UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FERNANDO RUIZ, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

AFFINITY LOGISTICS CORPORATION,

Defendant.

CASE NO. 05CV2125 JLS (KSC)

MEMORANDUM DECISION AND ORDER FOLLOWING REMAND FINDING PLAINTIFF AND ABSENT CLASS MEMBERS PROPERLY CLASSIFIED AS INDEPENDENT CONTRACTORS

On remand from the Ninth Circuit, this matter is before the Court to resolve a limited issue that is central to this class-action lawsuit: Whether, under California law, Affinity Logistics Corporation ("Affinity") should have classified the class members—defined as all current and former delivery drivers who made home deliveries for Affinity in the State of California between May 18, 2001, and the resolution of the complaint—as employees rather than independent contractors. This Memorandum Decision and Order Following Remand is based on the testimony and evidence admitted at the December 2009 bench trial,[1] as well as the arguments presented in the parties' briefs following remand. (ECF Nos. 209, 210, 214, 215) Having considered the

[1] At the appeal mandate hearing on March 28, 2012, the Court inquired whether the parties sought to introduce any additional evidence to aid in the Court's analysis. The parties represented that no further evidence was necessary, and that the case would not need to be re-tried. Although Plaintiff's counsel hedged somewhat, he advised the Court that if he determined a need for further evidence he would let the Court know as soon as possible. As of the date this Memorandum Decision and Order Following Remand is electronically docketed, neither party has advised the Court of any need to take additional testimony or submit additional evidence. Further, the parties fully and completely addressed the issue in their briefs following remand.

evidence presented, the parties' arguments, and the law, the Court concludes that Affinity met its burden of establishing that Plaintiffs were correctly classified as independent contractors and finds in favor of Affinity.

BACKGROUND

1. Procedural Background

This putative class action was transferred to this Court from the Northern District of California on November 14, 2005. (Transfer Order, ECF No. 1) Plaintiff Fernando Ruiz ("Ruiz"), on behalf of himself and all others similarly situated (collectively, "Plaintiffs"), alleged that Affinity misclassified the drivers it hired to perform home delivery services as independent contractors, contending that they should have been classified as employees. On January 28, 2009, the Court certified the class on the lone issue of whether Affinity should have classified the class members as employees, rather than independent contractors, (Class Cert. Order 1, ECF No. 105), and this limited issue went to trial.

Following a three-day bench trial in December 2009,[2] the Court—applying Georgia law—found that Affinity properly classified Ruiz and the absent class members as independent contractors, as summarized in a Memorandum Decision and Order Finding Plaintiff and Absent Class Members Properly Classified as Independent Contractors ("Memorandum Decision"). (Mem. Decision, Mar. 22, 2010, ECF No. 186) Ruiz appealed, and the Ninth Circuit—concluding that California, not Georgia, law applied—vacated and remanded in a February 8, 2012, opinion. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012).

Accordingly, the Court now revisits this issue, this time applying California law to the facts as established at the December 2009 bench trial. The Court accepted and reviewed briefs following remand from Plaintiffs, (Pls.' Brief, ECF No. 210), and Affinity, (Def.'s Brief, ECF No. 209), and replies from both parties, (Pls.' Reply, ECF No. 214); (Def.'s Reply, ECF No. 215).

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[2] At the December 2009 bench trial the Court heard testimony from witnesses Fernando Ruiz, Alfonso Sanchez, Oscar Arturo Reyes, Charles Hitt, Danny Lee Hansen, Robert William Crandell, and Gabriel Mejia, heard opening arguments from counsel, and admitted exhibits into evidence.

2. Factual Background[3]

Affinity,[4] a Georgia corporation, provided regulated, for-hire home delivery and transportation logistics support services to various home furnishing retailers, including Sears, Home Depot EXPO, J.C. Penney, Wickes, and Brueners. In November 2003 and again in 2006, Affinity entered into a Home Delivery Carrier Agreement with Sears to arrange for drivers to perform home delivery services out of the San Diego Market Delivery Operation ("MDO"). Sears owned the San Diego MDO, but provided Affinity with offices at the warehouse.

Ruiz worked as a driver for Affinity during the class period, making deliveries for Affinity to Sears customers. Ruiz decided to work for Affinity in late 2003 after meeting with Dan Hansen, who managed the Sears account for Affinity at the San Diego MDO. Before starting his work for Affinity, Ruiz formed his own business, R&S Logistics ("R&S"), by obtaining a Federal Employer Identification Number and establishing a separate business banking account for R&S.

To work as a driver for Affinity, Ruiz and the other Plaintiff drivers were required to enter into the Independent Truckman's Agreement ("ITA") and Equipment Lease Agreement ("ELA") with Affinity. Both the ITA and the ELA provided that the parties intended to create an independent contractor relationship:

> **Control and Exclusive Use**. . . . The parties intend to create an independent contractor relationship and not an employer-employee relationship. (Trial Ex. 77, at ¶ 9 (ITA))
>
> **Independent Contractor** (a) Contractor, in the performance of this Agreement, will be acting in his own separate capacity and not as an agent, employee, partner, joint venture or associate of Affinity. It is expressly understood and agreed that Contractor is an independent contractor of Affinity in all manners and respects and that Contractor is not authorized to bind Affinity to any liability or obligation or to represent that it has any such authority. (Trial Ex. 78, at ¶ 2 (ELA))

Additionally, under the ELA, Affinity leased "the equipment with a driver" from Plaintiffs. (Trial Ex. 78, at ¶ 1) Among the "equipment" Affinity leased from Plaintiffs under the ELA was the truck the drivers used to complete their deliveries. In a somewhat circular arrangement,

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[3] Facts contained in the Factual Background and throughout this Memorandum Decision and Order Following Remand are based on the factual findings as set forth in the Court's Memorandum Decision following the three-day bench trial, unless otherwise indicated. (*See* Mem. Decision, Mar. 22, 2010, ECF No. 186)

[4] In June 2007, Affinity was acquired by 3P Delivery, Inc.

Affinity actually leased the trucks from Ryder Truck Rental and subleased the Ryder trucks to Plaintiffs, who in turn leased the truck and driver back to Affinity under the ELA.

Although Ruiz and the other Plaintiff drivers could accomplish the deliveries themselves, they were not required to do so. Indeed, many Plaintiffs hired other drivers or operated multiple trucks, hiring second drivers and helpers to run these additional delivery routes. Further details of the contractual arrangement for delivery services between Plaintiffs and Affinity are discussed below.

ANALYSIS

"[U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) (citing *Robinson v. George*, 105 P.2d 914, 917 (Cal. 1940)). "'[T]he fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary.'" *Id.* (quoting *Robinson*, 105 P.2d at 116). Under these principals—and as directed by the Ninth Circuit in applying these principals to the facts of this case[5]—Affinity carries the burden to "prove, if it can, that the presumed employee was an independent contractor." *Id.* (citing *Cristler v. Express Messenger Sys., Inc.*, 89 Cal. Rptr. 3d 34, 43 (Cal. Ct. App. 2009)).

Under California law, that the parties placed a label on their relationship "is not dispositive and will be ignored if their actual conduct establishes a different relationship." *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Cal. Ct. App. 2007) (citing *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations*, 769 P.2d 399, 403 (Cal. 1989)). Instead, "the most important factor [informing the employee/independent contractor distinction] is the right to control

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[5] As explained in the Ninth Circuit's opinion vacating and remanding the case, "the starting point from which the drivers begin their lawsuit is vastly different depending on whether California or Georgia law applies." *Ruiz*, 667 F.3d at 1323. This is because, applying Georgia law, the Court found there was a presumption that Plaintiffs were independent contractors and that the burden was on Plaintiffs to rebut that presumption. (Mem. Decision 3–4, ECF No. 86 (citing *Fortune v. Principal Fin. Grp., Inc.*, 465 S.E.2d 698, 700 (Ga. Ct. App. 1995))) But, applying California law, "the presumption is that the drivers are employees and the burden is upon Affinity to demonstrate that the drivers are independent contractors." *Ruiz*, 667 F.3d at 1323.

the manner and means of accomplishing the result desired." *Cristler*, 89 Cal. Rptr. 3d at 38 (internal quotation marks omitted); *accord Estrada*, 64 Cal. Rptr. 3d at 335 ("The essence of the [common law] test [of employment] is the 'control of details'—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work . . . .").

California courts also look to several secondary factors to ascertain the nature of a service relationship. *Borello*, 769 P.2d at 404. Thus, in addition to the control test, "strong evidence in support of an employment relationship is the right to discharge at will, without cause." *Id.* (internal quotation marks and brackets omitted). And Courts also look to the following factors derived from the Restatement Second of Agency:

> (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship.

Estrada, 64 Cal. Rptr. 3d at 335 (citing *Borello*, 769 P.2d at 404 (citing Restatement (Second) of Agency § 200)). Finally, in addition to those factors covered by the Restatement, *Borello* noted several other relevant factors including "the alleged employee's opportunity for profit or loss depending on his managerial skill" and "the alleged employee's investment in equipment or materials required for his task, or his employment of helpers." *Borello*, 769 P.2d at 407.

According to Affinity, "[a]pplying California law to [the Court's factual] findings will not alter the conclusion this Court previously reached." (Def.'s Brief 1, ECF No. 209) Affinity places much emphasis on the fact that the Memorandum Decision "addressed and resolved" several of the same factors that are applicable under California law. (Def.'s Reply 1, ECF No. 215 (referring to Mem. Decision 5, ECF No. 186 (concluding that "some factors support a finding of employer-employee relationship" but that "the predominant evidence supports a finding that Ruiz and the unnamed class members were correctly classified as independent contractors"))) And, even for the factors the Court did not previously consider, Affinity argues that "the evidence bearing on [these factors] also weighs in favor of finding that Affinity properly classified Ruiz and the [drivers] as independent contractors." (*Id.*)

Plaintiffs disagree, arguing that Affinity has failed to carry the burden that now falls on them, and that "[t]he overwhelming weight of the evidence establishes that the drivers were misclassified." (Pls.' Brief 2, ECF No. 210) Plaintiffs correctly point out that the above factors should be applied by reference to and with deference for the remedial purposes of California's protective legislation. (Pls.' Brief 3–4, ECF No. 210); *see also Ruiz*, 667 F.3d at 1324 ("The California Supreme Court recognized that [the multi-factor test for determining employment status] 'must be applied with *deference to the purposes of the protective legislation*' that the worker seeks to enforce." (quoting *Borello*, 769 P.2d at 406 (emphasis added))). But Plaintiffs also challenge the Court's prior credibility and evidentiary findings, apparently under the assumption that the Court will revisit both the legal conclusions and factual findings of the Memorandum Decision. (*See, e.g.*, Pls.' Brief 19, 22, 29, ECF No. 210)

As between the parties' two positions—Affinity suggesting that many of the factors have already been resolved[6] and Plaintiffs implying that the Court should reconsider its factual findings—the appropriate balance is somewhere in the middle. The Court will not alter its previous factual findings, but the inferences to be made from those findings as applied to California law will be considered anew, in light of the principals outlined above. And so, the Court now turns to California's multi-factor test to determine how the drivers should be classified.

1. Affinity's Control Over the Manner and Means of Performance

The most important factor and the first factor that the Court considers in determining the appropriate classification of the drivers is the level of Affinity's right to control the manner and means of the drivers' performance. *Cristler*, 89 Cal. Rptr. 3d at 38. As explained, because Plaintiffs have proffered evidence that they provided services for Affinity, the burden is on

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[6] Indeed the Ninth Circuit already addressed and resolved Affinity's argument on this point:

> Affinity asserts that any error in applying Georgia law was harmless because the district court applied the common law factors that California considers and concluded that Ruiz was an independent contractor. Such an assertion, however, disregards the district court's repeated references to the Georgia presumption of independent contractor status and its general reliance on Georgia law to resolve the employee-independence contractor issue.

Ruiz, 667 F.3d at 1324 n.2.

Affinity to establish that Plaintiffs are independent contractors, rather than employees. Accordingly, the Court begins its analysis of the control factor with the various arguments set forth by Affinity in its brief following remand.

First, Affinity contends Ruiz and the other Plaintiff drivers controlled the manner, means, and details of their own work, as evidenced by the fact that Affinity permitted the drivers to choose their own routes and to hire others to complete the contracted work. (Def.'s Br. 20–25, ECF No. 209) Affinity points out that Plaintiffs were free to and did hire their own employees to perform the work Affinity hired them to do, even going so far as to operate multiple trucks with multiple employees. (*Id.* at 23–24) Affinity notes that the time at which Plaintiffs started and ended their days was also within their control: Ruiz elected to arrive to the warehouse earlier in the morning than other drivers, and his "ending time depended solely on the speed and efficiency with which [he] and his employees completed the deliveries." (*Id.* at 23) Moreover, Affinity contends that it exercised little to no control over Plaintiffs' appliance installation services, and that "[t]o the extent Ruiz was provided with any delivery or installation specifications, those specifications were the very services R&S agreed to provide and . . . Ruiz's adherence to those specifications merely shows that he provided the services for which he was engaged." (*Id.*)

The Court agrees with Affinity that the fact that Ruiz and the other drivers were able to hire others to complete the deliveries Affinity hired them to do is strong evidence suggesting that Affinity did not have the requisite level of control over the manner and means of Plaintiffs' work. As the Court previously found:

> The most prominent evidence that Affinity did not control the time, manner and method of the drivers is that Ruiz and the other drivers did not themselves have to do the work for which they were hired—drivers could hire other drivers to load the trucks, drive the trucks, run the routes, make the deliveries, unload the trucks, and perform virtually all other aspects of the job. . . . In fact, some of the drivers operated multiple trucks to complete the deliveries on any given day and hired drivers and helpers to staff those extra trucks.

(Mem. Decision 5, ECF No. 186 (citing trial transcript)) Based on this evidence, the Court found—and still finds—"that the Plaintiffs' ability to hire others to operate the trucks and perform the services they contracted with Affinity to perform[] is highly indicative of an independent contractor relationship. An employee is not able to hire a substitute to do their work as these

drivers were permitted, and even encouraged, to do." (*Id.*)

Plaintiffs argue, however, that their ability to run multiple trucks and hire additional drivers and helpers is nevertheless within Affinity's control because "Affinity retained the right to approve or reject helpers and second drivers for any reason or for no reason at all." (Pls.' Br. 13, ECF No. 210) The Court agrees that to the extent Affinity required second drivers to complete substantially the same application in order to be hired and monitored their performance and appearance after they were hired, this suggests the type of control characteristic of an employment relationship. Affinity's requirements in this regard must be discounted to the extent they were driven by a need to comply with federal regulations or with Sears' requirements, however. (*See* Mem. Decision 6–8, ECF No. 186)[7] And as the Court has already found, "the application and approval process for helpers and second drivers are the product of Sears' and federal regulation requirements," (*id.* at 6), and Affinity's monitoring of the helpers' and second drivers' performance and appearance is "attribute[d] . . . to Sears' requests," (*id.* at 8).

This same reasoning applies to Plaintiffs' argument that Affinity exercised control over Plaintiffs by requiring them to adhere to specific uniform and grooming guidelines.[8] The Court has not overlooked the fact that California courts have found "control over every exquisite detail

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[7] Apparently recognizing that the Court, as it did previously, is disinclined to give much—if any—weight to the requirements placed upon helpers and second drivers that are set by federal regulations, Plaintiffs state in a footnote that they "are not relying on any government regulations, but rather, the basic point that Affinity had to approve the drivers' helpers and second drivers." (Pls.' Br. 13 n.3, ECF No. 210) But the issues are inextricably intertwined: if Affinity's approval or disapproval of helpers and second drivers was rooted in compliance with federal regulations, then the "basic point that Affinity had to approve" them cannot be untied from compliance with those regulations. Accordingly, the Court again holds that the exercise of control over the drivers, second drivers, and helpers in compliance with government regulations does not weigh heavily toward an employer-employee relationship. *See SIDA of Haw., Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975).

[8] For example, drivers were expected to wear blue shirts with stripes and the words "Sears Authorized Carrier" on the back, dark blue pants, black shoes and belt, and a cap with the Sears logo. Affinity provided the uniforms to its drivers from stock inventory if needed, but Affinity did not require the drivers to purchase the uniforms from it, nor did Affinity profit off of the uniforms. Some drivers even embroidered their hats with "Sears Authorized Carrier" outside of Affinity. (Trial Tr. 55–56, 126–29, ECF No. 168); (Trial Tr. 286–87, 319–20, ECF No. 169); (Trial Tr. 499–501, ECF No. 170); (Trial Tr. 731, ECF No. 170)

The drivers and helpers were also subject to various grooming requirements. Facial hair was expected to be neatly groomed, and Affinity even supplied shaving kits in case drivers came to work with a "five o'clock" shadow. (Trial Tr. 387–88, ECF No. 169) The drivers and helpers were also expected to not have any visible body piercings or tattoos. (*Id.* at 387)

of the drivers' performance, including the color of their socks and the style of their hair" to be the type of control germane to an employee-employer relationship. *Estrada*, 64 Cal. Rptr. at 336. But unlike in *Estrada*, where FedEx imposed such uniform and grooming requirements on its drivers directly, here these requirements were attributable to Sears and are therefore not evidence of *Affinity's* control. (Trial Tr. 386–87, ECF No. 169 (testimony of Danny Hansen indicating that in checking the drivers' appearance and uniform he was looking "to make sure that the uniform they were wearing complied with Sears' requirements")); (*id.* at 340–42) Moreover, as several Affinity representatives testified to, "a uniform requirement often at least in part is intended to ensure customer security rather than control the driver." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) (internal quotation marks and brackets omitted).

As to Affinity's control over the hours worked, the evidence is mixed. The Court believes that Affinity did exercise some degree of control over the time that Plaintiffs began their day. For example, Affinity required the drivers to show up to the Sears warehouse prior to a morning stand-up meeting or they risked losing their routes (or getting a less preferable route). (Trial Tr. 41–42, 118–19, 154–55, ECF No. 168); (Trial Tr. 590–92, ECF No. 170) Although the drivers controlled the exact time they arrived at the warehouse—*e.g.*, Ruiz testified that he chose to show up earlier than other drivers, at 5:30a.m. rather than 6:30a.m., (Trial Tr. 590–92, ECF No. 170)—each testified that their decision for when to arrive was driven by Affinity's requirement that they be present for the stand-up meetings and to obtain their daily routes. (Trial Tr. 41–42, 118–19, ECF No. 168); (Trial Tr. 590–92, ECF No. 170) More evidence of Affinity's control over the drivers' hours is that drivers were told by Affinity whether they would be working the next day depending on how many routes were available, (Trial Tr. 75, 78, 136–37, ECF No. 168), and that in order to secure time off Plaintiffs had to request it several weeks in advance (and such requests were sometimes denied), (*id.* at 78–79).

Notwithstanding these measures of control, Affinity did not directly control the number of hours worked each day, or at what time Plaintiffs ended their day. Instead, the end of each day depended on how quickly and efficiently Plaintiffs completed their routes, and so the actual number of hours worked depended on the efficiency of the deliveries, and not on a set number of

hours required by Affinity.[9] Similarly, the number of hours worked was in large part determined by the drivers' delivery routes. This is because the routes varied as to the number of stops or miles needed to be traveled to make all of the stops.[10] And, rather then being controlled by Affinity, the predominant evidence indicates that the drivers selected or were assigned their routes based on scores they received from Sears' customer surveys—the higher the score, the higher the priority in selecting routes. (Trial Tr. 101, 150, 154–55, ECF No. 168); (Trial Tr. 434–45, ECF No. 169); (Trial Tr. 524–25, 592, ECF No. 170)

Affinity also asserts that it exercised no control over how Plaintiffs "perform[ed] the details of [their] job or the tools [they] use[d] or the procedures [they] follow[ed]." (Def.'s Br. 23, ECF No. 209) And, although Plaintiffs point to the Procedures Manuals as evidence of Affinity's control over these tools and procedures, (Pls.' Br. 14–16, ECF No. 210), Affinity asserts that the procedures manuals have no bearing on Affinity's right to control the drivers in light of the fact that they were "merely referenced" in the ITA and, "more importantly, Ruiz and the contractors either did not receive the manuals or did not read them, and none relied on their content or instructions in performing their work," (Def.'s Br. 21, ECF No. 209).

Based on the evidence presented, the Court agrees with Plaintiffs that the guidelines set forth in the Procedure Manuals were more than mere "suggestions," and that these guidelines were a means by which Affinity controlled the drivers, especially considering that a failure to follow these guidelines would likely result in a termination of the drivers' relationship with Affinity because the drivers would be deemed not "successful." (Trial Tr. 391, ECF No. 169); (*but see* Trial Tr. 252–56, ECF No. 168 (testimony of Charles Hitt, chief operating officer of Affinity, explaining that the drivers were not required to comply with the Procedures Manuals other than to the extent they required a driver to comply with legal requirements)) That said, however, the

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[9] The maximum number of hours the drivers were permitted to work was set by federal regulations, not by Affinity, (Trial Tr. 330–31, ECF No. 169), and therefore has no bearing on the control factor, *see supra* note 7.

[10] For example, Ruiz testified on cross examination that "[a] good route [is] 18 to 21 stops, everything in the area local in the range of 30 miles. You got less driving, everything is compact, and then you probably finish your route around 4:30, 5:00 with 20 stops. . . . The worst route you have to drive 130, 170 miles away from the warehouse for your first stop, and then the stop numbers is like 13 or 14 stops." (Trial Tr. 526, ECF No. 170)

Procedure Manuals themselves cannot demonstrate Affinity's control over the drivers in any significant way in light of the fact that the evidence does not support that Plaintiffs received these manuals, or, if they did, that they read or referred to them. (Trial Tr. 98, 150–51, ECF No. 168)

Thus, rather than rely on the guidelines as set forth in the Procedures Manuals, the Court instead looks to the evidence of Affinity's right to control or exercise of its right to control the details of Plaintiffs' work. The Court finds two main practices most emphasize the degree of control Affinity held over its drivers. First, as discussed, Affinity required the drivers to attend daily stand-up meetings, which were conducted by Affinity management. *See supra* at 8–9; (Mem. Decision 15, ECF No. 186) Second, and even more compelling, Affinity prohibited or highly discouraged Plaintiffs from using their trucks in any capacity other than in making deliveries for Affinity. As discussed *infra* at 15–16, the delivery truck was the main tool which Plaintiffs used to conduct their business. It seems to the Court that, as independent contractors, Plaintiffs would be able to use the truck for whatever purposes they wished, *i.e.*, to run routes for another company or to help a friend move on a day off. But the evidence paints a different picture: The drivers were not allowed to take their trucks home or to operate them for other companies or for personal use; instead, drivers kept the trucks in a secured lot at the Sears warehouse when they were not in use. Although Affinity representatives testified that this was necessary to avoid graffiti or other damage to the trucks, this is not the complete story. On occasion Affinity actually allowed other drivers to use the trucks on days the drivers were not operating their trucks themselves, and Affinity did not compensate Plaintiffs for this use. (Trial Tr. 65–66, 68, 71–72, 132, ECF No. 168); (Trial Tr. 398–99, ECF No. 169); (Trial Tr. 519, 521–23, ECF No. 170)

Even though Affinity necessarily exercised some level of control over Plaintiffs by virtue of its limits on Plaintiffs' use of their trucks while they were not working, this does not necessarily translate into the relevant inquiry of Affinity's control over the manner and means Plaintiffs use *while they are working*. *See Estrada*, 64 Cal. Rptr. at 335 ("The essence of the test is the 'control of details'—that is, whether the principal has the right to control the manner and means by which the worker *accomplishes the work* . . . ." (emphasis added)); *Borello*, 769 P.2d at 404. And a review of the control Affinity exercised while Plaintiffs worked—*i.e.* Affinity's control over the

manner and means by which Plaintiffs accomplished their deliveries and installations—convinces the Court that, combined with consideration of the secondary factors California courts consider, *see infra* at 12–20, Affinity carried its burden to demonstrate that it did not exercise the requisite level of control that would suggest an employee-employer relationship.

2. Secondary Factors

A. Right to Terminate at Will

Borello noted that the right to terminate at will, without cause is "strong evidence" of an employer-employee relationship. *Borello*, 769 P.2d at 404. California courts have noted since *Borello* that where the parties' contractual agreement contains a "mutual termination provision," however, this arrangement "'is consistent either with an employment-at-will relationship or parties in a continuing contractual relationship.'" *Desimone v. Allstate Ins. Co.*, 2000 U.S. Dist. LEXIS 18097, at *44 (N.D. Cal. Nov. 7, 2000) (quoting *State Compensation Ins. Fund v. Brown*, 38 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1995)); *accord Arnold v. Mut. of Omaha Ins. Co.*, 135 Cal. Rptr. 213, 221 (Cal. Ct. App. 2011) ("[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee."); *Varisco v. Gateway Sci. & Eng'g, Inc.*, 83 Cal. Rptr. 3d 393, 397–98 (Cal. Ct. App. 2008) ("An independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement. Such a clause does not, in and of itself, change the independent contractor relationship into an employee-employer relationship.").

Given this lay of the legal landscape, the parties here dispute the import of the contractual provisions in the ITA and ELA allowing for termination without cause upon sixty-days written notice. (Trial Ex. 77 ¶¶ 2–3); (Trial Ex. 78 ¶ 9) These provisions plainly provide that "either party" may terminate the contract without cause, so long as it gives the other sixty days written notice. As many courts have held since *Borello*, this type of mutual termination provision does not automatically transform the parties' relationship into an employment one. As such, the Court cannot conclude that this factor weighs in favor of one party or the other.

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B. Distinct Occupation or Business

"If a worker is engaged in a distinct occupation or business, then that would suggest that the worker is an independent contractor rather than an employee." *Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1138–38 (N.D. Cal. 2009). Here, Plaintiffs formed and operated distinct businesses, which included a business name, a separate business banking account, and the responsibility to pay, out of that account, employee taxes and other expenses associated with running the business. Affinity paid Ruiz's business (R&S) for the work Ruiz's employee drivers and helpers performed, and Ruiz in turn paid his employees from R&S's account. These facts suggest that this factor weighs in favor of independent contractor status. *Cf. Borello*, 769 P.2d at 409 ("[Plaintiffs] do not hold themselves out in business."); *Antelope Valley Press v. Poizner*, 75 Cal. Rptr. 3d 887, 900 (Cal. Ct. App. 2008) ("[T]he evidence does not show that in making deliveries for AVP, the carriers are engaged in a distinct occupation or business of their own. There was no evidence that any of AVP's carriers hold themselves out as being an independent delivery service that happens to have AVP as one of its customers."); *Air Couriers Int'l v. Emp't Dev. Dep't*, 59 Cal. Rptr. 3d 37, 47 (Cal. Ct. App. 2007).

On the other hand, several drivers testified that they would not have established their businesses but for their relationship with Affinity, and Affinity management substantially aided the drivers in setting up their businesses. (Trial Tr. 116–18, ECF No. 168); (Trial Tr. 473–74, ECF No. 169) Regardless of the motive for forming their businesses, however, Plaintiffs ultimately had the ability to expand their businesses by hiring more employees, operating multiple trucks, and making managerial decisions regarding the employment and performances of the employees hired. In fact, the drivers and their businesses were able to continue making deliveries for Sears even after Affinity lost their contract with Sears and therefore were unable to do so. (Trial Tr. 650, ECF No. 170)

Thus, the Court concludes that this factor supports a finding that the drivers were properly classified as independent contractors. Given the testimony and evidence suggesting that Plaintiffs would not have formed their businesses absent their relationship with Affinity, however, the Court is hesitant to weigh this factor too heavily.

C. Work Under Principal's Direction or by Specialist Without Supervision

If the type of work performed is usually done under an employer's direction, it suggests an employer-employee relationship; if the work is usually done by a specialist without supervision, it suggests an independent contractor relationship. Here, except for limited instances, Affinity did not supervise the drivers while they were in the field performing the necessary tasks to ensure completion of the deliveries. Affinity did engage in infrequent "follow alongs" whereby drivers were occasionally followed and photographed while on their delivery routes. And Sears and Affinity further monitored Plaintiffs throughout the day by requiring drivers to call in each delivery, which updated the drivers' location and delivery completion.

The Court notes, however, that the drivers needed no special driver's license to drive the delivery trucks, and therefore the lack of supervision might be better attributed to "the simplicity of the work, not the [drivers'] expertise." *Borello*, 769 P.2d at 408. But as explained *infra*, the skill required goes beyond the ability to drive the truck; the proper delivery and installation of the appliances requires substantial skill. And there is no evidence that this aspect of the drivers' work was supervised in any capacity. Thus, the type of work Plaintiffs engaged in here is better characterized as being performed by a specialist without supervision, which weighs in favor of a finding that Plaintiffs were properly classified as independent contractors.

D. Skill Required

"Where no special skill is required of a worker, that fact supports a conclusion that the worker is an employee instead of an independent contractor." *Harris*, 656 F. Supp. 2d at 1139. Several courts have found that this factor suggests an employee-employer relationship where drivers are "not required to possess a special driver's license, and [have] no skills beyond the ability to drive." *Narayan*, 616 F.3d at 903 (citing *Estrada*, 64 Cal. Rptr. 3d at 337; *JKH Enters., Inc. v. Dep't of Indus. Relations*, 48 Cal. Rptr. 3d 563, 579 (Cal. Ct. App. 2006)). But here, although the drivers need only a normal driver's license, their work is not limited to driving the trucks from the pick-up to the drop-off locations. In addition to delivering the appliances, the drivers and helpers must install them, which requires substantial skill, especially considering the dangers involved in installing appliances hooked to gas lines, or the potential water damage that

may arise. Indeed, Ruiz had extensive experience installing such appliances prior to joining Affinity, and testified to his acquired skill in recognizing potential complications and hazards. Thus, this factor points toward an independent contractor relationship.

E. Who Provides Instrumentalities, Tools, and Place of Work

"[I]f the worker is using his employer's tool or instrumentalities, especially if they are of substantial value . . . this indicates that the owner is a master." Restatement (Second) of Agency § 220 cmt. k. The relevant tools and instrumentalities here include tools such as maps, drills, hand tools, protective blankets, pads, and ties—all of which were furnished by the drivers—and, importantly, the delivery truck. The delivery truck was the main tool Plaintiffs used to conduct their business. Some of the drivers owned their own trucks, (Trial Tr. 393, 453, ECF No. 169), but most leased them, either from Affinity under the ELA, or from some other entity, (Trial Tr. 682, ECF No. 170). For those drivers who leased the trucks, the Court finds that they—not Affinity—furnished the "tool" of the truck. As explained, pursuant to the ELA, Ryder leased the truck to Affinity, Affinity subleased that truck to a driver, and ultimately the driver leased the truck plus a driver back to Affinity. As noted in the Memorandum Decision, this arrangement "is consistent with the Federal Leasing Regulations, which define the 'owner' of the truck as one '(1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person.'" (Mem. Decision 3 n.3 (citing 49 C.F.R. Part 376.2(d)). Thus, the Court concludes that Plaintiffs, not Affinity, provided the majority of the tools or instrumentalities, including the delivery trucks.

Plaintiffs also point to the mobile telephones that Plaintiffs used to communicate with Affinity throughout the day as part of the tools used, noting that Affinity required the drivers to use a specific type of mobile telephone that allowed for two-way communication. (Pls.' Brief 30, ECF No. 210) But Plaintiffs acknowledge that although the drivers obtained the mobile telephones through Affinity, they were responsible for paying for the telephone as well as the monthly costs of the telephone service, which was deducted from their paychecks. (*Id.*); (Trial Tr. 135–36, ECF No. 168); (Trial Tr. 512–13, ECF No. 170) Thus, the mobile telephones were not

given to the drivers, and therefore they were not Affinity's tools that were being used. *See* Restatement (Second) of Agency § 220 cmt. k.

Plaintiffs and Affinity also dispute whether, under these factual circumstances, Affinity can be said to have provided Plaintiffs a place of work. The drivers were generally on the road making deliveries throughout the day, but were required to report to the Sears warehouse at the beginning and end of the day in order to pick up the new appliances for the daily deliveries and to drop off the old appliances at the day's completion. To the extent requiring Plaintiffs to report to the Sears warehouse each day for pick ups and drop offs constitutes providing a "place of work," the Court notes that the warehouse was owned by Sears (though Affinity had offices there). (Trial Tr. 52, ECF No. 168); (Trial Tr. 305, 376, ECF No. 169); (Trial Tr. 487–89, ECF No. 170)

Upon consideration, the Court finds that Affinity did not furnish the majority of the tools and instrumentalities, nor did Affinity provide Plaintiffs with a place of work. Thus, this factor weighs slightly in favor of an independent contractor relationship.

F. Length of Time for Performance of Services

The Court next considers the length of time Plaintiffs worked for Affinity. "Where a worker is employed for a lengthy period of time, the relationship with the employer looks more like an employer-employee relationship." *Harris*, 656 F. Supp. 2d at 1140; *see also Narayan*, 616 F.3d at 902–03 ("Significantly, the contracts signed by the plaintiff Drivers contained automatic renewal clauses and could be terminated by either party upon thirty-days notice or upon breach of the agreement. Such an agreement is a substantial indicator of an at-will employment relationship."). This is because "the notion that an independent contractor is someone hired to achieve a specific result that is attainable within a finite period of time . . . is at odds with carriers who are engaged in prolonged service to [an employer]." *Antelope Valley Press*, 75 Cal. Rptr. 3d at 855.

Here, the ITA and ELA provide for a term of one year, which is automatically continued from year-to-year unless terminated on sixty-days written notice. (Trial Ex. 77 ¶¶ 2–3); (Trial Ex. 78 ¶ 9) Many Plaintiffs worked for Affinity for several years—*e.g.*, Sanchez and Mejia worked for Affinity for three and a half and four years, respectively, (Trial Tr. 41, ECF No. 168); (Trial Tr.

705, ECF No. 171)—while others terminated their contracts prior to the one-year term end—*e.g.*, Ruiz terminated his contract after just nine months, (Trial Tr. 113, ECF No. 168). In fact, it was estimated that just "20 to 30 percent of the [drivers] worked more than 12 months and that the remainder worked less than that." (Trial Tr. 352, ECF No. 169); (*see also* Trial Tr. 455–56 (noting a "turn-over" rate of approximately 60 to 65 percent, meaning that this percentage of drivers terminated their contracts prior to the end of the initial one-year term)) Still, "[t]his was not a circumstance where a contractor was hired to perform a specific task for a defined period of time." *Narayan*, 616 F. 3d at 903. When Affinity and the drivers entered into the relevant contractual agreements, "[t]here was no contemplated end to the service relationship," *id.*, and, indeed, the relationship often lasted months or even years. Thus, the Court finds that this factor weighs in favor of finding an employer-employee relationship.

G. Method of Payment

Turning to the method of payment factor, the Court looks to whether Affinity paid its drivers by time or by the job. Where the worker is paid by the hour, it typically suggests an employment relationship; where the worker is paid by the job, it points toward independent contractor. *See Harris*, 656 F. Supp. 2d at 1140.

According to Affinity, the drivers were paid by the job: "Affinity Logistics paid R&S $23.50 per delivery stop and made payments through weekly settlements. . . . Because the number of stops on the routes varied, settlements likewise varied from week-to-week." (Def.'s Br. 37. ECF No. 209 (citations omitted)) Indeed the "Contractor Compensation Schedule" of the ITA provides for compensation on a "'per Stop' rate," "regardless of the actual amount of time or people required for the Stop." (Trial Ex. 77 Ex. A) To the contrary, Plaintiffs contend that the drivers were more closely aligned with an employee relationship because they worked five to six days a week, worked at least eight hours per day, and made approximately eight deliveries per day. (Pls.'s Br. 31, ECF No. 210); (*See generally* Trial Ex. 101 (R&S manifests)) According to Plaintiffs, the fact that "the drivers were nominally paid by the delivery" is immaterial; "that was merely their **rate** of pay and there is no substantive difference between that pay scheme and one where an employee is paid on an hourly basis." (Pls.' Br. 31, ECF No. 210)

The Court finds that this factor weighs slightly in favor of independent contractor status. To be sure, the drivers were not hired to make single deliveries, but rather to make multiple deliveries each day, several days a week. Thus, to construe each delivery as an individual "job" is unrealistic. On the other hand, the evidence does not support a finding that the workers were paid hourly. There were no set hours to the day, nor did each delivery take the same amount of time, even though the amount paid essentially remained the same. Furthermore, the drivers were, on occasion, able to negotiate a higher payment for an individual delivery which proved to be particularly difficult. (*See* Trial Ex. 77 Ex. A (explaining procedures for obtaining additional compensation for special or difficult deliveries)) In contrast, an employee would not be able to ask for a higher hourly payment for a particularly difficult task. Accordingly, the Court finds that this factor weighs in favor of independent contractor status, albeit only slightly. *See Narayan*, 616 F.3d at 904 ("[T]he fact that the [drivers'] salary was determined [based on a percentage of each delivery] is equally consistent with an employee relationship, particularly where other indicia of employment are present.").

H. Work Part of Principal's Regular Business

When the work being done is an "integral part" of the regular business of the purported employer, this serves as a "strong indicator" that the worker is an employee. *Borello*, 256 Cal. Rptr. at 408. Here, Affinity is in the business of providing logistics management services, which involves coordinating the delivery of merchandise and procuring the equipment and labor necessary to facilitate such delivery. The parties contest whether and to what extent the drivers' work constitutes an integral part of Affinity's business.

On the one hand, Affinity itself did not make deliveries or installations, instead entering into leases with drivers to subcontract out the actual deliveries. But on the other hand, "[t]he work done by drivers like plaintiff Ruiz was the exact service (delivery of a retailer's merchandise) sold by Affinity to [its] customers." (Pls.' Br. 32, ECF No. 210) Thus, as the Court previously indicated, "[t]he drivers' role in Affinity's business is highly intertwined with what Affinity was hired to do, which is to coordinate the delivery of its clients' merchandise." (Mem. Decision 25, ECF No. 186) But this is the case with any business providing delivery services. *Harris*, 656 F.

Supp. 2d at 1140 (finding this factor not dispositive where sales representatives were an integral part of the principal's regular business because "this is the case in any direct sales business"); *see also FedEx Home Delivery*, 563 F.3d at 502. Thus, the Court finds this factor to be neutral.

I. Parties' Belief

Next, the Court looks to the parties' belief as to their relationship status. The record clearly indicates that Ruiz and Affinity both understood their relationship to be that of an independent contractor. (Trial Tr. 165, 171, ECF No. 168); (Trial Tr. 297, 333–34, 367–68, 472–74, 477, ECF No. 169); (Trial Ex. 77, at ¶ 9); (Trial Ex. 78, at ¶ 2) Perhaps in tacit acknowledgment that this factor weighs in Affinity's favor—*i.e.* toward a finding of independent contractor status—Plaintiffs did not address this factor whatsoever in their briefs following remand. Thus, the Court concludes that this factor suggests that Plaintiffs were independent contractors rather than employees.

Again, however, the Court declines to weigh this factor too heavily in light of the circumstances surrounding the parties' contractual relationship. *See Harris*, 656 F. Supp. 2d at 1140 ("[T]he context of the contractual relationship must be taken into account—*i.e.*, that Vector was largely contracting with young people with little to no business experience—and there is no evidence that the implications of the independent contractor status were explained to the trainees or Sales Reps."). Here, the evidence shows that Affinity management played a significant role in helping the drivers to establish their own, separate business entities, even going so far as filling out the forms for Ruiz except for his signature. (Trial Tr. 439, 473–75, ECF No. 169); (Trial Tr. 548–49, ECF No. 170) And although Ruiz testified that he was excited about becoming an independent contractor—and thus plainly believed himself to be an independent contractor—there is no evidence in the record that Affinity "explained the legal and practical" implications of becoming an independent contractor, *Air Couriers Int'l*, 59 Cal. Rptr. 3d at 47, other than to highlight the advantages of forming one's own business and having opportunity for business growth, (Trial Tr. 474–78, ECF No. 170). Thus, although the Court weighs this factor in favor of finding an independent contractor relationship, it does only slightly, with an eye toward this factual context.

J. Opportunity for Profit or Loss Depending on Managerial Skill

Borello cited with approval factors considered by other jurisdictions in determining whether a worker is an employee or an independent contractor, including the worker's "opportunity for profit or loss depending on his managerial skill." *Borello*, 769 P.2d at 407. For this factor, Affinity points to the fact that drivers had the ability to negotiate higher rates for more difficult deliveries and that they often operated multiple trucks, among other things. (Def.'s Br. 39, ECF No. 209) Plaintiffs offer no argument as to this factor other than arguments the Court already addressed and disposed of *supra* at 13 (discussing the distinct occupation or business factor).

As the Court discussed above, Plaintiffs were required to and did form their own businesses before contracting with Affinity. Once established, these businesses had the potential for profit, and Plaintiffs' operation of their businesses—such as deciding whether to operate the truck themselves, whether to operate multiple trucks, how much to pay helpers and second drivers, and other managerial decisions—potentially influenced this profit. (Trial Tr. 628–31, ECF No. 170 (expert testimony of Robert Crandall)) Indeed, Ruiz testified that he determined how much to pay his helpers and drivers, and that he found it more profitable to operate the truck himself. (*Id.* at 561–62, 570–71, 580–83) Thus, as with the distinct occupation or business factor, the Court finds that this factor weighs in favor of Affinity.

K. Investment in Equipment or Materials

Finally, the Court examines the extent to which Plaintiffs invested in their own equipment or materials or employed helpers. *See Borello*, 769 P.2d at 407. As already noted, Plaintiffs can and did employ helpers. More complicated is the extent to which Plaintiffs invested in their equipment and materials. Plaintiffs acknowledge that the majority of the costs associated with Plaintiffs' businesses were ultimately borne by Plaintiffs, yet emphasize the fact that these costs were "advanced by Affinity." (Pls.' Br. 34, ECF No. 210) The Court recognizes that such a set up does smack as simply tiptoeing around treating the workers as employees. *Cf. id.* ("Despite Borello's elaborate effort to deal with the cucumber harvesters as independent contractors, the indicia of their employment are compelling."). But ultimately, whether Plaintiffs were required to

pay for their equipment and materials with cash up front or whether the costs of those materials were deducted from their paychecks, either way it constitutes an "investment." And, despite the unique contractual arrangement, the Court has already concluded that Plaintiffs provide the tools and instrumentalities of their work. *Supra* at 15–16. Thus, this factor too weighs in favor of finding the drivers to be independent contractors.

CONCLUSION

Following a complete and comprehensive review of the testimony and evidence admitted at the three-day bench trial, and having duly considered the arguments raised by the parties in their post trial briefs, the Court **HEREBY FINDS** that Affinity has carried its burden of establishing that Plaintiffs were appropriately classified as independent contractors. In light of the type and extent of control Affinity had over the details of Plaintiffs' work, combined with the secondary factors considered by the Court, on balance, the Court concludes that Plaintiffs are more appropriately characterized as independent contractors. Although Affinity did exercise some control over Plaintiffs, for the most part this control was either unrelated to the manner and means by which Plaintiffs accomplished their work, or it was a result of other factors—such as federal regulatory requirements or Sears' preferences—rather than direct control by Affinity. Moreover, despite the fact that some of the secondary factors suggested an employee-employer relationship, were neutral, or weighed only slightly in favor of independent contractor status, "no one factor is decisive, and it is the rare case where the various factors will point with unanimity in one direction or the other." *Narayan*, 616 F.3d at 901 (quoting *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2007)). Taken together, the Court finds that the secondary factors also indicate that the drivers were independent contractors, not employees. Thus, for all the reasons stated, the Court **FINDS IN FAVOR OF DEFENDANT**. The clerk shall close the file.

DATED: August 27, 2012

Janis L. Sammartino

Honorable Janis L. Sammartino
United States District Judge