846:20-847:5 (Plaintiff Nasr owned two trucks that he ran as a business).

Furthermore, rates of pay differed dramatically between company drivers and owner-operators. Vol. 2, 1232-33, 1255. And unlike company drivers, owner-operators like plaintiffs were responsible for truck maintenance, and they took on a risk of monetary loss based on "a number of factors," including, but not limited to, monitoring fuel efficiency. *Id.* Again, these rulings enjoy record support. *See* Statement of the Case §§ B.2-B.3; Vol. 3, 390:21-24 (Plaintiff Ard paid $25,000 for a repair); 772:21-25 (Plaintiff Hollingsworth paid over $35,000 for a repair);

838:17-839:3 (Plaintiff Nasr paid $10,816.41 for a repair); 853:8-12 (if owner-operators aren't careful in accepting loads, they can spend more money on fuel in a week than they earn hauling the load); 957:23-958:6 (owner-operators who default on their lease obligations were at risk of having their trucks repossessed); Supp. App. 48 (listing plaintiffs and former opt-in plaintiffs whose trucks were repossessed).

Plaintiffs contend that their rates were effectively capped because Pathway and XPO offered competing financial incentives. AB 45 & n.15. But they misread the record. XPO did not merely offer plaintiffs an extra 3¢ per mile for miles driven *in excess of* 11,000 miles per month. *Id.* Instead, if they drove in excess of 11,000 miles in a month, XPO paid a 3¢/mile incentive for *all miles driven in that month*, including the first 11,000 miles. *See* Vol. 1, 629, ¶ 19; Supp. App. 86, ¶ 19; 114, ¶ 19. And plaintiffs fail to acknowledge that every cent Pathway collected as an excess mileage fee was returned to plaintiffs as a credit towards the payoff of their trucks at the end of the lease term. Vol. 3, 914:25-915:3; Supp. App. 52, ¶ 7.[4]

[4] Pathway collects the excess mileage fee to protect its ownership interest in the leased truck, which is an asset that depreciates quicker if excess miles are driven. *See* Vol. 3, 914:9-915:3. While plaintiffs' regular lease payments accounted for the depreciation expected to occur through normal use for the term of the lease, *see* Supp. App. 52, ¶ 7, driving excess miles depreciates the truck faster, hence the need for excess mileage fees, *see* Vol. 3, 914:9-915:3. Once truck ownership passes from Pathway to a plaintiff, Pathway no longer needs the protection and therefore credits the lessee with the excess mileage fees. *Id.*; *see also* Vol. 3,

Plaintiffs also rely on inapplicable authorities. AB 44. They again invoke *Dole*, where there was no way a cake decorator "could experience a business loss." *Dole*, 875 F.2d at 810. They also cite *Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1299369 (D. Ariz. Mar. 23, 2015). But there, the delivery company controlled virtually all aspects of the drivers' work, including equipment, uniforms, training, and discipline, and most important, their routes, and they were paid piece-work wages *per job*. *See id.* at *7-*19. Neither case supports plaintiffs.

Plaintiffs insist that the sole relevant consideration under this factor is whether the worker needed managerial skill, and they claim no such skill was needed here. AB 43, 46-48. *First*, plaintiffs didn't make this argument below. *See* Vol. 2, 910-36. They thus forfeited it, and by failing to request plain error review, they've abandoned it. *See Richison v. Ernest Grp., Inc*., 634 F.3d 1123, 1128-31 (10th Cir. 2011).

Second, this Court's precedent does not demand a singular focus on managerial skills to the exclusion of all other considerations in assessing the opportunity for profit and loss. *See Baker*, 137 F.3d at 1441 (citing multiple types of evidence relating to profit and loss potential); *Dole*, 875 F.2d at 809-10 (same).

944:5-945:9 (Plaintiff Lacy had $3,878.98 in excess mileage credits applied to the purchase of his truck).

Third, and most important, plaintiffs overlook the district court's express findings that they "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. 2, 1234; *see Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *13-*15 (citing similar facts and holding that drivers had significant opportunities for profit and loss); *Nichols*, 364 F. Supp. 2d at 633 (freight drivers had "investment and management responsibilities typical of an independent contractor"). The court cited extensive evidence to support these findings, Vol. 2, 1234-35, and plaintiffs never claim these findings were clearly erroneous.

3. Plaintiffs made substantial investments in their businesses.

The district court found that the third *Baker* factor, the worker's investment in their business, also militated in favor of independent contractor status. Vol. 2, 1256-57. This finding was again reinforced by copious evidence. In applying this factor, "large capital expenditures"—as opposed to "negligible items, or labor itself"—are highly relevant to determining whether an individual is an employee or an independent contractor. *Dole*, 875 F.2d at 810; *accord Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 144-45 (2d Cir. 2017) (citing *Dole*).

That is precisely the type and scope of investment plaintiffs made here. As the district court observed, plaintiffs had to lease or own a truck—a tractor trailer—to drive for XPO. Vol. 2, 1256-57; *see id.* at 1231-37. This is undeniably a large, capital investment. *See Browning*, 885 F. Supp. 2d at 608 (truckers' capital investments in vehicles, equipment, and supplies supported independent contractor status); *Nichols*, 364 F. Supp. 2d at 633 (drivers' capital investments in trucks favored independent contractor status). As one court put it, referring to freight drivers' leased trucks, "In traditional employer-employee settings, employees are not asked to take such risk upon themselves to ensure compensation." *Derolf*, 259 F. Supp. 3d at 883.

Here, plaintiffs who successfully completed their leases paid approximately $100,000 or more to own their trucks, factoring in down payments, lease payments, and maintenance expenses. *See* Vol. 3, 616:2-5 (Plaintiff Anthony Dennis paid $95,940.10 to Pathway); 774:1-5 (Plaintiff Hollingsworth paid $122,302.32 to Pathway); 840:17-21 (Plaintiff Nasr paid $124,937.44 to Pathway). These investments were substantial.

The court further noted that in addition to truck payments, maintenance, and repairs, plaintiffs were also responsible for "fuel costs, workers compensation and business liability insurance, and tax and accounting services." Vol. 2, 1245, 1256; Supp. App. 52-54, ¶¶ 13, 15. These significant costs are not borne by employees.

Plaintiffs respond that the court erred by not comparing plaintiffs' investment to Pathway's and XPO's. AB 48-49. But they forfeited this argument by failing to make it below, and they do not claim plain error. *Richison*, 634 F.3d at 1128-31. Moreover, they fail to explain "the purpose of such an analysis," which is "to compare [t]he extent of the economic risk which the [workers] incurred . . . [with] the risk that [the Defendant] undertook." *Saleem v. Corp. Transp. Grp., Ltd.*, 52 F. Supp. 3d 526, 540 (S.D.N.Y. 2014) (citation and internal quotation marks omitted), *order clarified*, 2014 WL 7106442 (S.D.N.Y. Dec. 9, 2014), *aff'd*, 854 F.3d 131 (2d Cir. 2017).

In short, the relevant comparison is not between gross investments; instead, one must compare a worker's and employer's relative investment *risks*. Consequently, large investments by workers can indicate independent contractor status even when the alleged employer's investment is also large. *E.g.*, *Saleem*, 52 F. Supp. 3d at 540 (not clear whether drivers or limousine company took more economic risk).

Plaintiffs here took far more economic risk than Pathway or XPO by investing in a tractor-trailer and taking responsibility for payment of all related maintenance, repairs, fuel, taxes, insurance, and accounting, with no promise of any minimum level of income from either Pathway or XPO. Vol. 2, 1232-37, 1256; *see* Statement of the Case §§ B.2-B.3. By contrast, Pathway and XPO had

multiple sources of income from leases (Pathway) or from other company drivers and contractors (XPO). Nor is this case comparable to *Herman*, *see* AB 49, where delivery drivers used their automobiles not just for work but for personal and recreational purposes. 161 F.3d at 303.

Finally, courts have found that this factor favors independent contractor status when drivers can hire others to perform the work and thereby take on the usual burdens of an employer. *See Derolf*, 259 F. Supp. 3d at 882-83 (long-haul truck drivers could hire their own drivers and driver assistants); *Saleem*, 52 F. Supp. 3d at 539-40 (limousine drivers could decide whether to hire other drivers). The same result obtains here. The district court made no error, much less clear error, in finding that plaintiffs' substantial investments favored independent contractor status.

4. The parties' relationship was temporary and limited.

The court next found that the permanence-of-the-relationship factor "weighs slightly in favor of a finding of independent contractor status." Vol. 2, 1257. If anything, this finding was generous to plaintiffs.

Relationships based on a contract for a fixed term weigh against employee status. *See Derolf,* 259 F. Supp. 3d at 883 (factor favored independent contractor status where lease agreements between drivers and freight carrier were for fixed terms); *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *18 (relationship lacked

permanence where drivers' agreement with freight carrier was terminable by either party with 30-day notice and drivers were free to accept or decline loads without penalty); *Browning*, 885 F. Supp. 2d at 609-10 (relationship was impermanent where agreements between drivers and freight carrier were for one-year terms and could be terminated early by either party); *see also Baker*, 137 F.3d at 1442 (independent contractors generally work for fixed employment periods).

Here, the court found a lack of permanence in the plaintiffs' relationships with both Pathway and XPO, where plaintiffs' agreements with both were for fixed terms and could be terminated earlier by either party. Vol. 2, 1257; *see* Supp. App. 54, ¶ 19a. (Pathway Lease Agreement was for a 40-month term and Pathway could terminate upon notice); Supp. App. 91, ¶ 30 (XPO Hauling Agreement was for a two-year term but could be terminated by either party with ten-days' notice).[5]

Moreover, and contrary to plaintiffs' contention, AB 52, the court did not find for Pathway on this factor based solely on the parties' agreements. It also considered the economic realities. As the court noted, once plaintiffs purchased their trucks, which many did, Pathway had no further dealings with them unless they leased another truck. Vol. 2, 1246-47, ¶¶ 39, 41. On the flip side, if

[5] The district court correctly found that XPO's Hauling Agreement was for a two-year term, Vol. 2, 1238, ¶ 13, but in applying this factor, it mistakenly said the Agreements had three-year terms, *id.* at 1257. The court was right the first time. *See* Supp. App. 91, ¶ 30. Its minor mistake benefitted plaintiffs and is immaterial.

plaintiffs' contracts with XPO were terminated or they asked to switch freight carriers, they could continue to lease from Pathway while driving for another carrier. *Id.* at 1246-47, ¶ 40. These findings have record support. *See* Statement of the Case §§ B.1, B.4; *see also* Vol. 3, 593:22-594:24 (Plaintiff Anthony Dennis switched from another carrier to XPO while leasing a Pathway truck); 731:17-25 (Plaintiff Herring also switched from another carrier to XPO while leasing a Pathway truck).

Plaintiffs also argue that permanence is assessed within the confines or time limits of the job. AB 52 (citing *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (involving seasonal workers).[6] But that principle is relevant only for seasonal work. It is certainly not true as a general proposition; otherwise, every work relationship would be "permanent." Here, plaintiffs were not hired seasonally or for an indefinite time. They had contracts for fixed periods. These relationships were temporary and limited, not permanent.

5. Plaintiffs' work required a high degree of skill.

The court found that the fifth factor—the degree of skill required to perform the work—weighed slightly in favor of independent contractor status. Vol. 2, 1258. This finding too is fully supported by the record.

[6] Plaintiffs also rely on *Ingram v. Passmore*, 175 F. Supp. 3d 1328, 1337 (N.D. Ala. 2016), AB 51, but they fail to mention that the *Ingram* court found this factor didn't favor either party.

Commercial long-haul truck driving is a special skill. *See United States v. Berry*, 717 F.3d 823, 834 (10th Cir. 2013) (affirming finding that commercial truck driving was a "special skill" warranting a sentencing enhancement) (citing *United States v. Lewis*, 41 F.3d 1209, 1214 (7th Cir. 1994) and *United States v. Mendoza*, 78 F.3d 460, 465 (9th Cir. 1996)). Indeed, "courts have found trucking positions, particularly those that involve the transportation of cargo, to demonstrate a high degree of skill." *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *16. Long-haul truck drivers are professionally trained and possess technical driving skills, knowledge of DOT regulations, and freight-handling skills, which weigh in favor of independent contractor status. *Id.* at *17; *see Nichols*, 364 F. Supp. 2d at 632 (driving large loads of cargo requires a significant degree of skill). Though the court noted that both company drivers and owner-operators possess these skills, Vol. 2, 1258, that doesn't make the skills any less specialized.

In response, plaintiffs rely on cases involving delivery drivers for courier services, not long-haul truck drivers. AB 55; *see Flores v. Velocity Express LLC*, 250 F. Supp. 3d 468, 490 (N.D. Cal. 2017) (package delivery drivers); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 995 (9th Cir. 2014) (FedEx drivers were employees where they 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) (delivery drivers didn't require specialized skills where they

needed only to have a driver's license, sign a contract, and pass a physical exam and a drug test). There is simply no comparison between the skills needed for freight hauling versus delivery driving.

The district court further observed that owner-operators like plaintiffs also need "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." Vol. 2, 1258. Plaintiffs maintain these skills are irrelevant, arguing, without citation to authority, for a distinction between skills needed to perform a job and to profit from it. AB 53. In fact, these skills were and are essential to the job, where plaintiffs have no guaranteed income and must use the skills not just to profit but to avoid losing money.

As federal courts have found, this factor favors independent contractor status precisely because long-haul truckers who own and operate their rigs require business acumen to succeed. *See Derolf*, 259 F. Supp. 3d at 883 (owner-operators "clearly need to possess business acumen, diligence, and managerial skills as they are much more like business people than merely drivers"); *Browning*, 885 F. Supp. 2d at 608-09 (truckers needed "a significant degree of skill," including "driving skills, business management skills, knowledge of [DOT] regulations, and freight-handling skills"); *Nichols*, 364 F. Supp. 2d at 632 (responsibilities for paying all

expenses, managing operating costs, and navigating regulatory landscape "demonstrates that the drivers must exercise entrepreneurial skills often associated with small business owners"). The court's finding comports with these eminently sensible rulings.

6. Whether plaintiffs' work was an integral part of the business was a wash.

The district court finally found that the sixth factor—the extent to which plaintiffs' work was an integral part of Pathway's and XPO's businesses—favored neither party. Vol. 2, 1259 ("the Court finds this factor to be neutral"). It noted that neither side had presented adequate evidence on this factor. *Id.* Plaintiffs do not point to any pertinent evidence the court overlooked. The court's finding was thus permissible; there was no clear error.

As the court observed, while Pathway could not stay in business without plaintiffs performing hauling work, Pathway was only interested in plaintiffs satisfying their lease obligations. Vol. 2, 1259. Thus, it is not plaintiffs' work, but the fulfillment of their contractual duties, that was integral to Pathway's business.

Factoring in plaintiffs' relationship with XPO improves their position slightly. *See* AB 58-59, n.19. But even in cases brought by long-haul drivers against freight carriers like XPO, federal courts have ruled that this factor's weight "is diminished where the work performed easily is interchangeable with work by other drivers." *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *20; *see Browning*,

885 F. Supp. 2d at 610 (same). Those are the facts here, where the vast majority of XPO's hauling work is performed by company drivers. As of June 2017, XPO employed approximately 2,400 company drivers, and it contracted with roughly 540 owner-operators, Vol. 2, 969 (39:20-40:1), only a quarter of whom were Pathway lessees, *id.* at 1237, ¶ 12. And company drivers, who are subject to force dispatch, can't decline the work. *Id.* at 1240, ¶ 16 (finding company drivers are subject to "forced dispatch"); 878 (31:15-32:8) (describing "forced dispatch").

But the kicker is this: Federal courts have uniformly ruled that even when this factor favored employee status, freight haulers were independent contractors when considering the totality of the circumstances. *See Derolf*, 259 F. Supp. 3d at 884; *Mikhaylov*, 2019 U.S. Dist. LEXIS 59203, at *21; *Browning*, 885 F. Supp. 2d at 610; *Nichols*, 364 F. Supp. 2d at 634. So, even if this factor were not neutral and favored employee status, when considering all six factors and the totality of the circumstances, plaintiffs were independent contractors.

* * *

In sum, the district court made no clear error in finding that five of the six *Baker* factors militated in favor of independent contractor status or in finding that the sixth was neutral. Its ultimate conclusion flowed naturally from these findings: plaintiffs were "in business for [themselves]." Vol. 2, 1260 (quoting *Baker*, 137 F.2d at 1436). This Court should affirm that conclusion.

CONCLUSION

For the foregoing reasons, Pathway asks the Court to affirm the district court's ruling that plaintiffs were independent contractors.

In the alternative, if the Court were to conclude that the district court erred, it should remand for the district court to make findings as to whether XPO and Pathway were joint employers, and if they were not, to decide whether plaintiffs were independent contractors given their relationship with Pathway alone.

STATEMENT CONCERNING ORAL ARGUMENT

Pathway requests oral argument. This case raises important issues under the FLSA relating to the classification of freight haulers who own or lease their own trucks. Scheduling oral argument will also give law students who appear per 10th Cir. R. 46.7 an opportunity to experience an appellate argument.

Dated: January 14, 2022.

Respectfully submitted,

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I hereby certify that on the 14th day of January 2020, I electronically filed the foregoing Appellees' Brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system.

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