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-00411

Judge Michael R. Barrett

FRANCHISEE DEFENDANTS' MOTION TO COMPEL OPT-IN AND PUTATIVE CLASS MEMBER DISCOVERY

Pursuant to Fed. R. Civ. P. 26 and 37(a)(3) and Local Rule 37.1, 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 (collectively, the "Franchisee Defendants") move this Court for an order compelling Plaintiffs to engage in opt-in and putative class member discovery, as contemplated by the proposed Stipulation attached as Exhibit A to Defendants' Memorandum in Support ("Motion to Compel").[1]

The discovery is directly relevant to this case and the requests are narrowly tailored to confine the bounds of discovery. Despite repeated and protracted attempts, both written and oral, to resolve this dispute without the intervention of the Court, Plaintiffs refuse to allow this opt-in and putative class member discovery to occur. Extrajudicial means for resolving this dispute have failed. Therefore, Defendants respectfully moves this Court for an order compelling the discovery.

[1] Defendant Papa John's International, Inc. is contemporaneously filing a Response joining this Motion to Compel.

The parties have met and conferred on this issue and are at an impasse, thus necessitating the filing of this motion. A proposed order follows the Memorandum in Support of this Motion.

Respectfully submitted,

/s/ Brian P. O'Connor

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MEMORANDUM IN SUPPORT

The Franchisee Defendants submit this Memorandum of Law in support of their Motion to Compel Opt-In and Putative Class Member Discovery, to which Defendant Papa John's International, Inc. ("PJI") joins.

PRELIMINARY STATEMENT

On September 29, 2020, Defendants proposed to Plaintiff what they had imagined would be an uncontroversial discovery stipulation ('Stipulation"). The Stipulation contains many concessions by Defendants and sets the parameters for and minimizes the burden for discovery of the opt-in plaintiffs and putative Rule 23 class members. Discovery of the opt-in and Rule 23 class members is Defendants' right under the Federal Rules of Civil Procedure and Defendants' stipulation is abundantly reasonable.

As party plaintiffs to the litigation, opt-in Plaintiffs are subject to discovery, and Courts have permitted depositions of *all* opt-ins. Similarly Courts routinely allow discovery of putative Rule 23 class members where that discovery is not designed to dissuade their involvement in the lawsuit. Recognizing the cost and burden associated such discovery, Defendants' Stipulation significantly limits the discovery that Defendants would otherwise be entitled to take. The Stipulation proposes 30 depositions of the opt-in plaintiffs (and no putative Rule 23 class members), with Plaintiff potentially providing an additional 10 to be selected for deposition. Defendants also propose limiting the length of these depositions to 3 hours, with the option of using 7 hours for five of the opt-in deponents. Defendants agreed to take these depositions telephonically and/or by videoconference and to provide any intended exhibits 7 days advance of the depositions. Similarly, rather than propound requests for production and interrogatories, the Stipulation proposes a user-friendly questionnaire.

These are significant concessions by the Defendants and are designed to streamline and minimize the discovery propounded on the opt-in plaintiffs and putative Rule 23 class members. Moreover, the Stipulation largely tracks the procedures used in *Perrin v. Papa John's Int'l USA, Inc.*, No. 09-cv-1335, 2011 U.S. Dist. LEXIS 104059 (E.D. Mo. 2011) and *Durling, et al. v. Papa John's International Inc*. No. 16-cv-3592, 2018 U.S. Dist. LEXIS 11584 (S.D.N.Y. 2018).

Nevertheless, Plaintiff opposes the Stipulation as "unnecessary" and opposes discovery entirely because Plaintiffs' theory is that putative class members' actual vehicle costs are irrelevant because every putative class member (regardless of their vehicle type) is presumed to incur vehicle costs at least equal to the IRS rate.

Both positions are incorrect. First, the alternative to the Stipulation is full-scale discovery propounded on all 117 opt-in plaintiffs – a result Plaintiff would surely not favor. Second, contrary to Plaintiff's position, discovery of the opt-ins' vehicle costs is relevant. Both the U.S. Department of Labor ("DOL"), and several courts have rejected Plaintiff's theory that employers are required to reimburse delivery drivers at the IRS rate. As such, a delivery driver's actual vehicle costs are a necessary component in the determination of whether the reimbursement reasonably approximated actual expenses.

In sum, Plaintiff's position is untenable and fundamentally unfair to Defendants, depriving them of adequately defending against the claims in this case. Discovery should not be one-sided. It should come as no surprise to Plaintiff that Defendants are seeking the discovery contemplated in the Stipulation. Indeed, the collective action notice expressly informs opt-in plaintiffs that they may be subject to discovery, including depositions, and similarly, Defendants raised the issue of such discovery in the parties Rule 26(f) Report. At the end of the day, the discovery Defendants seek is relevant to parties' claims and defenses and proportional to the needs of this case. For these

reasons and the reasons below, the Court should grant Defendants' Motion and compel the discovery contemplated under the Defendants' Stipulation, and grant Defendants' fees and costs associated with bringing this Motion.

RELEVANT FACTS

Defendants have provided tens-of-thousands pages of discovery to Plaintiff. Plaintiff has provided, to date, 15 excel spreadsheets and a 17-page pdf. That's it. Plaintiffs are seeking to entirely shirk their discovery obligations.

In order to minimize the discovery burden on Plaintiff, Defendants proposed a discovery stipulation (the "Stipulation") on September 29, 2020. This Stipulation is attached hereto as **Exhibit A**. The stipulation limited the number of depositions Defendants could take to 30. It capped the time limit of 25 of these depositions at three hours. Deponents would not be required to leave their jurisdiction. Instead of interrogatories and requests for productions (permitted by the federal rules) Defendants proposed a user-friendly questionnaire sent to opt-in plaintiffs and putative class members. The purpose of the Stipulation was to minimize the discovery burden—a goal it would have accomplished, had Plaintiff agreed to it.

Plaintiff ignored the stipulation until October 7, 2020 when a meet-and-confer via phone was held. Plaintiff indicated they would evaluate the Stipulation in a timely manner. On October 27, 2020 another meet-and-confer was held, whereby Plaintiff maintained that any discovery seeking the actual expenses of delivery drivers was irrelevant. Plaintiff refuses to allow discovery to be conducted on any opt-in plaintiffs or putative Rule 23 class members.

ARGUMENT

A. Defendants Satisfy The Standard To Compel Discovery

Federal Rule of Civil Procedure Rule 26(b)(1) states that "[p]arties 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." Fed. R. Civ. P. 26(b)(1). Both the law of the Sixth Circuit and the law of this Court hold that relevance is an easily satisfied threshold and that the rules allow for liberal discovery. *Clifford v. Church Mut. Ins. Co.*, No. 2:13-cv-853, 2014 U.S. Dist. LEXIS 149224, at *11 (S.D. Ohio 2014) ("Relevance for discovery purposes is extremely broad.") (citing *Lewis v. ACB Bus. Servs.*, 135 F.3d 389 (6th Cir. 1998); *Varga v. Rockwell Int'l Corp.*, 242 F.3d 693, 697 (6th Cir. 2001) ("The rules are broad.").

When a party refuses to engage in discovery as required by the civil rules, a motion to compel discovery under Federal Rule 37(a)(3) is the appropriate remedy. In this instance, Defendants (1) created a narrow stipulation to ease Plaintiff's discovery burden and (2) met and conferred on two separate occasion in an effort to quell the concerns of Plaintiff. Plaintiff still refuses to engage in discovery and the only recourse left to Defendants is this Motion.

B. Defendants Are Entitled To Opt-In And Putative Class Member Discovery

Rule 30 of the Federal Rules of Civil Procedure unmistakably give Defendants the right to depose party plaintiffs in this case. Fed. R. Civ. P. 30. In a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), a "party plaintiff" includes any individual who opts-in to the case. *See* 29 U.S.C. § 216(b). By willingly entering into this litigation, the opt-in Plaintiffs assumed a duty to participate in discovery:

> Having affirmatively opted into this action, . . . plaintiffs . . . have agreed to the discovery procedure at issue. As such, they cannot sit on the side lines and ignore discovery obligations imposed by this Court.

Brennan v. Qwest Communs. Int'l, No. 07-cv-2024, 2009 U.S. Dist. LEXIS 47898, at *26 (D. Minn. 2009). Indeed, the Court-authorized notice to potential plaintiffs advising them of their ability to participate in this lawsuit included a statement that their depositions may be taken in the course of the litigation. (Doc. 52-1) ("Opt-in plaintiffs may be required to participate in written discovery, attend a deposition, and/or attend a trial.")

Given this affirmative duty in collective actions, courts in jurisdictions around the country have permitted – if not required – individualized discovery addressed to ***all*** opt-in plaintiffs. *See*, *e.g*., *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1244 (11th Cir. 2008) (affirming the district court's order allowing the defendant to depose 250 opt-in plaintiffs); *Abubakar v. City of Solano*, 2008 WL 508911, *2 (E.D. Cal. 2008) (allowing the defendant to depose all 160 opt-in plaintiffs); *Coldiron v. Pizza Hut, Inc.*, 2004 WL 2601180, *2 (C.D. Cal. 2004) (permitting discovery of all 306 opt-in plaintiffs); *Krueger v. New York Telephone Co.*, 163 F.R.D. 446, 451-452 (S.D.N.Y. 1995) (authorizing discovery addressed to all 162 opt-in plaintiffs); *Brooks v. Farm Fresh, Inc*., 759 F. Supp. 1185, 1188 (E.D. Va. 1991) (authorizing depositions of all 127 opt-ins) (rev'd on other grounds *sub nom*); *Shaffer v. Farm Fresh, Inc*., 966 F.2d 142 (4th Cir. 1992); *Kass v. Pratt & Whitney*, 1991 WL 158943, *5 (S.D. Fla. 1991) (authorizing individualized discovery, including depositions, of all 100 opt-ins). Many other decisions are in accord.[2]

While the burden for subjecting putative Rule 23 class members to discovery is certainly higher than the low threshold of FLSA opt-in plaintiffs, courts have nonetheless permitted it where

[2] *See*, *e.g.*, *Davis v. Westgate Planet Hollywood,* No. 08-cv-00722, 2010 U.S. Dist. LEXIS 80787, at *23, 25 (D. Nev. 2010) (compelling designated opt-in plaintiffs to respond to defendants' discovery requests and warning them that they would face Rule 37 sanctions, including possible dismissal, if they continued to refuse to respond); *Brennan*, 2009 WL 1586721, at *18 (permitting discovery of opt-ins and dismissing claims of 91 opt-ins who failed to appear for depositions or did not respond to written discovery); *Ingersoll v. Royal & Sunalliance USA, Inc.*, 2006 WL 2091097, at *1-2 (W.D. Wash. 2006) (allowing depositions of all opt-in plaintiffs, which numbered more than 34); *Williams v. Sprint/United Mgt. Co.*, 2006 WL 1867471 (D. Kan. 2006) (declining to restrict depositions even though the defendant had already deposed 300 opt-ins); *Rosen v. Reckitt & Coleman, Inc.*, 1994 WL 652534, at *3-4 (S.D.N.Y. 1994) (permitting depositions of all 50 opt-ins).

"the information requested is relevant to the decision of common questions, the discovery is tendered in good faith and not unduly burdensome or harassing, the discovery does not require expert, technical or legal assistance to respond, and is not available from the representative parties." *Boynton v. Headwaters, Inc.*, No. 1-02-1111-JPM-egb, 2009 U.S. Dist. LEXIS 94949, at *3 (W.D. Tenn. 2009). Defendants realize this and therefore proposed a simple questionnaire. This questionnaire could be mass emailed to putative members and is user friendly—it asks about car mileage, not GPS mechanics. Such discovery is reasonable and well within bounds permitted by courts. *Id.*

C. Defendants' Stipulation Seeks Relevant Discovery Proportional To The Needs Of This Case

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. P 26(b)(b). As explained prior, the bar for relevance is incredibly low. Clifford, *supra* page 4. The bar for proportionality, especially for the party who is being refused discovery, is even lower. "The burden remains on the party resisting discovery to - in order to prevail on a motion for protective order or successfully resist a motion to compel - specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable." *Bros. Trading Co. v. Goodman Factors*, No. 1: 14-cv-975, 2016 U.S. Dist. LEXIS 194187, at *4 (S.D. Ohio 2016) (internal quotations omitted).

1. Defendants' Stipulation is Proportional To The Needs Of This Case And Does Not Impose An Undue Burden

Although authority is clear that Defendants are entitled to seek discovery from *all* opt-ins, (*see* Morgan, *supra* page 5) Defendants' Stipulation reasonably seeks depositions of merely a representative sample. Defendants' Stipulation also limits the length of the depositions to 3 hours, with exhibits being provided seven days in advance of the depositions. Similarly, rather than propound complicated and burdensome interrogatories and request for production, Defendants' Stipulation proposes a user-friendly questionnaire that opt-ins can prepare without significant assistance from Plaintiff's counsel. This is the exact procedure that was followed in *Perrin* and *Durling* and that has proved to be fair and reasonable for all parties. *Perrin v. Papa John's Int'l USA, Inc.*, No. 09-cv-1335, 2011 U.S. Dist. LEXIS 104059 (E.D. Mo. 2011); *Durling, et al. v. Papa John's International Inc*. No. 16-cv-3592, 2018 U.S. Dist. LEXIS 11584 (S.D.N.Y. 2018). Defendants' Stipulation minimizes the parties' discovery burden while taking a tailored and narrow approach to seeking the discovery necessary for Defendants to defend this case.

Moreover, Plaintiff's demand in this case is $8.5 million, and Plaintiff estimates that Defendants' alleged liability may reach an even higher amount. In light of Defendants' significant alleged exposure in this case, the discovery contemplated in the Stipulation is proportional to the needs of this case.

2. Delivery Driver Vehicle Costs Are Relevant To The Claims And Defenses In This Case

The discovery sought in Defendants' Stipulation is also relevant to the claims in this case. As in *Durling* and *Perrin*, Defendants are entitled to seek discovery from opt-in plaintiffs regarding their vehicle costs because that information is directly relevant to their claim that Defendants' vehicle reimbursement amount did not sufficiently reimburse them for their vehicle costs.

The FLSA is entirely silent on an employer's vehicle reimbursement obligations. However, an employee must be paid a minimum wage and that minimum wage must be paid "free and clear" of any deductions or "kickbacks" to employers. *Stein v. HHGREGG, Inc.*, 873 F.3d 523, 530 (6th Cir. 2017) (citing 29 C.F.R. § 531.35). A kickback occurs when an employee kicks back to an employer – either directly (through a deduction) or indirectly (through absorbing an expense) – a portion of his or her wage. If the kickback causes the employee's wage to drop below the minimum wage in an FLSA workweek, and the kickback represents an expense to which the employee is entitled a reimbursement, then there is a FLSA violation.

The equation to determine whether a kickback occurred in this case is simple:

> (1) delivery driver's hourly wage
> +
> (2) vehicle expense reimbursements
> -
> (3) delivery driver's actual vehicle costs (fuel, maintenance, repair, depreciation, insurance, etc.)
>
> =
> ______________________________
> Kickback amount

Authority is clear, however, that an employer need not reimburse employees for their *actual* vehicle expenses but can instead can reasonably approximate those expenses. Indeed, the DOL concluded that the Wage and Hour Division's ("WHD") regulations:

> permit reimbursement of a **reasonable approximation** of actual expenses incurred by employees for the benefit of the employer by any appropriate methodology; **the IRS business standard mileage rate is not legally mandated by the WHD's regulations** but is presumptively reasonable; and reimbursement for fixed and variable vehicle expenses hinges on whether the cost at issue primarily benefits the employer.

WHD Opinion Letter FLSA2020-12, at 7 (August 31, 2020) (emphasis added).

Several courts have reached the same conclusion and rejected Plaintiff's position that employers must reimburse at the IRS rate if they fail to track actual vehicle costs. As recently as August 26, 2020, the court in *Kennedy v. Mountainside Pizza, Inc*., No. 19-CV-01199, Dkt. No 97, (D. Colo. 2020), held that "Defendants may reasonably approximate the vehicle-related expenses of its delivery driver employees for minimum wage purposes and are not required to reimburse Plaintiff at the Internal Revenue Service's standard mileage rate." *Id*. at 1; *see also Blose v. Jarinc*, Ltd, No. 1:18-CV-02184-RM-SKC, 2020 WL 5513383, at *2 (D. Colo. Sept. 14, 2020) (rejecting IRS rate and stating "the reasonable approximation standard has acquired traction in district courts around the country"). The court, moreover, specifically rejected *Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2019 WL 5725043 (S.D. Ohio 2019):

> The Court declines to adopt *Hatmaker's* reasoning, and the standard put forth by Plaintiff because the applicable regulations are not genuinely ambiguous and the FOH is not entitled to deference . . . .

Id. at 9. In addition to finding that "no regulation or statute supports Plaintiff's contention," the court noted that adopting the plaintiff's interpretation would result in under-reimbursement in geographic regions where the IRS rate – which is simply a national annualized weighted average – is insufficient to cover actual vehicle costs:

> [T]he Court appreciates the pragmatic concern that a bright line rule that reimbursement of delivery drivers at the IRS standard mileage rate is *per se* reasonable would result in under-reimbursement of employees who work in regions of the nation with above average vehicle-related costs.

Id. at 11. Likewise, in S*ullivan v. PJ United, Inc*., 362 F. Supp. 3d 1139, 1154 (N.D. Ala. 2018), (opinion vacated in part on reconsideration) the court stated:

> The IRS rate is arbitrary and has no logical tie to the ultimate question in a minimum wage case – whether Sullivan was paid the federal minimum wage taking into account reimbursements he received for vehicle expenses he incurred.
>
> No regulation or statute supports Sullivan's contention that if the Defendants do

> not keep records of Sullivan's actual costs then Defendants' compliance with the minimum-wage laws must be measured by the IRS standard business mileage rate.

Id; see also Perrin v. Papa John's Int'l, Inc., 114 F. Supp. 3d 707, 729 (E.D. Mo. 2015) (rejecting plaintiffs' argument that Papa John's was required to reimburse at the IRS rate and stating that "the regulations applicable to the FLSA allow employers to reasonably approximate the amount of an employee's expenses incurred on his employer's behalf in lieu of tracking the employee's actual expenses."); *Tyler v. JP Operations, LLC*, 342 F. Supp. 3d 837, 848 (S.D. Ind. 2018) (same).

The above authority is clear that the opt-ins and putative Rule 23 class members' vehicle costs are relevant to the claims and defenses in this case. The discovery that Defendants now seek is directly related to the delivery drivers' vehicle costs, including but not limited to, the year and make of the vehicle, and whether the vehicle is also used in connection with other employment or personal use. *See* WHD Opinion Letter FLSA2020-12, at 7 (August 31, 2020) ("reimbursement for fixed and variable vehicle expenses hinges on whether the cost at issue primarily benefits the employer").

Plaintiff has provided no basis to depart from the procedure adopted in *Durling* or *Perrin,* let alone supported his position for why opt-in discovery should not proceed. Plaintiff's position is that none of the requested discovery is relevant because employees are not required to track their actual or approximate expenses. (Plaintiff's Objections to Discovery, page 3). First, this is an incorrect understanding of relevance. Second, Plaintiff's legal support for its position is misplaced.

Relevance is an incredibly low bar to satisfy under the federal rules. *Clifford v. Church Mut. Ins. Co.*, No. 2:13-cv-853, 2014 U.S. Dist. LEXIS 149224, at *11 (S.D. Ohio 2014) ("Relevance for discovery purposes is extremely broad.") (citing *Lewis v. ACB Bus. Servs.*, 135 F.3d 389 (6th Cir. 1998); *Varga v. Rockwell Int'l Corp.*, 242 F.3d 693, 697 (6th Cir. 2001) ("The

rules are broad."). This is a case about reimbursement of delivery driver expenses. If the delivery drivers maintained a record of expenses, the record is relevant, discoverable information. If the plaintiffs do not have such records, they can indicate as such on Defendants' proposed questionnaire, or in the case of Opt-Ins, explain as much during deposition. By the same token, Defendants are entitled to explore whether fixed vehicle costs (such as insurance) "primarily benefits the employer." WHD Opinion Letter FLSA2020-12, at 7. Plaintiffs confuse "relevance" with "mandatorily maintained." Certainly, the delivery drivers were not required to track how many miles they drove their car each week. But if they did, Defendants are entitled to that information and, indeed, that information would go far in resolving this case. Defendants are certainly entitled to *ask* for that information.

Next, Plaintiffs lean on *Hatmaker*, for the proposition that discovery cannot be conducted against parties to a case. (Plaintiff's Objections to Discovery, page 3). First, both the DOL and district courts have rejected *Hatmaker's* conclusion that the IRS rate is mandatory. *See* supra p. 11. Importantly, the decision in *Hatmaker* denying discovery of individual vehicle costs on that basis was decided *before* the DOL's August 31, 2020 Opinion Letter, which concluded that employers are permitted to reasonably approximate vehicle expenses. Second, the facts here are markedly different. In *Hatmaker* Defendants wanted to depose 166 plaintiffs. *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2020 U.S. Dist. LEXIS 39715, at *2 (S.D. Ohio Mar. 6, 2020). Here, Defendants seek to depose a fraction of that: 30. This small sampling is the "representative discovery" the Court in *Hatmaker* so endorsed. *Id* at *12.. Apparently, Plaintiffs want to avoid all discovery, not simply narrow the scope of discovery.

Plaintiff's self-serving claim that the opt-in plaintiffs will not have relevant information is contrary to the questionnaire and deposition results in *Durling.* Moreover, Defendants are not

required to simply take Plaintiff at his word any more than Plaintiff was required to take PJI's word regarding discovery related to FOCUS data. For example, PJI had produced summary FOCUS data, and yet Plaintiff insisted on more detailed data to verify the summary data. PJI obliged. In the same way, Defendants are entitled to explore for themselves whether the opt-in Plaintiffs have relevant information that substantiates their claims in this case.

3. Opt-In Discovery Is Relevant To Issues Related To Willfulness And Joint Employer

As discussed above, delivery drivers' actual vehicle costs are directly relevant to the question of whether Defendant's reimbursements reasonably approximate the delivery drivers' vehicle expenses. If the Court is inclined to first rule definitively on the reimbursement standard, Defendant requests the opportunity to fully brief this issue in the context of a dispositive motion. However, the Court need not decide that issue to reach the conclusion that opt-in and putative class member discovery is appropriate because there are other relevant issues beside individual vehicle costs to explore in the Opt-In depositions. Indeed, Defendants are entitled to explore issues related willfulness under the FLSA, and in the case of PJI, joint employer liability. Both of these issues are relevant to the parties' claims and defenses.

Here, Plaintiff seeks to impose a three-year statute of limitations period under the Fair Labor Standards Act. In order to expand the FLSA's usual two-year statute of limitations to three years, a plaintiff must show that the employer's violation was willful – that is, the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Similarly. Plaintiff also seeks to hold PJI liable as a joint employer. The DOL's Final Rule regarding joint employer status sets forth a four-factor balancing test for determining joint-employer status under the FLSA. Those factors are whether the putative joint employer:

(i) Hires or fires the employee;
(ii) Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
(iii) Determines the employee's rate and method of payment; and
(iv) Maintains the employee's employment records.

Hence, in Opt-In depositions, Defendants are entitled to explore these factors (and other relevant joint employer factors considered by courts), as well as facts related to willfulness in order to test and defend Plaintiff's claim that Defendants acted willfully, and that PJI is a joint employer.

Because Defendants are entitled to Opt-In depositions regardless of Plaintiff's position on the relevancy of individual vehicle costs, the most efficient course is to proceed with Opt-In depositions and allow Defendants to obtain testimony regarding any and all relevant issues. The Court can then, at a later date, decide the appropriate reimbursement standard and, if the Court agrees with the overwhelming weight of authority that the correct standard is a "reasonable approximation," the parties will have conducted and completed discovery relevant to that issue.

By contrast, if Opt-In discovery is denied and/or if Defendants cannot obtain testimony regarding individual vehicle costs, the Opt-In Plaintiffs may be subject to two depositions and discovery may have to be re-opened if the Court later determines that individual vehicle costs are relevant to the question of whether Defendants "reasonably approximated" those costs. Hence, Defendants' proposed procedure is efficient and avoids piecemeal discovery.

CONCLUSION

In sum, because Defendants' Stipulation seeks discovery that is relevant to the parties' claims and defenses and because such discovery is also proportional to the needs of this case, the Court should grant Defendants' Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon all attorneys of record via electronic mail on November 10, 2020.

/s/ Brian P. O'Connor
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