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., *et al* Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S REPLY IN SUPPORT OF AMENDED MOTION FOR RULE 23 CLASS CERTIFICATION

Defendants argue that class certification should be denied because the claims in this case require an "individualized analysis" of the "unique circumstances" of each the delivery drivers. Yet, by their own admission, Defendants did not engage in an individualized inquiry when they created their cookie cutter compensation and reimbursement structure. Instead, Defendants subjected every delivery driver who has worked for them to the same basic employment arrangement: the drivers provide a car for work, are paid minimum or sub-minimum tipped wage, are reimbursed the same set store-wide rate regardless of the car they drive or the expenses they incur, and (until 2017) were also required to pay $1.00 per pay period for the cost of uniforms. The existence of these policies, and the fact that they were applied to all delivery drivers in the same way, is undisputed.

Under these very circumstances, courts have consistently granted Rule 23 class certification. *See, e.g.*, *Waters v. Pizza to You, LLC*, Case No. 3:19-cv-371, 2021 U.S. Dist. LEXIS 11743 (S.D. Ohio Jan. 22, 2021); *Brandenburg v. Cousin Vinny's Pizza, LLC*, Case No. 3:16-cv-516, 2018 U.S. Dist. LEXIS 189878 (S.D. Ohio Nov. 6, 2018); *McFarlin v. Word Enters., LLC*, Case 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-01335 AGF, 2013 U.S. Dist. LEXIS 181749 (E.D. Mo. Dec. 31, 2013); *Bass v. PJCOMN Acquisition Corp.*, No. 09-cv-01614-REB-MEH, 2011 U.S. Dist. LEXIS 58352, at *18 (D. Colo. June 1, 2011). Despite this well-established precedent, Defendants' Opposition rehashes arguments that have already been rejected in other similar cases.

First, Defendants claim that Plaintiff must prove a minimum wage violation to prevail on class certification, and that he has failed to do so. But, while Defendants are correct that the Court's "rigorous analysis" of the class certification question "will entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), this inquiry does not require a summary judgment style evaluation of the putative class's claims. In any event, Plaintiff has made ample allegations that Defendants' common policies did result in minimum wage violations. The determination of whether a minimum wage violation occurred will be determined on a week-by-week basis, applying a common formula to each driver's hours worked, wages paid, miles driven, and reimbursement paid.

Second, despite not relying on the individualized circumstances of drivers in setting their compensation and reimbursement, Defendants ask the Court to rely on these differences to deny class certification. This argument, first asserted by Defendants' franchisor Papa John's International, Inc. ("PJI") at least eight years ago, has been repeatedly rejected. Obviously, the

drivers drive different cars. That, however, is not a bar to class certification.

Finally, Defendants claim that class adjudication is not the superior means for adjudicating this dispute because some putative class members have allegedly signed arbitration agreements. However, through their actions, Defendants have waived their right to enforce arbitration as to the entire class of delivery drivers.

Because all elements of Rule 23 have been met, this Court should grant Plaintiff's Motion for Class Certification.

1. Plaintiff has asserted sufficient facts to warrant class certification.

Defendants' Opposition claims that Plaintiff has not proved a minimum wage violation and, therefore, he has not met the standard for Rule 23 class certification. In essence, Defendants seek to hold Plaintiff to a summary judgment standard on his Motion for Class Certification. "In determining the propriety of a class action, the question is **not** whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Rosiles-Perez v. Superior Forestry Serv.*, 250 F.R.D. 332, 337 (M.D. Tenn. 2008) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (emphasis added) (quoting *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971))). "The Court may consider 'only whether those matters relevant to deciding if the prerequisites of Rule 23 are satisfied' and 'may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.'''" *May v. Blackhawk Mining, LLC*, 319 F.R.D. 233, 237 (E.D. Ky. 2017) (quoting *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851-52 (6th Cir. 2013) (quoting *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 801, 822 (7th Cir. 2012))); *see also Rikos v. P&G*, No. 1:11-cv-226, 2014 U.S. Dist. LEXIS 109302, at *7-9 (S.D. Ohio June 19, 2014), *Garden City Emples.*

Ret. Sys. V. Psychiatric Solutions, Inc., No. 3:09-00882, 2012 U.S. Dist. LEXIS 4445, at *87-89 (M.D. Tenn. Mar. 29, 2012).

Contrary to Defendants' arguments, Plaintiff has put forth evidence that he and all other delivery drivers at Defendants' Papa John's stores have been subject to the same compensation and reimbursement *policies*. Defendants intentionally chose to treat their delivery drivers uniformly, including through their unlawful reimbursement policy. Plaintiff has presented sufficient evidence of class-wide policies and practices such that class certification is warranted. For example:

– All the stores where the putative class delivery drivers work are subject to nearly identical franchise agreements which proscribe operational requirements. *See* ECF # 127-3, 127-4, 127-5, 127-6, 127-7, 127-8, 127-9, 127-10.

– All delivery drivers have the same general job description and duties. Hutmier Dep., 120:20-121:10, March 3, 2021 ("Hutmier Dep. 1").

– All delivery drivers with the Hutmier Group receive the same Team Member Handbook (ECF # 127-11). Hutmier Dep. 1, 68:9-19.

– All Hutmier Group Papa John's stores are subject to the It's Only Work Rules (ECF # 127-17). Hutmier Dep. 1, 71:19-72:4, 72:14-73:14.

– All delivery drivers are paid a tipped wage rate for the hours worked "on-the-road" making deliveries. ECF # 127-11; ECF # 91-5, Phelps Dep., 67:21-68:18; ECF # 127-14, 127-15, and 127-16; ECF # 24-1 (Plaintiff's Declaration).[1]

[1] In their Response, Defendants take issue with the fact that Plaintiff did not include his own declaration in the Motion for Rule 23 Class Certification. *See* ECF # 131, Page ID 2464 ("Plaintiff merely offers the declarations of three delivery drivers (but not of the Plaintiff himself) …"). However, Plaintiff did cite to Plaintiff's payroll records (ECF # 24-2) in his Original and Amended Motions. Further, Plaintiff felt that reiterating the same evidence already in the record was

– All delivery drivers perform the same procedure for clocking in and out of their shifts, as well as switching from in-store to on-the-road status, at the Hutmier Group Papa John's stores. Hutmier Dep. 1, 76:15-24, 77:20-78:19.

– All delivery drivers for the Hutmier Group must meet the same requirements: be at least 18 years of age, have an acceptable motor vehicle report, and have their own drivers' license and vehicle to use for deliveries. Hutmier Dep. 1, 107:22-108:3.

– All delivery drivers must use their own personal vehicles to make deliveries on Defendants' behalf. ECF # 91-5, Phelps Dep. 64, 84; ECF # 127-17; ECF # 24-1.

– The Hutmier Group collects proof of insurance for all their delivery drivers. Hutmier Dep. 1, 111:21-24; Hutmier Dep., 36:3-22, April 6, 2021 ("Hutmier Dep. 2").

– All delivery drivers with the Hutmier Group are subject to the same uniform policy. Hutmier Dep. 1, 128:21-129:12; ECF # 24-1.

– Up until 2017, all delivery drivers had to pay a uniform fee of $1.00, which was deducted from every paycheck during their employment with the Hutmier Group. Hutmier Dep. 2, 41:24-42:17; *see also* ECF # 91-5, Phelps Dep., 82:15-16, ECF #24-2, ECF # 127-13.

– The Hutmier Group does not track any actual expenses associated with using personal vehicles for deliveries for any of their delivery drivers. Hutmier Dep. 1, 135:4-11; Hutmier Dep. 2, 48:4-10; ECF # 24-1.

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not a worthy use of this Court's time. But Plaintiff's arguments are further supported by Plaintiff's own declaration which was filed much earlier in the proceedings.

– Instead, the Hutmier Group Defendants employ the same methodology to determine reimbursements rates to all their delivery drivers. *See* ECF # 127-11, 127-20; ECF # 91-5, Phelps Dep., 96-103, 84:9-85:16, 96:14-97:1.

– Prior to termination, Mr. Phelps made all reimbursement rate changes applicable to all Hutmier Group delivery drivers. Hutmier Dep. 1, 147:10-19; Hutmier Dep. 2, 49:23-25, 60:2-5; ECF # 91-5, Phelps Dep., 94:5-95:11, 90:20-91:9.

– All delivery drivers are paid their mileage, or reimbursements, in cash at the end of their shift. Hutmier Dep. 1, 155:1-19.

– Delivery data—necessary to determine liability and damages here—for all Hutmier Group Papa John's stores is stored centrally through an electronic platform called FOCUS, which is provided by PJI. *See* Hutmier Dep. 1, 54:9-55:3; Hutmier Dep. 2, 18:1-10.

Defendants' Opposition does not deny, oppose, or object to these allegations, except to note that some long-tenured drivers have received raises and other drivers have also worked as managers in some circumstances. In other words, the basic facts of the case are not in dispute.

The questions then are at what rate should Defendants have reimbursed the delivery drivers and were they paid that amount. Whether those questions are answered easily by reference to the IRS rate (since Defendants concede they did not collect records of actual expenses), or the question is answered through more complex testimony provided by experts from both sides regarding what constitutes a "reasonable approximation," is immaterial at this time. Either way, these questions can and should be answered on a class-wide basis. Once the operative rate is selected, a simple math formula will determine whether a given delivery driver has suffered damages in each work week.

2. Courts consistently grant class certification, no matter which legal standard applies to the delivery driver's claims.

Defendants premise their entire brief on the presumption that their preferred "reasonable approximation" standard applies to this case. As the Court is aware, briefing on this issue is currently pending in the context of the parties' cross-motions relating to discovery. *See* ECF # 85, 86, 91, 95, 99. However, in brief summary, the parties advocate for two different standards to determine liability and damages in this case. Plaintiff contends that the Court should defer to the Department of Labor's ("DOL") Field Operations Handbook, which gives employers two options for vehicle reimbursement: (1) track and pay each driver's actual driving-related expenses or (2) reimburse drivers at the IRS business mileage rate. DOL Field Operations Handbook § 30c15. This standard has been adopted by courts in the Southern District of Ohio. *See, e.g., Waters v. Pizza,* No. 3:19-cv-372, 2021 U.S. Dist. LEXIS 87604, at *28 (S.D. Ohio May 7, 2021). Defendants, in contrast, believe that employers are permitted to pay drivers a "reasonable approximation" of the drivers' expenses. *See, e.g.,* DOL Opinion Letter 2020-12.

For purposes of the present Motion, however, it does not matter which standard the Court eventually adopts. Obviously, if the Handbook standard applies, the claims can be easily adjudicated on a class-wide basis. Because Defendants did not keep records of actual expenses, the Court can simply determine the difference between the IRS rate and the reimbursements paid. But "even in cases where courts utilized the 'reasonable approximation' standard, the courts still granted Rule 23 class certification." *Waters*, 2021 U.S. Dist. LEXIS 11743, at * 13; *see also McFarlin*, 2017 U.S. Dist. LEXIS 164968 (granting class certification under reasonable approximation standard); *Perrin*, 2013 U.S. Dist. LEXIS 181749 (same); *Bass*, 2011 U.S. Dist. LEXIS 58352, at *18 (same).

3. Defendants' arguments regarding "common proof" are illusory and contradicted by established law.

Defendants claim that "[c]ertification is not appropriate in this case because resolving the issues requires looking at the unique personal experience of each class member." ECF # 131, Page ID 2471. As a result, according to Defendants, Plaintiff has failed to meet the "commonality" requirement for class certification. *Id*. at Page ID 2469.

Again, Defendants ignore that every pizza delivery driver lawsuit to consider the same question has found that commonality exists. For example, in *Perrin*, the defendant, Papa John's International, Inc., made the same arguments back in 2013 that Defendants make here: "Plaintiffs cannot meet the 'commonality' requirement of Rule 23(a) because whether the application of Defendants' reimbursement policy resulted in sub-minimum wage for a particular driver is dependent on individualized, not common, evidence regarding that driver's income and expenses." *See Perrin*, 2013 U.S. Dist. LEXIS 181749, at *16-17.

The court rejected the argument, finding:

> that the commonality requirement is met, despite the fact that there will be a need for individualized calculation of damages. The issues facing the class arise from *common questions* involving Defendants' *policies* regarding the calculation and payment of reimbursement for delivery expenses. This is sufficient to satisfy the commonality requirement.

Id. at *17-18 (emphasis added). The court also rejected PJI's argument that each delivery driver would be required to make "individualized showings" of their vehicle expenses:

> Defendants' assertion that individualized showings of each Plaintiff's vehicle expenses will be required to prove Plaintiffs' claims is without merit. Defendants' own reimbursement methodology does not depend upon the drivers' actual expenses and the regulatory framework does not require that reimbursement be based on actual expenses. Nowhere do Defendants argue that if Plaintiffs prevail on their theory of liability, Defendants will not be able to determine each class member's damages by using computer data readily availability to Defendants.

Id. at *24. Finally, in *Perrin*, PJI also claimed, as Defendants do here, that some plaintiffs might not have sustained injuries, but the court nonetheless determined that "Plaintiffs have met their burden of showing that all of Defendants' delivery drivers in the five states at issue have, at some point during the relevant time period, been paid at or very near the applicable minimum wage, and thus will have sustained some injury if Plaintiffs[] prevail on their theory of liability." *Id*.

Even under an "approximation" standard, the "issues" in this case "arise from common questions involving Defendants' policies regarding the calculation and payment of reimbursement for delivery expenses." *See Perrin*, 2013 U.S. Dist. LEXIS 181749, at *17-18. All delivery drivers will have suffered "some injury" as a result of Defendants' unlawful employment practices. *See id*. at *24.

Likewise, in *Brandenburg v. Cousin Vinny's*, the Southern District of Ohio found commonality when analyzing the case under the DOL Handbook standard:

> Although some delivery drivers may occasionally have received the minimum wage for inside work as opposed to minimum wage less a tip credit, [] all delivery drivers used their own vehicles, kept them insured, paid for their own fuel and maintained the vehicles in a safe legally operable condition, all as required by Cousin Vinny's. Cousin Vinny's did not record expenses incurred by their drivers, nor did they reimburse any of the drivers at the IRS standard reimbursement delivery rate … [T]here needed 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 *10-11.

The Court further defined how these common facts met the commonality element for Rule 23 class certification as announced in *Wal Mart v. Dukes*:

> Given the uniformity of Defendants' policies, the common questions of law and fact include the following: 1. the extent of the delivery driver's reimbursement for their expenses; 2. whether the delivery drivers were adequately reimbursed for their

> delivery expenses; 3. the amount and pay received by drivers for in-store work; and 4. the amount and nature of damages. All of these common questions of law and fact are relevant in determining the existence of any state law violations of non-payment of minimum wage, overtime pay and the Ohio prompt pay act. Based on the evidence before this Court, the three proposed claims depend 'on a common contention … of such a nature that is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at *11-12 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

As in *Perrin*, *Bass*, *Brandenburg* and other pizza delivery driver cases, Plaintiff has met his burden of showing the common questions to this case that meet the commonality requirement of Rule 23(a).

3.1. Commonality is not defeated nor is the class rendered overbroad or unascertainable by the fact that damages must be calculated individually.

Defendants argue that some drivers will not have minimum wage violations because their damages will not decrease their wages below minimum wage. *See* ECF # 131 at Page ID 2472-73. Thus, Defendants assert that Plaintiff's proposed class is overbroad as it includes people who have not suffered minimum wage violations. However, courts in this District have already determined that this is a damages analysis that does not defeat class certification:

> Cousin Vinny's argues that because their delivery drivers were paid a base wage rate, per-delivery reimbursement and received cash and credit card tips, there are no minimum wage or overtime violations. While Defendants' argument may, theoretically, be possible for some delivery drivers, the need for individualized inquiry and calculation of damages is not enough to defeat commonality under Rule 23(a)(2).

Brandenburg, 2018 U.S. Dist. LEXIS 189878, at *12-13 (citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012). Simply put, "the fact that there will need to be individualized inquiry in this case as to the amount of damages for each delivery driver is not enough to invalidate

commonality." *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *9.

Defendants are correct that damages will be determined on an individual basis by reference to each work week. Class certification is not defeated because Plaintiff has not shown a violation will occur for *every* class member in *every* work week. *See, e.g., Bass*, 2011 U.S. Dist. LEXIS 58352, at *8 (finding commonality and explaining that "[r]esolution of each of these issues would affect *all or a significant number* of the members of a class of plaintiffs who may have been harmed by the defendants alleged actions." (emphasis added)); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460-61 (finding the issue of apportioning damages to only those who suffered actual FLSA violations was *premature* to the issue of Rule 23 class certification). This is an unavoidable reality in any wage and hour case—damages must be calculated on a week-by-week basis and, in some weeks, a violation may not take place. *See, e.g.,* 29 U.S.C. § 206(a); *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 U.S. Dist. LEXIS 191790, at *13 (S.D. Ohio Nov. 5, 2019) ("*Hatmaker I*") ("Moreover, minimum wage violations generally must be proven on a week-by-week basis."). A simple mathematical formula using common proof from Defendants' records showing miles driven and reimbursements paid will determine damages.

3.2. Because Defendants' commonality arguments fail, their "predominance" arguments also fail.

Defendants repackaged their commonality arguments in positing that individualized issues in this case predominate. *See* ECF # 131, Page ID 2475-78. But, as already discussed herein, Defendants' arguments are in direct contradiction to the clear requirements of Rule 23. Further, Courts within this Circuit have already held that the *same arguments* that Defendants have made are inadequate to defeat a motion for class certification. *See generally Waters*, 2021 U.S. Dist. LEXIS 11743; *McFarlin*, 2017 U.S. Dist. LEXIS 164968; *Perrin*, 2013 U.S. Dist. LEXIS 181749;

Bass, 2011 U.S. Dist. LEXIS 58352, at *18; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878. "Liability turns on what the proper reimbursement rate is for pizza delivery drivers and whether Defendants paid that rate. These issues would be determined based on common proof, and common questions predominate in this case. [] As a result, this case is appropriate for class certification." *Waters*, 2021 U.S. Dist. LEXIS 11743, at *24 (internal citation omitted).

4. Defendants have waived any right to arbitrate and any agreements to arbitration are immaterial to this Motion.

Defendants argue that a class action is not the superior means for adjudicating this dispute because they claim that some putative class members have signed arbitration agreements containing class action waivers. ECF # 131, Page ID 2479-80. But Defendants have waived their right to enforce any arbitration agreements they claim exist in this case.

After nearly four years, Defendants now raise arbitration as a "defense" despite failing to provide any evidence of the enforceability of the agreements. Moreover, rather than asserting arbitration, Defendants have actively engaged in litigation with the class members (both opt-in and putative Rule 23 members). Defendants have even asked this Court to compel opt-in and putative class members to respond to discovery. *See* ECF # 85. Defendants' actions have been inconsistent with reliance on any arbitration agreement, and they have delayed in raising the arbitration agreements to the point of prejudicing Plaintiff and the putative class.

Plaintiff filed his action in June 2017. *See* ECF # 1. Defendants spent the first year of litigation attempting transfer the case to New York or dismiss it. *See* ECF # 10, 12, 21, 22, 25, 26, 40. The Court denied that motion on September 30, 2018. On September 29, 2019, the Court granted conditional certification of an FLSA collective action. ECF # 51. In its Order, the Court acknowledged the possibility of enforceable arbitration agreements, but concluded that there was

insufficient information to determine if the agreements were valid, and deferred consideration of the agreements until later in the litigation. ECF # 51, Page ID 889. As a result, in late 2019, delivery drivers who allegedly signed arbitration agreements filed consent to join forms. However, even after these drivers opted into the case, Defendants failed to raise or assert arbitration.

To the contrary, in 2020, Defendants sought discovery from *all* FLSA opt-in plaintiffs and *all* putative Rule 23 class members, including those who they now allege had signed arbitration agreements. ECF # 85 (Motion to Compel "Opt-In and Putative Class Member Discovery); ECF # 85-1 (Proposed Questionnaire to *all* opt-in and putative class members). The proposed questionnaire did not ask *any* questions about arbitration, but instead sought extensive information about each putative class member's individual vehicle expenses. *See* ECF # 85-1, Page ID 1495-1503. When Plaintiff refused to provide responses to these questionnaires because the information sought was entirely irrelevant to the claims asserted, Defendants moved to compel responses to the questionnaires. ECF # 85. That motion is currently pending before the Court.

In other words, Defendants are currently seeking an order from this Court compelling discovery from the same putative class members who they also claim should be barred from participating in this case because they have signed arbitration agreements. Plaintiff was forced to expend substantial attorney time dealing with litigation and discovery directed toward individuals that Defendants now claim cannot be part of the case.

Defendants have "'slept on [their] rights' too long." *See Gunn v. NPC Int'l, Inc.*, 625 Fed. Appx. 261, 263 (6th Cir. 2015). They have waived any right to assert the right to arbitrate the claims of the Plaintiff, any opt-in plaintiff, or any putative class member.

"[A] party may waive an agreement to arbitrate by engaging in two courses of conduct: (1)

taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) 'delaying its assertion to such an extent that the opposing party incurs actual prejudice.'" *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) (quoting *Hurley v. Deutsche Bank Tr. Co. Americas*, 610 F.3d 334, 356 (6th Cir. 2010) (quoting *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003))).

The Sixth Circuit found a defendant waived arbitration when they participated in litigation by "filing an answer without raising arbitration as an affirmative defense, engaging in settlement negotiations, participating in a scheduling conference, and serving discovery requests." *Gunn*, 625 Fed. Appx. at 264 (citing *Johnson Associates*, 680 F.3d at 718-20). In other circumstances, the Sixth Circuit determined the defendant's actions were inconsistent with reliance on arbitration where plaintiffs had "particip[ated] in extensive discovery, defend[ed] against four summary judgment motions, and [were] subjected to a change in venue at the defendant's request." *Gunn*, 625 Fed. Appx. at 264 (citing *Hurley*, 610 F.3d at 338-40). In *Gunn*, the Court found plaintiffs had been prejudiced and defendants had unduly delayed raising arbitration as the defendant waited fifteen months to raise arbitration, "engaged in settlement negotiations, participated in a scheduling conference for all five cases, and filed several motions (some dispositive) without ever mentioning the arbitration agreement." *Gunn*, 625 Fed. Appx. at 264-65.

Here, by litigating against and seeking discovery from the entire putative class (and forcing them to incur the attorneys' fees related thereto), Defendants' actions have waived their rights (if there ever were any[2]) to arbitrate as to <u>any member</u> of the putative class. In *Gunn*, the defendants

[2] Notably, Defendants did not even attempt to convince the Court in their Response that these "agreements" were valid or enforceable. Defendants have not presented this Court with any of those agreements, nor have Defendants asked this Court to enforce any such agreements. Given this lack of evidence, Defendants have not presented a scintilla of evidence that the arbitration agreements exist, are valid, or are enforceable.

alleged that "it was error not to evaluate the waiver issue individually as to each plaintiff." *Gunn*, 625 Fed. Appx. at 266. The defendants argued that waiver should be determined individually as to each opt-in plaintiff from the date that the opt-in plaintiff actively opted into the case. *Id*. In rejecting the claim, the court stated "the effects of NPC's failure to timely raise arbitration—in unnecessary delay and expense—is effectively the same for all plaintiffs, irrespective of when they opted in." *Id*. at 267.

Defendants have not only delayed in attempting to enforce the arbitration agreements as to those opt-in Plaintiffs who have allegedly signed arbitration agreements, they have also taken intentional actions vis-à-vis all of the putative class that are inconsistent with reliance upon arbitration. Because Defendants have waived any right to enforce arbitration, the alleged arbitration agreements are immaterial and irrelevant to the Rule 23 class certification analysis.

5. Defendants' affidavits are irrelevant to class certification.[3]

Defendants present affidavits from five separate putative class members and current employees explaining that the delivery drivers drove different cars and completed deliveries under different circumstances.

First, these communications were obtained from putative class members under inherently coercive and intimidating circumstances. *See Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high. Indeed, there may be some inherent coercion in such a situation."). Given the manner in which they were obtained, the declarations have minimal evidentiary value. *See Turner v. Bernstein*, 768 A.2d 24, 39 (Del. Ch.

[3] Because these affidavits are inherently coercive and misleading, Plaintiff intends to file a Motion to Strike and will provide further legal background as to the impropriety of these communications therein.

2000) (" '[F]orm affidavits of this sort resulting from unsupervised, one-sided communications to class members are entitled to very little, if any, weight.").

Second, substantively, even if the affidavits were obtained through non-coercive means, they are still immaterial to the class certification determination. Defendants' proffered affidavits all relate to the repetitive, but immaterial, theme from their response that each delivery driver incurs individualized expenses by using their personal vehicles to make deliveries. No one disputes the fact that the drivers drove different vehicles. This is true in every case like this.

Under any legal standard that could apply to this case, he individualized expenses of the putative class delivery drivers are *irrelevant and immaterial* to the determination of class certification. "While the extent of Defendants' under-reimbursement might be different from driver to driver or location to location[,] the need for individualized inquiry is not enough to defeat commonality." *Waters*, 2021 U.S. Dist. LEXIS 11743, at *19. "[D]ifferences in the amount of damages allegedly owed each putative class member 'is not fatal to a finding of typicality.'" *Id.* at *20 (quoting *Laichev v. JBM, Inc.*, 269 F.R.D. 633, 641 (S.D. Ohio 2008)). "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." *Waters*, 2021 U.S. Dist. LEXIS 11743, at *24-25 (quoting *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *4). Summarily, Defendants' proffered affidavits simply do not matter to the class's certification.

6. Class treatment provides the most efficient, consistent, and practical means of resolution.

Defendants argues class treatment is an inferior means of resolution for two reasons: (1) some delivery drivers agreed to arbitration and (2) there is sufficient incentive to bring individual claims. First, Plaintiff has already established that the arbitration agreements at issue here were

waived by Defendants' conduct long ago in this case. Second, courts in this district have consistently found Rule 23 class certification to be appropriate in wage and hour cases. *See, e.g., Waters*, 2021 U.S. Dist. LEXIS 11743; *Ganci v. MBF Insp. Servs.*, 323 F.R.D. 249 (S.D. Ohio 2017); *Swigart v. Fifth Third Bank*, 288 F.R.D. 177 (S.D. Ohio 2012); *Dillow v. Home Care Network, Inc.*, No. 1:16-cv-612, 2017 U.S. Dist. LEXIS 85788 (S.D. Ohio June 5, 2017); *Beaver v. Eastland Mall Holdings, LLC*, No. 2:20-cv-485, 2021 U.S. Dist. LEXIS 40185 (S.D. Ohio Jan. 8, 2021); *Fenley v. Wood Grp. Mustang, Inc.*, 325 F.R.D. 232 (S.D. Ohio 2018); *Castillo v. Morales, Inc.*, 302 F.R.D. 480 (S.D. Ohio 2014).

As to Defendants' claim as to individual incentive, "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." *Waters*, 2021 U.S. Dist. LEXIS 11743, at *25-26 (citing *Tedrow v. Cowles*, No. 2:06-cv-637, 2007 U.S. Dist. LEXIS 67391, at *8 (S.D. Ohio Sept. 12, 2007)). Further, Defendants' suggestion that there is sufficient incentive to pursue these cases individually is belied by reality. This case has been pending since 2017 and, as far as Plaintiff is aware, no putative class member has sought to pursue the unpaid wage claims asserted here individually. Likewise, the supposed differences between the drivers does not seem to result in their wanting to pursue their claims separately. Plaintiff's counsel represented the classes that were certified in *Waters* and *Brandenburg*. In those cases, no class members asked to be excluded from the class so they could pursue their claims individually.

In truth, these are complex cases that should be adjudicated on a class-wide basis, just as the Defendants intentionally chose to adopt and apply policies to all delivery drivers across the board. Courts in this district have consistently granted class certification in wage and hour cases,

and in pizza delivery driver cases in particular. Class certification is appropriate here as well.

7. Defendants' response shows why the DOL Handbook standard should be adopted here.

The arguments raised by Defendants in their Opposition—essentially, that even though they did not themselves collect or care about any of their drivers' individualized expenses while the drivers worked for them, they should be permitted to rely on those same differences to block class certification—shows why the DOL Handbook standard is the appropriate standard for adjudicating pizza delivery driver cases and the only standard that has a chance of bringing an end to the constant litigation in this area.

The DOL Handbook standard "recognizes that—when an employer is standing on the minimum wage fault line—an employer cannot and should not be allowed to guess, estimate, or come 'close enough' to reimbursing for these substantial expenses. Instead, the law should provide a clear directive of how to comply with the minimum wage laws." *Waters*, 2021 U.S. Dist. LEXIS 87604, at *5-6. This approach "is consistent with the FLSA's remedial goals." *Id.* "The Fair Labor Standards Act's remedial goals are defeated if employees have no way of knowing whether they are being paid properly." *Id.*

In contrast, if employers can "approximate" mileage expenses, neither employers nor employees know what the rules are until someone files a lawsuit and receives a verdict. As a court in this District recently found in *rejecting* the DOL opinion letter endorsing the "reasonable approximation" standard, what is "reasonable" is left undefined, "leaving employees in the dark as to what rights they have." *Waters*, 2021 U.S. Dist. LEXIS 87604, at *20. Then, after litigation is filed, each side will need experts to argue over whether a specific rate is a "reasonable approximation" in that case. Furthermore, that issue becomes one that must be re-litigated

throughout various motions as it affects the extent of discovery, burdens of proof, the necessity for expert witnesses, etc. This approximation touches upon nearly every aspect of litigation, exponentially increasing the burden upon low-wage workers, as well as the Court.

Under the DOL Handbook standard, employers and employees can know, *prior to litigation*, whether an employer meets its minimum wage requirements. The standard provides a way for minimum wage compliance to be easily calculated and places the burden for proper payment where it should be, on the employer. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1956) (the "obligation of [FLSA compliance] is the employer's and it is absolute.").

Under Defendants' proposed method, there is no clear standard. No one—not the employer and certainly not the employee—would know whether the employer properly reimbursed an employee. The only way for an employee to find out whether they were properly reimbursed, prior to litigation, would be to hire an expensive vehicle costing expert. This is too much to ask of low-wage workers and is anathema to FLSA's remedial purposes. *See Waters*, 2021 U.S. Dist. LEXIS 87604, at *27.

This argument can be seen clearly through Defendants' response in opposition to class certification. Defendants state that "[v]ehicle 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." ECF # 131, Page ID 2474. Thus, despite the undeniable premise that Defendants willfully ignored these individualized costs when setting their reimbursement rates, they believe these individualized costs are now important in determining whether the reimbursements at issue were "reasonable." If Defendants had tracked those individualized expenses and reimbursed delivery drivers in conformity, then, *ipso facto*, they would

have complied with the FLSA. But Defendants chose to ignore the allegedly individualized nature of reimbursement for vehicle expenses—it was immaterial to them when reimbursing their employees. Under their method, they can simply argue that (1) individualized issues predominate so these workers cannot join forces to assert their rights and (2) the rates (no matter what they are) were reasonable because an expert says so.

Clearly, this vicious cycle of avoiding liability contravenes and defeats the purpose of the FLSA by harming employees. But, under the DOL Handbook standard, again, Defendants either keep the records of actual expenses and proof of reimbursement for those expenses, or they must reimburse at the IRS rate. Courts and employees can apply the standard easily to determine damages on a class-wide basis. Plaintiffs can understand whether they have a valid claim *before* filing a lawsuit. The DOL Handbook standard "provides employers with a clear directive for minimum wage compliance and allows them to avoid the substantial costs of keeping records of their employees' actual expenses. It likewise provides employees a clear understanding of how the minimum wage laws apply to them." *Waters*, 2021 U.S. Dist. LEXIS 87604, at *27 (quoting *Hatmaker v. PJ Ohio*, No. 3:17-cv-146, 2020 U.S. Dist. LEXIS 39715, at *7 (S.D. Ohio Mar. 6, 2020) ("*Hatmaker II*")). Defendants have unwittingly shown this Court exactly why the DOL Handbook standard should be adopted here.

8. Conclusion.

For the foregoing reasons, Plaintiff respectfully requests that this Court grant his Motion for Class Certification pursuant to Rule 23. He has established that all the requirements of Rule 23 are met, and class treatment provides the superior means for adjudication in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Defendants.

/s/ Erica F. Blankenship
Erica F. Blankenship