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. Papa John's International, Inc., *et al.*, Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DEFENDANTS' PAYROLL RECORDS

Pursuant to Federal Rule of Civil Procedure 37, Local Rule 37.1, and the Court's Standing Order I.D., Plaintiff hereby moves to compel production of documents and information relevant to the merits of Plaintiff's case, including Defendants' payroll records. The arguments in support of this Motion are more fully set forth in the attached Memorandum in Support.

Plaintiff met and conferred with Defendants via email and held a teleconference with the Court on February 10, 2022. The parties are at impasse on this issue. As the Court instructed on the conference and via text entry on February 10, 2022, Plaintiff submits this formal motion and attached memorandum in support.

Respectfully submitted,

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Plaintiff's Memorandum in Support of Plaintiff's Motion to Compel Production of Defendants' Payroll Records

This is a lawsuit for unpaid minimum wages that, like many such cases, centers on Defendants' payroll records. Not only have Defendants refused to produce their pay records, but Defendants also attempted to leverage their refusal into an argument against class certification. *See* Doc. 131, Franchisee Defendants' Memorandum in Opposition to Plaintiff's Motion for Class Certification, at PAGEID #: 2466–68.

Plaintiff has repeatedly attempted to get these records from Defendants, but to no avail. Plaintiff needs the Court's help in this matter. Plaintiff respectfully asks the Court to order Defendants to produce Defendants' pay records.

1. Background of Plaintiff's Claims

Plaintiff and the putative class members are pizza delivery drivers at Defendants' Papa John's franchise operation. Plaintiff alleges that Defendants shortchanged him and other drivers in a multiple ways.

First, Plaintiff alleges that Defendants under-reimbursed the drivers for their vehicle expenses. *See, e.g.*, *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2019 U.S. Dist. LEXIS 204371, at *10 (S.D. Ohio Nov. 25, 2019) (approving the parties' settlement and noting that "the most relevant pieces of information in this case—records of driver, payroll, and delivery data" were exchanged, which the court found a "sufficient" amount of discovery "to inform settlement negotiations"). This claim is partially proven by examining Defendants'

payroll records and reimbursement records to determine what Defendants paid the drivers and how much Defendants reimbursed the drivers. From there, any shortfall can be determined.

Second, Plaintiff alleges that Defendants deducted money from each driver's paycheck for a "UNIFORM FEE." *Marshall v. Root's Rest., Inc.*, 667 F.2d 559, 561 (6th Cir. 1982) (affirming in part the district court's finding that requiring waitresses to pay for uniforms resulted in an FLSA violation); *see also Nail v. Shipp*, No. 17-00195-KD-B, 2019 U.S. Dist. LEXIS 132072, at *18 (S.D. Ala. Aug. 6, 2019) (citing *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002); 29 C.F.R. § 531.36(b)) (explaining the claim in greater detail). Defendants' payroll records are both the evidence of this unlawful deduction and the method by which damages will be calculated.

Third, Plaintiff alleges that Defendants deducted money from each driver's paycheck for insurance. Defendants made deductions for health insurance, but unlike the unform charge where at least the drivers did receive a company uniform, Defendants did not actually provide the drivers with health insurance. *See* Doc. 1; Doc 75.1. Instead, they simply deducted money from each driver's paychecks. As with the deductions for uniforms, Plaintiff will prove both liability and calculate damages from improper insurance deductions by referring to Defendants' payroll records.

2. The Discovery Requests at Issue

On November 30, 2018, Plaintiff served his first set of discovery requests to Defendants. Exhibit 1, Excerpts from Plaintiff's First Requests for the Production of Documents. Those requests included the following:

> **REQUEST FOR PRODUCTION 2:** Documents, including any computer readable list, spreadsheet, or database, related to payments made or compensation provided to Delivery Drivers in connection with their employment at the It's Only Papa John's stores, including but not limited to hourly wages, delivery reimbursement payments, tips, and any other payments.
> …
>
> **REQUEST FOR PRODUCTION 3:** Documents, including any computer readable list, spreadsheet, or database, related to hours worked by Deliver Drivers during the relevant period at Defendants' Papa John's stores, both inside the restaurant and while on the road making deliveries.
> …
>
> **REQUEST FOR PRODUCTION 17:** Documents related to uniform deductions taken from Delivery Drivers at Defendants' Papa John's stores.
> …
>
> **REQUEST FOR PRODUCTION 19:** Documents related to deductions taken from Delivery Drivers for insurance by Defendants.

Id. The general focus of the above requests is Defendants' payroll and related records.

Defendants have produced a smattering of payroll records. Specifically, Defendants produced nine paystubs for three delivery drivers. *See* Exhibit 2, Confidential Placeholder Exhibit.[1] Based on the contents of those records, Plaintiff asked Defendants to produce the remaining records. Defendants have refused.

Defendants objected to producing their payroll records on two bases. First, Defendants claim that the requests are too burdensome. As discussed below, Defendants have not described

[1] Plaintiff files this placeholder exhibit pursuant to the Protective Order, Defendants have 10 days to file a motion to seal. Doc. 70.

how or why it would be burdensome to produce their payroll records. *See* Section 4.2, *infra*. Second, Defendants claim that they should not have to produce the records until after the Court grants class certification.

3. Legal Standard for Discovery

Rule 26 governs the scope of discovery and provides that:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. Pro. 26(b)(1).

4. Argument

In a lawsuit where Plaintiff alleges that he and his fellow workers were paid improperly, Plaintiff asked for he and his fellow workers' payroll records. Defendants refuse to produce them.

Requests for payroll records in wage and hour cases "go[] to the core of [plaintiff's] claims." *Toro v. Coastal Indus., LLC*, 2018 U.S. Dist. LEXIS 76337, at *12 (M.D. La. May 7, 2018). "Certainly documents reflecting the hours worked and the amounts paid are important to the issues." *Id.* at *11. "[T]he greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." *See Kozak v. Office Depot, Inc.*, 2020 U.S. Dist. LEXIS 32851, *4 (W.D.N.Y. Feb. 24, 2020) (quoting cases).

4.1. The records are relevant to class certification, liability, and damages.

Both the Fair Labor Standards Act and the Ohio Constitution require employers to create, keep, and, upon appropriate request, produce employee payroll records. 29 U.S.C. § 211(c); 29 C.F.R. Part 516.; Ohio Const. Art. II, § 34a. The reason is obvious: those records

generally prove or disprove a wage violation. Moreover, employees have a right to review their payroll records. Ohio Const. Art. II, § 34a.

As the Supreme Court held, "When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds as recognized in O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 602 (6th Cir. 2009); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 456–60 (2016) (explaining the continued application and relevance of the application of *Mt. Clemens*' recordkeeping analysis).

Normally, Plaintiffs "rely on defendants' payroll records to establish common evidence of unlawful payroll practices." *Williams v. Sweet Home Healthcare, LLC*, 325 F.R.D. 113, 129 (E.D. Pa. 2018) (citing cases). Assuming Defendants properly maintain their records, inquiries "can be decided by mechanically referring to a defendant's payroll records." *Mendez v. U.S. Nonwovens Corp.*, 314 F.R.D. 30, 59 (E.D.N.Y. 2016).

This case is no different.

Plaintiff will prove his claim that Defendants deducted money for uniforms and non-existent health insurance by showing Defendants' payroll records to the Court. Plaintiff will calculate damages using those same records. And, finally, Plaintiff would seek to use those records to show Defendants treated their workers in the same way, thereby supporting class certification.

Plaintiff will similarly use Defendants' pay records to prove his mileage reimbursement claim, show suitability for class certification, and calculate damages. The only difference is that the mileage claim, unlike the payroll deduction claims, will require some additional records as

well. This does not mean that the records are not relevant, only that other pieces of evidence are also relevant (like Defendants' records that show the miles each driver drove).

4.2. The Court should reject Defendants' unsupported claim that producing the records would be burdensome.

Defendants argue that it is too burdensome to produce their payroll records, and, therefore, Defendants should be excused from doing so. Defendants' argument fails for numerous, independently-sufficient reasons.

First, Defendants' claim of burden is completely unsubstantiated. This alone is fatal to Defendants' refusal to produce documents. *See Mancia v. Mayflower Textile Servs.* Co., 253 F.R.D. 354, 358 (D. Md. 2008) ("[B]oilerplate objections that a request for discovery is overbroad and unduly burdensome….[is] improper unless based on particularized facts."); *see also First Horizon Nat'l Corp. v. Hous. Cas. Co.*, No. 2:15-cv-2235-SHL-dkv, 2016 U.S. Dist. LEXIS 142332, at *20 (W.D. Tenn. Oct. 5, 2016) (requiring a party to "articulate explicitly why" a production is unduly burdensome).

Further, the Supreme Court has explained, that "[d]ue regard must be given to the fact that it is the employer who has the duty… to keep proper records" and that it is the employer "who is in position to know and to produce the most probative facts." *Mt. Clemens*, 328 U.S. at 687. A perquisite for an employee to rely upon an employer's records, as the Supreme Court envisioned in *Mt. Clemens*, is that the employer produces those records to the employee.

Second, the claim of burdensomeness is not credible. Defendants, like most employers, keep their payroll documents electronically. *Martin v. Jbs Techs.*, No. 2:05-cv-920, 2006 U.S. Dist. LEXIS 117563, at *6 (S.D. Ohio Nov. 21, 2006) ("[I]f, as Plaintiff contends, Defendant's computerized payroll records would contain information responsive to the request, it is unlikely

that compiling a response would be unduly burdensome."). And, as a result, Defendants can quickly and efficiently produce those records.

Moreover, federal and state law requires Defendants to not only maintain these records, but also to produce them to either the Department of Labor or employees upon demand. 29 U.S.C. § 211(c); Ohio Const. Art. II, § 34a. Thus, to the extent that Defendants have made their records burdensome to produce, they have done so by their own choice and at their own peril. Defendants should not be able to use a claim of burdensome records as a shield to discovery, "[s]uch a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty." *Mt. Clemens*, 328 U.S. at 687. This cannot be permitted, especially when federal and state law requires availability and production.

It is also important to note that these records require little attorney time to produce. There is no need for a privilege review or a detailed review for relevance. Defendants can simply pull the appropriate payroll report and produce it as-is.

Third, Plaintiffs ask, as a practical matter, do Defendants' counsel not already have these payroll records? This case has been pending since June 16, 2017. Surely, Defendants' counsel requested Defendants to produce their payroll records so that Defendants' counsel could analyze the case for liability, exposure, and settlement. If not, why did Defendants represent in their opposition to class certification that their records would establish that there was no commonality? Doc. 131 at PAGEID #: 2464–68. If Defendants have already produced the records to their counsel, a claim that it is now too burdensome to produce to Plaintiff is not credible.

Fourth, even if producing the records did entail some level of burden, the necessary nature of the records warrants Defendants to produce them. As Rule 26 explains, the propriety of

discovery is assessed on a sliding scale, taking into account two primary considerations: relevance and proportionality. Thus, Courts may permit simple and inexpensive discovery, even into matters of questionable relevance, when the burden and cost of production is minimal. Conversely, courts may also permit complex and expensive discovery when the information is clearly relevant and not available from another source.

This case represents neither extreme. Defendants' payroll records are highly relevant. Defendants claim it is too costly to produce them right now but have provided no explanation, nor does such a claim make sense. In this case, the documents are proportional to the case's needs and, thus, should be produced.

4.3. There is no reason for delaying Defendants' production of their payroll records, particularly because Defendants have put them at issue in their opposition to class certification.

Defendants have also argued that they should be able to withhold the payroll records until after the Court grants class certification. For several reasons, there is no reason to wait on producing the records and, in fact, doing so would prejudice Plaintiff.

First, approximately 120 drivers have filed consent forms to join this case in response to the Court's conditional certification Order. There is no argument to withhold those drivers' records based on an outstanding Rule 23 class certification motion. The outcome of that motion will not bear on the opt-in drivers' claims, who need the records to prepare their case to present to the Court.

Second, the records are relevant to class certification and, accordingly, Defendants should have produced them *before* the deadline to file for class certification. Not only did Defendants withhold the records, but Defendants also used their refusal to produce the records as part of their argument:

> 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.
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> …
>
> 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.
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> …
>
> 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.
>
> …
>
> 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.
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> …
>
> 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….. 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.

Doc. 131 at PAGEID #: 2464–68.

As described further in Section 4.4 below, Plaintiff requested these records on November 30, 2018. This was well ahead of the deadline to file a motion for class certification. The records are obviously relevant to this issue because they will show that all of the drivers were subject to

Defendants' unlawful deductions and the same mileage reimbursement policy. Defendants, however, refused to produce the records.

As a result of the outstanding discovery issues, the parties jointly moved to extend the class certification deadline. Doc. 103. Because the Court had not ruled on that motion, Plaintiff acted conservatively and moved for class certification without the records. Doc. 108, Plaintiff's Motion for Rule 23 Class Certification; *see also* Doc. 127, Plaintiff's Amended Motion for Rule 23 Class Certification. Still, Plaintiff noted that he intended to supplement his filing with the records and that he was in the process of trying to obtain them. *Id.* at PAGEID #: 2028 n.10; Doc. 127 at PAGEID #: 2337 n.9.

In response to Plaintiff's motion to certify a class, Defendants complained that "there is no evidence regarding the hours worked or compensation received... in any given workweek or in the aggregate" and then that "If 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." Doc. 131 at PAGEID 2466–67. Defendants included no exhibit to support that claim and are currently refusing to produce the payroll records that would prove or (more likely) disprove their argument. By making this argument, Defendants conceded that the payroll records are centrally relevant to class certification. Given Defendants' concession, Defendants' refusal to produce the records is particularly egregious.

Third, even if Defendants had not put the records at issue, and even if the records were not relevant to class certification, there is still no legitimate basis to withhold the records, pending the Court's ruling on class certification. Discovery is not bifurcated in this case.

Certainly, Plaintiff agrees that, in some cases, burdensome discovery that can be obviated by particular motions may best be left until after resolving those motions. But that is not the case here. Plaintiff is talking about basic payroll records. Defendants have not described how or why these records are too burdensome to produce.

To the extent that Defendants are withholding the records on the basis of possibly defeating class certification, Plaintiff notes that any *one* of Plaintiff's claims justify class certification: deductions for uniforms and/or purported health insurance and/or under-reimbursement of mileage.

Defendants' conduct not only causes extreme prejudice to Plaintiff, who cannot adequately dispute Defendants' assertion without the records they appear to reference, but also attempts to convince the Court to wrongly-decide class certification based on unsubstantiated claims about evidence being withheld from it. For this reason, Defendants cannot claim that there is no harm in waiting to provide these documents until after the Court rules on class certification.

4.4. Plaintiff has exhausted extra-judicial methods of resolving this dispute.

Prior to filing this motion, Plaintiff exhausted extra-judicial means of obtaining the discovery responses he seeks. Plaintiff's efforts are described below.

Plaintiff served discovery requests on Defendants on November 30, 2018. *See* Ex. 1. The Parties engaged in numerous phone discussions and emails since that time.

On January 12, 2021, following a meet-and-confer call during the previous day, Defendants produced a sampling of responsive payroll documents to Plaintiff. *See* Ex. 2; *see also* Exhibit 3, Discovery Email Correspondence.

On February 22, 2021, Plaintiff confirmed the existence of unlawful deductions in the sample produced by Defendants and requested the "full payroll records." Ex. 3, Email from Erica Blankenship to Alexander Foxx (February 22, 2021).

On March 7, 2021, Defendants asked for "the name and identifying information of the drivers you want, as well as the time periods you need?" *Id.*, Email from Foxx to Blankenship (March 7, 2021). Defendants also noted that they were working with Defendants' third-party payroll processor to "to determine the burden and feasibility of production and will circle back with you when we know more." *Id.*

On March 8, 2021, Plaintiff clarified that we sought "all payroll records for the relevant time period outlined in the Complaint." *Id.*, Email from Blankenship to Foxx (March 8, 2021).

On May 24, 2021, Plaintiff contacted Defendants requesting an update on Defendants' progress. *Id.*, Email from Blankenship to Foxx (May 24, 2021). On May 28, 2021, Defendants responded that they were "reviewing the notice of supplemental authority [Plaintiff] just filed to determine how it impacts discovery in our case, if at all." *Id.*, Email from Foxx to Blankenship (May 28, 2021).

On July 5, 2021, Plaintiff again followed up with Defendants, asking for either a date certain for production or confirmation of Defendants' intent to withhold the requested payroll records. Ex. 3, Email from Nathan Spencer to Foxx (July 5, 2021). On July 6, 2021, Defendants responded by claiming not to understand Plaintiff's request for all records and asking Plaintiff to agree to sampling again. *Id.*, Email from O'Connor to Spencer (July 6, 2021). On July 7, 2021, Plaintiff responded by again restating that Plaintiffs "want all payroll records (reflecting hours worked, wages paid and at what hourly rate, tips paid, deductions taken, etc.) from the relevant

time period (June 16, 2014 to present) for all of Defendants' drivers." *Id.*, Email from Spencer to O'Connor (July 7, 2021). Plaintiff further explained that based on his review of the sample of records already produced, that Plaintiff "determined that it will be necessary to review the full set of pay records for all drivers during the time period in question. These are clearly relevant wage documents that are foundational to this case and must be produced as such. To the extent you want to produce the requested records in phases or batches, we can work with you to establish acceptable parameters for their production." *Id.* Plaintiff also sought an update on Defendants' investigation of the burden of desponding to discovery. *Id.*

Defendants did not respond to that email.

On July 13, 2021, Plaintiff followed-up with Defendants' Counsel, asking about their position and whether it would be helpful to have a call, Defendants agreed to hold a call but needed to "circle back" to schedule it. Ex. 3, Email from Spencer to O'Connor (July 13, 2021); Email from O'Connor to Spencer (July 13, 2021). Between July 12, 2021, and September 2, 2021, the Parties attempted, unsuccessfully, to schedule a call to discuss these discovery disputes. *See id.*

On December 9, 2021, Plaintiff followed up on these previous discussions. *Id.*, Email from Riley Kane to O'Connor (December 9, 2021). On December 17, 2021, Defendants finally answered that: "In light of the Court's decision in your other delivery driver case, and in light of the still-pending class certification motion, I don't believe that the burden of compiling records for the drivers who did not opt into the case is worth the benefit at this stage. We've talked with our client about this, and the burden of obtaining records for those who did not opt-in is substantial. Is there any harm to you in waiting to gather the documents until after the Court

rules on the class certification motion?" *Id.*, Email from O'Connor to Kane (December 17, 2021).

On December 22, 2021, Plaintiff asked Defendants to explain the specific burdens that their clients face because, normally, the production of such records is a straightforward process of obtaining the documents from computer files. *Id.*, Email from Kane to O'Connor (December 22, 2021).

On December 27, 2021, Defendants stated that their objection was based on the fact that: "your request is for the payroll records for hundreds of drivers who did not opt-in to the lawsuit for more than a five year period of time. The third party who my client works with to process payroll does not believe this is easily performed with 'a few keystrokes.'" *Id.*, Email from O'Connor to Kane (December 27, 2021).

On December 29, 2021, in response to Defendants' non-answer, Plaintiff stated that we have never been provided with a clear explanation of why it is burdensome for Defendants to produce basic payroll records that they are under a legal duty to maintain and ought to have retained and reviewed in order to defend the case. Ex. 3, Email from Kane to O'Connor (December 29, 2021).

On January 4, 2022, Defendants requested an explanation of: "Why do you believe that these payroll records for drivers who did not opt-in to this lawsuit are relevant to the claims presently before the court concerning only the drivers who have opted in? And what is the harm in waiting for the Court to decide whether this case will be certified as a class before we start sifting through records of hundreds of other individuals?" Ex. 3, Email from O'Connor to Kane (January 4, 2022). On January 10, 2022, Plaintiff addressed Defendants' points as follows:

> You asked us to answer why payroll records would be relevant in a case about your clients' pay practices. Although we have already answered that question, and the answer is obvious from the nature of the case, we will answer it again to move this along.
>
> To answer your first question, this case is about unpaid wages. It is also not just a collective action. It is also a putative class action where your clients' pay practices, as applied to each person, is at issue. The payroll records of putative class members are relevant irrespective of whether a putative class member did or did not chose to also opt-in to the collective action.
>
> Despite you withholding these records, Defendants argued in opposition to class certification that "there is no evidence regarding the hours worked or compensation received... in any given workweek or in the aggregate" and then that "If 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." Doc. 131 at PAGEID 2466-67. Based on your argument, it is apparent that you understand the records' relevance.
>
> To answer your second question, there is harm because Defendants have argued that information in aggregate payroll records would merit denial of class certification, but are refusing to produce those records because the class has not been certified. An additional harm is the risk that the Court makes an erroneous judgment based on unsubstantiated claims about evidence that you withheld from it. We intend to supplement our motion with your clients' records.
>
> Having now answered your questions, we ask that you promptly either (1) agree to produce the records or (2) confirm that you will not produce the records so that we can ask the Court to decide this issue. There is no reason to delay any further. Please respond with your position by January 12th.

Ex. 3, Email from Kane to O'Connor (January 10, 2021). Defendants did not answer, so Plaintiff contacted the Court.

On February 10, 2022, the Parties and the Court held a discovery dispute call which resulted in the Court instructing the parties to brief this issue.

5. Conclusion

Plaintiff respectfully asks that the Court order Defendants to respond, in full, to Plaintiff's requests payroll records by ordering Defendants to produce the weekly payroll records for the entire putative class for the entire relevant time period, June 16, 2014, to present.

Respectfully submitted,

/s/ *Riley Kane*
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Certificate of Service

The undersigned hereby certifies that the above document was filed on March 3, 2021, using the Court's ECF system, which will provide notice to all parties.

/s/ *Riley Kane*
Riley E. Kane