

No. 22-1218

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In the Supreme Court of the United States

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WENDY SMITH, ET AL., PETITIONERS

*v.*

KEITH SPIZZIRRI, ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 14, 2023  
CERTIORARI GRANTED: JANUARY 12, 2024

## TABLE OF CONTENTS

	Page
Independent contractor owner/operator agreement (Martinez), D. Ct. Doc. 21-2 (Feb. 10, 2015).....	1
Independent contractor owner/operator agreement (Smith), D. Ct. Doc. 21-4 (Sept. 21, 2018) .....	21
Independent contractor owner/operator agreement (Turner), D. Ct. Doc. 21-5 (Apr. 15, 2020) .....	41
Plaintiffs' hybrid collective and class action complaint, D. Ct. Doc. 1-3 (July 9, 2021).....	61
Defendants' motion to compel arbitration and dismiss action, D. Ct. Doc. 18 (Oct. 15, 2021) .....	87
Plaintiffs' response to defendants' motion to compel arbitration and dismiss action, D. Ct. Doc. 21 (Oct. 29, 2021).....	91
Defendants' reply in support of motion to compel arbitration and dismiss action, D. Ct. Doc. 22 (Nov. 8, 2021) .....	101

## II

The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari:

Appendix A:	Court of appeals opinion, Mar. 16, 2023.....	1a
Appendix B:	District court opinion and order, June 17, 2022.....	9a

INDEPENDENT CONTRACTOR  
OWNER/OPERATOR AGREEMENT

This Independent Contractor Owner/Operator Agreement (the "Contract") is made between Intelliserve LLC, whose principal place of business is located at 4022 S 20th St., Phoenix, Arizona 85040 and MICHELLE IRENE MARTINEZ whose principal place of business is located at 4730 W NORTHERN AVE UNIT 1075 GLENDALE AZ 85301 (hereinafter referred to as "Owner/Operator") and is effective February 10, 2015.

WHEREAS Broker is a for-profit business which Brokers delivery services and which operates as a Broker of delivery services;

WHEREAS Owner/Operator is engaged in an independently established trade, occupation or business which is authorized to provide delivery and/or transportation services in the states in which it operates;

WHEREAS Customers are third parties who use brokers or Broker to arrange transportation services and desire to be connected with drivers who can provide services related to the Customer's transportation needs;

WHEREAS Owner/Operator desires to enter into a contract whereby Owner/Operator will be available to perform services for Customers located by Broker as an Owner/Operator, and not that of an employee of either Broker or Customers; and,

WHEREAS Broker also desires to enter into this Contract wherein it may refer to Owner/Operator Customers in need of services related to the pick-up and/or delivery of items;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants set forth below, and for other

good and valuable consideration, the parties agree as follows:

1. Services Covered.

(a) Owner/Operator agrees to pick up and deliver documents, items designated for pick up or delivery by Customers subject to the specifications as may be established or required by the Customer(s) for whom the pick up or delivery services are performed.

(b) IN PERFORMING FOR CUSTOMERS ANY SERVICES PURSUANT TO THIS CONTRACT, OWNER/OPERATOR UNDERSTANDS AND AGREES THAT HE/SHE/IT SHALL BE AND REMAIN AT ALL TIMES AN OWNER/OPERATOR IN FACT AND LAW. OWNER/OPERATOR IS NOT AN EMPLOYEE OF BROKER OR OF THE CUSTOMERS FOR WHICH OWNER/OPERATOR PROVIDES SERVICES.

2. Owner/Operator shall be responsible for the manner and means of securing the end result of the provision of services under this Contract and shall use its own independent judgment and discretion for the most effective and safe manner to conduct its pick-up and delivery services, including the acceptance or agreement to perform services, the order of pick-ups and deliveries, and Owner/Operator's hours of operation, taking into account the set specifications of customers for whom Owner/Operator has agreed to perform services. Broker will not instruct Owner/Operator as to how Owner/Operator's work will be performed. Broker shall exercise no direct control over Owner/ Operator, nor the method or means used by Owner/ Operator in the performance of such services, including the selection of routes, order of deliveries, and hours of operation. It is the sole responsibility of

Owner/Operator to complete all services Owner/ Operator agrees to perform and Owner/Operator shall be solely responsible for any failure(s) related to that performance. Owner/Operator agrees to bring to the attention of Broker any instance it believes this provision is not being adhered to. Abandonment of route, failure to either pick-up or deliver per a Customer's specifications, or other failures to provide the services Owner/Operator has agreed to provide may result in immediate termination of this Contract. Owner/ Operator is free to decline offers of services from Broker and doing so will not be considered a breach of this agreement. If Owner/Operator fails to perform services as specified by the customer after agreeing to perform the services, such a failure will be considered a material breach of this agreement.

(a) Owner/Operator agrees to provide and maintain a vehicle for the performance of delivery services under this Contract and represents and warrants that it will always have adequate transportation to complete all services it agrees to perform.

(b) Owner/Operator is responsible for and shall pay all operation costs and expenses including, but not limited to, fuel, repairs, motor vehicle insurance, maps, hand truck, rope, office overhead, payroll expenses for Owner/Operator's own employees, if any, and all other equipment or supplies it deems necessary to perform the services covered by this Contract. The parties agree that Broker is not responsible for Owner/ Operator's maintenance or other operational expenses. Owner/Operator understands and agrees that Broker shall not reimburse Owner/Operator for any such operation costs or other expenses.

(c) As required by law, regulation or certain Customer requirements, Owner/Operator shall submit to any background check, drug test (random or otherwise), or other

related requirement at the reasonable request of the party so requiring it. Owner/Operator agrees to pay for any and all costs associated with such law, regulation or requirements.

(d) Broker may from time to time notify Owner/ Operator of available pick-ups or deliveries. In the event Owner/Operator chooses to perform the available pick-ups or deliveries, Owner/Operator shall immediately notify Broker of Owner/Operator's acceptance of the available pick-up or delivery. If Owner/Operator does not notify Broker of acceptance within 15 minutes of the initial notification, Broker has the right to offer the pick-ups or deliveries to other Owner/Operators. Broker neither has, nor reserves, any right or power to exercise any direction, control, or determination over when Owner/Operator shall work. Owner/Operator shall be free to set its own work schedule provided the schedule satisfies the specifications of the customer or customers for whom Owner/ Operator has agreed to perform pick-up or delivery services.

(e) If accepted, Owner/Operator agrees to perform all pick-ups and deliveries in a timely, and safe manner, and as directed by the specifications established by the customer for whom the pick-ups and deliveries are performed. Owner/Operator will be solely responsible for completion of the pick-up or delivery as provided for herein and will perform the pick-ups and deliveries in a manner dictated by Owner/Operator, following the specifications or requirements set forth by the Customer, law or regulation. In addition, depending upon the nature of the product being picked-up or delivered, Owner/Operator further agrees that upon acceptance of said pick-up or delivery, Owner/Operator will deliver or pick up the identi-

fied product. Owner/Operator may designate a subcontractor or hire his/her/its own employee(s) to execute a delivery or pick-up provided that the potential subcontractor or Owner/Operator's employee(s) (1) meet(s) the same standards, criteria and qualifications as Owner/Operator which are provided in this Contract and (ii) is/are covered by either Occupational Accident Insurance or Workers' Compensation Policy (as applicable) paid for and provided by Owner/Operator.

(f) Owner/Operator agrees to provide its own communication device and all other equipment necessary to perform the services Owner/Operator agrees to perform according to Customer specifications. Owner/ Operator may, through a separately negotiated agreement, rent/lease a communications device, or certain other limited equipment from Broker if available at the sole discretion and cost of the Owner/Operator. Owner/Operator is not required to purchase or lease any equipment from Broker or Customers but may do so at Owner/Operator's sole discretion.

(g) Because of the security and safety concerns of various Customers due to the heightened level of security in the United States, Owner/Operator agrees to prominently wear an identification badge and uniform in accordance with any Customer requirements for rendering services. Owner/Operation will be responsible for the cost of the identification badge(s) and uniform(s).

(h) Owner/Operator agrees to faithfully and diligently devote its best efforts, skills and abilities to comply with the Customer's specifications. Owner/ Operator must determine the method and manner of best meeting a customer's specifications and is solely responsible for any failure to do so.



(i) Owner/Operator represents and warrants that Owner/Operator is not presently charged with a criminal offense and that Owner/Operator has not been convicted of a felony within the past ten years.

(j) Owner/Operator understands that Owner/ Operator may be involved in the transportation and delivery of sensitive material, and, as a result, Owner/Operator agrees that if Owner/Operator or Owner/Operator's designee converts any material, this Contract shall be considered immediately terminated.

(k) Owner/Operator will provide on a regular basis all the information to Broker for payment of Owner/ Operator's business services hereunder. This information will be provided by invoices generated by Owner/Operator's business. The Broker's supplied manifests and delivery receipts must accompany the Owner/Operator's invoice. The Owner/Operator will be paid based on clear and complete invoices only.

(l) Owner/Operator agrees that, for any engagement or services performed under this Contract, Owner/ Operator will use delivery manifests in a form acceptable to Broker and Owner/Operator and that Broker's acceptance of the form of Owner/Operator's delivery manifests must be explicit.

(m) Owner/Operator will comply with all Customer pick-up and delivery specifications. Owner/Operator is responsible for ensuring it is aware of Customer requirements and instructions and is solely responsible for ensuring that it is able to meet all such requirements and instructions before accepting performance of services or engagements for the Customer. Such requirements and instructions may include, but are not limited to: requirements to obtain signatures for pick-ups or deliveries and

instructions regarding the acceptability or unacceptability of leaving packages unattended. BROKER WILL NOT PROVIDE OWNER/OPERATOR ANY TRAINING. IT IS OWNER/OPERATOR'S SOLE RESPONSIBILITY TO ENSURE THAT IT IS AWARE OF AND CAN SATISFY ALL CUSTOMER SPECIFICATIONS WHEN ACCEPTING WORK FOR THE CUSTOMER, if there is any question about a Customer's specifications, Owner/Operator shall contact Customer or Broker.

(n) Owner/Operator agrees to provide all necessary documentation requested by Customer or Broker to support Customer invoicing. Owner/Operator understands that all such requested documentation must accurately reflect the date, time and description of items delivered or picked up. If required by the Customer, Owner/Operator will promptly call in all pick-ups and deliveries.

### 3. NO RIGHTS TO BENEFITS.

(a) OWNER/OPERATOR UNDERSTANDS AND AGREES, DUE TO ITS STATUS AS AN OWNER/OPERATOR ENGAGED IN ITS OWN INDEPENDENTLY CONTROLLED AND OPERATED BUSINESS, THAT OWNER/OPERATOR IS NOT ELIGIBLE FOR, NOR SHALL PARTICIPATE IN, ANY BROKER PENSION PLAN, HEALTH OR DISABILITY PLAN, OR OTHER INSURANCE OR FRINGE BENEFIT PLAN OF ANY KIND.

(b) AS AN INDEPENDENTLY CONTRACTING BUSINESS ENTITY, OWNER/OPERATOR IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS UNEMPLOYMENT COMPENSATION COVERAGE IS PROVIDED BY THE OWNER/OPERATOR OR SOME OTHER ENTITY,

AND OWNER/OPERATOR IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON MONEYS PAID PURSUANT TO ITS CONTRACTUAL RELATIONSHIP WITH BROKER.

4. Compensation.

(a) Owner/Operator shall not be compensated on an hourly or salary basis but shall be paid based on a separately negotiated rate, either per delivery, or per route. Payment shall be made to Owner/Operator's business entity, not to Owner/Operator as an individual except where Owner/Operator is operating as a sole proprietor under Owner/Operator's individual name. Broker will collect amounts due from Customers and pay Owner/Operator any proportional amount due based on billings actually collected in accordance with the settlement separately negotiated between Broker and Owner/Operator. These payments will be as negotiated and indicated in the separate negotiated rate agreement. Owner/Operator acknowledges that in order to be compensated for pickups and deliveries, all required documents, including but not limited to, manifests shall be promptly completed and turned in to Broker's office as negotiated.

(b) Broker agrees to provide timely invoices to Customers for the services rendered by Owner/ Operator. Provided, however, that Broker shall have sole and exclusive discretion and judgment regarding the form and content of its billings. Broker further agrees to use its best efforts in collecting billings from Customers and agrees to pay Owner/Operator any owed proportional share of the billing as agreed between the parties as soon as practicable after receipt of payment but in no event more than fourteen (14) days after receipt.

(c) As an independently contracting owner/operator, Owner/Operator is solely responsible for filing and paying all necessary federal, state and local taxes and returns, including, but not limited to, the timely payment of estimated income taxes and self-employment taxes. In particular, Owner/Operator will not be treated as an employee with respect to any services for federal, state or local tax purposes, and agrees, represents and warrants that it is an Owner/Operator engaged in an independently established trade, occupation or business and is responsible for all of its Owner/Operator and business taxes and agrees to pay them to the respective governmental entities and to hold harmless, defend and indemnify Broker therefrom. Owner/Operator is required to and will submit a completed IRS Form W-9 before commencement of its business services and Broker or its designated agent will provide an IRS Form 1099 at the end of each tax year.

(d) If Owner/Operator collects Cash On Delivery (COD) either in moneys or check and fails to turn in moneys or check to Broker, Broker shall have the right to recover from the Owner/Operator a sum equal to Broker's proportional share of the COD payment. In the case of such a failure, Owner/Operator agrees to pay Broker for Broker's proportional share of the COD payment and any expense or indebtedness related to the recovery of such funds. Said failure to promptly turn in any funds collected is also grounds for termination of this Contract.

(e) If Owner/Operator disputes its settlement, or any billing to the customers for which Owner/Operator has performed services, Owner/Operator must bring its documented records to the attention of Broker within seven (7) days of the disputed settlement so that the billing can be corrected to the Customer and Owner/Operator's settlement can be corrected to reflect any change. The absence

of notification from Owner/Operator to Broker of any dispute as described, and within the time frame indicated above will constitute Owner/Operator's acceptance of the settlement as complete, correct, and accurate.

(f) Owner/Operator understands and agrees that it has a business-to-business relationship with Broker and recognizes that it may incur expenses or indebtedness to Broker pursuant to that relationship. Accordingly, Owner/Operator agrees to pay Broker for any such expenses or indebtedness, including any expense or indebtedness related to Owner/Operator's failure to perform services it has agreed to perform under this Contract, incurred in the course of its business-to-business dealings with Broker.

#### 5. Insurance.

(a) Vehicle Insurance. Owner/Operator shall maintain, at its sole expense, commercial auto insurance. Owner/Operator understands that allowing this policy to lapse shall be considered immediate default of this Contract and cause for termination of this Contract. Such policy shall meet, at least: (i) the minimum coverage limits required by Owner/Operator's own business practices, (ii) the requirements of any customer for whom Owner/Operator performs services, or (iii) a policy with a limit of not less than a \$300,000 single coverage limit, whichever minimum requirement is greater. Owner/Operator agrees to notify Broker immediately if notice of cancellation is received or non-renewal takes place. An up-to-date policy face page must be on file with Broker at all times. Broker is to be listed as an additional insured on the policy.

(b) WORKERS' COMPENSATION INSURANCE. OWNER/OPERATOR SHALL NOT BE COVERED BY BROKER'S WORKERS' COMPENSATION

INSURANCE BECAUSE OWNER/OPERATOR IS ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS AND IS NOT AN EMPLOYEE OF BROKER. OWNER/OPERATOR ASSUMES THE RESPONSIBILITIES OF AN EMPLOYER FOR THE PERFORMANCE OF THE SERVICE PERFORMED PURSUANT TO THIS CONTRACT AND WILL PROVIDE WORKERS' COMPENSATION INSURANCE COVERAGE TO THE OWNER/OPERATOR'S EMPLOYEES, IF ANY.

(c) Owner/Operator also agrees to obtain and maintain at all times either an Occupational Accident Insurance Policy or Workers' Compensation Insurance for Owner/Operator and all of its subcontractors or employees authorized to perform work under this Contract. Said policy of Insurance shall also be on file with Broker or Broker's designee at all times. Owner/ Operator will defend, indemnify and hold harmless Broker from any workers' compensation claim or any other claim arising out of an accident or injury while Owner/Operator, any of its subcontractors, or employees, is/are performing transportation services under this Contract.

(d) Unemployment Insurance. Owner/Operator acknowledges it is engaged in an independent business providing transportation services separate and apart from the business of Broker and that Owner/Operator does not perform any function as a broker of transportation services. Owner/Operator agrees that if it, at any time during the operation of this Contract begins performing the functions of a broker of pick-up or delivery services that this Contract will terminate and will need to be renegotiated. In the event Owner/Operator begins performing services relating to brokering pick-ups and/or deliveries,

Owner/ Operator agrees to provide notice to Broker of Owner/ Operator's intent to do so in advance of performing such brokering services.

(e) OWNER/OPERATOR ACKNOWLEDGES IT IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE, AND THAT TO THE EXTENT OWNER/OPERATOR WANTS TO BE COVERED FOR THE SAME, OWNER/OPERATOR WILL PROCURE ITS OWN INSURANCE OF THAT TYPE.

(f) Owner/Operator will defend, indemnify and hold harmless Broker from any unemployment insurance claim of either it or any of its drivers or others that may be employed by Owner/Operator.

6. Defense and Indemnity. Owner/Operator agrees to defend, indemnify, and hold harmless Broker from any and all claims, demands, damages, suits, losses, liabilities and causes of action arising directly or indirectly from, as a result of, or in connection with, the actions of Owner/Operator and/or Owner/ Operator's employees and subcontractors arising from the performance of Owner/Operator's services under this Contract, including, but not limited to: abandonment of route, damage to property, missing property and personal injury or death to any person, including Owner/Operator and/or Owner/Operator's employees and subcontractors. Owner/Operator further agrees to defend, indemnify and hold harmless Broker from any loss, cost or expense in the event of any loss, damage or destruction of the items or personal property that Owner/Operator acquires or takes possession of in, or for, the performance of this Contract. Broker shall have the right independently to take whatever action it may deem necessary, including hiring counsel of its choice, in its sole discretion, to protect or defend itself

against any threatened action subject to defense and indemnification. Owner/Operator's obligations hereunder shall include advancing the cost of defense as well as the payment of any Judgment rendered against Broker.

7. Owner/Operator Business.

(a) It is expressly agreed that Owner/Operator is an independent contractor and owner/operator. Owner/ Operator will not be considered an employee of Broker for any purpose whatsoever. Broker neither has nor reserves any right of power to exercise any direction, control or determination over the manner, means or methods of Owner/Operator's business activities and objectives in operating its business.

(b) Owner/Operator agrees not to hold itself out as an employee or partner of Broker, nor as having authority to represent Broker, but, in relation to Broker, only as an Owner/Operator for the purpose of performing services for Customers contacted and identified by Broker under this Contract. Owner/ Operator has no power or authority to incur any debt, obligation or liability on behalf of Broker or Customers.

(c) As Owner/Operator is engaged in an independently established trade, occupation or business, Broker neither has nor reserves the right to restrict Owner/Operator from being concurrently or subsequently engaged in providing other delivery services or engaging in any other occupation or business, subject to the terms of confidentiality established herein. Further, Owner/Operator agrees and understands that it may, subject to the terms of confidentiality established herein, work with, or for, any other entity, including entities considered to be direct competitors of Broker, as long as such other work does not prohibit Owner/Operator from satisfactorily completing all work



Owner/Operator chooses to accept under this Contract. Owner/Operator understands and agrees that it can refuse services or engagements offered by Broker for any reason Owner/Operator deems sufficient, including work for other entities related to pick-ups and deliveries, and further understands and acknowledges that services or engagements offered by Broker may be intermittent and/or irregular, depending on demand.

(d) Owner/Operator shall at all times comply with any and all laws, ordinances, statutes, executive orders and regulations, federal, state, county and municipal, insofar as applicable to Owner/Operator's performance of services under this Contract.

(e) Owner/Operator expressly represents and warrants that it has all city, county and/or state business licenses, permits and accounts required to operate an independently established trade, occupation or business.

(f) Owner/Operator further expressly represents and warrants that it has all city, county and/or state motor vehicle carrier permit or other transportation licensing required, if any, to operate as a courier or trucker in the cities, counties and states where it operates.

8. Pricing. It is understood that Broker has the sole and exclusive right to set or change the delivery and pick-up charges and prices with Customers from time-to-time. Owner/Operator shall separately negotiate the compensation Owner/Operator will receive for performing pick-up and deliveries under this Contract.

9. Confidentiality. Except upon order of government authority having jurisdiction, Owner/Operator agrees that it shall not disclose to third parties any of Broker's proprietary information or trade secrets learned, nor use, either directly or indirectly, any of this information for

proprietary gain. Owner/Operator understands that for 1099 reporting purposes and otherwise, Broker will have access to confidential information of Owner/Operator. Owner/Operator consents to the disclosure of this information to any governmental or subpoenaing party.

10. Confidential/Sensitive Information. During the course of the business relationship between Owner/ Operator and Broker, Owner/Operator may learn confidential information or trade secrets of Broker or Customer. Owner/Operator agrees not to use any of such information for any improper purpose, including but not limited to, soliciting Customers and agrees to keep all such information confidential.

11. Term and Termination Provisions. The term of this agreement shall commence on the date of execution of this document by Broker and Owner/ Operator. This Contract is for an initial term of 30 days. At the end of the initial term, this Contract shall automatically renew on a month-to-month basis for a maximum of twelve (12) months from the date of execution by all parties hereto, unless either party gives the other at least thirty (30) days advanced written notice of intent of non-renewal prior to the 12 month period expiring, as indicated below. This Contract may be indicated for non-renewal without cause at any time by either party giving the other party at least thirty (30) calendar days written notice of the desire to keep this Contract from further automatic renewal. In the case of written notice of the intent to end the automatic renewal of this Contract in the designated twelve month period, the Contract will terminate at the conclusion of the 30 day term following the written notice of non-renewal and will not renew. Either party may terminate this Contract immediately with cause upon default or some other material breach. The provisions of paragraphs 9, 10, 13, and 14

shall survive the termination or conclusion of this Contract.

12. Right to Rescind Contract. This Contract may be rescinded by either party, without penalty, within 72 hours after execution hereof. Such notice of rescission shall be in writing and sent by Certified Mail, Return Receipt Requested.

13. Arbitration. In the event of any dispute, claim, question, or disagreement arising from or relating to this Contract or the breach thereof, or arising from any arrangement under this Contract between Owner/ Operator and Broker or Customer; the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, the parties shall consult and negotiate with one another in good faith, in an attempt to reach a just and equitable solution, satisfactory to both parties. If informal resolution of the dispute, claim, question or disagreement cannot be reached, disputes that are within the jurisdictional maximum for small claims will be settled in the Nevada Small Claims Court. With regard to other disputes, Broker and Owner/Operator mutually agree to resolve any justiciable disputes between them, specifically including any claims related to payments due and the classification of Owner/Operator as a Contractor, that cannot be resolved by the Parties, exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration agreement shall apply to any and all claims arising out of or relating to this Contract, the Owner/Operator's provision of services to Customers, the payments received by Owner/Operator for providing services to Customers, the termination of this Contract, and all other aspects of the Owner/Operator's relationship with Broker, past or present, whether arising under federal, state or local statutory and/or common law.

If either party wishes to initiate arbitration, the initiating party must notify the other party in writing via certified mail, return receipt requested, within the applicable statute of limitations period. This demand for arbitration must include (1) the name and address of the party seeking arbitration, (2) a statement of the legal and factual basis of the claim, and (3) a description of the remedy sought. Any demand for arbitration by Owner/Operator must be delivered to 4022 S 20th St., Phoenix, Arizona 85040.

(a) Class Action Waiver. Broker and Owner/Operator mutually agree that by entering into this Agreement, both waive their right to have any dispute brought, heard or arbitrated as a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action. **All claims covered by this arbitration agreement will be pursued in an individual claimant proceeding and not as part of a representative, collective, or class action.** Notwithstanding any other clause contained in this Agreement, any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. This Agreement does not prevent the filing of charges with a government agency like the Department of Labor or participation in any investigation or proceeding conducted by a government agency.

(b) Any arbitration shall be governed by the American Arbitration Association Commercial Arbitration Procedures, except as follows:

(1) Arbitration will be conducted by a mutually agreeable arbitration service or the American Arbitration Association (AAA) if no other service is agreed upon. The

arbitrator shall be selected from a list of no less than seven names through alternative strikes.

(2) If the parties cannot otherwise agree on a location for the arbitration, the arbitration shall take place in Clark County, Nevada.

(3) Unless the parties agree or applicable law provides otherwise, as determined by the Arbitrator, Broker shall pay all of the Arbitrator's fees and costs.

(4) The arbitrator may issue orders allowing the parties to conduct discovery sufficient to allow each party to prepare that party's claims and/or defenses, taking into consideration that arbitration is designed to be a speedy and efficient method for resolving disputes.

(5) The arbitrator may award all remedies to which a party is entitled under applicable law and which would otherwise be available in a court of law, but shall not be empowered to award any remedies that would not have been available in a court of law for the claims presented in arbitration. The arbitrator shall apply the state or federal substantive law, or both, as is applicable.

(6) The arbitrator may hear motions to dismiss and/or motions for summary judgment, and will apply the standards of the Federal Rules of Civil Procedure governing such motions.

(7) Any decision or award by the arbitrator shall be in writing.

(c) Nothing herein is intended to or shall preclude Broker or Owner/Operator from filing a complaint and/or charge with any appropriate federal, state, or local government agency and/or cooperating with said agency in its investigation. Nonetheless, Broker and Owner/Operator acknowledge that to the fullest extent permitted by law

they shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge, without regard as to who brought said complaint or charge.

(d) Either Party may bring an action in a court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, or to review an arbitration award. In an action to review an award, the standard of review applied will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury, without any special deference to the arbitrator.

(e) Owner/Operator and Broker expressly waive trial by jury for all claims covered by this Agreement. All other rights, remedies, exhaustion requirements, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration. Owner/Operator and Broker agree that arbitration as explained herein provides a fair and adequate mechanism for enforcing the Parties' statutory rights.

(f) Owner/Operator agrees and acknowledges that entering into this arbitration agreement does not change its status as an independent contractor in fact and in law, and that Owner/Operator is not an employee of Broker or its Customers notwithstanding this arbitration agreement.

14. Governing Law. This Contract and all rights and obligations of the parties shall be construed in accordance with the laws of Nevada, where Broker is headquartered, and any action shall be commenced in that jurisdiction. Accordingly, unless the parties agree otherwise, any claims or disputes arising from or in connection with this agreement shall be brought exclusively in Clark County,

Nevada. Broker's rights shall inure to the benefit of its successors and assigns.

15. Entire Agreement. This Contract constitutes the entire agreement between the parties and supersedes all previous agreements between the parties. Any additions or changes shall be in writing signed by an authorized representative of Broker and Owner/ Operator. Broker shall have the right to assign its rights and delegate its duties under this Contract.

16. Signature. This Contract may be signed and is enforceable by electronic signature and facsimile.

IN WITNESS WHEREOF, the parties have executed this Contract effective on the date first indicated above.

<b><u>OWNER/OPERATOR</u></b>	<b><u>INTELLISERVE LLC</u></b>
Signature: <u>/s/ Michelle I Martinez</u>	Signature: <u>/s/ Keith Spizzirri</u>
Date: 2/10/2015	Date: 2/10/2015
Printed Name: MICHELLE IRENE MARTINEZ	Printed Name: Keith Spizzirri
Address: 4730 W NORTHERN AVE UNIT 1075 GLENDALE AZ 85301	Address: 4022 S 20th St., Phoenix, Arizona 85040

FOR COLORADO  
Subscribed and sworn  
to before me this \_\_ day of  
\_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public, State of Colorado

INDEPENDENT CONTRACTOR  
OWNER/OPERATOR AGREEMENT

This Independent Contractor Owner/Operator Agreement (the “Contract”) is made between Intelliserve LLC, whose principal place of business is located at 4022 S 20th St., Phoenix, Arizona 85040 and Wendy Smith whose principal place of business is located at 10535 W CHICKASAW ST TOLLESON AZ 85353 (hereinafter referred to as “Owner/Operator”) and is effective September 21, 2018.

WHEREAS Broker is a for-profit business which Brokers delivery services and which operates as a Broker of delivery services;

WHEREAS Owner/Operator is engaged in an independently established trade, occupation or business which is authorized to provide delivery and/or transportation services in the states in which it operates;

WHEREAS Customers are third parties who use brokers or Broker to arrange transportation services and desire to be connected with drivers who can provide services related to the Customer’s transportation needs;

WHEREAS Owner/Operator desires to enter into a contract whereby Owner/Operator will be available to perform services for Customers located by Broker as an Owner/Operator, and not that of an employee of either Broker or Customers; and,

WHEREAS Broker also desires to enter into this Contract wherein it may refer to Owner/Operator Customers in need of services related to the pick-up and/or delivery of items;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants set forth below, and for other



good and valuable consideration, the parties agree as follows:

1. Services Covered.

(a) Owner/Operator agrees to pick up and deliver documents, items designated for pick up or delivery by Customers subject to the specifications as may be established or required by the Customer(s) for whom the pick up or delivery services are performed.

(b) IN PERFORMING FOR CUSTOMERS ANY SERVICES PURSUANT TO THIS CONTRACT, OWNER/OPERATOR UNDERSTANDS AND AGREES THAT HE/SHE/IT SHALL BE AND REMAIN AT ALL TIMES AN OWNER/OPERATOR IN FACT AND LAW. OWNER/OPERATOR IS NOT AN EMPLOYEE OF BROKER OR OF THE CUSTOMERS FOR WHICH OWNER/OPERATOR PROVIDES SERVICES.

2. Owner/Operator shall be responsible for the manner and means of securing the end result of the provision of services under this Contract and shall use its own independent judgment and discretion for the most effective and safe manner to conduct its pick-up and delivery services, including the acceptance or agreement to perform services, the order of pick-ups and deliveries, and Owner/Operator's hours of operation, taking into account the set specifications of customers for whom Owner/Operator has agreed to perform services. Broker will not instruct Owner/Operator as to how Owner/Operator's work will be performed. Broker shall exercise no direct control over Owner/ Operator, nor the method or means used by Owner/ Operator in the performance of such services, including the selection of routes, order of deliveries, and hours of operation. It is the sole responsibility of

Owner/Operator to complete all services Owner/ Operator agrees to perform and Owner/Operator shall be solely responsible for any failure(s) related to that performance. Owner/Operator agrees to bring to the attention of Broker any instance it believes this provision is not being adhered to. Abandonment of route, failure to either pick-up or deliver per a Customer's specifications, or other failures to provide the services Owner/Operator has agreed to provide may result in immediate termination of this Contract. Owner/Operator is free to decline offers of services from Broker and doing so will not be considered a breach of this agreement. If Owner/Operator fails to perform services as specified by the customer after agreeing to perform the services, such a failure will be considered a material breach of this agreement.

(a) Owner/Operator agrees to provide and maintain a vehicle for the performance of delivery services under this Contract and represents and warrants that it will always have adequate transportation to complete all services it agrees to perform.

(b) Owner/Operator is responsible for and shall pay all operation costs and expenses including, but not limited to, fuel, repairs, motor vehicle insurance, maps, hand truck, rope, office overhead, payroll expenses for Owner/Operator's own employees, if any, and all other equipment or supplies it deems necessary to perform the services covered by this Contract. The parties agree that Broker is not responsible for Owner/ Operator's maintenance or other operational expenses. Owner/Operator understands and agrees that Broker shall not reimburse Owner/Operator for any such operation costs or other expenses.

(c) As required by law, regulation or certain Customer requirements, Owner/Operator shall submit to any background check, drug test (random or otherwise), or other

related requirement at the reasonable request of the party so requiring it. Owner/ Operator agrees to pay for any and all costs associated with such law, regulation or requirements.

(d) Broker may from time to time notify Owner/ Operator of available pick-ups or deliveries. In the event Owner/Operator chooses to perform the available pick-ups or deliveries, Owner/Operator shall immediately notify Broker of Owner/Operator's acceptance of the available pick-up or delivery. If Owner/Operator does not notify Broker of acceptance within 15 minutes of the initial notification, Broker has the right to offer the pick-ups or deliveries to other Owner/Operators. Broker neither has, nor reserves, any right or power to exercise any direction, control, or determination over when Owner/Operator shall work. Owner/Operator shall be free to set its own work schedule provided the schedule satisfies the specifications of the customer or customers for whom Owner/Operator has agreed to perform pick-up or delivery services.

(e) If accepted, Owner/Operator agrees to perform all pick-ups and deliveries in a timely, and safe manner, and as directed by the specifications established by the customer for whom the pick-ups and deliveries are performed. Owner/Operator will be solely responsible for completion of the pick-up or delivery as provided for herein and will perform the pick-ups and deliveries in a manner dictated by Owner/Operator, following the specifications or requirements set forth by the Customer, law or regulation. In addition, depending upon the nature of the product being picked-up or delivered, Owner/Operator further agrees that upon acceptance of said pick-up or delivery, Owner/Operator will deliver or pick up the identified product. Owner/ Operator may designate a subcontractor or hire his/her/its own employee(s) to execute a delivery

or pick-up provided that the potential subcontractor or Owner/Operator's employee(s) (i) meet(s) the same standards, criteria and qualifications as Owner/ Operator which are provided in this Contract and (ii) is/are covered by either Occupational Accident Insurance or Workers' Compensation Policy (as applicable) paid for and provided by Owner/Operator.

(f) Owner/Operator agrees to provide its own communication device and all other equipment necessary to perform the services Owner/Operator agrees to perform according to Customer specifications. Owner/ Operator may, through a separately negotiated agreement, rent/lease a communications device, or certain other limited equipment from Broker if available at the sole discretion and cost of the Owner/Operator. Owner/Operator is not required to purchase or lease any equipment from Broker or Customers but may do so at Owner/Operator's sole discretion.

(g) Because of the security and safety concerns of various Customers due to the heightened level of security in the United States, Owner/Operator agrees to prominently wear an identification badge and uniform in accordance with any Customer requirements for rendering services. Owner/Operation will be responsible for the cost of the identification badge(s) and uniform(s).

(h) Owner/Operator agrees to faithfully and diligently devote its best efforts, skills and abilities to comply with the Customer's specifications. Owner/ Operator must determine the method and manner of best meeting a customer's specifications and is solely responsible for any failure to do so.

(i) Owner/Operator represents and warrants that Owner/Operator is not presently charged with a criminal

offense and that Owner/Operator has not been convicted of a felony within the past ten years.

(j) Owner/Operator understands that Owner/ Operator may be involved in the transportation and delivery of sensitive material, and, as a result, Owner/Operator agrees that if Owner/Operator or Owner/Operator's designee converts any material, this Contract shall be considered immediately terminated.

(k) Owner/Operator will provide on a regular basis all the information to Broker for payment of Owner/ Operator's business services hereunder. This information will be provided by invoices generated by Owner/Operator's business. The Broker's supplied manifests and delivery receipts must accompany the Owner/Operator's invoice. The Owner/Operator will be paid based on clear and complete invoices only.

(l) Owner/Operator agrees that, for any engagement or services performed under this Contract, Owner/ Operator will use delivery manifests in a form acceptable to Broker and Owner/Operator and that Broker's acceptance of the form of Owner/Operator's delivery manifests must be explicit.

(m) Owner/Operator will comply with all Customer pick-up and delivery specifications. Owner/Operator is responsible for ensuring it is aware of Customer requirements and instructions and is solely responsible for ensuring that it is able to meet all such requirements and instructions before accepting performance of services or engagements for the Customer. Such requirements and instructions may include, but are not limited to: requirements to obtain signatures for pick-ups or deliveries and instructions regarding the acceptability or unacceptability of leaving packages unattended. **BROKER WILL NOT**

PROVIDE OWNER/ OPERATOR ANY TRAINING. IT IS OWNER/ OPERATOR'S SOLE RESPONSIBILITY TO ENSURE THAT IT IS AWARE OF AND CAN SATISFY ALL CUSTOMER SPECIFICATIONS WHEN ACCEPTING WORK FOR THE CUSTOMER, if there is any question about a Customer's specifications, Owner/ Operator shall contact Customer or Broker.

(n) Owner/Operator agrees to provide all necessary documentation requested by Customer or Broker to support Customer invoicing. Owner/Operator understands that all such requested documentation must accurately reflect the date, time and description of items delivered or picked up. If required by the Customer, Owner/Operator will promptly call in all pick-ups and deliveries.

### 3. NO RIGHTS TO BENEFITS.

(a) OWNER/OPERATOR UNDERSTANDS AND AGREES, DUE TO ITS STATUS AS AN OWNER/ OPERATOR ENGAGED IN ITS OWN INDEPENDENTLY CONTROLLED AND OPERATED BUSINESS, THAT OWNER/OPERATOR IS NOT ELIGIBLE FOR, NOR SHALL PARTICIPATE IN, ANY BROKER PENSION PLAN, HEALTH OR DISABILITY PLAN, OR OTHER INSURANCE OR FRINGE BENEFIT PLAN OF ANY KIND.

(b) AS AN INDEPENDENTLY CONTRACTING BUSINESS ENTITY, OWNER/OPERATOR IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS UNEMPLOYMENT COMPENSATION COVERAGE IS PROVIDED BY THE OWNER/OPERATOR OR SOME OTHER ENTITY, AND OWNER/OPERATOR IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON MONEYS

PAID PURSUANT TO ITS CONTRACTUAL  
RELATIONSHIP WITH BROKER.

4. Compensation.

(a) Owner/Operator shall not be compensated on an hourly or salary basis but shall be paid based on a separately negotiated rate, either per delivery, or per route. Payment shall be made to Owner/Operator's business entity, not to Owner/Operator as an individual except where Owner/Operator is operating as a sole proprietor under Owner/Operator's individual name. Broker will collect amounts due from Customers and pay Owner/Operator any proportional amount due based on billings actually collected in accordance with the settlement separately negotiated between Broker and Owner/Operator. These payments will be as negotiated and indicated in the separate negotiated rate agreement. Owner/Operator acknowledges that in order to be compensated for pickups and deliveries, all required documents, including but not limited to, manifests shall be promptly completed and turned in to Broker's office as negotiated.

(b) Broker agrees to provide timely invoices to Customers for the services rendered by Owner/ Operator. Provided, however, that Broker shall have sole and exclusive discretion and judgment regarding the form and content of its billings. Broker further agrees to use its best efforts in collecting billings from Customers and agrees to pay Owner/Operator any owed proportional share of the billing as agreed between the parties as soon as practicable after receipt of payment but in no event more than fourteen (14) days after receipt.

(c) As an independently contracting owner/operator, Owner/Operator is solely responsible for filing and paying

all necessary federal, state and local taxes and returns, including, but not limited to, the timely payment of estimated income taxes and self-employment taxes. In particular, Owner/Operator will not be treated as an employee with respect to any services for federal, state or local tax purposes, and agrees, represents and warrants that it is an Owner/Operator engaged in an independently established trade, occupation or business and is responsible for all of its Owner/Operator and business taxes and agrees to pay them to the respective governmental entities and to hold harmless, defend and indemnify Broker therefrom. Owner/Operator is required to and will submit a completed IRS Form W-9 before commencement of its business services and Broker or its designated agent will provide an IRS Form 1099 at the end of each tax year.

(d) If Owner/Operator collects Cash On Delivery (COD) either in moneys or check and fails to turn in moneys or check to Broker, Broker shall have the right to recover from the Owner/Operator a sum equal to Broker's proportional share of the COD payment. In the case of such a failure, Owner/Operator agrees to pay Broker for Broker's proportional share of the COD payment and any expense or indebtedness related to the recovery of such funds. Said failure to promptly turn in any funds collected is also grounds for termination of this Contract.

(e) If Owner/Operator disputes its settlement, or any billing to the customers for which Owner/Operator has performed services, Owner/Operator must bring its documented records to the attention of Broker within seven (7) days of the disputed settlement so that the billing can be corrected to the Customer and Owner/Operator's settlement can be corrected to reflect any change. The absence of notification from Owner/Operator to Broker of any dispute as described, and within the time frame indicated



above will constitute Owner/Operator's acceptance of the settlement as complete, correct, and accurate.

(f) Owner/Operator understands and agrees that it has a business-to-business relationship with Broker and recognizes that it may incur expenses or indebtedness to Broker pursuant to that relationship. Accordingly, Owner/Operator agrees to pay Broker for any such expenses or indebtedness, including any expense or indebtedness related to Owner/Operator's failure to perform services it has agreed to perform under this Contract, incurred in the course of its business-to-business dealings with Broker.

#### 5. Insurance.

(a) Vehicle Insurance. Owner/Operator shall maintain, at its sole expense, commercial auto insurance. Owner/ Operator understands that allowing this policy to lapse shall be considered immediate default of this Contract and cause for termination of this Contract. Such policy shall meet, at least: (i) the minimum coverage limits required by Owner/Operator's own business practices, (ii) the requirements of any customer for whom Owner/Operator performs services, or (iii) a policy with a limit of not less than a \$300,000 single coverage limit, whichever minimum requirement is greater. Owner/Operator agrees to notify Broker immediately if notice of cancellation is received or non-renewal takes place. An up-to-date policy face page must be on file with Broker at all times. Broker is to be listed as an additional insured on the policy.

(b) WORKERS' COMPENSATION INSURANCE. OWNER/OPERATOR SHALL NOT BE COVERED BY BROKER'S WORKERS' COMPENSATION INSURANCE BECAUSE OWNER/OPERATOR IS

ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS AND IS NOT AN EMPLOYEE OF BROKER. OWNER/OPERATOR ASSUMES THE RESPONSIBILITIES OF AN EMPLOYER FOR THE PERFORMANCE OF THE SERVICE PERFORMED PURSUANT TO THIS CONTRACT AND WILL PROVIDE WORKERS' COMPENSATION INSURANCE COVERAGE TO THE OWNER/OPERATOR'S EMPLOYEES, IF ANY.

(c) Owner/Operator also agrees to obtain and maintain at all times either an Occupational Accident Insurance Policy or Workers' Compensation Insurance for Owner/Operator and all of its subcontractors or employees authorized to perform work under this Contract. Said policy of Insurance shall also be on file with Broker or Broker's designee at all times. Owner/ Operator will defend, indemnify and hold harmless Broker from any workers' compensation claim or any other claim arising out of an accident or injury while Owner/Operator, any of its subcontractors, or employees, is/are performing transportation services under this Contract.

(d) Unemployment Insurance. Owner/Operator acknowledges it is engaged in an independent business providing transportation services separate and apart from the business of Broker and that Owner/Operator does not perform any function as a broker of transportation services. Owner/Operator agrees that if it, at any time during the operation of this Contract begins performing the functions of a broker of pick-up or delivery services that this Contract will terminate and will need to be renegotiated. In the event Owner/Operator begins performing services relating to brokering pick-ups and/or deliveries, Owner/ Operator agrees to provide notice to Broker of

Owner/ Operator's intent to do so in advance of performing such brokering services.

(e) OWNER/OPERATOR ACKNOWLEDGES IT IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE, AND THAT TO THE EXTENT OWNER/OPERATOR WANTS TO BE COVERED FOR THE SAME, OWNER/OPERATOR WILL PROCURE ITS OWN INSURANCE OF THAT TYPE.

(f) Owner/Operator will defend, indemnify and hold harmless Broker from any unemployment insurance claim of either it or any of its drivers or others that may be employed by Owner/Operator.

6. Defense and Indemnity. Owner/Operator agrees to defend, indemnify, and hold harmless Broker from any and all claims, demands, damages, suits, losses, liabilities and causes of action arising directly or indirectly from, as a result of, or in connection with, the actions of Owner/Operator and/or Owner/Operator's employees and subcontractors arising from the performance of Owner/Operator's services under this Contract, including, but not limited to: abandonment of route, damage to property, missing property and personal injury or death to any person, including Owner/Operator and/or Owner/Operator's employees and subcontractors. Owner/Operator further agrees to defend, indemnify and hold harmless Broker from any loss, cost or expense in the event of any loss, damage or destruction of the items or personal property that Owner/Operator acquires or takes possession of in, or for, the performance of this Contract. Broker shall have the right independently to take whatever action it may deem necessary, including hiring counsel of its choice, in its sole discretion, to protect or defend itself against any threatened action subject to defense and indemnification.

Owner/Operator's obligations hereunder shall include advancing the cost of defense as well as the payment of any Judgment rendered against Broker.

7. Owner/Operator Business.

(a) It is expressly agreed that Owner/Operator is an independent contractor and owner/operator. Owner/ Operator will not be considered an employee of Broker for any purpose whatsoever. Broker neither has nor reserves any right of power to exercise any direction, control or determination over the manner, means or methods of Owner/Operator's business activities and objectives in operating its business.

(b) Owner/Operator agrees not to hold itself out as an employee or partner of Broker, nor as having authority to represent Broker, but, in relation to Broker, only as an Owner/Operator for the purpose of performing services for Customers contacted and identified by Broker under this Contract. Owner/ Operator has no power or authority to incur any debt, obligation or liability on behalf of Broker or Customers.

(c) As Owner/Operator is engaged in an independently established trade, occupation or business, Broker neither has nor reserves the right to restrict Owner/Operator from being concurrently or subsequently engaged in providing other delivery services or engaging in any other occupation or business, subject to the terms of confidentiality established herein. Further, Owner/Operator agrees and understands that it may, subject to the terms of confidentiality established herein, work with, or for, any other entity, including entities considered to be direct competitors of Broker, as long as such other work does not prohibit Owner/Operator from satisfactorily completing all

work Owner/Operator chooses to accept under this Contract. Owner/Operator understands and agrees that it can refuse services or engagements offered by Broker for any reason Owner/Operator deems sufficient, including work for other entities related to pick-ups and deliveries, and further understands and acknowledges that services or engagements offered by Broker may be intermittent and/or irregular, depending on demand.

(d) Owner/Operator shall at all times comply with any and all laws, ordinances, statutes, executive orders and regulations, federal, state, county and municipal, insofar as applicable to Owner/Operator's performance of services under this Contract.

(e) Owner/Operator expressly represents and warrants that it has all city, county and/or state business licenses, permits and accounts required to operate an independently established trade, occupation or business.

(f) Owner/Operator further expressly represents and warrants that it has all city, county and/or state motor vehicle carrier permit or other transportation licensing required, if any, to operate as a courier or trucker in the cities, counties and states where it operates.

8. Pricing. It is understood that Broker has the sole and exclusive right to set or change the delivery and pick-up charges and prices with Customers from time-to-time, Owner/Operator shall separately negotiate the compensation Owner/Operator will receive for performing pick-up and deliveries under this Contract.

9. Confidentiality. Except upon order of government authority having jurisdiction, Owner/Operator agrees that it shall not disclose to third parties any of Broker's proprietary information or trade secrets learned, nor use, either directly or indirectly, any of this information for

proprietary gain. Owner/Operator understands that for 1099 reporting purposes and otherwise, Broker will have access to confidential information of Owner/Operator. Owner/Operator consents to the disclosure of this information to any governmental or subpoenaing party.

10. Confidential/Sensitive Information. During the course of the business relationship between Owner/ Operator and Broker, Owner/Operator may learn confidential information or trade secrets of Broker or Customer. Owner/Operator agrees not to use any of such information for any improper purpose, including but not limited to, soliciting Customers and agrees to keep all such information confidential.

11. Term and Termination Provisions. The term of this agreement shall commence on the date of execution of this document by Broker and Owner/Operator. This Contract is for an initial term of 30 days. At the end of the initial term, this Contract shall automatically renew on a month-to-month basis for a maximum of twelve (12) months from the date of execution by all parties hereto, unless either party gives the other at least thirty (30) days advanced written notice of intent of non-renewal prior to the 12 month period expiring, as indicated below. This Contract may be indicated for non-renewal without cause at any time by either party giving the other party at least thirty (30) calendar days written notice of the desire to keep this Contract from further automatic renewal. In the case of written notice of the intent to end the automatic renewal of this Contract in the designated twelve month period, the Contract will terminate at the conclusion of the 30 day term following the written notice of non-renewal and will not renew. Either party may terminate this Contract immediately with cause upon default or some other material breach. The provisions of paragraphs 9, 10, 13, and 14

shall survive the termination or conclusion of this Contract.

12. Right to Rescind Contract. This Contract may be rescinded by either party, without penalty, within 72 hours after execution hereof. Such notice of rescission shall be in writing and sent by Certified Mail, Return Receipt Requested.

13. Arbitration. In the event of any dispute, claim, question, or disagreement arising from or relating to this Contract or the breach thereof, or arising from any arrangement under this Contract between Owner/ Operator and Broker or Customer; the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, the parties shall consult and negotiate with one another in good faith, in an attempt to reach a just and equitable solution, satisfactory to both parties. If informal resolution of the dispute, claim, question or disagreement cannot be reached, disputes that are within the jurisdictional maximum for small claims will be settled in the Nevada Small Claims Court. With regard to other disputes, Broker and Owner/Operator mutually agree to resolve any justiciable disputes between them, specifically including any claims related to payments due and the classification of Owner/Operator as a Contractor, that cannot be resolved by the Parties, exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration agreement shall apply to any and all claims arising out of or relating to this Contract, the Owner/Operator's provision of services to Customers, the payments received by Owner/Operator for providing services to Customers, the termination of this Contract, and all other aspects of the Owner/Operator's relationship with Broker, past or present, whether arising under federal, state or local statutory and/or common law.

If either party wishes to initiate arbitration, the initiating party must notify the other party in writing via certified mail, return receipt requested, within the applicable statute of limitations period. This demand for arbitration must include (1) the name and address of the party seeking arbitration, (2) a statement of the legal and factual basis of the claim, and (3) a description of the remedy sought. Any demand for arbitration by Owner/Operator must be delivered to 4022 S 20th St., Phoenix, Arizona 85040.

(a) Class Action Waiver. Broker and Owner/ Operator mutually agree that by entering into this Agreement, both waive their right to have any dispute brought, heard or arbitrated as a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action. **All claims covered by this arbitration agreement will be pursued in an individual claimant proceeding and not as part of a representative, collective, or class action.** Notwithstanding any other clause contained in this Agreement, any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. This Agreement does not prevent the filing of charges with a government agency like the Department of Labor or participation in any investigation or proceeding conducted by a government agency.

(b) Any arbitration shall be governed by the American Arbitration Association Commercial Arbitration Procedures, except as follows:

(1) Arbitration will be conducted by a mutually agreeable arbitration service or the American Arbitration As-



sociation (AAA) if no other service is agreed upon. The arbitrator shall be selected from a list of no less than seven names through alternative strikes.

(2) If the parties cannot otherwise agree on a location for the arbitration, the arbitration shall take place in Clark County, Nevada.

(3) Unless the parties agree or applicable law provides otherwise, as determined by the Arbitrator, Broker shall pay all of the Arbitrator's fees and costs.

(4) The arbitrator may issue orders allowing the parties to conduct discovery sufficient to allow each party to prepare that party's claims and/or defenses, taking into consideration that arbitration is designed to be a speedy and efficient method for resolving disputes.

(5) The arbitrator may award all remedies to which a party is entitled under applicable law and which would otherwise be available in a court of law, but shall not be empowered to award any remedies that would not have been available in a court of law for the claims presented in arbitration. The arbitrator shall apply the state or federal substantive law, or both, as is applicable.

(6) The arbitrator may hear motions to dismiss and/or motions for summary judgment, and will apply the standards of the Federal Rules of Civil Procedure governing such motions.

(7) Any decision or award by the arbitrator shall be in writing.

(c) Nothing herein is intended to or shall preclude Broker or Owner/Operator from filing a complaint and/or charge with any appropriate federal, state, or local government agency and/or cooperating with said agency in its investigation. Nonetheless, Broker and Owner/Operator

acknowledge that to the fullest extent permitted by law they shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge, without regard as to who brought said complaint or charge.

(d) Either Party may bring an action in a court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, or to review an arbitration award. In an action to review an award, the standard of review applied will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury, without any special deference to the arbitrator.

(e) Owner/Operator and Broker expressly waive trial by jury for all claims covered by this Agreement. All other rights, remedies, exhaustion requirements, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration. Owner/Operator and Broker agree that arbitration as explained herein provides a fair and adequate mechanism for enforcing the Parties' statutory rights.

(f) Owner/Operator agrees and acknowledges that entering into this arbitration agreement does not change its status as an independent contractor in fact and in law, and that Owner/Operator is not an employee of Broker or its Customers notwithstanding this arbitration agreement.

14. Governing Law. This Contract and all rights and obligations of the parties shall be construed in accordance with the laws of Nevada, where Broker is headquartered, and any action shall be commenced in that jurisdiction. Accordingly, unless the parties agree otherwise, any claims or disputes arising from or in connection with this agreement shall be brought exclusively in Clark County,

Nevada. Broker's rights shall inure to the benefit of its successors and assigns.

15. Entire Agreement. This Contract constitutes the entire agreement between the parties and supersedes all previous agreements between the parties. Any additions or changes shall be in writing signed by an authorized representative of Broker and Owner/ Operator. Broker shall have the right to assign its rights and delegate its duties under this Contract.

16. Signature. This Contract may be signed and is enforceable by electronic signature and facsimile.

IN WITNESS WHEREOF, the parties have executed this Contract effective on the date first indicated above.

<u>OWNER/OPERATOR</u>	<u>INTELLISERVE LLC</u>
Signature: <u>/s/ Wendy Smith</u>	Signature: <u>/s/ Keith Spizzirri</u>
Date: 9/21/2018	Date: 9/21/2018
Printed Name: Wendy Smith	Printed Name: Keith Spizzirri
Address: 10535 W CHICKSAW ST TOLLESON AZ 85353	Address: 4022 S 20th St., Phoenix, Arizona 85040

FOR COLORADO  
Subscribed and sworn  
to before me this \_\_ day of  
\_\_\_\_\_, 20 \_\_.

\_\_\_\_\_  
Notary Public, State of Colorado

INDEPENDENT CONTRACTOR  
OWNER/OPERATOR AGREEMENT

This Independent Contractor Owner/Operator Agreement (the “Contract”) is made between Intelliserve LLC, whose principal place of business is located at 4022 S 20th St., Phoenix, Arizona 85040 and KENNETH TURNER whose principal place of business is located at 1426 E DARREL RD PHOENIX AZ 85042 (hereinafter referred to as “Owner/ Operator”) and is effective April 15, 2020.

WHEREAS Broker is a for-profit business which Brokers delivery services and which operates as a Broker of delivery services;

WHEREAS Owner/Operator is engaged in an independently established trade, occupation or business which is authorized to provide delivery and/or transportation services in the states in which it operates;

WHEREAS Customers are third parties who use brokers or Broker to arrange transportation services and desire to be connected with drivers who can provide services related to the Customer’s transportation needs;

WHEREAS Owner/Operator desires to enter into a contract whereby Owner/Operator will be available to perform services for Customers located by Broker as an Owner/Operator, and not that of an employee of either Broker or Customers; and,

WHEREAS Broker also desires to enter into this Contract wherein it may refer to Owner/Operator Customers in need of services related to the pick-up and/or delivery of items;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants set forth below, and for

other good and valuable consideration, the parties agree as follows:

1. Services Covered.

(a) Owner/Operator agrees to pick up and deliver documents, items designated for pick up or delivery by Customers subject to the specifications as may be established or required by the Customer(s) for whom the pick up or delivery services are performed.

(b) IN PERFORMING FOR CUSTOMERS ANY SERVICES PURSUANT TO THIS CONTRACT, OWNER/OPERATOR UNDERSTANDS AND AGREES THAT HE/SHE/IT SHALL BE AND REMAIN AT ALL TIMES AN OWNER/OPERATOR IN FACT AND LAW. OWNER/OPERATOR IS NOT AN EMPLOYEE OF BROKER OR OF THE CUSTOMERS FOR WHICH OWNER/OPERATOR PROVIDES SERVICES.

2. Owner/Operator shall be responsible for the manner and means of securing the end result of the provision of services under this Contract and shall use its own independent judgment and discretion for the most effective and safe manner to conduct its pick-up and delivery services, including the acceptance or agreement to perform services, the order of pick-ups and deliveries, and Owner/Operator's hours of operation, taking into account the set specifications of customers for whom Owner/Operator has agreed to perform services. Broker will not instruct Owner/ Operator as to how Owner/Operator's work will be performed. Broker shall exercise no direct control over Owner/Operator, nor the method or means used by Owner/Operator in the performance of such services, including the selection of routes, order of deliveries, and hours of operation. It is the sole responsibility of

Owner/Operator to complete all services Owner/ Operator agrees to perform and Owner/Operator shall be solely responsible for any failure(s) related to that performance. Owner/Operator agrees to bring to the attention of Broker any instance it believes this provision is not being adhered to. Abandonment of route, failure to either pick-up or deliver per a Customer's specifications, or other failures to provide the services Owner/Operator has agreed to provide may result in immediate termination of this Contract. Owner/Operator is free to decline offers of services from Broker and doing so will not be considered a breach of this agreement. If Owner/Operator fails to perform services as specified by the customer after agreeing to perform the services, such a failure will be considered a material breach of this agreement.

(a) Owner/Operator agrees to provide and maintain a vehicle for the performance of delivery services under this Contract and represents and warrants that it will always have adequate transportation to complete all services it agrees to perform.

(b) Owner/Operator is responsible for and shall pay all operation costs and expenses including, but not limited to, fuel, repairs, motor vehicle insurance, maps, hand truck, rope, office overhead, payroll expenses for Owner/Operator's own employees, if any, and all other equipment or supplies it deems necessary to perform the services covered by this Contract. The parties agree that Broker is not responsible for Owner/ Operator's maintenance or other operational expenses. Owner/Operator understands and agrees that Broker shall not reimburse Owner/Operator for any such operation costs or other expenses.

(c) As required by law, regulation or certain Customer requirements, Owner/Operator shall submit to any background check, drug test (random or otherwise), or other

related requirement at the reasonable request of the party so requiring it. Owner/Operator agrees to pay for any and all costs associated with such law, regulation or requirements.

(d) Broker may from time to time notify Owner/ Operator of available pick-ups or deliveries. In the event Owner/Operator chooses to perform the available pick-ups or deliveries, Owner/Operator shall immediately notify Broker of Owner/Operator's acceptance of the available pick-up or delivery. If Owner/Operator does not notify Broker of acceptance within 15 minutes of the initial notification, Broker has the right to offer the pick-ups or deliveries to other Owner/Operators. Broker neither has, nor reserves, any right or power to exercise any direction, control, or determination over when Owner/Operator shall work. Owner/Operator shall be free to set its own work schedule provided the schedule satisfies the specifications of the customer or customers for whom Owner/Operator has agreed to perform pick-up or delivery services.

(e) If accepted, Owner/Operator agrees to perform all pick-ups and deliveries in a timely, and safe manner, and as directed by the specifications established by the customer for whom the pick-ups and deliveries are performed. Owner/Operator will be solely responsible for completion of the pick-up or delivery as provided for herein and will perform the pick-ups and deliveries in a manner dictated by Owner/Operator, following the specifications or requirements set forth by the Customer, law or regulation. In addition, depending upon the nature of the product being picked-up or delivered, Owner/Operator further agrees that upon acceptance of said pick-up or delivery, Owner/Operator will deliver or pick up the identi-

fied product. Owner/Operator may designate a subcontractor or hire his/her/its own employee(s) to execute a delivery or pick-up provided that the potential subcontractor or Owner/Operator's employee(s) (i) meet(s) the same standards, criteria and qualifications as Owner/Operator which are provided in this Contract and (ii) is/are covered by either Occupational Accident Insurance or Workers' Compensation Policy (as applicable) paid for and provided by Owner/Operator.

(f) Owner/Operator agrees to provide its own communication device and all other equipment necessary to perform the services Owner/Operator agrees to perform according to Customer specifications. Owner/ Operator may, through a separately negotiated agreement, rent/lease a communications device, or certain other limited equipment from Broker if available at the sole discretion and cost of the Owner/Operator. Owner/Operator is not required to purchase or lease any equipment from Broker or Customers but may do so at Owner/Operator's sole discretion.

(g) Because of the security and safety concerns of various Customers due to the heightened level of security in the United States, Owner/Operator agrees to prominently wear an identification badge and uniform in accordance with any Customer requirements for rendering services. Owner/Operation will be responsible for the cost of the identification badge(s) and uniform(s).

(h) Owner/Operator agrees to faithfully and diligently devote its best efforts, skills and abilities to comply with the Customer's specifications. Owner/Operator must determine the method and manner of best meeting a customer's specifications and is solely responsible for any failure to do so.



(i) Owner/Operator represents and warrants that Owner/Operator is not presently charged with a criminal offense and that Owner/Operator has not been convicted of a felony within the past ten years.

(j) Owner/Operator understands that Owner/ Operator may be involved in the transportation and delivery of sensitive material, and, as a result, Owner/Operator agrees that if Owner/Operator or Owner/Operator's designee converts any material, this Contract shall be considered immediately terminated.

(k) Owner/Operator will provide on a regular basis all the information to Broker for payment of Owner/ Operator's business services hereunder. This information will be provided by invoices generated by Owner/Operator's business. The Broker's supplied manifests and delivery receipts must accompany the Owner/Operator's invoice. The Owner/Operator will be paid based on clear and complete invoices only.

(l) Owner/Operator agrees that, for any engagement or services performed under this Contract, Owner/ Operator will use delivery manifests in a form acceptable to Broker and Owner/Operator and that Broker's acceptance of the form of Owner/Operator's delivery manifests must be explicit.

(m) Owner/Operator will comply with all Customer pick-up and delivery specifications. Owner/Operator is responsible for ensuring it is aware of Customer requirements and instructions and is solely responsible for ensuring that it is able to meet all such requirements and instructions before accepting performance of services or engagements for the Customer. Such requirements and instructions may include, but are not limited to: requirements to obtain signatures for pick-ups or deliveries and

instructions regarding the acceptability or unacceptability of leaving packages unattended. BROKER WILL NOT PROVIDE OWNER/OPERATOR ANY TRAINING. IT IS OWNER/OPERATOR'S SOLE RESPONSIBILITY TO ENSURE THAT IT IS AWARE OF AND CAN SATISFY ALL CUSTOMER SPECIFICATIONS WHEN ACCEPTING WORK FOR THE CUSTOMER, if there is any question about a Customer's specifications, Owner/Operator shall contact Customer or Broker.

(n) Owner/Operator agrees to provide all necessary documentation requested by Customer or Broker to support Customer invoicing. Owner/Operator understands that all such requested documentation must accurately reflect the date, time and description of items delivered or picked up. If required by the Customer, Owner/Operator will promptly call in all pick-ups and deliveries.

### 3. NO RIGHTS TO BENEFITS.

(a) OWNER/OPERATOR UNDERSTANDS AND AGREES, DUE TO ITS STATUS AS AN OWNER/OPERATOR ENGAGED IN ITS OWN INDEPENDENTLY CONTROLLED AND OPERATED BUSINESS, THAT OWNER/OPERATOR IS NOT ELIGIBLE FOR, NOR SHALL PARTICIPATE IN, ANY BROKER PENSION PLAN, HEALTH OR DISABILITY PLAN, OR OTHER INSURANCE OR FRINGE BENEFIT PLAN OF ANY KIND.

(b) AS AN INDEPENDENTLY CONTRACTING BUSINESS ENTITY, OWNER/OPERATOR IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS UNEMPLOYMENT COMPENSATION COVERAGE IS PROVIDED BY THE OWNER/OPERATOR OR SOME OTHER ENTITY,

AND OWNER/OPERATOR IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON MONEYS PAID PURSUANT TO ITS CONTRACTUAL RELATIONSHIP WITH BROKER.

4. Compensation.

(a) Owner/Operator shall not be compensated on an hourly or salary basis but shall be paid based on a separately negotiated rate, either per delivery, or per route. Payment shall be made to Owner/Operator's business entity, not to Owner/Operator as an individual except where Owner/Operator is operating as a sole proprietor under Owner/Operator's individual name. Broker will collect amounts due from Customers and pay Owner/Operator any proportional amount due based on billings actually collected in accordance with the settlement separately negotiated between Broker and Owner/Operator. These payments will be as negotiated and indicated in the separate negotiated rate agreement. Owner/Operator acknowledges that in order to be compensated for pick-ups and deliveries, all required documents, including but not limited to, manifests shall be promptly completed and turned in to Broker's office as negotiated.

(b) Broker agrees to provide timely invoices to Customers for the services rendered by Owner/ Operator. Provided, however, that Broker shall have sole and exclusive discretion and judgment regarding the form and content of its billings. Broker further agrees to use its best efforts in collecting billings from Customers and agrees to pay Owner/Operator any owed proportional share of the billing as agreed between the parties as soon as practicable after receipt of payment but in no event more than fourteen (14) days after receipt.

(c) As an independently contracting owner/operator, Owner/Operator is solely responsible for filing and paying all necessary federal, state and local taxes and returns, including, but not limited to, the timely payment of estimated income taxes and self-employment taxes. In particular, Owner/Operator will not be treated as an employee with respect to any services for federal, state or local tax purposes, and agrees, represents and warrants that it is an Owner/Operator engaged in an independently established trade, occupation or business and is responsible for all of its Owner/Operator and business taxes and agrees to pay them to the respective governmental entities and to hold harmless, defend and indemnify Broker there from. Owner/Operator is required to and will submit a completed IRS Form W-9 before commencement of its business services and Broker or its designated agent will provide an IRS Form 1099 at the end of each tax year.

(d) If Owner/Operator collects Cash On Delivery (COD) either in moneys or check and fails to turn in moneys or check to Broker, Broker shall have the right to recover from the Owner/Operator a sum equal to Broker's proportional share of the COD payment. In the case of such a failure, Owner/Operator agrees to pay Broker for Broker's proportional share of the COD payment and any expense or indebtedness related to the recovery of such funds. Said failure to promptly turn in any funds collected is also grounds for termination of this Contract.

(e) If Owner/Operator disputes its settlement, or any billing to the customers for which Owner/Operator has performed services, Owner/Operator must bring its documented records to the attention of Broker within seven (7) days of the disputed settlement so that the billing can be corrected to the Customer and Owner/Operator's settlement can be corrected to reflect any change. The absence

of notification from Owner/Operator to Broker of any dispute as described, and within the time frame indicated above will constitute Owner/Operator's acceptance of the settlement as complete, correct, and accurate.

(f) Owner/Operator understands and agrees that it has a business-to-business relationship with Broker and recognizes that it may incur expenses or indebtedness to Broker pursuant to that relationship. Accordingly, Owner/Operator agrees to pay Broker for any such expenses or indebtedness, including any expense or indebtedness related to Owner/Operator's failure to perform services it has agreed to perform under this Contract, incurred in the course of its business-to-business dealings with Broker.

#### 5. Insurance.

(a) Vehicle Insurance. Owner/Operator shall maintain, at its sole expense, commercial auto insurance. Owner/Operator understands that allowing this policy to lapse shall be considered immediate default of this Contract and cause for termination of this Contract. Such policy shall meet, at least: (i) the minimum coverage limits required by Owner/Operator's own business practices, (ii) the requirements of any customer for whom Owner/Operator performs services, or (iii) a policy with a limit of not less than a \$300,000 single coverage limit, whichever minimum requirement is greater. Owner/Operator agrees to notify Broker immediately if notice of cancellation is received or non-renewal takes place. An up-to-date policy face page must be on file with Broker at all times. Broker is to be listed as an additional insured on the policy.

(b) WORKERS' COMPENSATION INSURANCE. OWNER/OPERATOR SHALL NOT BE COVERED BY BROKER'S WORKERS' COMPENSATION

INSURANCE BECAUSE OWNER/OPERATOR IS ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS AND IS NOT AN EMPLOYEE OF BROKER. OWNER/OPERATOR ASSUMES THE RESPONSIBILITIES OF AN EMPLOYER FOR THE PERFORMANCE OF THE SERVICE PERFORMED PURSUANT TO THIS CONTRACT AND WILL PROVIDE WORKERS' COMPENSATION INSURANCE COVERAGE TO THE OWNER/OPERATOR'S EMPLOYEES, IF ANY.

(c) Owner/Operator also agrees to obtain and maintain at all times either an Occupational Accident Insurance Policy or Workers' Compensation Insurance for Owner/Operator and all of its subcontractors or employees authorized to perform work under this Contract. Said policy of Insurance shall also be on file with Broker or Broker's designee at all times. Owner/Operator will defend, indemnify and hold harmless Broker from any workers' compensation claim or any other claim arising out of an accident or injury while Owner/Operator, any of its subcontractors, or employees, is/are performing transportation services under this Contract.

(d) Unemployment Insurance. Owner/Operator acknowledges it is engaged in an independent business providing transportation services separate and apart from the business of Broker and that Owner/Operator does not perform any function as a broker of transportation services. Owner/Operator agrees that if it, at any time during the operation of this Contract begins performing the functions of a broker of pick-up or delivery services that this Contract will terminate and will need to be renegotiated. In the event Owner/Operator begins performing services relating to brokering pick-ups and/or deliveries,

Owner/Operator agrees to provide notice to Broker of Owner/Operator's intent to do so in advance of performing such brokering services.

(e) OWNER/OPERATOR ACKNOWLEDGES IT IS NOT ENTITLED TO UNEMPLOYMENT INSURANCE, AND THAT TO THE EXTENT OWNER/OPERATOR WANTS TO BE COVERED FOR THE SAME, OWNER/OPERATOR WILL PROCURE ITS OWN INSURANCE OF THAT TYPE.

(f) Owner/Operator will defend, indemnify and hold harmless Broker from any unemployment insurance claim of either it or any of its drivers or others that may be employed by Owner/Operator.

6. Defense and Indemnity. Owner/Operator agrees to defend, indemnify, and hold harmless Broker from any and all claims, demands, damages, suits, losses, liabilities and causes of action arising directly or indirectly from, as a result of, or in connection with, the actions of Owner/Operator and/or Owner/Operator's employees and subcontractors arising from the performance of Owner/Operator's services under this Contract, including, but not limited to: abandonment of route, damage to property, missing property and personal injury or death to any person, including Owner/Operator and/or Owner/Operator's employees and subcontractors. Owner/Operator further agrees to defend, indemnify and hold harmless Broker from any loss, cost or expense in the event of any loss, damage or destruction of the items or personal property that Owner/Operator acquires or takes possession of in, or for, the performance of this Contract. Broker shall have the right independently to take whatever action it may deem necessary, including hiring counsel of its choice, in its sole discretion, to protect or defend itself

against any threatened action subject to defense and indemnification. Owner/Operator's obligations hereunder shall include advancing the cost of defense as well as the payment of any Judgment rendered against Broker.

7. Owner/Operator Business.

(a) It is expressly agreed that Owner/Operator is an independent contractor and owner/operator. Owner/ Operator will not be considered an employee of Broker for any purpose whatsoever. Broker neither has nor reserves any right of power to exercise any direction, control or determination over the manner, means or methods of Owner/Operator's business activities and objectives in operating its business.

(b) Owner/Operator agrees not to hold itself out as an employee or partner of Broker, nor as having authority to represent Broker, but, in relation to Broker, only as an Owner/Operator for the purpose of performing services for Customers contacted and identified by Broker under this Contract. Owner/ Operator has no power or authority to incur any debt, obligation or liability on behalf of Broker or Customers.

(c) As Owner/Operator is engaged in an independently established trade, occupation or business, Broker neither has nor reserves the right to restrict Owner/Operator from being concurrently or subsequently engaged in providing other delivery services or engaging in any other occupation or business, subject to the terms of confidentiality established herein. Further, Owner/Operator agrees and understands that it may, subject to the terms of confidentiality established herein, work with, or for, any other entity, including entities considered to be direct competitors of Broker, as long as such other work does not prohibit Owner/Operator from satisfactorily completing all work



Owner/Operator chooses to accept under this Contract. Owner/Operator understands and agrees that it can refuse services or engagements offered by Broker for any reason Owner/Operator deems sufficient, including work for other entities related to pick-ups and deliveries, and further understands and acknowledges that services or engagements offered by Broker may be intermittent and/or irregular, depending on demand.

(d) Owner/Operator shall at all times comply with any and all laws, ordinances, statutes, executive orders and regulations, federal, state, county and municipal, insofar as applicable to Owner/Operator's performance of services under this Contract.

(e) Owner/Operator expressly represents and warrants that it has all city, county and/or state business licenses, permits and accounts required to operate an independently established trade, occupation or business.

(f) Owner/Operator further expressly represents and warrants that it has all city, county and/or state motor vehicle carrier permit or other transportation licensing required, if any, to operate as a courier or trucker in the cities, counties and states where it operates.

8. Pricing. It is understood that Broker has the sole and exclusive right to set or change the delivery and pick-up charges and prices with Customers from time-to-time. Owner/Operator shall separately negotiate the compensation Owner/Operator will receive for performing pick-up and deliveries under this Contract.

9. Confidentiality. Except upon order of government authority having jurisdiction, Owner/Operator agrees that it shall not disclose to third parties any of Broker's proprietary information or trade secrets learned, nor use, either directly or indirectly, any of this information for

proprietary gain. Owner/Operator understands that for 1099 reporting purposes and otherwise, Broker will have access to confidential information of Owner/Operator. Owner/Operator consents to the disclosure of this information to any governmental or subpoenaing party.

10. Confidential/Sensitive Information. During the course of the business relationship between Owner/ Operator and Broker, Owner/Operator may learn confidential information or trade secrets of Broker or Customer. Owner/Operator agrees not to use any of such information for any improper purpose, including but not limited to, soliciting Customers and agrees to keep all such information confidential.

11. Term and Termination Provisions. The term of this agreement shall commence on the date of execution of this document by Broker and Owner/Operator. This Contract is for an initial term of 30 days. At the end of the initial term, this Contract shall automatically renew on a month-to-month basis for a maximum of twelve (12) months from the date of execution by all parties hereto, unless either party gives the other at least thirty (30) days advanced written notice of intent of non-renewal prior to the 12 month period expiring, as indicated below. This Contract may be indicated for non-renewal without cause at any time by either party giving the other party at least thirty (30) calendar days written notice of the desire to keep this Contract from further automatic renewal. In the case of written notice of the intent to end the automatic renewal of this Contract in the designated twelve month period, the Contract will terminate at the conclusion of the 30 day term following the written notice of non-renewal and will not renew. Either party may terminate this Contract immediately with cause upon default or some other material breach. The provisions of paragraphs 9, 10, 13, and 14

shall survive the termination or conclusion of this Contract.

12. Right to Rescind Contract. This Contract may be rescinded by either party, without penalty, within 72 hours after execution hereof. Such notice of rescission shall be in writing and sent by Certified Mail, Return Receipt Requested.

13. Arbitration. In the event of any dispute, claim, question, or disagreement arising from or relating to this Contract or the breach thereof, or arising from any arrangement under this Contract between Owner/ Operator and Broker or Customer; the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, the parties shall consult and negotiate with one another in good faith, in an attempt to reach a just and equitable solution, satisfactory to both parties. If informal resolution of the dispute, claim, question or disagreement cannot be reached, disputes that are within the jurisdictional maximum for small claims will be settled in the Nevada Small Claims Court. With regard to other disputes, Broker and Owner/Operator mutually agree to resolve any justiciable disputes between them, specifically including any claims related to payments due and the classification of Owner/Operator as a Contractor, that cannot be resolved by the Parties, exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration agreement shall apply to any and all claims arising out of or relating to this Contract, the Owner/Operator's provision of services to Customers, the payments received by Owner/Operator for providing services to Customers, the termination of this Contract, and all other aspects of the Owner/ Operator's relationship with Broker, past or present, whether arising under federal, state or local statutory and/or common law.

If either party wishes to initiate arbitration, the initiating party must notify the other party in writing via certified mail, return receipt requested, within the applicable statute of limitations period. This demand for arbitration must include (1) the name and address of the party seeking arbitration, (2) a statement of the legal and factual basis of the claim, and (3) a description of the remedy sought. Any demand for arbitration by Owner/Operator must be delivered to 4022 S 20th St., Phoenix, Arizona 85040.

(a) Class Action Waiver. Broker and Owner/ Operator mutually agree that by entering into this Agreement, both waive their right to have any dispute brought, heard or arbitrated as a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action. **All claims covered by this arbitration agreement will be pursued in an individual claimant proceeding and not as part of a representative, collective, or class action.** Notwithstanding any other clause contained in this Agreement, any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. This Agreement does not prevent the filing of charges with a government agency like the Department of Labor or participation in any investigation or proceeding conducted by a government agency.

(b) Any arbitration shall be governed by the American Arbitration Association Commercial Arbitration Procedures, except as follows:

(1) Arbitration will be conducted by a mutually agreeable arbitration service or the American Arbitration As-

sociation (AAA) if no other service is agreed upon. The arbitrator shall be selected from a list of no less than seven names through alternative strikes.

(2) If the parties cannot otherwise agree on a location for the arbitration, the arbitration shall take place in Clark County, Nevada.

(3) Unless the parties agree or applicable law provides otherwise, as determined by the Arbitrator, Broker shall pay all of the Arbitrator's fees and costs.

(4) The arbitrator may issue orders allowing the parties to conduct discovery sufficient to allow each party to prepare that party's claims and/or defenses, taking into consideration that arbitration is designed to be a speedy and efficient method for resolving disputes.

(5) The arbitrator may award all remedies to which a party is entitled under applicable law and which would otherwise be available in a court of law, but shall not be empowered to award any remedies that would not have been available in a court of law for the claims presented in arbitration. The arbitrator shall apply the state or federal substantive law, or both, as is applicable.

(6) The arbitrator may hear motions to dismiss and/or motions for summary judgment, and will apply the standards of the Federal Rules of Civil Procedure governing such motions.

(7) Any decision or award by the arbitrator shall be in writing.

(c) Nothing herein is intended to or shall preclude Broker or Owner/Operator from filing a complaint and/or charge with any appropriate federal, state, or local government agency and/or cooperating with said agency in its investigation. Nonetheless, Broker and Owner/Operator

acknowledge that to the fullest extent permitted by law they shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge, without regard as to who brought said complaint or charge.

(d) Either Party may bring an action in a court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, or to review an arbitration award. In an action to review an award, the standard of review applied will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury, without any special deference to the arbitrator.

(e) Owner/Operator and Broker expressly waive trial by jury for all claims covered by this Agreement. All other rights, remedies, exhaustion requirements, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration. Owner/Operator and Broker agree that arbitration as explained herein provides a fair and adequate mechanism for enforcing the Parties' statutory rights.

(f) Owner/Operator agrees and acknowledges that entering into this arbitration agreement does not change its status as an independent contractor in fact and in law, and that Owner/Operator is not an employee of Broker or its Customers notwithstanding this arbitration agreement.

14. Governing Law. This Contract and all rights and obligations of the parties shall be construed in accordance with the laws of Nevada, where Broker is headquartered, and any action shall be commenced in that jurisdiction. Accordingly, unless the parties agree otherwise, any claims or disputes arising from or in connection with this agreement shall be brought exclusively in Clark County,

Nevada. Broker's rights shall inure to the benefit of its successors and assigns.

15. Entire Agreement. This Contract constitutes the entire agreement between the parties and supersedes all previous agreements between the parties. Any additions or changes shall be in writing signed by an authorized representative of Broker and Owner/ Operator. Broker shall have the right to assign its rights and delegate its duties under this Contract.

16. Signature. This Contract may be signed and is enforceable by electronic signature and facsimile.

IN WITNESS WHEREOF, the parties have executed this Contract effective on the date first indicated above.

<b><u>OWNER/OPERATOR</u></b>	<b><u>INTELLISERVE LLC</u></b>
Signature: <u>/s/ Kenneth Turner</u>	Signature: <u>/s/ Keith Spizzirri</u>
Date: 4/15/2020	Date: 4/15/2020
Printed Name: Kenneth Turner	Printed Name: Keith Spizzirri
Address: 1426 E DARREL RD PHOENIX AZ 85042	Address: 4022 S 20th St., Phoenix, Arizona 85040

FOR COLORADO  
Subscribed and sworn  
to before me this \_\_ day of  
\_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public, State of Colorado

LUBIN & ENOCH, P.C.  
Nicholas J. Enoch  
State Bar No. 016473  
Clara S. Acosta  
State Bar No. 036044  
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Attorneys for Plaintiffs

**IN THE SUPERIOR COURT OF THE  
STATE OF ARIZONA IN AND  
FOR THE COUNTY OF MARICOPA**

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No. CV2021-010875

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WILLIAM F. FORREST, a single man, WENDY SMITH, a single woman, MICHELLE MARTINEZ, a single woman, JODI MILLER, a married woman, and KENNETH TURNER, a married man,  
Plaintiffs,

v.

KEITH SPIZZIRRI, and MIRIAM SPIZZIRRI, husband and wife; KEN MARING and JANE DOE MARING, a married couple; CYNTHIA MOORE and JOHN DOE MOORE, a married couple; PAT DOE and JANE DOE I, husband and wife, JOHN DE LA CRUZ and JANE DOE DE LA CRUZ, a married couple,



INTELLIQUICK DELIVERY, INC. an Arizona Corporation, MAJIK LEASING, LLC, an Arizona corporation; and MAJIK ENTERPRISES I, INC., an Arizona Corporation,

Defendants.

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**PLAINTIFFS' HYBRID COLLECTIVE AND CLASS  
ACTION COMPLAINT**

**Tier 3**

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Plaintiffs, William F. Forrest (“Forrest”), Jodi Miller (“Miller”), Michelle Martinez (“Martinez”), Wendy Smith (“Smith”), and Kenneth Turner (“Turner”) (collectively “Plaintiffs”), by and through their attorneys, Lubin & Enoch, P.C., bring this action pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (“FLSA”); the Arizona Minimum Wage Act, A.R.S. §§ 23-362-365 (“AMWA”); the Fair Wages and Healthy Families Act, A.R.S. §§ 23-371-381 (the “Act”); A.R.S. § 23-202; and the equitable theory of restitution/unjust enrichment.

**INTRODUCTION**

1. Plaintiffs are current and former employees of Kenneth Maring (“Maring”), Cynthia Moore (“Moore”), Pat (Last Name Unknown) (“Pat”), John De La Cruz (“De La Cruz”), Keith Spizzirri (“Spizzirri”) and companies, IntelliQuick Delivery, Inc., (“IntelliQuick”), Majik Leasing, LLC, and Majik Enterprises I, Inc. (hereinafter collectively referred to as “Defendants”).

2. This action is brought as a collective action under the FLSA, 29 U.S.C § 216 (b), to recover minimum wages, overtime wages, liquidated damages, attorneys’ fees, and

other statutory penalties resulting from Defendants' violations of the FLSA. This lawsuit is also brought as a class action under Arizona Rules of Civil Procedure ("ARCP") Rule 23, to recover unpaid minimum and overtime wages, unlawful deductions from wages, benefits, compensatory damages, treble damages, attorneys' fees, and any other statutory penalties resulting from Defendants' violations of the AMWA and the Act.

3. In this lawsuit, Plaintiffs allege Defendants have knowingly misclassified Plaintiffs and Class Members as defined below (collectively referred to hereinafter as "Drivers," "Plaintiffs," and/or "Class Members"), as independent contractors, failed to pay them the statutorily required minimum wages and overtime wages, and failed to provide earned paid sick time. The proposed Class includes route, on-demand and freight drivers who either use their own vehicle or lease one from Defendants to make deliveries and pick-ups for IntelliQuick.

4. Defendants benefit greatly by misclassifying Plaintiffs as independent contractors by shifting business expenses onto their employees. Defendants require Plaintiffs to pay weekly fees for use of Defendants' equipment, to process their pay checks, to maintain secondary OCC insurance, and mandatory uniform laundry fees, regardless of if they use the service. Defendants also require Plaintiffs to either use their personal cars for business purposes and pay for all car-related expenses, such as gas and vehicle repair and maintenance, or to rent a vehicle from Defendant Majik Leasing, or another specified and designated company at unnegotiable rates.

5. By treating Plaintiffs as independent contractors instead of employees, Defendants avoid worker's compensation and unemployment payments, social security taxes, and other taxes and benefits owed to employees. As a result,

Plaintiffs have been forced to saddle the costs of their employer. Defendants have also attempted and continue to attempt to avoid liability under wage protection statutes, like the AMWA and the FLSA. In doing so, Defendants are able to obtain a vast competitive advantage over competitors that treat their employees in compliance with federal and state law. As a result, Defendants' misclassification drives down wages and undercuts fair labor practices across the industry. Additionally, Defendants are unjustly enriched by these practices.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction over the subject matter of this complaint pursuant to 29 U.S.C. § 216(b) and A.R.S. § 12-123(A).

7. This Court has personal jurisdiction over Defendants because they regularly transact business in and have significant and continuous contact with Arizona.

8. Venue is proper under A.R.S. § 12-401. Defendants Spizzirri, Moore, Pat, Maring, and De La Cruz (hereinafter "the Individual Defendants") reside in Maricopa County, Arizona. The principal place of business for Defendants is in Maricopa County, Arizona. A substantial part of the acts and omissions giving rise to the claims occurred in this county.

9. The amount of Plaintiffs' damages qualifies this matter as a Tier 3 case in accordance with Rule 8(b)(2) of the Arizona Rules of Civil Procedure.

### **PARTIES**

10. Currently and during all relevant time periods, Plaintiffs were residents of Maricopa County, Arizona.

11. Plaintiffs Forrest, Miller, Martinez, Smith, and Turner are current and former employees of Defendants as that term is defined in 29 U.S.C. § 203(e)(1) and A.R.S. § 23-362(A).

12. Plaintiffs hereby consent to opt-in to this lawsuit. *See Exhibit A* with the consent and opt-in forms for Miller, Smith and Forrest.

13. Pursuant to ARCP 23, Plaintiffs seek to represent all current and former drivers or couriers who made pickups or deliveries for or on behalf of IntelliQuick within the State of Arizona and who were paid and treated as independent contractors by IntelliQuick at any time on or after July 8, 2018 through the present date.

14. Plaintiffs request that they be permitted to serve as representatives of those who will join in the class action pursuant to ARCP 23.

15. Plaintiffs presently believe and allege that the class includes over one hundred (100) separate individuals who have worked for IntelliQuick since July 8, 2018. Accordingly, joinder of all members of the class would be impracticable.

16. The claims asserted herein on behalf of Plaintiffs and the class present questions of law and fact common to the class including, in particular, whether Defendants have failed to pay the requisite minimum wage compensation to their employees.

17. Plaintiffs' claims are typical of the claims of the class.

18. Plaintiffs, as representative parties, will fairly and adequately protect the interests of the class.

19. The prosecution of separate lawsuits by individual members of the class would not only be judicially inefficient but would create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for Defendants.

20. Pursuant to 29 U.S.C. § 216(b), Plaintiffs Forrest, Miller, Martinez, Smith, and Turner seek to represent all other current or former similarly situated employees who have worked for Defendants in the past three (3) years, and who have not been paid the requisite minimum wage and overtime.

21. Plaintiffs request that they be permitted to serve as representatives of those who will later consent to participate in this action and that this action be granted collective action status pursuant to 29 U.S.C. § 216 (b) and class action status pursuant to ARCP 23.

22. At all relevant times for this lawsuit, Defendant Keith Spizzirri was and is the President and an Owner of IntelliQuick. Spizzirri resides in Scottsdale, Arizona and works at IntelliQuick's headquarters, located at 4022 South 20th Street, Phoenix, Arizona 85040. At all relevant times to this lawsuit, Spizzirri has exercised direct and/or indirect supervisory authority over Plaintiffs. Upon information and belief, Spizzirri has been directly involved in decision affecting the terms and conditions of employment for Plaintiffs at IntelliQuick, including, but not limited to, decisions regarding employee classification, hiring, termination, hours worked, wages paid, deductions made to wages, and discipline.

23. At all relevant times for this lawsuit, Spizzirri has been and continues to be Plaintiffs' "employer" within the meaning of 29 § 203(d) and A.R.S. § 23-362(B).

24. Defendants Spizzirri and Miriam Spizzirri (hereinafter collectively referred to as the “Spizzirris”) are now, and at all times relevant hereto have been, husband and wife, constituting a marital community under the laws of the State of Arizona. The acts engaged in and the omissions made by the Spizzirris were performed as agents and for the benefit of the marital community.

25. During the relevant time period, Defendant Kenneth Maring was a Driver Supervisor for IntelliQuick. Maring resides and works in Maricopa County, Arizona. Maring exercised direct or indirect supervisor authority over Plaintiffs. Upon information and belief, Maring has been directly involved in decisions affecting the terms and conditions of employment for Plaintiffs at IntelliQuick, including, but not limited to, decisions involving hiring, termination, hours worked, wages paid, wage deductions made, and discipline.

26. Maring is an employer as that term is defined in 29 U.S.C. § 203(d) and A.R.S. § 23-362(B).

27. Defendants Kenneth and Jane Doe Maring (hereinafter collectively referred to as the “Marings”) are now, and at all times relevant hereto have been, husband and wife, constituting a marital community under the laws of the State of Arizona. The acts engaged in and the omissions made by the Marings were performed as agents and for the benefit of the marital community.

28. During the relevant time period, Defendant Cynthia Moore was a Driver Supervisor for IntelliQuick. Moore resides and works in Maricopa County, Arizona. Moore exercised direct or indirect supervisor authority over Plaintiffs. Upon information and belief, Moore has been directly involved in decisions affecting the terms and con-

ditions of employment for Plaintiffs at IntelliQuick, including, but not limited to, decisions involving hiring, termination, hours worked, wages paid, wage deductions made, and discipline.

29. At all relevant times for this lawsuit, Moore is an employer as that term is defined in 29 U.S.C. § 203(d) and A.R.S. § 23-362(B).

30. Moore and John Doe Moore (hereinafter collectively referred to as the “Moores”) are now, and at all times relevant hereto have been, wife and husband, constituting a marital community under the laws of the State of Arizona. The acts engaged in, and the omissions made by the Moores were performed as agents and for the benefit of the marital community.

31. During the relevant time period, Defendant John De La Cruz was a Manager of the Freight Drivers. De La Cruz resides and works in Maricopa County, Arizona. De La Cruz exercised direct and/or indirect supervisor authority over Plaintiffs. Upon information and belief, De La Cruz has been directly involved in decisions affecting the terms and conditions of employment for Plaintiffs at IntelliQuick, including, but not limited to, decisions involving hiring, termination, hours worked, wages paid, wage deductions made, and discipline.

32. At all relevant times for this lawsuit, De La Cruz was an employer as that term is defined in 29 U.S.C. § 203(d) and A.R.S. § 23-362(B).

33. De La Cruz and Jane Doe De La Cruz (hereinafter collectively referred to as the “De La Cruz’s”) are now, and at all times relevant hereto have been, husband and wife, constituting a marital community under the laws of

the State of Arizona. The acts engaged in, and the omissions made by the De La Cruz's were performed as agents and for the benefit of the marital community.

34. During the relevant time period, Defendant Pat was a Manager of the Freight Drivers. Pat resides and works in Maricopa County, Arizona. Pat exercised direct and/or indirect supervisor authority over Plaintiffs. Upon information and belief, Pat has been directly involved in decisions affecting the terms and conditions of employment for Plaintiffs at IntelliQuick, including, but not limited to, decisions involving hiring, termination, hours worked, wages paid, wage deductions made, and discipline.

35. During the relevant time period, Pat was an employer as that term is defined in 29 U.S.C. § 203(d) and A.R.S. § 23-362(B).

36. Pat and Jane Doe (hereinafter collectively referred to as the "Does") are now, and at all times relevant hereto have been, husband and wife, constituting a marital community under the laws of the State of Arizona. The acts engaged in, and the omissions made by the Does were performed as agents and for the benefit of the marital community.

37. IntelliQuick is an Arizona corporation with its principal place of business at 4022 South 20th Street Phoenix, Arizona 85040.

38. IntelliQuick is Plaintiffs' employer as that term is defined in 29 U.S.C. § 203 (d) and A.R.S. § 23-362 (B). Moreover, upon information and belief, IntelliQuick is a joint employer with one or more of the other named corporate Defendants.

39. Upon information and belief, IntelliQuick is not only influenced and governed by the Spirrizzis, but there



is such a unity of interest and ownership that the individuality or separateness of IntelliQuick and the Spizzirris have ceased to exist.

40. Upon information and belief, the facts are such that an adherence to the fiction of the separate existence of IntelliQuick and the Spizzirris would, under these particular circumstances, sanction a fraud or promote injustice.

41. Majik Leasing (“Majik”) is an Arizona corporation that is owned and operated by Spizzirri. Majik’s place of business is the same as IntelliQuick’s principal place of business at 4022 S. 20<sup>th</sup> Street, Phoenix, Arizona 85040. Upon information, Majik owns multiple vehicles that are used by IntelliQuick, its employees and Drivers. IntelliQuick requires some drivers to use vehicles owned by Majik and pay weekly for their use, a cost deducted directly from the Drivers’ pay.

42. Defendant Majik Enterprises I, Inc. manages Majik, and Spizzirri is an officer and director of Majik Enterprises I. Upon information and belief, Defendant Majik Enterprises I, Inc. has a financial interest in IntelliQuick and/or Majik.

43. Upon information and belief, all named Defendants constitute joint employers of Plaintiffs under the FLSA and AMWA. All joint employers are individually responsible for compliance with the FLSA. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 11469 (9th Cir. 1983) (citing 29 C.F.R. § 791.2(A)). The Department of Labor has stated that joint employment relationships exist when one (1) employer acts directly or indirectly in the interest of the other employers in relation to the employee; or two (2) employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly

or indirectly, by reason that one employer controls, is controlled, or is under control with the other employer. *Id.* 1469-70 (citing 29 C.F.R. § 791.2(b)). The same applies to AMWA. A.R.S. § 23-362(B) (employer includes “[a]ny corporation, proprietorship, partnership, joint venture, limited liability company, trust, association, political subdivision of the state, individual or other entity acting directly or indirectly in the interest of an employer in relation to an employee...”)

44. It is clear that IntelliQuick is engaged in commerce or in the production of goods for commerce and/or handles, sells, or otherwise works on goods or materials that have been moved in or produced for commerce, and that the enterprise’s annual gross volume of sales or business done is not less than \$500,000.

45. While working for IntelliQuick, Plaintiffs were “engaged in commerce” as defined in the FLSA and corresponding regulations. 29 U.S.C. § 203(b); *see also* 29 C.F.R. § 776.9 (“[i]t is clear that the employees covered by the wage and hour provisions of the Act as employees ‘engaged in commerce’ are employees doing work involving or related to the movement of persons or things . . .”).

### **GENERAL ALLEGATIONS**

46. From on or about April 2012 through June 2020, Defendants employed Plaintiff Forrest. During this period of time, Forrest worked for Defendants as a route driver who also occasionally delivered or picked-up on-demand items. Forrest leased a vehicle from Defendants to complete his two routes, delivering and picking up specimens for Lab Corp in Flagstaff, Cottonwood, and Sedona and for Mayo Clinic.

47. During the relevant time period, Forrest typically worked twelve (12) to thirteen (13) hours per day, five (5)

days per week, including the time he spent picking and gassing up the company vehicle, loading and unloading coolers for his route, completing paperwork and processing specimen as required by the clients, and unloading his vehicle.

48. Forrest paid out of pocket daily to gas up the vehicle, and two hundred dollars \$200 per week was deducted from his pay to lease the vehicle. These business expenses were not reimbursed to him.

49. From on or about November 2018 through September 25, 2020, Defendants employed Plaintiff Miller as a route driver who also occasionally delivered or picked-up on-demand items. Miller used her personal vehicle to complete her Saturday “West Valley” route and her Monday through Friday route, which included stops in Havasu, Parker, and Quartzsite for Idexx and Lab Corps.

50. During the relevant time period, Miller worked fourteen (14) hours per day, five (5) days per week. During most of the relevant time period she routinely drove a Saturday route as well and occasionally covered other drivers’ shifts on Sundays. In addition to transporting specimen, she also loaded and unloaded coolers, picked up needed supplies from IntelliQuick, and completed paperwork and processed specimen as required by the clients.

51. Miller paid out of pocket to maintain and gas up her vehicle on which she put, on average, 600 miles per week. These business expenses were not reimbursed to her.

52. From on or about October 2012 through July 2016 and again from on or about September 2018 to September 2020, Defendants employed Plaintiff Smith as a route driver who also occasionally delivered or picked-up on-demand items.

53. During the relevant time period, Smith used her personal vehicle to complete her Bullhead City route, which included stops in Bullhead City, Gold Valley, Kingman, Wickenburg, and Phoenix for LabCorps, Quest Diagnostics, Western Eye Clinic and Idexx. She also drove a Saturday route for Lab Corps.

54. During the relevant time period, Smith worked fourteen (14) to sixteen (16) hour days, five (5) days per week, and seven (7) hours on Saturday. In addition to transporting specimen, she also loaded and unloaded coolers, picked up needed supplies from IntelliQuick, and completed paperwork and processed specimen as required by the clients. She was also required to deliver dry ice and other items as needed to IntelliQuick drivers in Kingman.

55. Smith paid out of pocket to maintain and gas up her vehicle on which she put, on average, 600 miles per week. These business expenses were not reimbursed to her.

56. From on or about June 2014 to the present date, Defendants employed Plaintiff Martinez as a route driver.

57. During the relevant time period, Martinez used her personal vehicle to complete her various routes. While IntelliQuick still had LabCorps routes, she worked eleven (11) to twelve (12) hour days driving a Phoenix metro area route during the day, a Maricopa route at night, and a Florence route on Saturdays. During this time period, she worked, on average, sixty-five (65) hours per week. On or about mid-2018 through the present date, she drives three runs daily of a Phoenix-area route for Garcia Labs, working approximately fifty (50) hours per week.

58. In addition to transporting specimen, she also loaded and unloaded coolers, picked up needed supplies from IntelliQuick, and completed paperwork and processed

specimen as required by the clients. While driving the Lab Corp route, she put approximately 1,200 miles per week on her vehicle and, on her new route, puts an average 750 miles per week on her vehicle. These business expenses were not reimbursed to her.

59. From on or about March of 2014 through the present, Defendants employed Plaintiff Turner as a freight/utility driver. Turner was assigned a company vehicle daily. He was scheduled for an eight (8) hour shift during which he must be present and available for a pickup or delivery anywhere in the state. Turner might receive an assignment at the end of the shift and he was required to complete the delivery or pickup, with no additional compensation, regardless of how long it took to complete. During his down time, he worked in the warehouse organizing and scanning totes and boxes. During the relevant time period, Turner was also a floater driver able to take over any route when needed.

60. On occasions in which Turner accepted extra work for additional compensation after his shift, he was required to split the value of the job with the company along a 40/60 split (60 for the company) or 35/65 split if he used the company vehicle. Turner was not reimbursed for the cost of the vehicle.

61. Turner worked anywhere from eight (8) to eleven (11) hours per day, five (5) and sometimes six (6) days per week.

62. Plaintiffs were paid a fixed daily rate, regardless of the hours they worked, to complete their routes. Defendants could and occasionally did add stops to their manifests with no additional compensation. Plaintiffs had no power or control over this daily rate. In fact, Plaintiffs were subjected to an across-the-board, non-negotiated

7.5% pay cut effective May 31, 2020 with no change in their work duties or hours (**Exhibit B**).

63. In addition to covering work related car expenses, Plaintiffs additionally had to cover expenses for uniform laundering, secondary car insurance, required scanner rental and software, and paycheck processing. These fees Defendants charged Plaintiffs were, and continue to be considerable, range from \$35 to \$40 per week. When these paycheck deductions and car rental and vehicle maintenance costs are taken together, they bring Plaintiffs' hourly wage each week under the minimum wage.

64. Upon information and belief, the pay and work structures described above applied to all drivers employed by Defendants. At the start of the relevant pay period: Forrest earned \$213.50 per day; Miller earned \$223 per day; Smith earned \$265 per day; Martinez earned \$183 per day; and Turner earned \$150 per day. In May 2020, Plaintiffs and those similarly situated had their wages cut by 7.5% with no change in work duties or hours.

65. Plaintiffs were, at times, given the option for additional on-demand work for a negotiable price. Often, this pay was missing from their pay statements.

66. Plaintiffs were required to undergo unpaid training for several days prior to beginning work as a driver and anytime they changed routes. Plaintiffs also participated in occasional unpaid (or nominally paid) trainings on weekends.

67. Plaintiffs were not permitted to take time off, including when sick and, if they did, they were not paid for the time. When Plaintiffs took unauthorized time off, they were often threatened with termination.

68. Plaintiffs, at times, were required to train other drivers.

69. The company name “IntelliQuick” appears on Plaintiffs’ pay logs and work uniforms.

70. IntelliQuick does not set Plaintiffs’ work schedules. Instead, it gives Plaintiffs and others similarly situated a deadline for when they must have a truck, or packages, delivered to a customer. It is then the Plaintiffs’ responsibility to ensure that the truck, or packages, are delivered on-time. Frequently, if not in most cases, these deadlines required Plaintiffs to drive more hours per day than is legal pursuant to 49 C.F.R. § 395.3, which permits property-carrying drivers to drive only eleven (11) hours during fourteen (14) consecutive-hour periods, which must follow a break of at least ten (10) hours.

71. Defendants have failed to pay minimum wage to Plaintiffs and others similarly situated in accordance with 29 U.S.C. § 206 and A.R.S. § 23-364. IntelliQuick’s paycheck deductions, along with its failure to fully reimburse Plaintiffs for their work-related expenses has caused the gross pay of Plaintiffs and others similarly situated to fall below the minimum wage.

72. Although Defendants may claim in response to this Complaint that the Plaintiffs were employed as independent contractors, they will be unable to meet the burden of proof at trial according to the standards of the FLSA, or certainly, under the Arizona Minimum Wage Act, A.R.S. § 23-362(D) which requires the employer to prove independent contractor status by clear and convincing evidence. Clear and convincing evidence is an exacting standard where “[a] party who has the burden of proof by clear and convincing evidence that the claim is highly probable.” Rev. Ariz. Jury Instr. (Civil) Stand. 3 (6th ed. 2017).

73. Further, Spizzirri and his companies, were named Defendants in an almost identical lawsuit filed several years ago, proving they have continued willfully misclassifying drivers as independent contractors to avoid paying overtime, employment taxes, and earned paid sick time. That lawsuit resulted in a court-approved, multi-million dollar settlement with the plaintiffs. *See Collinge v. Intelliquick Delivery, Inc.*, No. CV-12-00824-PHX-JWS, Docket No. 605 (D. Ariz. 2013).

#### **COLLECTIVE ACTION ALLEGATIONS**

74. Plaintiffs bring an FLSA minimum and overtime wage standard claim on behalf of themselves and all similarly situated persons who are current or former drivers who made pick-ups or deliveries for or on behalf of IntelliQuick within the State of Arizona from July 8, 2018 to present, and who elect to join this action pursuant to 29 U.S.C. 216(b) (“FLSA Collective”).

75. As part of its regular business practice, Defendants have intentionally, willfully, and repeatedly engaged in a pattern and practice of violating the FLSA with respect to Plaintiffs and the FLSA Collective. This includes willfully failing to pay Plaintiffs and the FLSA Collective minimum wage and overtime rate of pay for hours they worked in excess of forty (40) hours per workweek.

76. Upon information and belief, the FLSA Collective consists of many similarly situated individuals who have been underpaid by Defendants in violation of the FLSA and who would benefit from the issuance of a court-supervised notice of the lawsuit and the opportunity to join the lawsuit. Those similarly situated collective members are known to Defendants, are readily identifiable, and can be located through their records. Notice should be sent to the



members of the FLSA Collective pursuant to 29 U.S.C. § 216(b).

### **CLASS ACTION ALLEGATIONS**

77. Plaintiffs also bring an AMWA, the Act, and restitution/unjust enrichment class action (the “State Class”) on behalf of themselves and all similarly situated persons who work or have worked as employees for Intelliquick between July 8, 2018 to the present date, who did not receive the Arizona minimum wage pursuant to A.R.S. § 23-363(A), who did not receive paid sick time benefits pursuant to A.R.S. §§ 23-372-375, who were unlawfully charged weekly fees as condition of employment, who were coerced into purchasing goods and supplies for as part of their employment, and, whose paid sick entitlement resulted instead in unjust enrichment to Defendants by way of unconscionable contract terms. This is limited to those who do not elect to be excluded from this action pursuant to ARCP 23(c)(2).

78. The proposed State Class Members are so numerous that joinder of all members is impracticable. Upon information and belief, Defendants have at least sixty (60) employees at any given time, and many more who have come and gone over the years, who are similarly situated because they worked under and were subject to Defendants’ policies and practices.

79. There are questions of law and fact common to the State Class that predominate over any questions solely affecting individual members of the State Class.

80. The claims of Plaintiffs are typical of the claims of the State Class they seek to represent. Plaintiffs and State Class Members work or have worked for Defendants and have been subjected to common policies and practices of

failing to pay overtime owed and denying Plaintiffs paid sick time.

81. Plaintiffs will fairly and adequately represent and protect the interests of the State Class.

82. Plaintiffs have retained counsel competent and experienced in complex class action employment litigation.

83. The State Class Members have been damaged and are entitled to recovery as a result of Defendants' common policies, practices, and procedures.

84. A class action is superior to other available methods for the fair and efficient adjudication of this litigation because it will eliminate the need for duplicative litigation which could result in inconsistent judgments regarding Defendants' practices and Plaintiffs' claims.

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### **FIRST CLAIM FOR RELIEF**

#### **Violation of FLSA Minimum Wage Standard (All Plaintiffs and FLSA Collective)**

85. Plaintiffs incorporate by reference all paragraphs and allegations set forth in this Complaint as though fully and completely set forth herein.

86. Defendants have willfully failed to pay wages due Plaintiffs in violation of the federal minimum wage law, 29 U.S.C. § 206. Plaintiffs are entitled to recover all unpaid wages and liquidated damages pursuant to 29 U.S.C. § 216(b).

**SECOND CLAIM FOR RELIEF****Violation of Arizona Minimum Wage Act  
(All Plaintiffs and State Class)**

87. Plaintiffs incorporate by reference all paragraphs and allegations set forth in this Complaint as though fully and completely set forth herein.

88. Defendants have willfully failed to pay wages at the rate of the AMWA, violating A.R.S. § 23-363(A). Plaintiffs are entitled to recover the balance of the wages owed, including interest thereon, and an additional amount equal to twice the underpaid wages pursuant to A.R.S. § 23-364(G).

89. Defendants' violation of the AMWA was committed as a matter of a continuing course of employer conduct within the meaning of A.R.S. § 23-364(H). As such, this action encompasses all violations that occurred from January 1, 2007 until the present day. *See* A.R.S. § 23-364(H). *Cf. Reyes v. LaFarga*, 2014 U.S. Dist. LEXIS 153338, \*1 (D. Ariz. Oct. 21, 2014) (affirming the jury's "special verdict finding that Plaintiff worked 40-hour workweeks as Defendant's employee between March 24, 2007, and August 31, 2011, and was therefore eligible for lost wages pursuant to the Arizona Minimum Wage Act."); *Juvera v. Salcido*, 294 F.R.D. 516, 523 (D. Ariz. 2013) [*construing* A.R.S. § 23-364(H)].

**THIRD CLAIM FOR RELIEF****Unpaid Overtime Under FLSA  
(All Plaintiffs and FLSA Collective)**

90. Plaintiffs incorporate by reference all paragraphs and allegations set forth in this Complaint as though fully and completely set forth herein.

91. Defendants have willfully failed to compensate the FLSA Collective for overtime hours they worked as required under 29 U.S.C. § 207.

92. The FLSA Collective are entitled to receive compensation at a rate of one and one-half times (1 1/2 x) the regular wage rate for each hour worked they worked in excess of forty hours in any week plus liquidated damages and attorneys' fees and costs pursuant to 29 U.S.C. § 216(b).

93. Because Defendants' violation was willful, the statute of limitations for an overtime pay action is three years instead of two. 29 U.S.C. § 255(a).

#### **FOURTH CLAIM FOR RELIEF**

##### **Paid Sick Time (All Plaintiffs and State Class)**

94. Plaintiffs incorporate by reference all paragraphs and allegations set forth in this Complaint as though fully and completely set forth herein.

95. At all times relevant to the Complaint, Defendants have been an employer within the meaning of A.R.S. §§ 23-362(B) and 371(G).

96. At all times hereinafter mentioned, Plaintiffs and the State Class have been employees within the meaning of A.R.S. §§ 23-362(A) and 371(F).

97. During the relevant time period, Plaintiffs have been covered employees entitled to the protections of A.R.S. § 23-372(A) which requires that employees shall accrue at least one (1) hour of earned paid sick time for every thirty (30) hours worked.

98. Defendants have willfully restrained and interfered with Plaintiffs rights in violation of A.R.S. § 23-374(A).

99. Defendants willfully denied Forrest his right to paid sick time when they forbade him from leaving work when he reported that he was sick. Defendants forced Forrest to continue working until he was physically no longer capable of driving the delivery truck.

100. Defendants willfully denied Miller her right to paid sick time when she was not paid for sick days taken after two separate surgeries. First, Miller had surgery in February of 2020, after which she was only allowed to take one day off work, for which she was not paid. Second, Miller underwent a second surgery later in February of 2020, in which she was only allowed to take one day off, and for which she was not paid.

101. Defendants willfully denied Smith her right to paid sick time when they forced Smith to work even though she reported she was sick. On one occasion Defendants forced Smith, who was suffering from an allergic reaction, to still drive all her routes even though the swelling in her face impaired her vision.

102. Defendants willfully denied Turner his right to paid sick time when he was injured in May of 2020 and did not receive any paid sick time for the seven week period in which he was recovering and not working.

103. Defendants repeatedly and willfully denied Plaintiffs their rights by denying them paid sick time when he took sick time off from work.

104. Plaintiffs and the State Class are entitled to recover the balance of the earned paid sick time owed, including interest thereon, and an additional amount equal to twice that amount owed pursuant to A.R.S § 364(G).

**FIFTH CLAIM FOR RELIEF****Exaction of Fee as Condition of Employment  
(All Plaintiffs and State Class)**

105. Plaintiffs incorporate by reference all paragraphs and allegations set forth in this Complaint as though fully and completely set forth herein.

106. Defendants unlawfully exacted fees from Plaintiffs as a condition of employment, in violation of A.R.S. § 23-202. By charging Plaintiffs weekly fees of between thirty five dollars (\$35) to forty dollars (\$40) or more for paycheck processing, uniform services, and scanners, Defendants were exacting a fee as condition of employment from Plaintiffs. By violating A.R.S. §23-202 Defendants are guilty of committing a class 2 misdemeanor.

107. Defendants knowingly compelled and coerced Plaintiffs into purchasing goods and supplies as a part of their employment. Defendants required Plaintiffs to purchase uniform supplies, secondary car insurance, rent scanners, rent company vehicles, and purchase masks from the Defendant. By doing so, Defendants compelled and coerced Plaintiffs to purchase goods or supplies from a particular person, and therefore violated A.R.S. § 23-202.

**SIXTH CLAIM FOR RELIEF****Restitution/Unjust Enrichment  
(All Plaintiffs and State Class)**

108. Plaintiffs reallege and incorporate by reference all allegations in all paragraphs as if fully set forth herein.

109. Defendants' Independent Contractor Owner/ Operator Agreement is unconscionable.

110. Defendants' unconscionable agreements are void, or alternatively, voidable by Plaintiffs under the common law.

111. Defendants have been unjustly enriched by the unconscionable terms of the contracts they imposed on the Plaintiffs and Class Members.

112. Defendant have been unjustly enriched by the work performed by the Plaintiffs and Class Members without any compensation for the work performed.

113. Defendants have been unjustly enriched by not providing Plaintiffs and Class Members with any paid sick time.

114. Defendants have been unjustly enriched by the deductions made from the Plaintiffs and Class Members pay.

115. Plaintiffs are entitled to restitution and/or damages in quantum meruit for the value of Defendants' unconscionable contracts conferred upon Defendants.

116. Plaintiffs are entitled to restitution for all of Defendants' costs or fees that have been levied upon Plaintiffs and Class Members, including weekly deductions, uniform fees, check processing fees, insurance fees, and electronic device fees.

#### **PRAYER FOR RELIEF**

Plaintiffs pray that they recover from Defendants the following:

117. An award of unpaid minimum wages in an amount appropriate to the proof adduced at trial pursuant to 29 U.S.C. §§ 206 and 216(b);

118. An award of liquidated damages regarding # 1, *supra*, in an amount appropriate to the proof adduced at trial pursuant to 29 U.S.C. § 216(b );

119. In the event Defendants fail to satisfy any judgment for Plaintiffs, *to wit*, satisfy a judgment against Defendants within 10 days of the Order becoming final, Defendants shall pay Plaintiffs an amount which is treble the amount of the outstanding judgment with interest thereon, in accordance with A.R.S. § 23-360;

120. An enhancement payment of no less than five thousand dollars (\$5,000) to Plaintiffs as compensation for the expense they incurred on behalf of the class;

121. Pre-judgment and post judgment interest on unpaid back wages pursuant to, *inter alia*, A.R.S. § 23-364(G);

122. Attorneys' fees pursuant to 29 U.S.C. § 216(b) and A.R.S. § 23-364(G);

123. Court costs and costs of litigation pursuant to 29 U.S.C. § 216(b), A.R.S. § 12-341 and A.R.S. § 23-364(G);

124. A declaratory judgment pursuant to the Uniform Declaratory Judgments Act, A.R.S. § 12-1831, *et seq.*, that Defendants have violated their statutory and legal obligations and deprived the Plaintiffs of their rights, privileges, protections, compensation, benefits, and entitlements under the law, as alleged herein; and

125. Such other and further equitable relief as the Court deems just.



RESPECTUFLY SUBMITTED this 9th day of July  
2021.

LUBIN & ENOCH, P.C.

/s/ Nicholas J. Enoch

Nicholas J. Enoch, Esq.

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*Attorneys for Defendants*

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

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Case No. 2:21-cv-01688-GMS

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William F. Forrest, a single man, Wendy Smith, a single woman, Michelle Martinez, a single woman, Jodi Miller, a married woman, and Kenneth Turner, a married man,

Plaintiffs,

v.

Keith Spizzirri and Miriam Spizzirri, husband and wife;  
Ken Maring and Jane Doe Maring, a married couple;  
Cynthia Moore and John Doe Moore, a married couple;  
Pat Doe and Jane Doe I, husband and wife, John De La Cruz and Jane Doe De La Cruz, a married couple, Intel-  
liquick Delivery, Inc. an Arizona Corporation, Majik  
Leasing, LLC, an Arizona corporation; and Majik Enter-  
prises I, Inc., an Arizona Corporation,

Defendants.

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**DEFENDANTS' MOTION TO COMPEL  
ARBITRATION AND DISMISS ACTION**

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Defendants hereby request that the Court compel Plaintiffs to refer their dispute to arbitration and dismiss this action. *Altela, Inc. v. Arizona Sci. & Tech. Enters. LLC*, CV-16-01762-PHX-DGC, 2016 WL 4539949 at \*8 (D. Ariz. Aug. 31, 2016) (relying upon *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (affirming dismissal of case where all claims were subject to arbitration). The Parties, admittedly, are subject to agreements to arbitrate dispute between them, including all the claims raised in the present action.

In an attempt to avoid unnecessary motion practice, the Parties, via counsel, have extensively discussed and agreed that the Plaintiffs in the above-captioned action entered into individual arbitration agreements (although Defendants maintain that the proper party for their dispute is not correctly name in the instant action). The Parties have conferred and confirmed that Arbitration is the proper venue and forum for handling the claims that are at the heart of the present lawsuit. Pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, and the decision of the Supreme Court in *Epiq Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (relying in part on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32 (1991)), there is no issue to be addressed in this Court, and this case must be referred to private arbitration.

One lone disagreement remains between the Parties, however, which is the question of what should occur to this legal proceeding following referral to Arbitration. Plaintiffs want the Court to retain jurisdiction in the event judicial confirmation proves needed or the Court's authority

could otherwise be invoked. Defendants believe this matter must be dismissed because all claims are to be addressed by way of arbitration, leaving no current issue in front of the Court.

Counsel for Defendants had previously joined in a similar stipulation to the one Plaintiffs contemplate in this District Court, and had been corrected that dismissal, not a stay, of the action is the proper protocol for the District Court to follow. See attached order in *Manes v. Stetson Desert Project LLC*, 2:18-cv-04664-PHX-DJH (D. Ariz. Sept. 3, 2019), a copy of which is attached as **Exhibit A**. Although Section 3 of the FAA provides that a federal court must stay its proceedings until completion of arbitration, prior decisions in this district and elsewhere have found that stays “serve no obvious purpose,” and that the weight of authority supports dismissal of the action when all disputes between the parties are subject to arbitration, as is the case here. See *Manes, supra*; *Altela*, 2016 WL 4539949 at \*8 (D. Ariz. Aug. 31, 2016) (holding that because “the Agreement’s arbitration provision provides that all Agreement-related disputes between the parties shall be submitted to arbitration[...]” the court would “dismiss this case rather than staying it.”) (citing *Jann v. Interplastic Corp.*, 631 F. Supp. 2d 1161, 1167 (D. Minn. 2009)). The Ninth Circuit has confirmed the authority of the district courts to dismiss disputes subject to arbitration rather than to issue a stay. See *Sparling*, 864 F.2d at 638; see also *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 147-8 (9th Cir. 1978) (approving summary disposition of claims subject to mandatory arbitration). In response thereto, Plaintiffs’ counsel pointed out a matter in a Fifth Circuit District Court in which the request for a stay was granted. In light of existing case law in the Ninth Circuit and prior orders, Defendants’

counsel does not believe Plaintiffs' suggested request for a stay combined with an administrative closure is appropriate and could not join in it.

For the reasons enumerated above, the Parties concur that the dispute at bar must be directed to arbitration. Defendants, as movants, hereby request dismissal of this action and an order that the Parties proceed with the arbitration of their disputes.

#### **MEET AND CONFER CERTIFICATION**

Defendants' undersigned counsel hereby attests and certifies that, pursuant to this Court's October 5, 2021 Order (Doc. 8) he has engaged in comprehensive discussions with opposing counsel from September 22, 2021 to October 14, 2021 via phone and electronic communications in an effort to assess the Parties' respective positions regarding the dismissal of this action. The Parties concur that no amendment can obviate the Parties' agreement to arbitrate their dispute. The Parties solely disagree on whether this Court should retain some form of jurisdiction over this matter rather than dismiss it outright.

DATED this 15th day of October, 2021.

**BUCHALTER,  
A PROFESSIONAL CORPORATION**

By: /s/ Laurent R.G. Badoux

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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No. CV-21-01688-PHX-GMS

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William F. Forrest, *et al.*,  
Plaintiffs,

v.

Keith Spizzirri, *et al.*,  
Defendants.

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**PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION TO COMPEL ARBITRATION AND  
DISMISS ACTION**

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Plaintiffs, William F. Forrest, *et al.*, by and through their attorneys at Lubin & Enoch, P.C., hereby respond to Defendants' Motion to Compel Arbitration and Dismiss Action (the "Motion") (Doc. 18).

Plaintiffs agree that this action is subject to arbitration. However, Plaintiffs contend that the proper course is to stay, not dismiss, this action pending arbitration. Not only does the Federal Arbitration Act, 9 U.S.C. § 3 (the “FAA”) require an action be stayed pending arbitration, but that is also the result contemplated by the arbitration clause of the Parties’ Independent Contractor Owner/Operator Agreements (the “Contracts”). The Contracts containing the arbitration provisions are attached hereto as Exhibits A—E.

**I. DEFENDANTS REMOVED THE CASE TO THIS COURT ONLY TO THEN IMMEDIATELY ASK FOR THE CASE TO BE DISMISSED.**

As a preliminary matter, Plaintiffs note that this case was originally filed in Maricopa County Superior Court. Defendants had this case removed to the U.S. District Court for the District of Arizona on October 1, 2021 (Doc. 1). Then, exactly two weeks after removal the Defendants filed their Motion to Dismiss this case (Doc. 18). By removing the case, the Defendants chose this Court as the appropriate forum for resolving arbitration-related disputes. In the interests of securing “the just, speedy, and inexpensive determination of every action,” Fed. R. Civ. P. 1, this Court ought to retain jurisdiction to do so. These arbitration-related disputes, more fully briefed below, include, *inter alia*, adjudicating the action in the event the Defendants are unable to pay the Arbitrator’s fees and costs and reviewing an arbitral award *de novo*. Accordingly, Plaintiffs request that the Court stay and administratively close this action pending arbitration, rather than dismiss it.

## II. THE FAA DIRECTS THE COURTS TO STAY, RATHER THAN DISMISS ACTIONS PENDING ARBITRATION.

Where a valid arbitration agreement exists between the parties, the plain language of Section 3 of the FAA directs a court to stay the action until arbitration has been completed. 9 U.S.C. § 3 (LexisNexis, Lexis Advance through Public Law 117-51, approved October 19, 2021). Section 3 reads: “the court in which [a] suit [referable to arbitration] is pending, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.” *Id.* (emphasis added). Thus, when a party “move[s] the district court for a stay pending arbitration[,] [t]he proper course . . . for the district court [is] to grant [the Party’s] motion and stay the action pending arbitration.” *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994).

### A. The Plain Language of the FAA is Unambiguous and On its Face Requires Actions Be Stayed, Not Dismissed, Pending Arbitration.

The plain language of the FAA unambiguously directs a court to stay, rather than dismiss, an action as evinced by Congress’ use of the word “shall.” 9 U.S.C. § 3. In *Green Tree Fin. Corp.-Ala. v. Randolph*, the Supreme Court instructed courts to apply “the plain language of the statutory text” in interpreting the FAA. 531 U.S. 79, 88 (2000) (holding that the plain meaning of the term “final decision” in 9 U.S.C. § 16(a)(3) must be applied). In Arizona, “[t]o determine the plain meaning of a term, we refer to established and widely used dictionaries.” *Flowers-Carter v. Braun Corp.*, No. CV-18-03836-PHX-DWL, 2021 U.S. Dist. LEXIS 63202, at \*43 (D. Ariz. Mar. 31, 2021) (citing *Western Corr. Grp., Inc. v. Tierney*, 208



Ariz. 583 (Ct. App. 2004); *accord Parada v. Parada*, 196 Ariz. 428, 999 P.2d 184, 187 (2000)). As explained by the Missouri Court of Appeals, the definition of the word “shall,” as found in Black’s Law Dictionary and Webster’s Dictionary, implies a mandatory obligation of the court:

“[The] dictionary definitions of the word “shall,” . . . indicate that this term expresses a mandatory duty or command. For example, *Black’s Law Dictionary* defines “shall” as follows: “[h]as a duty to; more broadly, is required to,” and further notes that, “[t]his is the *mandatory* sense that drafters typically intend and that courts typically uphold.” *Shall, Black’s Law Dictionary* (11th ed. 2019) (emphasis added). Although *Black’s Law Dictionary* covers several other senses in which the word “shall” can be used (i.e., “should,” “may,” and “will”), the definition concludes by stating that the *mandatory* sense is the only one that is acceptable “under strict standards of drafting.” *Id. See also Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, 367 P.3d 994, 1002 n.36 (Utah 2016) (similarly noting that *Black’s Law Dictionary* recognizes that drafters typically intend, and courts typically uphold, the mandatory sense of the word “shall”).

Likewise, Webster’s Dictionary similarly notes that “shall” is “used to express a command or exhortation.” *Webster’s Third New International Dictionary* (2003). *See also U.S. Cent. Underwriters Agency, Inc. v. Hutchins*, 952 S.W.2d 723, 725 (Mo. App. E.D. 1997) (citing *Webster’s Third New International Dictionary* (1976) for the proposition that, “[t]he definition of ‘shall’

states that it is ‘used in laws, regulations, or directives to express what is mandatory’).

*Pelopidas, LLC v. Keller*, No. ED109395, 2021 Mo. App. LEXIS 757, at \*27-28 (Ct. App. Aug. 10, 2021). Thus, under the plain language of the statute, a court must stay an action pending arbitration as opposed to dismissing it.

**B. Taking the Congressional Text at Face Value, Federal Courts Do Not Have Discretion to Dismiss an Action Pending Arbitration.**

Congress’ use of the word, “shall,” normally “creates an obligation impervious to judicial discretion.” *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerarch*, 523 U.S. 26, 35 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“[Congress] use of a mandatory ‘shall’ . . . impose[s] discretionless obligations.”). To allow courts discretion to dismiss actions rather than to abide by the mandate to stay them would be to ignore the will of Congress. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982) (“[A court’s] task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, ‘that language must ordinarily be regarded as conclusive.’” (internal citations omitted)). Absent an amendment to the statute, a court must stay an action pending arbitration, *id.* at 576 (“The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court.”); it does not have discretion to dismiss it. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (“When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings, 9 U.S.C. § 3, and to compel arbitration, *id.* § 4.”); *Lloyd v. Hovensa*, 369 F.3d 263, 269 (3d. Cir. 2004) (“[T]he plain

language of § 3 affords a district court no discretion to dismiss a case where one of the parties applies for a stay pending arbitration.”); *but see Johnmohammadi v. Bloomingtondale’s, Inc.*, 755 F.3d 1072, 1073-74 (9th Cir. 2014) (citing *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (“We have held that, notwithstanding the language of § 3, a district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration.”)).

**C. Staying, Rather Than Dismissing, a Case Pending Arbitration is Also Consistent with Nevada and Arizona State law.**

The choice of law provision in the Parties’ Contracts specifies that “all rights and obligations of the parties shall be construed in accordance with the laws of Nevada . . . and any action shall be commenced in that jurisdiction . . . unless the parties agree otherwise.” Exs. A—E, § 14.

Regardless of whether federal or state law applies, the result is the same. Both Nevada and Arizona State law also require an action be stayed pending arbitration. Under the Uniform Arbitration Act of 2000, Nev. Rev. Stat. Ann. §§ 38.206 to 38.248, “[i]f a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.” Nev. Rev. Stat. Ann. § 38.221. Arizona adopted identical language in A.R.S. § 12-3007(F). Additionally, under A.R.S. §§ 12-1502 and 3007(G), a court is directed that “[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application thereof has been made . . . [and] the order shall include such stay.”

Accordingly, both state and federal law direct courts to stay any action pending arbitration.

**III. ASSUMING, *ARGUENDO*, THIS COURT FINDS IT HAS DISCRETION TO DISMISS OR STAY THIS CASE, THE COURT SHOULD DECIDE TO RETAIN JURISDICTION BECAUSE THE ARBITRABLE CLAIMS ARE SUBJECT TO *DE NOVO* REVIEW BY THIS COURT.**

Even disregarding the plain language of the statute, the Parties' Contracts expressly reserves the power for "a court of competent jurisdiction to compel arbitration under this Agreement, to enforce an arbitration award, or to review an arbitration award." Exs. A-E, § 13(d). In so agreeing, the Parties indicated that "the standard of review applied will be the same as that applied by an appellate court reviewing the decision of a trial court sitting without a jury, *without any special deference to the arbitrator.*" *Id.* (emphasis added).

One of the reasons Plaintiffs wish to keep this action stayed in this court is to retain a forum in which they can seek to have the arbitration award reviewed and confirmed. *See NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019) ("A federal-court order confirming an arbitration award has 'the same force and effect' as a final judgment on the merits." (quoting 9 U.S.C. § 13)). The Court, paying no "special deference to the arbitrator," would presumably be bound by neither the arbitrator's conclusions of law nor her findings of fact. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc) ("An appellate court reviews a district court's conclusions of law de novo and its findings of fact for clear error following a bench trial."); *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir. 2009) ("The clear error standard is significantly deferential."). Defendants' Motion was

conspicuously silent regarding the Court's novel role in reviewing an arbitral award *de novo*, most likely in the hope that by not bringing attention to this role the Court would assume there were no matters left to be resolved by the Court and dismiss the case.

A second reason Plaintiffs wish this action stayed rather than dismissed is Plaintiffs well-founded belief that Defendants will be unable or unwilling to pay the ongoing arbitration fees and that this action will ultimately be kicked back to the Court to be fully litigated. Per the arbitration provision in the Parties' Contracts, "Defendants shall pay all of the Arbitrator's fees and costs." Exs. A—E, § 13(b)(3). In 2019, Defendants were a party to a class action settlement agreement in a case, quite similar to this one, in which they agreed to pay the gross settlement amount of \$5,500,000.00. *Collinge v. IntelliQuick Delivery, Inc.*, 2:12-CV-00824-PHX-JWS (D. Ariz. May 14, 2019) (Doc. 605). During settlement talks, "Defendants' brought their outside bankruptcy counsel and a debt restructuring finance professional" and represented "to Class Counsel that if the case could not be resolved Defendants would file for bankruptcy protection within the next several weeks." *Id.* (Doc. 560, p. 5). Judge John W. Sedwick, in granting final approval of the class action settlement agreement, specifically found that "[t]he Settlement eliminates the risks inherent in continuing the litigation in this case, including the risk that there could eventually be no monetary [compensation] for Class Members and that one or more of the Defendants could file for bankruptcy protection." *Id.* (Doc. 595, pp. 3—4). Here, if at any time during arbitration proceedings Defendants are unable or unwilling to pay the Arbitrators' fees and costs for the five (5) separate arbitrations that will take place, *see* Exs. A—E, § 13(a), Plaintiffs would move this Court to lift the stay

and proceed without delay to litigate this action in Court. Accordingly, there are matters in this action that remain subject to review and enforcement by this Court that weigh in favor of staying, rather than dismissing, this action.

#### **IV. STAYING THE ACTION IS CONSISTENT WITH PREVIOUS ORDERS ISSUED BY THIS COURT.**

In their Motion to Dismiss, defense counsel refers to a previous order issued by this Court that dismissed, rather than stayed an action in lieu of arbitration (Doc. 18, Ex. A). That order indicated that “[t]he Court [found] that dismissal [was] more appropriate because the entire matter [would] be resolved by arbitration and a stay would serve no obvious purpose.” *Id.* (referring to the order issued in *Manes v. Stetson Desert Project LLC*, 2:18-CV-04664-PHX-DJH (D. Ariz. Sept. 3, 2019) (Doc. 30)). Ordering a stay in the instant case is fully consistent with the Court’s order in *Manes*, because here there are matters left to be resolved by this Court, specifically reviewing and confirming the arbitral award, and staying the case serves the obvious purpose of retaining jurisdiction over the action to do so. Further, in the event that Defendants are unable to pay the Arbitrators’ fees and costs for any or all of the five (5) separate arbitrations, the only action required would be to lift the stay and proceed without delay with litigation. Thus, dismissal is not appropriate in the instant case.

Plaintiffs offer, as a counter example, an Order issued by the U.S. District Court for the Northern District of Texas that denied Defendants’ motion to dismiss and instead order the action be stayed and administratively closed. *Godwin v. Orcutt*, 5:18-CV-133-C (N.D. Tex. Mar. 26, 2019) (Doc. 15). This is the Order mentioned in passing by the Defendants in their motion to dismiss (Doc. 18,

p. 3). The Order allowed that “[s]hould any matters require the case to be reopened following arbitration, the parties may file a notice with the Court at that time requesting that the case be reopened and the stay lifted.” *Id.* That Order has been attached hereto as Exhibit F and is precisely the outcome Plaintiffs urge this Court to effect.

#### V. CONCLUSION

Consequently, while the Parties agree that this dispute must be deferred to arbitration, Plaintiffs respectfully request this action be stayed, rather than dismissed, pending arbitration because the Plaintiffs anticipate there will be matters pending during and after arbitration that will require the Court’s review.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

LUBIN & ENOCH, P.C.

/s/ Nicholas J. Enoch

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

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Case No. 2:21-cv-01688-GMS

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William F. Forrest, a single man, Wendy Smith, a single woman, Michelle Martinez, a single woman, Jodi Miller, a married woman, and Kenneth Turner, a married man,

Plaintiffs,

v.

Keith Spizzirri and Miriam Spizzirri, husband and wife;  
Ken Maring and Jane Doe Maring, a married couple;  
Cynthia Moore and John Doe Moore, a married couple;  
Pat Doe and Jane Doe I, husband and wife, John De La Cruz and Jane Doe De La Cruz, a married couple, Intel-  
liquick Delivery, Inc. an Arizona Corporation, Majik  
Leasing, LLC, an Arizona corporation; and Majik Enter-  
prises I, Inc., an Arizona Corporation,

Defendants.

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**DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO COMPEL ARBITRATION AND  
DISMISS ACTION**

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Defendants hereby timely file the following Reply in Support of their Motion to Compel Arbitration and Dismiss Action. This Reply Brief is supported by the following Memorandum of Points and Authorities, which is incorporated by reference herein for this Court's consideration.

**MEMORANDUM AND POINTS OF AUTHORITY**

**I. Introduction.**

After reviewing Plaintiffs' Opposition to Defendants' Motion To Dismiss and wading through ten pages of largely immaterial information, the reader is left to recognize that Plaintiffs concur that the dispute they have brought is subject to arbitration, which they knew before the motion was filed, not only in reviewing their agreement but from dialogue with counsel for Defendants, in an effort to avert the need for filing the instant motion.

Since there is no dispute that the claims at issue must be, in their totality, submitted to arbitration, the Court is left to weigh the argument of Plaintiffs that, despite the existence of rulings by other judges in this District, anchored in Ninth Circuit jurisprudence, this Court should not dismiss this action but instead keep it open in abeyance while the Parties take their dispute to a different forum for adjudication, as required.

Not dismissing this action would add obligations to the Parties and the Court, however slight, that are unwarranted. It is settled law that arbitration provides a proper alternative to civil litigation, and the procedural posture of

this case is not unique. Dismissal is the proper course of action.

## II. Legal Arguments.

Plaintiffs seek to argue that the Federal Arbitration Act calls for a district court to defer to arbitration and allow it to take its course before becoming involved. This argument has been advanced before, but the Ninth Circuit has recognized that it is entirely proper in harmonizing the demands of the FAA with court procedures to dismiss an action subject to arbitration in its entirety, which is undeniably the case here.

In addition, Judge Campbell, in a prior opinion, reviewed applicable case law in other jurisdiction and came to the same conclusion Defendants offer here, which is that dismissal is the appropriate course of action, not staying an action and keeping it pending in an inactive state. *Altela, Inc. v. Arizona Sci. & Tech. Enters. LLC*, CV-16-01762-PHX-DGC, 2016 WL 4539949 at \*8 (D. Ariz. Aug. 31, 2016). As mentioned in the briefing of the Motion to Dismiss, the *Altela* decision is not unique and has resulted in the dismissal of similar wage and hour law complaints subject to arbitration. Motion to Dismiss [Doc. 18] at 2-3.

Plaintiffs offer no compelling reasons for a change in procedure for handling the dismissal of claim subject to arbitration in this district. First, Plaintiffs contend that financial trouble could cause one or more Defendants to fail to pay arbitration costs. This is an eventuality that is present in every case but it is not a reason for a court to retain jurisdiction. If a party does not abide by its contractual commitment to arbitrate, there are arbitral recourses available first before having the option to return to court to compel action, if necessary. This does not require the Court to retain jurisdiction over a matter it is not actually

adjudicating. Indeed the failure to abide by an arbitration agreement is not the same as litigating the underlying dispute between the Parties. Thus, even if the eventuality Plaintiffs contemplate were to occur, however distant a prospect it might be, the issue to present would be one of compliance with contract to arbitrate, not the subject of the present lawsuit.

Second, Plaintiffs contend that this Court retains jurisdiction to review and or enforce any decision of an arbitrator. This is nonsense. The Parties have agreed to resolution via final and binding arbitration. By its very nature, the agreement to arbitrate leads to a self-effecting order from the neutral the parties might select. Here again, if the order of the arbitrator were not complied with, the aggrieved party would be allowed to bring an action to compel enforcement, not an action to rule upon the dispute between the Parties.

It is black letter law that for a court to weigh in on any legal issue, that issue in controversy must be live, not academic, advisory or prospective. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997) (recognizing that an actual controversy must be extant at all stages of review). The hypotheticals that Plaintiffs present are not situations for which this Court can retain jurisdiction, because they are just that, hypotheticals. There is no live and actual controversy in the case at bar since both sides agree arbitration is the proper forum for dispute resolution. Plaintiffs have not yet submitted an arbitration demand, the neutral has not been selected and the neutral has not had the opportunity to consider how to rule. The prospects of a potential controversy, whether non-payment of arbitration fees or failure to abide by final and binding award, do not vest a court with jurisdiction. Until

that controversy materializes, which is exceedingly unlikely to occur, a court has no reason to be involved. *Id.* at 45.

Since the Parties concur that arbitration is their proper forum, this Court is left with nothing over which to exercise jurisdiction and this action should simply be dismissed.

**III. Conclusion.**

For the foregoing reasons, Defendants, as movants, hereby request dismissal of this action and an order that the Parties proceed with the arbitration of their disputes.

DATED this 8th day of November, 2021.

**BUCHALTER,  
A PROFESSIONAL CORPORATION**

By: /s/ Laurent R.G. Badoux

Laurent R.G. Badoux

*Attorneys for Defendants*