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

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

FRANCHISEE DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Defendants, It's Only Downtown Pizza, Inc., It's Only Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza LLC, and Michael Hutmier (the "Franchisee Defendants") respectfully submit this Memorandum in Opposition to Plaintiff Derrick Thomas's Amended Motion For Class Certification (ECF No. 127).

I. INTRODUCTION

Plaintiff Derrick Thomas ("Plaintiff") was employed as a delivery driver at one Papa John's franchise restaurant for a couple months. He filed this lawsuit on behalf of himself and purportedly on behalf of all other delivery drivers employed by the same franchise group, alleging that his employer illegally applied the tip credit to delivery driver wages, under-reimbursed delivery drivers for their delivery expenses, and took illegal deductions from delivery drivers' wages. He now moves for class certification.

Plaintiff's Motion for Class Certification (the "Motion") should be denied because it falls well short of his burden to show that this case qualifies for "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation omitted). Here, Plaintiff's proof is practically non-existent. In support of the motion for class certification of this delivery driver case concerning reimbursement mileage, Plaintiff merely offers the declarations of three delivery drivers (but not of the Plaintiff himself) who each "estimate" the "average" miles they individually drove when the three of them delivered pizzas. (Declarations, ECF Nos. 127-14, 15, 16).

There are several fundamental problems here.

First, Plaintiff has not established that he has any injury. There is no evidence in the record concerning the miles driven by Plaintiff Derrick Thomas during his short stint of part-time work as a pizza delivery driver, nor is there any evidence concerning what he was paid in any given workweek. As a result, there is nothing in the record to suggest that Plaintiff's wages ever fell below the FLSA minimum. Because he has not established that he has any injury, Plaintiff cannot represent the class he seeks to certify.

Second, Plaintiff has offered no common evidence here which would suggest liability to the putative class. The questions in this case will necessarily devolve into an individualized analysis of the unique experiences of the putative class members. Given this lack of class wide evidence, Plaintiff cannot satisfy the commonality requirement of Rule 23(a) or the predominance requirement of Rule 23(b)(3).

Third, resolution on a class wide basis is not the superior means of resolution. The remedies sought here are not small potatoes. Given the amounts sought, including the requested attorney's fees and liquidated damages, these (meritless) claims can be feasibly pursued on an

individual basis. Indeed, various members of the putative class are bound by arbitration provisions that ***require*** individualized arbitrations of any of the claims Plaintiff asserts in this action.

For all of these reasons, the Court should deny Plaintiff's Motion.

II. RELEVANT FACTS

The Franchisee Defendants own and operate only nine of the over 3,350 Papa John's franchise stores in the United States. Plaintiff Derrick Thomas avers that he worked part-time as a delivery driver at the Papa John's store located in Norwood, Ohio from February to May 2017, which is owned and operated by Defendant It's Only Downtown Pizza, Inc. Plaintiff does not aver (and he did not) work at any of the other eight Papa John's stores that the Franchisee Defendants operate. (Phelps Decl., ECF No. 43-2, PageID 696). After a couple months of part-time work, Plaintiff quit without notice. (*Id* at PageID 697).

Plaintiff's motion for class certification offers no evidence regarding how many hours Plaintiff Thomas worked or the compensation he received. The motion offers no evidence regarding this necessary information in any given workweek or in the aggregate.

Similarly, Plaintiff Thomas has not provided evidence regarding the make, model, vehicle identification number, or state(s) of registration of the vehicle(s) he drove while working as a delivery driver. (Thomas Response to Interrogatory #11) (Excerpted Interrogatory Responses attached hereto as Exhibit 1). He has not offered any evidence of who paid for the vehicle(s) driven or what the purchase price was. *Id*. He has not offered any evidence of the total operating costs for those vehicle(s) such as costs for fuel, parts, maintenance, or repair. (Thomas Response to Interrogatory #12). He has not said who all drove the vehicle and whether and how often it was driven for personal use. (Thomas Response to Interrogatory #14). He has not offered any evidence of the total number of miles each vehicle was driven while working for the Franchisee Defendants,

let alone in any workweek. (Thomas Response to Interrogatory #15). To the contrary, Plaintiff refuses to provide all of this information from him or the opt-in plaintiffs. (*See* pending Motion to Compel, ECF No. 85).

Thus, Plaintiff's motion for class certification offers no evidence concerning Plaintiff Thomas's individual experience whatsoever – nothing to suggest that he has any injury. And although Plaintiff seeks to certify this case as a class action, he similarly offers no common evidence which would suggest liability to the putative class. His motion cites no expert analysis or testimony. He concedes that his own review of the records suggests that with respect to at least two of the Franchisee Defendants' stores, the average reimbursement rate ***exceeded the IRS rate*** during the relevant time period. (Plaintiff's Original Motion for Class Certification, ECF No. 108, PageID 2027)("As the data analysis shows, Defendants' reimbursement payments at two stores are actually, on average, higher than the IRS rate.").

Undeterred, Plaintiff still moves to certify a class of all delivery drivers who worked at any location operated by Franchisee Defendants during the putative class period, including even the locations that he believes exceeded the IRS rate that he advocates should be used. The only evidence he offers in support of his motion are declarations from three opt-in plaintiffs who worked at the one Norwood store where Plaintiff Thomas worked. (Declarations, ECF Nos. 127-14, 15, 16). And here again, there is no evidence regarding the hours worked or compensation received by these three individuals in any given workweek or in the aggregate. Nor is there any evidence regarding their vehicles, operating costs, miles driven, or personal use of those vehicles. (*See generally*, Declarations, ECF Nos. 127-14, 15, 16). All that is contained in those declarations are self-described estimates of supposedly average miles driven on a usual delivery, and the amount they estimate they received as mileage reimbursement.

If the Plaintiff's motion for class certification had offered these necessary facts, it would have become apparent quickly that each delivery driver's situation is unique.

The cars they drive (and the costs associated with those cars) differ tremendously. Some delivery drivers drive new cars, some drive used cars. (*Compare, e.g.*, Declaration of Josh Black Declaration at ¶4 *with* Declaration of Frank Mazur at ¶3)(attached as Exhibits 2 and 3, respectively). Some drive other people's cars that they do not own – thus causing them to have no maintenance or repair costs whatsoever. (Declaration of Clarence Edward Davenport at ¶2) (attached as Exhibit 4). Some drive hybrid vehicles. *Id*. Others choose gasoline powered SUV's. (Ex. 2, Declaration of Frank Mazur at ¶3). The range of vehicles driven spans a wide cross-section of the automotive industry. (*See, e.g.*, Declaration of Micah Elliot at ¶6)(during 16 years with the company, this particular declarant drove a 2015 Dodge Stratus, a 2001 Pontiac Firebird, a 2006 Chevy Cobalt, a 2015 Chrysler 2000, and a 2020 Jeep Cherokee) (attached as Exhibit 5).

The driving experiences also differ across stores and across points of time. Drivers who have worked at multiple locations over their career (unlike Plaintiff Thomas) attest that the driving experience varies greatly amongst the nine stores operated by the Franchisee Defendants. (*See, e.g.*, Ex. 5, Declaration of Micah Elliott at ¶8). For example, one driver who has worked for the Franchisee Defendants since 2005 testifies that the downtown store has the biggest delivery area compared to, for example, the Clifton store that has a tight delivery area centered around the university. *Id*. Another driver who has worked at the Price Hill and Hyde Park locations testified that "the delivery area in Price Hill is tighter, there is no need to travel through the city, and overall there is less traffic compared to the Hyde Park delivery area. With respect to the Hyde Park delivery area, there is no easy way to get around and making deliveries requires more driving than compared to Price Hill." (Ex. 3, Declaration of Josh Black ¶8). Drivers who are familiar with

their delivery area often disregard the route suggested by the Franchisee Defendants' computers and instead use their discretion to travel a different distance that they believe is more efficient. (Ex. 4, Declaration of Clarence Edward Davenport at ¶6). And different times of day or days of the week generate different driving experiences (such as traffic, number of deliveries, timing of deliveries, and delivery locations). (*See* Ex. 4, Declaration of Clarence Edward Davenport at ¶7; Ex. 3, Declaration of Josh Black at ¶7; Declaration of John David Flanagan at ¶13(attached as Exhibit 6)).

Crucially, the way in which drivers are paid is also not uniform throughout the stores or even by employee. For examples, many drivers with a long tenure with the company have received raises over the years, making their rates of pay while making deliveries higher than a driver who just joined the company. (*See, e.g.*, Ex. 6, Declaration of John David Flanagan at ¶9; Ex. 5, Declaration of Micah Elliott at ¶5). These drivers also note that in a given shift or workweek, they and others may work as both shift leaders or general managers with substantially higher rates of pay, while at other times they will switch roles to being a delivery driver with a lower rate of pay. (Ex. 5, Declaration of Micah Elliott at ¶5; Ex. 4, Declaration of Clarence Edward Davenport at ¶10; Ex. 2, Declaration of Frank Mazur at ¶8).

III. ARGUMENT

A. Legal Standard

In granting conditional certification, this Court correctly noted the low threshold under 29 U.S.C. § 216(b), observing that "[a]t the notice stage of certification . . . courts apply a 'fairly lenient' standard to determine whether the named plaintiffs have demonstrated they are similarly situated to the opt-in plaintiffs." (ECF No. 51, PageID 890.). By contrast, Rule 23's standard for class certification is "more stringent" than the lenient standard for conditional FLSA certification. *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (abrogated on other grounds

by *Campbell Ewald v. Gomez*, 136 S.Ct. 663 (2016)). Plaintiff has the burden of demonstrating with "significant proof" that (1) the class is sufficiently numerous; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a) ("Rule 23"); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-51 (2011). Plaintiff proposes a Rule 23(b)(3) class, so he must also demonstrate "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

District courts must perform a "rigorous analysis" to ensure these requirements have been met, *Wal-Mart*, 564 U.S. at 349-51, and are permitted to probe behind the pleadings because "class determinations should be predicated on evidence the parties present concerning the maintainability of the class action." *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, 678 F.3d 409, 416-17 (6th Cir. 2012). The court must consider evidence on the record pertaining to class certification, even when such consideration overlaps with merit issues. *Id.; Rodney v. Nw. Airlines,* 146 Fed. Appx. 783, 288 (6th Cir. 2005).

B. Plaintiff Has Not Satisfied Rule 23's Commonality or Predominance Requirements

Plaintiff's class claims fail because he has not shown that other putative class members' claims could be established through common proof. Rule 23(a)(2) requires that there be questions of law or fact common to the class, and Rule 23(b)(3) requires those questions predominate. Fed. R. Civ. P. 23(a)(2), (b)(3). *See Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 642 (S.D. Ohio 2017) ("A court may certify a class action only if it meets the requirements of Federal Rule of Civil Procedure 23(a) and either Rule 23(b)(1), (b)(2), or (b)(3).").

Citing an out-of-district case from four decades ago and pre-*Wal-Mart*, Plaintiff argues that

"[c]ommonality 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.'" (ECF No. 127, PageID 2342 (citing *Sweet v. Gen. Tire & Rubber Co*., 74 F.R.D. 333, 335 (N.D. Ohio 1976)). This is not the correct standard. As articulated by the Supreme Court in *Dukes v. Wal-Mart*, "commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' which does not mean merely that they have all suffered a violation of the same provision of law." 131 S. Ct. at 2551. Instead, the "claims must depend on a common contention" that is "of such a nature that it is capable of classwide resolution." *Id*.; *see also In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, 708 F.3d 704, 709 (6th Cir. 2013) (affirming denial of class certification because no uniform policy or practice existed amongst defendant's agents); *Jungkunz v. Schaeffer's Inv. Research, Inc*., No. 1:11-CV-00691, 2014 WL 1302553, at *13 (S.D. Ohio Mar. 31, 2014) (denying motion for class certification: "without more proof of a common policy or practice affecting other employees in a manner similar to [plaintiff] he cannot show that his individual claim and the purported class claim will share common questions of law or fact").

Plaintiff's unsubstantiated allegations are not sufficient; Rule 23 requires "evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *Gooch v. Life Inv'rs Ins. Co. of Am*., 672 F.3d 402, 417 (6th Cir. 2012) ("A 'limited factual inquiry' assuming plaintiff's allegations to be true does not constitute the required 'rigorous analysis' we have repeatedly emphasized."). Rule 23(b)(3) allows a class to be certified only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and where a class action is superior to other available methods." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017). The predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement of Rule 23(a) and tests

whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Where an individualized, fact-intensive analysis is needed to adjudicate each putative class member's claims, a class cannot be certified. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (holding individual claims should have been tried separately because class treatment did not advance the efficiency and economy of litigation); *Camilotes v. Resurrection Health Care Corp.*, 286 F.R.D. 339, 346 (N.D. Ill. 2012) (holding that factual differences among plaintiffs' work experiences predominate over common issues).

Certification is not appropriate in this case because resolving the issues requires looking at the unique personal experience of each class member. The Franchisee Defendants operate nine different store locations and each is run by a general manager and shift leader (Phelps Depo., ECF. No. 91-5, PageID 1696, pp. 59-60), some of whom are also members of the putative class because they also worked as delivery drivers. (*See, e.g.*, Ex. 5, Declaration of Micah Elliott at ¶5; Ex. 4, Declaration of Clarence Edward Davenport at ¶10; Ex. 2, Declaration of Frank Mazur at ¶8). Assessing whether any minimum wage violation occurred will require inquiry into detailed individual facts regarding, for example, where each employee worked, whether they worked in different roles with different rates of pay in a given workweek, what they were actually paid in a given workweek, how many hours they worked in a given workweek, how many deliveries they made in a given workweek, what they delivered, what vehicle they drove in that workweek, what their operating costs were, and how far they drove in that workweek, among other things. These individualized inquiries render class certification improper.

To satisfy commonality under Rule 23(a), Plaintiffs have the burden of presenting "significant proof" that a resolution of the legal issues in the case shall be performed "in one

stroke." *See Wal-Mar*t, 564 U.S. at 351. To establish commonality, Plaintiffs must do more than simply "raise[] common questions." *Wal-Mart*, 131 S. Ct. at 2551. "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). Rather, the key inquiry under the commonality requirement is whether class treatment "will generate common answers apt to drive the resolution of the litigation" *Wal-Mart*, 564 U.S. at 350. Similarly, to satisfy the typicality requirement, Plaintiffs must show that "'a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'" *Sprague*, 133 F.3d at 399 (citations omitted).

Plaintiffs have not met these requirements. As a threshold and dispositive matter, the only purported "common question" referenced in Plaintiff's motion is "what the proper reimbursement rate is for pizza delivery drivers and whether Defendants paid that rate." (Motion, ECF. No. 127, PageID 2346). But that purported "common question" would not resolve the class members' claims. Liability in this case does not depend on whether Franchisee Defendants' reimbursement policy failed to reasonably approximate these vehicle expenses. The FLSA does not require reimbursement for work related expenses, except in the narrow circumstance where, without reimbursement, the employee's hourly rate of pay in any workweek would fall beneath the minimum wage. *Davis v. Omnicare, Inc.*, 2018 WL 6932118 at *4 (E.D. Ky. Dec. 12, 2018); *Martinez-Trumm v. Citywide Home Loans*, 2018 WL 3037395 at *3 (D. Utah June 19, 2018)(citing *Sanchez v. Aerogroup Retail Holdings, Inc.*, 2013 WL 1942166 at *9 (N.D. Cal. May 8, 2013)); *Franks v. MKM Oil, Inc.*, 2010 WL 3613983 at *4 (N.D. Ill. Sept. 8, 2010)(citing *Heder v. City of Two Rivers, Wisc.*, 295 F.3d 777, 782 (7th Cir. 2002)); 29 C.F.R. 531.55.

Hence, the only relevant question is whether a class member's vehicle costs, taking into account the vehicle reimbursements received, reduced his or her pay below the minimum wage in a given workweek. *See Sullivan v. PJ United, Inc.*, 362 F. Supp. 3d 1139, 1154 (N.D. Ala. 2018), opinion vacated in part on reconsideration (Aug. 7, 2018)("IRS rate is arbitrary and has no logical tie to the ultimate question in a minimum wage case—whether [plaintiff] was paid the . . . minimum wage taking into account reimbursements he received for vehicle expenses he incurred."). Plaintiffs have not established that the class-wide proceedings they seek will "generate common answers" to this question. *Wal-Mart*, 131 S. Ct. at 2551; *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) ("In pursuing their own claims, the named plaintiffs could not advance the interests of the entire early retiree class. Each claim, after all, depended on each individual's particular interactions with GM—and these, as we have said, varied from person to person. A named plaintiff who proved his own claim would not necessarily have proved anybody else's claim.").

The key inquiry that will drive resolution of Plaintiffs' claim is whether a delivery driver suffered a minimum wage violation in a given workweek because in that workweek the driver's vehicle costs so exceeded the reimbursement amounts that it reduced the driver's wages below the minimum wage. This question cannot be answered on a class-wide basis using common evidence. To the contrary, this question is layered with variables, none of which are common throughout the class:

(1) The driver's rate of pay, which was not uniform throughout the stores or even within the stores;

(2) The number of deliveries a driver made within a given workweek;

(3) The vehicle reimbursement amounts paid to a driver in a given workweek; and

(4) The driver's unique vehicle costs.

i. A Driver's Vehicle Costs Cannot Be Determined Based On Common Evidence

To determine whether a driver's vehicle costs exceeded the reimbursement amounts, the factfinder must know information about the driver's vehicle costs. Yet, this amount varies significantly within the proposed class because there are a number of components that vary from driver to driver.

Vehicle costs (like depreciation and insurance) are impacted by the age, make, and model of the vehicle driven by a particular driver, as well as gas prices, which differ across different locations and time. As one delivery driver testified, "[t]he cost of my insurance per year was different depending on my vehicle. I purchased commercial insurance for my Dodge Pickup, which costs about $1,400 per year. * * * By contrast, the cost of insurance for [his] Mercury Mountaineer was about $1,000 per year." (Ex. 2, Declaration of Frank Mazur at ¶7). And data from the U.S. Energy Information Administration confirms the huge variance in gasoline prices during the period of the class that Plaintiff seeks to certify. For example, in the Midwest region, the average price of regular gasoline in January 2015 (near the beginning of the putative class period) was $1.95/gallon; whereas last month that price was $2.72/gallon. *See* U.S. ENERGY INFORMATION ADMINISTRATION, *Weekly Retail Gasoline and Diesel Prices*, available at https://www.eia.gov/dnav/pet/PET_PRI_GND_DCUS_NUS_W.htm (last visited April 26, 2021). The dates of a particular delivery driver's workweeks will therefore impact whether a class member's vehicle costs, taking into account the vehicle reimbursement received, reduced her pay below the minimum wage in that particular workweek. Plaintiff has failed to demonstrate that these individualized questions can be resolved by common proof.

ii. Plaintiff Fails to Satisfy Rule 23(b)(3) Because Individualized Issues Predominate

Rule 23(b)(3) requires this Court "to find that 'the questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Comcast*, 133 S. Ct. at 1432 (quoting Fed. R. Civ. P. 23(b)(3)). "Considering whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co*., 131 S. Ct. 2179, 2184 (2011). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 311 (3d Cir. 2008) (internal quotation omitted). Here, as explained throughout, multiple, significant individual issues overwhelm Plaintiff's claims.

To succeed on his minimum wage violation claims, Plaintiff must prove that, in a given workweek, his employer failed to pay him the relevant minimum wage after deducting his expenses for vehicle costs and after including the reimbursement payments he received. This calculation is overwhelmed with individualized issues as it would require proof as to each putative class member's hours they worked in a given workweek, their hourly rate, whether they had multiple rates of pay in a given workweek, the number of deliveries they made in a given workweek, their vehicle reimbursement received, and their unique vehicle costs, among other things. None of these variables is uniform with respect to the putative class as a whole.

Plaintiff unsuccessfully tries to overcome these individualized issues through the use of averages or estimates. This attempt misses the mark. If this were solely an individual action, Plaintiff would be put to the task of establishing his vehicle costs based on (1) the vehicle he actually drove, (2) the miles he actually drove in a workweek, (3) the number of deliveries he

actually made in a workweek, and (4) his actual hourly rate. But Plaintiff does not do any of this. Instead, Plaintiff's motion for class certification calculates a supposed "estimate" based on the cherry-picked declarations of only three drivers from one of the Franchisee Defendants' nine stores. Plaintiff's motion explains his unscientific guesswork thusly:

> 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.

(Motion, ECF No. 127, PageID 2336, at n. 8). Thus, Plaintiff asks this Court to certify a class of over seven hundred delivery drivers on the basis of what three delivery drivers guessed they received as an "average" mileage reimbursement rate.

The Courts are clear that the use of an "average" or "composite" driver or vehicle would be legal error. In *Gates v. Rohm and Hass,* the Third Circuit rejected plaintiffs attempt to use "composite persons in order to gain class certification." *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 266 (3rd Cir. 2011). In *Gates*, plaintiffs sought certification of a class of plaintiffs under Rule 23(b)(2) or 23(b)(3) for medical monitoring and property damage claims. *Id*. at 258, 262. Plaintiffs argued that no individual analysis of class members was necessary because they could rely on average exposures for class members as calculated by their expert. *Id*. at 265. Rejecting this argument, the Third Circuit criticized the plaintiffs' efforts to put forward "[a]verages or community-wide estimations" of exposure to obviate the individual fact inquiries necessary to make out their claims. *Id*. at 266. Specifically, the Third Circuit held:

> The evidence here is not 'common' because it is not shared by all (possibly even most) individuals in the class. Averages or community-wide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average. *Gates v. Rohm & Haas Co*., 655 F.3d 255, 266 (3d Cir. 2011). Thus, the Third Circuit affirmed the district court's denial of plaintiffs' class certification motion. *Id*. at 270; *Pryor v. Nat'l Collegiate Athletic Ass'n*, No. CIV.A. 00-3242, 2004 WL 1207642, at *5 (E.D. Pa. Mar. 4, 2004), opinion modified on denial of reconsideration, No. CIV.A.00-3242, 2004 WL 1472797 (E.D. Pa. Apr. 6, 2004) (denying class certification in part because the "the composite case on liability would necessarily be stronger than a plaintiff's individual action.").

Similarly, in *Broussard,* the Fourth Circuit reversed certification of a class based on defendant-franchisor's allegedly fraudulent use of funds paid by plaintiff-franchisees. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). In particular, the court found significant that "plaintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." 155 F.3d at 344. To create the "perfect plaintiff," plaintiffs were permitted to "draw on the most dramatic alleged misrepresentations made to Meineke franchisees … with no proof that those 'misrepresentations' reached them. And plaintiffs were allowed to stitch together the strongest contract case based on language from various FTAs, with no necessary connection to their own contract rights." *Id*. The Fourth Circuit criticized the lower court for "los[ing] sight of the fact that a class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" and for overlooking the fact that Rule 23 "cannot be allowed to expand the substance of the claims of class members." *Id*. at 345 (citation omitted). The court further instructed that "courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk … of a composite case being much stronger than any plaintiff's individual action would be." *Id*. at 345.

Here, Plaintiff fails to satisfy the requirements of Rule 23 because fundamental individual differences in the totality of the factual circumstances exist among the putative class members. The Court's "rigorous analysis" is therefore particularly warranted here. *Wal-Mart*, 131 S. Ct. at 2551. Plaintiff's motion offers no individualized proof of his own claim, let alone any class wide proof that would satisfy the stringent requirements of Rule 23. Instead, Plaintiff essentially posits that because some other delivery driver cases have been certified, his case too should receive class certification too. Absent any proof that Plaintiff satisfies all of the requirements of Rule 23, the Court should not take this leap.

C. The Proposed Class is Overbroad And Unascertainable

In addition to analyzing the requirements of Rules 23(a) and (b), the Court must also consider whether the proposed class is ascertainable. *See, e.g.*, *Romberio v. UnumProvident Corp*., 385 Fed. Appx. 423, 431 (6th Cir. 2009); *Cerdant, Inc. v. DHL Express (USA), Inc.*, No. 2:08-cv-186, 2010 U.S. Dist. LEXIS 95087, at *14-*15 (S.D. Ohio Aug. 25, 2010). Ascertainability is not satisfied if the putative class, as defined, is overbroad. *See, e.g., McGee v. East Ohio Gas Co*., 200 F.R.D. 382, 388 (S.D. Ohio 2001); *Givens v. Van Devere, Inc*., No. 1:11-cv-666, 2012 U.S. Dist. LEXIS 131934, at *40 (N.D. Ohio Apr. 27, 2012). The putative class in this case is overbroad and unascertainable because the definition would include even those persons who had not suffered a minimum wage violation. For example, one delivery driver testified that, because of raises he has received over the years, he earns $9.00/hour plus his mileage reimbursement plus tips while he is on the road making deliveries. (Ex. 6, Declaration of John David Flanagan at ¶9). When the federal minimum wage is $7.25/hour, this strongly suggests that no FLSA minimum wage violation would have occurred with this driver. Yet, he would be swept up in Plaintiff's proposed class definition. And, as detailed above, there is truly no way to know whether a minimum wage

violation occurred for even this highly-paid driver without analyzing the individualized factors pertaining to him such as hours worked in a given workweek, his various rates of pay, the number of deliveries he completed, and his unique vehicle costs.

Just as Plaintiff has failed to satisfy commonality, typicality, and predominance, so too is Plaintiff's proposed class overbroad and unascertainable.

D. Plaintiff Fails to Satisfy Rule 23(b)(3) Because Class Treatment Is Not a Superior Means of Resolution

Nor has Plaintiff demonstrated that a class action is the superior method for fairly and efficiently adjudicating this controversy. *See* Fed. R. Civ. P. 23(b)(3). This is not a consumer class action concerning a *de minimis* amount in controversy. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014) ("Also this doesn't appear to be one of those small-claims suits that as a practical matter can proceed only as a class action (e.g. overcharges of $5.50 for rental cars). The damages may not be huge, but may well be sizable enough for individual (or joined) suits to be a feasible alternative to a class action."). To the contrary, as the Court is well-aware, the Plaintiff made a multiple million-dollar demand in this case divided amongst what the Plaintiff describes as a class of over 700 delivery drivers. If the Plaintiff's theory of liability were correct – and it is not – then the individual delivery drivers have more than sufficient incentive to pursue their claims on an individual basis. This is particularly true when the Plaintiff here alleges the entitlement to attorney fees and liquidated damages.

A class action is also not the superior method for fairly and efficiently adjudicating this controversy because a large portion of the putative class agreed to a dispute resolution program that requires arbitration on an individualized basis. Since 2014, delivery drivers working for the Franchisee Defendants have agreed to a dispute resolution program that requires arbitration.

(Hutmier Depo., p. 86)(attached as Exhibit 7). That agreement was updated and revised in the middle of 2018. (Sample Dispute Resolution Agreement and Receipt of Agreement) (attached as Exhibits 8 and 9, respectively). The current agreement binds delivery drivers who have worked for the Franchisee Defendants since then, and it requires mediation and then arbitration on an individualized basis. (Ex. 8 Sample Dispute Resolution Agreement, pp. 2-4). Hundreds of absent class members are bound by this dispute resolution agreement, and it is improper for Plaintiff Thomas to try to sweep them into his litigation. No less than 500 Receipt of Agreements (*See* Ex. 9, Receipt of Agreement; Decl. of Brian P. O'Connor (attached as Exhibit 10) have been furnished in discovery to Plaintiff, who alleges a class of over 700.

O'Connor v. Uber Technologies, Inc., 904 F.3d 1087 (9th Cir. 2018), sheds light on the impact of arbitration agreements and class waivers in these putative class actions. There, a district court certified a class that included "drivers who entered into agreements to arbitrate their claims and to waive their right to participate in a class action with regard to those claims." *Id*. at 1094. The Court of Appeals reversed the class certification order, finding that even the question of arbitrability was designated to the arbitrator, and that the district court's order granting class certification was undermined by the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) which finds those agreements and waivers to be enforceable. *Id*. at 1094-95.

The same result should occur here. A federal class action is not the superior means for adjudicating a controversy concerning a large number of absent class members who are bound to arbitrate any dispute they have on an individualized basis. *See also Independent Living Resource Center San Francisco v. Lyft, Inc.*, 2020 WL 6802410 (N.D. Cal. Nov. 19, 2020)(denying class certification where a class action waiver and agreement to arbitrate was "the elephant in the room"

and concluding that it would "simply lead to interminable satellite litigation" concerning the arbitration agreement if a class were certified).

IV. CONCLUSION

For all of the foregoing reasons, the Franchisee Defendants respectfully request that the Court deny Plaintiff's Amended Motion for Class Certification (ECF No. 127.).

Respectfully submitted,

/s/ Brian P. O'Connor
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2021, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Brian P. O'Connor
Brian P. O'Connor

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