IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Derrick Thomas, *on behalf of himself and those similarly situated*, Plaintiff, v. It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Papa's Pizza, LLC; It's Only Downtown Pizza II, Inc., Michael Hutmier, *et al*. Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S AMENDED MOTION FOR RULE 23 CLASS CERTIFICATION

Pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff Derrick Thomas ("Plaintiff") moves this Court for an Order certifying this action as a class action, and designating Thomas as the representative of the following class:

> All non-owner, non-employer delivery drivers who worked at any of the Papa John's Pizza locations owned/operated by It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza LLC, Michael Hutmier, and/or James "Chip" Phelps[1] in Ohio at any time from June 16, 2014 to present.

[1] Plaintiff requests that James Phelps be included in the class description pursuant to his pending Motion for Leave to File First Amended Complaint, ECF # 77, in which James "Chip" Phelps is requested to be added as a Defendant-employer.

In connection with this certification, Plaintiff moves this Court to affirm his selection of counsel by appointing Biller & Kimble, LLC as Class Counsel pursuant to Rule 23(g). Plaintiff also asks that he be permitted to send notice of this lawsuit to putative class members pursuant to Rule 23(c)(2).

As set forth in the accompanying memorandum, this action meets each of the prerequisites for class certification. Plaintiff respectfully asks that this Court grant this Motion.

Respectfully submitted,

/s/ Erica F. Blankenship
Andrew R. Biller
BILLER & KIMBLE, LLC
4200 Regent Street, Suite 200
Columbus, OH 43219
Telephone: (614) 604-8759
Facsimile: (614) 340-4620
abiller@billerkimble.com

Andrew P. Kimble
Philip J. Krzeski
Nathan B. Spencer
Erica F. Blankenship (*admitted pro hac vice*)
BILLER & KIMBLE, LLC
8044 Montgomery Road, Suite 515
Cincinnati, OH 45236
Telephone: (513) 202-0710
Facsimile: (614) 340-4620
akimble@billerkimble.com
pkrzeski@billerkimble.com
nspencer@billerkimble.com
eblankenship@billerkimble.com

Counsel for Plaintiff

Memorandum in Support of Plaintiff's Amended Motion to Certify a Rule 23 Class Action

1. Introduction

Plaintiff Derrick Thomas worked for Defendants at one of their 10 Cincinnati-area Papa John's Pizza locations. Plaintiff alleges that each of Defendants' Papa John's stores adheres to a compensation policy that results in illegal underpayment to their delivery drivers. First, Defendants pay each of their delivery drivers minimum wage or tipped minimum wage. Second, Defendants require their delivery drivers to provide cars to use to deliver their pizzas. Third, Defendants do not adequately reimburse the delivery drivers for using those vehicles, resulting in Defendants underpaying the drivers. Additionally, Defendants unlawfully deduct the cost of uniforms from delivery drivers' wages.

Because Defendants applied these policies to all delivery drivers at all their Papa John's Pizza locations in Ohio, Plaintiff's Ohio minimum wage (Count 2), Ohio Prompt Pay Act (Count 3), and O.R.C. § 2307. 60 (Count 4) claims are well-suited for class certification and meet Rule 23's requirements. Plaintiff therefore seeks certification of the following class:

> All non-owner, non-employer delivery drivers who worked at any of the Papa John's Pizza locations owned/operated by It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza LLC, Michael Hutmier, and/or James "Chip" Phelps in Ohio at any time from June 16, 2014 to present.

See Complaint, ECF # 1, ¶ 220 and Proposed Amended Complaint, ECF # 77-1 (adding James "Chip" Phelps as a Defendant and "employer").

Rule 23 class certification is appropriate in "pizza delivery driver under-reimbursement" cases. *See Waters v. Pizza*, No. 3:19-cv-372, 2021 U.S. Dist. LEXIS 11743, at *14 (S.D. Ohio Jan. 22, 2021); *Brandenburg v. Cousin Vinny's Pizza,* No. 3:16-cv-516, 2018 U.S. Dist. LEXIS 189878 (S.D. Ohio Nov. 6, 2018); *McFarlin v. The Word Enterprises, LLC*, No. 16-cv-12536, 2017 U.S. Dist. LEXIS 164968 (E.D. Mich. Oct. 5, 2017); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09-cv-1335, 2013 U.S. Dist. LEXIS 181749 (E.D. Mo. Dec. 31, 2013) ("*Perrin I*").

Just like the pizza delivery cases to come before it, this case is suitable for Rule 23 class certification. As the Court is aware from the recent briefing on Defendants' Motion to Compel Discovery and Plaintiff's Cross-Motion for Protective Order (ECF # 85, 89, 91, 95, 99), the parties disagree regarding what legal standard applies to the delivery drivers' claims in this case. That dispute, however, does not bear on class certification because no matter which legal standard the Court deems proper, class certification is appropriate. "[E]ven if a reasonable approximation standard applied, Rule 23 class certification is still appropriate." *Waters,* 2021 U.S. Dist. LEXIS 11743, at *14. Indeed, two of the four class certification orders cited in the paragraph above (*McFarlin* and *Perrin*) involved cases where the *plaintiffs* were advocating for the "approximation" standard.

Because the delivery drivers at all of Defendants' Papa John's stores are subject to the same compensation policies, the Court should grant Plaintiff's Motion for Class Certification.

2. Background

Plaintiff Derrick Thomas worked as a delivery driver at Defendants' Papa John's location in Norwood, Ohio from February to May 2017. He filed this action on June 16, 2017. *See* ECF # 1.

On September 29, 2019, the Court granted Plaintiff's Motion for Conditional Certification of an FLSA Collective Action. ECF # 51. Approximately 117 delivery drivers have joined the suit by filing consent to join forms under 29 U.S.C. 216(b). *See, e.g.,* ECF # 53-71.

Plaintiff now moves under Fed. R. Civ. P. 23 to represent a class of over 600 delivery drivers who work or worked for 10 Papa John's Pizza restaurants in the Cincinnati, Ohio area.

3. The Parties.

The proposed Rule 23 class consists of all delivery drivers who worked at any of the 10 Papa John's Pizza stores owned and operated by the "Franchisee Defendants," It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Papa's Pizza LLC, It's Only Downtown Pizza II Inc., and Michael Hutmier.[2] ECF # 1, at ¶ 220; ECF # 43-1, Declaration of Michael Hutmier, ¶ 7; Exhibit 1,[3] Franchisee Defendants' Interrogatory Responses, # 1. The Franchisee Defendants and their 10 Papa John's locations (only 9 of which are still operational) are referred to herein as the "Hutmier Group" and the "Hutmier Group stores."[4]

The Hutmier Group stores are operated pursuant to nearly identical franchise agreements entered into between Michael Hutmier and Papa John's International, Inc. ("PJI"). *See* ECF 43-1, ¶ 7; Exhibits 2-9, Franchise Agreements. Since 2008 or 2009, Mr. Phelps and Mr. Hutmier have been the sole owners of the Hutmier Group stores. ECF # 91-5, Phelps Dep., at 26:11-28:20.

[2] Plaintiff has moved to add an additional Defendant, James Phelps, who Plaintiff also considers to be a part of the Franchisee Defendants/Hutmier Group.

[3] Plaintiff has attached some but not all of the exhibits referenced in this Motion. Pursuant to the parties' Stipulated Protective Order (ECF # 70), Plaintiff anticipates Defendants will make a motion to seal Plaintiffs' exhibits, the outcome of which will determine whether Plaintiff's exhibits are filed on the public record or under seal. For now, Plaintiff has listed the exhibits he intends to use on the attached Exhibit List.

[4] *See* ECF # 91-5, Deposition of James Phelps ("Phelps Dep."), 31:11-34:1 (Mr. Phelps explaining that he refers to the Franchisee Defendants' stores as the "Hutmier Group").

Throughout the relevant period, Mr. Phelps has been the Operating Partner and Mr. Hutmier has been CEO. *Id*. at 30:9-23.

4. The Delivery Drivers are subject to the same basic terms of employment.

The drivers who work for Defendants' Papa John's Pizza restaurants are all subject to the same basic terms of employment throughout the relevant period (from June 16, 2014 to present).

4.1. Defendants pay the drivers minimum wage minus a tip credit while making deliveries.

First, Defendants pay all the delivery drivers a tipped wage rate for the hours they worked delivering food. As the Franchisee Defendants' Team Member Handbook explains, "[d]elivery drivers are employed in an occupation in which they customarily and regularly receive tips. For your work as a delivery driver, you will receive a cash hourly wage and a tip credit will be taken toward your wages for your hours worked related to deliveries." Exhibit 10, Team Member Handbook at IOP000050.

The Franchisee Defendants, as well as Mr. Phelps, have admitted that delivery drivers are paid a tipped wage rate for hours delivering food. Exhibit 11, Combined Defendants' Responses to Plaintiffs' First Requests for Admissions, Admission 3; ECF # 91-5, Phelps Dep., 67:21-68:18; 82:1-24; *see also* Exhibit 12, Redacted Payroll Records; Exhibits 13, 14, and 15, Declarations of Opt-in Plaintiffs.

4.2. Defendants require drivers to provide cars to use to make deliveries.

Second, Defendants require all the delivery drivers to provide a car to use to deliver pizzas for Defendants. ECF # 91-5, Phelps Dep., 84. To be hired at any of the Hutmier Group stores, Defendants required delivery drivers to show proof of insurance for their car and have a clean

Motor Vehicle Record ("MVR") Report. "[I]f they have a clean MVR and, obviously, car insurance and a car, then they can take a delivery." ECF # 91-5, Phelps Dep., 64; *see also*, Exhibit 16, Franchisee Defendants' "Work Rules"; Exhibit 17, MVR Criteria; Exhibit 18, PJI Operations Manual, Chapter 11: Delivery IOP006684, IOP006693) (discussing MVR compliance).

4.3. Defendants subject drivers to the same automobile expense reimbursement policy.

Defendants reimbursed drivers *something* for their automobile expenses. *See, e.g.,* Exhibit 10, Team Member Handbook, IOP000051. While there has been some variation in the amount of the "something" from location to location or from time to time, the same basic policy has always applied to all of Defendants' delivery drivers. *See* ECF # 91-5, Phelps Dep. 96-103. Of relevance here, Defendants' reimbursement amounts and methodology did not meet any legal standard that could apply to vehicle reimbursement for minimum wage purposes. Specifically, Defendants' reimbursement policy and methodology fails to (1) track and reimburse for actual expenses, (2) reimburse at the IRS rate, or *even* (3) reimburse based on a reasonable approximation of actual expenses.

Defendants did not base their reimbursements on the drivers' actual expenses because Defendants failed to keep records of those expenses.[5] ECF # 91-5, Phelps Dep., 84: 9-24. The only information the company collects about the delivery drivers' automobiles or automobile expenses is proof of insurance. *Id.* While the delivery drivers' insurance cards contain information about each car's year, make, and model, the Hutmier Group does not use that information to determine

[5] While the Hutmier Group does not collect receipts based on the drivers' automobile expenses, as required by the FLSA's recordkeeping requirements, they do collect receipts and reimburse based on those receipts for extra expenses, such as when a delivery driver has to stop to purchase a 2-liter of soda to fulfill an order. ECF # 91-5, Phelps Dep. 109:16-110:4.

how much they will reimburse each of the delivery drivers. *Id*. at 84:25-85:16. The delivery drivers receive the same reimbursement no matter what car they drive, and no matter how many miles they drive to complete the delivery. *See, e.g., id*. at 96:14-97:1.

Prior to consulting with a third-party called MOTUS,[6] Mr. Phelps set the reimbursement rate for the delivery drivers who worked for the Hutmier Group. *Id*. at 94:5-9.

> Q. Who would have been involved in setting the reimbursement rate before you consulted with Motus about setting the reimbursement rate?
> A. Me.
> …
> Q. Do you have any training or experience in vehicle costing?
> A. No.
> Q. Did you factor in how much the price of somebody's insurance was when you set the reimbursement rate?
> A. No.
> Q. Did you factor in the price of the automobile that they were using when you set the reimbursement rate?
> A. No.
> Q. Did you factor in the price of maintenance and repairs that the delivery drivers incurred when you set the reimbursement rate?
> A. No. We did factor in – when gas prices increased, I know we adjusted.
> Q. So you adjusted the reimbursement rate if the price of gas changed?
> A. Dramatically, yes.
> Q. Did you factor in depreciation to the reimbursement rate that you paid?
> A. No.

Id. at 94: 5-95:11; *see also* 90:20-91:9 (explaining that the rate does not change depending upon make, model, or age of the vehicle). In 20 years with the Papa John's brand, Mr. Phelps acknowledged that he had never set an individual delivery driver's reimbursement rate to be

[6] The Franchisee Defendants claim to have consulted with MOTUS approximately 3 or 4 years ago (*i.e.*, around the time this lawsuit was filed), but they have not produced any documentary evidence or communications they have either sent to or received from MOTUS.

different than the other delivery drivers and did not even believe it was possible to do such a thing in PJI's tracking and point of sale ("POS") operation software, FOCUS. *Id.* at 108:10-109:8.

Three of the Hutmier Group stores reimburse a set amount per delivery, and six of the Hutmier Group stores reimburse based on a percentage of the delivery order completed. According to the Franchisee Defendants, the specific reimbursement rates at the nine stores that are still operational have been:

Store	Reimbursement Rate[7]
Milford	2014-2017: 6% 2018: 6.5% 2020: 7%
Goshen	2014-2017: 6% 2018: 6.5% 2020: 7%
North Bend	2014-2017: 6% 2018: 6.5% 2020: 8%
Hyde Park	2014-2017: $1.10 flat rate 2018-2020: $1.20 flat rate
Clifton	2014-2017: $1.10 flat rate 2018-2020: $1.20 flat rate
Downtown	2014-2016: 5.5% 2017-2020: 6.5%
Price Hill	2014-2016: 5.5% 2017-2020: 6%
Amelia	2014-2016: 5.5% 2017-2018: 6.5% 2019-2020: 7%
Norwood	2014-2016: $1.10 flat rate 2017: $1.20 flat rate 2018-2020: $1.30 flat rate

None of Defendants' reimbursement rates are based on any drivers' actual expenses or particular circumstances—they are instead set on a store-by-store basis and apply the same to

[7] Taken from Exhibit 19, Reimbursement Rates Chart produced by Defendants.

anyone who completes a delivery. Thus, the Hutmier Group has treated their delivery drivers in the same way, using the *same policies*, the *same standards*, and the *same procedures* regarding all drivers. *See generally*, ECF # 91-5, Phelps Dep., 67-78 (describing basic terms of employment), 111; Exhibit 16, Work Rules; Exhibit 10, Team Member Handbook; and Exhibit 18, PJI Operations Manual.

Using declarations from opt-in plaintiffs as a basis, the Franchisee Defendants reimburse their delivery drivers, on average, at $0.25 per mile.[8] For comparison, the IRS rate during the relevant period ranged from $0.56 to $0.58 per mile. Class certification is appropriate because the same policy is being applied to all of the delivery drivers. *See Laichev v. JBM, Inc.,* 269 F.R.D. 633, 641 (S.D. Ohio 2008). Whether each individual delivery driver was reimbursed more or less than the reimbursement rate that the Court or a jury deems applicable in any workweek is a damages question that can be easily determined using a mathematical formula. Whatever reimbursement rate ultimately applies—whether it is the IRS rate or a "reasonably approximate" rate chosen by the Court or a jury—it will apply, as Defendants' reimbursement policy did, to all of the delivery drivers. As such, the question is well suited for class adjudication. Likewise, some delivery drivers will have a uniform deduction claim and others will not. But that question will be easily determined by reference to Defendants' payroll records.

[8] In Exhibit 13, Brandon Jackson estimated he traveled eight miles per delivery and was reimbursed at either $1.00 ($0.13/mile) or $1.10 ($0.14/mile) per delivery. In Exhibit 14, Colin Moreland estimated that he traveled 3-5 miles per delivery and was reimbursed at $1.00 to $1.50 per delivery. Using 4 miles at rates of $1.00, $1.25, and $1.50 per delivery, estimates range from $0.25/mile to $0.38/mile with $0.31/mile as the median. In Exhibit 15, Shawn Hendricks averaged her distance to be 4.5 miles per delivery at a reimbursement of $1.20 per delivery, providing a rate of $0.27/mile. Averaging each of these calculations leads to an overall average of $0.25 per mile.

4.4. Defendants unlawfully deducted the cost of uniforms from the delivery drivers' wages.

Defendants took improper deductions for delivery drivers' uniforms during at least some of the relevant time period. According to Mr. Phelps, delivery drivers were required to pay for their uniforms until approximately 2016 or 2017. ECF # 91-5, Phelps Dep., 82:25-16. Plaintiff's paystub reflects deductions taken for the cost of uniforms. ECF # 24-2. Further, the Franchisee Defendants have provided, to date, only a sampling of records showing deductions and withholdings taken from delivery drivers' wages[9] but even that sampling shows that at least some of the delivery drivers had deductions taken for uniforms. *See* Exhibit 12. Defendants' comprehensive records will show who had deductions taken for uniforms and who did not.

5. Defendants' compensation policies and practices violate Ohio law.

5.1. Defendants' reimbursement policy violates Ohio minimum wage law.

To operate its pizza delivery business, Defendants need functioning automobiles to deliver their pizzas. Rather than maintaining a fleet of cars themselves, Defendants require their minimum-wage delivery drivers to supply safe, functioning, insured cars to use at work. Defendants recognize that wage and hour laws prohibit them from passing these expenses onto their drivers, so Defendants reimburse the drivers *something*. But the reimbursement payments are not enough to cover all the drivers' expenses. To the extent that those un- or under-reimbursed expenses drop a delivery driver's effective wage rate below minimum wage, a minimum wage violation is triggered.

[9]Plaintiff has started the Court's discovery dispute process in hopes of getting the complete set of Defendants' payroll records, and will seek leave to supplement this Motion if the Court ultimately compels Defendants to provide more.

Ohio law requires employers to pay their employees at least minimum wage for all hours worked. *See* Oh. Const., Art. II, § 34a; O.R.C. § 4111.03. Ohio law also requires that all employees be paid "the wages earned by them." *See* O.R.C. § 4113.15(A). In other words, employees must receive any wages the employer promised to pay, or any wages that are otherwise required by law (such as the Ohio Constitution, the Ohio Revised Code, or the Fair Labor Standards Act). *Craig v. Bridges Bros.*, 823 F.3d 382, fn. 1 (6th Cir. 2016).

Whether under the FLSA or Ohio law, wage requirements become meaningless if employers can force employees to "kick back" money to the employer. "In the pizza delivery context, the cost associated with delivering food for an employer is a 'kickback' to the employer that must be fully reimbursed, lest a minimum wage violation be triggered." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 U.S. Dist. LEXIS 191790, at *3 (S.D. Ohio Nov. 5, 2019) ("*Hatmaker I*"); *see also, e.g., Benton v. Deli Management, Inc.,* 396 F.Supp.3d 1261, 1269-74 (N.D. Ga. Aug. 8, 2019) ("[Employer's] need for a vehicle is directly incidental to its business."); *Perrin v. Papa John's Int'l, Inc.*, 114 F. Supp. 3d 707, 729-30 (E.D. Mo. July 8, 2015) (denying summary judgment that fixed costs could be excluded from "tools of the trade").

Courts in this district have adopted the DOL Handbook standard, which requires that employers either (1) track and reimburse for the drivers' actual expenses, or (2) reimburse at the applicable IRS standard business mileage rate. *Hatmaker I*, 2019 U.S. Dist. LEXIS 191790, at *6. "Because the vehicles owned by the delivery drivers are considered 'tools of the trade,' 29 C.F.R. 531.35, and required by [Defendants] as a condition of being hired as a delivery driver, there need[s] to be an adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost, in order to avoid a decrease in the minimum wage and overtime paid." *Brandenburg*, 2018

U.S. Dist. LEXIS 189878, at *4 (granting Rule 23 class certification of the same class sought here); *see also Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2019 U.S. Dist. LEXIS 204371, at *1 (S.D. Ohio Nov. 25, 2019) (granting final approval of Rule 23 settlement and adopting DOL Handbook standard).

However, as the Court is aware, Defendants are advocating for the application of a "reasonable approximation" standard. No matter the standard that this Court applies to this case, class certification is proper and warranted. "Even if a reasonable approximation standard applied, Rule 23 class certification is still appropriate." *Waters,* 2021 U.S. Dist. LEXIS 11743, at *14. This makes sense, of course, because Defendants themselves applied a set reimbursement rate to all delivery drivers at a given store, regardless of individual circumstances. *See id.*

Likewise, under the same "kickback" principle, it is illegal for an employer to take a deduction from the wages of a minimum wage worker for the cost of a uniform. *See Garcia v. Frog Island Seafood, Inc.*, 644 F.Supp.2d 696, 708 (E.D.N.C. 2009) (citing 29 C.F.R. § 531.35). Because they have taken *de facto* and formal deductions from tipped workers' wages, Defendants are not entitled to claim a tip credit from the delivery drivers' wages. *See generally* 29 U.S.C. § 203(m)(2); 29 C.F.R. § 531.59(b).

Under either standard, for all of the allegations, the proof of the class claims is common to all delivery drivers and class certification is appropriate. *See Waters,* 2021 U.S. Dist. LEXIS 11743, at *14.

5.2. Ohio's Prompt Pay Act covers all claims raised in this case.

Ohio's Prompt Pay Act allows workers to recover wages paid late for any reason. That includes wages not paid because of a violation of any other law, including the FLSA or Ohio's wage

laws. *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 385, n.2 (6th Cir. 2016) (the Prompt Pay Act "rises and falls" with underlying FLSA and Ohio wage and hour claims); *see also, e.g., Parks v. Cent. USA Wireless, LLC*, No. 1:17-cv-448, 2019 U.S. Dist. LEXIS 167502, at *6 (S.D. Ohio Sept. 29, 2019) (holding that FLSA violations "automatically give rise to violations under Ohio's Prompt Pay Act, codified at Ohio Rev. Code § 4113.15."). Thus, any violation of an underlying wage and hour law, including the FLSA, warrants class certification under O.R.C. § 4113.15, assuming Rule 23's requirements are met. *See, e.g., Waters*, 2021 U.S. Dist. LEXIS 11743, at *14.

5.3. Plaintiff's O.R.C. § 2307.60 claim is the same for all of Defendants' delivery drivers.

Plaintiff's claims under O.R.C. § 2307.60 that the delivery drivers are entitled to compensatory and punitive damages as a result of Defendants' criminal act of willfully violating the Fair Labor Standards Act. ECF # 1, ¶¶ 261-65. The FLSA carries criminal penalties for willful violations. 29 U.S.C. § 216(a). The Ohio Revised Code provides compensatory and punitive damages for those injured by another party's criminal act. O.R.C. § 2307.60(A)(1); *see also Buddenberg v. Weisdack*, 2020-Ohio-3832 (Ohio 2020) (holding that claim under § 2307.60 requires a criminal act, not a criminal conviction). Because Defendants' compensation and reimbursement policies apply to all the delivery drivers in the same way, the question of whether Defendants' FLSA violations were "willful" will be answered in the same way as to all of the delivery drivers. *See, e.g., Waters*, 2021 U.S. Dist. LEXIS 11743, at *14.

6. Law & Argument

6.1. Legal Standard for Rule 23 Class Certification.

Rule 23 allows one or more individuals to act on behalf of a class of individuals with similar claims. Representative actions are especially appropriate in wage and hour lawsuits where individual claims may be relatively small, but substantial in the aggregate. Plaintiff asks the Court to certify the following class:

> All non-owner, non-employer delivery drivers who worked at any of the Papa John's Pizza locations owned/operated by It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza LLC, Michael Hutmier, and/or James "Chip" Phelps in Ohio at any time from June 16, 2014 to present.

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As described below, all requirements for class certification are met.[10]

6.2. Plaintiff has satisfied the four Rule 23(a) prerequisites for class certification.

Under Rule 23(a), Plaintiff must satisfy four prerequisites for the Court to certify a class: (1) the class must be "so numerous that joinder of all members is impracticable," (2) "questions of law or fact common to the class" must exist, (3) "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class," and (4) the representatives must "fairly and adequately protect the interests of the class." Each of these requirements is satisfied.

[10] Class certification has been granted in several similar cases. *See Waters,* 2021 U.S. Dist. LEXIS 11743; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878; *McFarlin*, 2017 U.S. Dist. LEXIS 164968; *Perrin I,* 2013 U.S. Dist. LEXIS 181749.

Numerosity. Rule 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. Approximately 117 class members have already opted in as FLSA plaintiffs. The class list provided for FLSA notice contains 697 names. The Hutmier Group has presumably hired additional drivers since late fall 2019. This meets the numerosity requirement.

Commonality. Rule 23(a)(2)'s commonality requirement is satisfied where there are "questions of law or fact common to the class." Commonality exists "as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation." *Sweet v. Gen. Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976). Individual class members need not be identically situated to meet this requirement. Rather, the "requirement is met where the questions linking the class members are substantially related to the resolution of the litigation even though the individuals are not identically situated." *Swigart*, 288 F.R.D. at 183 (citing *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). Commonality is not required on every question. *Id.*; *see also Bacon v. Honda of American Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004).

Here, the legal theories and relevant facts are common to the class because the class consists of employees that were harmed in the same way. With respect to all their delivery drivers, Defendants (1) required the delivery drivers to provide cars to complete their job duties;[11] (2) paid the delivery drivers minimum wage minus a tip credit for hours worked while completing

[11] ECF # 91-5, Phelps Dep. 64, 84, Sep. 16, 2020; *see also* Exhibit 10, Team Member Handbook, at IOP000051, Exhibit 13, Declaration of Brandon Jackson, ¶ 13; Exhibit 14, Declaration of Colin Moreland, ¶¶ 4, 13; Exhibit 15, Declaration of Shawn Hendricks, ¶¶ 4, 14; Exhibit 16, Work Rules; Exhibit 18, Papa John's Operations Manual, Chapter 11: Delivery, at IOP006684 and 006693.

deliveries;[12] (3) did not keep track of or reimburse for the delivery drivers' actual expenses;[13] and (4) did not reimburse the delivery drivers at the IRS standard business mileage rate.[14] Even if the Court adopted Defendants' "approximation" theory, Defendants did not meet even that standard.

"While the extent of Defendants' under-reimbursement might be different from driver to driver or location to location the need for individualized inquiry and calculation of damages alone is not enough to defeat commonality." *Waters*, 2021 U.S. Dist. LEXIS 11743, at *19; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *4; *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *3; *Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *5. Like these other delivery driver cases, this class meets the commonality requirement.

Typicality. Rule 23(a)(3) requires that the class representatives' claims be typical of the class members' claims. "Typical does not mean identical, and the typicality requirement is liberally construed." *Swigart*, 288 F.R.D. at 185 (citing *Gaspar v. Linvatec Corp.,* 167 F.R.D. 51, 57 (N.D.Ill.1996)). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims and gives rise to the same legal or remedial theory." *Id.* (citing *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir.1996)).

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[12] ECF # 91-5, Phelps Dep. 82-83; Exhibit 10, Team Member Handbook, IOP000050-000051; Exhibit 11, Combined Defendants' Responses to Plaintiffs' First Requests for Admissions, Admission 3; Exhibit 13, Declaration of Brandon Jackson, ¶10; Exhibit 14, Declaration of Colin Moreland, ¶ 10; Exhibit 15, Declaration of Shawn Hendricks, ¶ 11.

[13] ECF # 91-5, Phelps Dep. 84, 90-95; Exhibit 13, Declaration of Brandon Jackson, ¶¶ 18-21; Exhibit 14, Declaration of Colin Moreland, ¶¶ 18-21; Exhibit 15, Declaration of Shawn Hendricks, ¶¶ 15-17, 21-22.

[14] ECF # 91-5, Phelps Dep. 84, 90-95; Exhibit 13, Declaration of Brandon Jackson, ¶ 22; Exhibit 14, Declaration of Colin Moreland, ¶ 22; Exhibit 15, Declaration of Shawn Hendricks, ¶ 23. *See Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *4.

The requirement of typicality focuses on the conduct of a defendant and whether a proposed class representative has been injured by the same kind of conduct alleged against the defendant as other members of the proposed class. *Swigart*, 288 F.R.D. at 185 (citing *Clay v. Am. Tobacco Co.,* 188 F.R.D. 483, 491 (S.D.Ill.1999) ("The Court should concentrate on the defendants' alleged conduct and the plaintiffs' legal theory to satisfy Rule 23(a)(3)."")). Generally, a finding that commonality exists results in a finding that typicality also exists. *Violette v. P.A. Days, Inc.,* 214 F.R.D. 207, 214 (S.D. Ohio 2003). Typicality "is generally considered to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." *Swigart*, 288 F.R.D. at 185 (internal citations omitted). Where, as here, "it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff[s] and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Laichev v. JBM, Inc.,* 269 F.R.D. 633, 640-41 (S.D. Ohio 2008). Additionally, differences in damages allegedly owed each putative class member "[are] not fatal to a finding of typicality." *Id*. at 641.

If Defendants' wage and hour practices violate Ohio law as to the Plaintiff, they violate Ohio law as to the class members; and, accordingly, the typicality requirement is met. *See McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *4; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *4. Here, Mr. Thomas claims that under-reimbursement, promulgated and effectuated through Defendants' compensation and reimbursement policies, caused him and other delivery drivers to be paid less than required by both the FLSA and Ohio law.

Adequacy of Representatives. Rule 23(a)(4) requires that class representatives must fairly and adequately protect the interests of the class. This requirement calls for a two-pronged inquiry:

(1) Do the representatives have common interests with the unnamed members of the proposed class? (2) Will the representatives prosecute the class's interests through qualified counsel? *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996). These two requirements are met.

With respect to the first inquiry, Plaintiff is challenging the same unlawful conduct and seeking the same relief as would the rest of the class members. Thus, Plaintiff's interests are aligned with and essentially identical to all putative class members' interests. This satisfies the first prong of the adequacy requirement. *See, e.g., Swigart*, 288 F.R.D. at 186; *Smith v. Babcock*, 19 F.3d 257, n.13 (6th Cir. 1994); *Thomas v. SmithKline*, 201 F.R.D. 386, 396 (E.D. Pa. 2001).

With respect to the second inquiry, the proposed class representative is ready, willing, and able to fulfill his duties and has done so to date. Likewise, Plaintiff's counsel is well-qualified to handle this matter. Plaintiff's counsel, Biller & Kimble, LLC, has established an expertise in wage and hour cases in general, and specifically in pizza delivery driver wage and hour cases. *Brandenburg*, 2019 U.S. Dist. LEXIS 204371, at *6 (finding Biller & Kimble, LLC's work in pizza delivery driver cases to be "exemplary"); *Mullins v. Southern Ohio Pizza, Inc.*, No. 1:17-cv-426, 2019 U.S. Dist. LEXIS 11019, at *5 (S.D. Ohio Jan. 18, 2019) (finding that Plaintiff's counsel has "established an expertise in 'pizza delivery driver' litigation"); *Waters*, 2021 U.S. Dist. LEXIS 11743, at *23 ("Plaintiff's counsel has established an expertise in wage and hour cases in general, and in pizza delivery driver wage and hour cases in particular."). Plaintiff's counsel has committed, and will continue to commit, the resources necessary to representing the putative class in this case.

6.3. Plaintiff has satisfied the Rule 23(b)(3) class certification requirements.

When the prerequisites of Rule 23(a) are satisfied, an action may be maintained as a class action when it qualifies under any one of three conditions set forth in Rule 23(b). Courts will certify

class actions under Rule 23(b)(3) when common issues of fact and law predominate, and the class mechanism is superior to other methods of relief. Both of Rule 23(b)(3)'s requirements are met.

Common questions of law and fact predominate. The predominance requirement evaluates whether a proposed class is cohesive enough to merit adjudication by representation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance is established where "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc.*, 306, F.3d 1247, 1252 (2d Cir. 2002).

There are numerous common questions of law and fact arising out of Defendants' conduct to each class member, making this an appropriate case for resolution by means of a class action. Most notably, liability turns on what the proper reimbursement rate is for pizza delivery drivers and whether Defendants paid that rate. These issues will be determined based on common proof, and common questions predominate in this case. *See, e.g., Swigart*, 288 F.R.D. at 186.

Plaintiff's, and the class's, claims rise and fall on the Defendants' reimbursement and pay policies. These policies were not applied on an individual basis. ECF # 91-5, Phelps Dep. 90-91. The proof to substantiate these claims will be common to all class members. As the court explained in *McFarlin*, the adequacy of Defendants' reimbursement policy will predominate in this case:

> [T]he general issue of the adequacy of the reimbursement policy/policies maintained by Defendants predominate over individual inquiries. Although the damages for each delivery driver will be an individual determination, the damages arise from a course of conduct that is applicable to the entire class: Defendants' payroll practices. Therefore, the predominance requirement is met.

McFarlin, 2017 U.S. Dist. LEXIS 164968, at *4. This case is appropriate for class certification.

A class action is a superior method of adjudication. The superiority question under Rule 23(b)(3) requires the Court to consider whether a class action is superior to other methods of adjudication. Rule 23(b)(3) lists four factors to be considered: (1) the interests of class members in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties likely to be encountered in management of the class action.

Here, there is no evidence that putative class members have any interest in maintaining this litigation in separate actions. Indeed, the relative size of the individual claims in this case makes class resolution perhaps the only way these workers can recover their allegedly unpaid wages in an economical way. *See, e.g., Tedrow v. Cowles*, No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, at *8 (S.D. Ohio 2007) ("As Plaintiffs convincingly argue, the majority of putative class members would not likely have their day in court on these claims if a class is not certified because of a lack of sophistication, lack of resources, lack of representation and similar barriers.").

Moreover, efficiency favors concentrating the claims in this Court, as there is no record of other, similar litigation pending in Ohio, the franchise Defendants are headquartered in Hamilton County, and their stores are in the Cincinnati metropolitan area. A final resolution of Defendants' liability is also fair because the case deals with policies affecting large numbers of employees. It avoids competing decisions on the issues and offers finality. There is no device that can resolve these matters as efficiently and fairly as a class action. Finally, no major difficulty is likely to arise in management of the class action as the putative class is a defined size. Class certification here promotes consistent results, giving Defendants "the benefit of finality and repose." *Tedrow*, 2007

U.S. Dist. LEXIS 67391, at *8 (internal citations omitted); *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *5 ("there are no likely difficulties in managing a class action.").

6.4. The Court should approve Plaintiff's Proposed Notice.

Plaintiff's proposed notice complies with all the requirements of Rule 23(c)(2). *See* Exhibit 20, Proposed Notice. Plaintiff asks that the Court grant Plaintiff's request to send the notice to all delivery drivers by mail and email. For individuals for whom mail or email is returned as undeliverable, Plaintiff proposes that he and/or a class administrator run the class member's name through a change of address database and re-send the notice to any new address identified.

7. Conclusion

For the foregoing reasons, Plaintiff respectfully requests the Court to (1) certify this action as a class action under Rule 23 consisting of Defendants' current and former delivery drivers with regard to claims 2, 3, and 4, (2) appoint plaintiff Derrick Thomas as class representative, (3) appoint counsel Biller & Kimble, LLC as lead counsel, and (4) approve the attached notice to be delivered to class members by mail and email.

Respectfully submitted,

/s/ Erica F. Blankenship
Andrew R. Biller
BILLER & KIMBLE, LLC
4200 Regent Street, Suite 200
Columbus, OH 43219
Telephone: (614) 604-8759
Facsimile: (614) 340-4620
abiller@billerkimble.com

Andrew P. Kimble
Philip J. Krzeski
Nathan B. Spencer
Erica F. Blankenship (*admitted pro hac vice*)
BILLER & KIMBLE, LLC
8044 Montgomery Road, Suite 515
Cincinnati, OH 45236
Telephone: (513) 202-0710
Facsimile: (614) 340-4620
akimble@billerkimble.com
pkrzeski@billerkimble.com
nspencer@billerkimble.com
eblankenship@billerkimble.com

Counsel for Plaintiff

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Defendants through the Court's ECF system.

/s/ Erica F. Blankenship
Erica F. Blankenship