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

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

PAPA JOHN'S INTERNATIONAL, INC.'S REPLY IN SUPPORT OF MOTION TO COMPEL OPT-IN AND PUTATIVE CLASS MEMBER DISCOVERY

Defendant Papa John's International Inc. ("PJI") and the Franchisee Defendants [1] respectfully submit this Reply in Support of the Franchisee Defendants' Motion to Compel Opt-In and Putative Class Member Discovery, to which PJI has joined, ECF No 85, (the "Motion").

INTRODUCTION

In his ongoing effort to stonewall discovery, Plaintiff takes the breathtaking position that discovery related to delivery drivers' vehicle costs is irrelevant because the Franchisee Defendants were required to reimburse delivery drivers at the IRS Rate. The problem for Plaintiff is that *nothing* requires employers to reimburse solely at the IRS Rate, and his position is contrary to the Department of Labor's ("DOL") "official" guidance on this very issue. In FLSA2020-12, the DOL, consistent with virtually every federal court that has meaningfully considered this issue, concluded that the IRS rate is *not* mandatory and that employers may "reasonably approximate" employees' vehicle expenses. Plaintiff's position is a complete outlier.

Nevertheless, Plaintiff launches a misguided attack against the applicable regulations, fabricating ambiguity where none exists to justify his preferred deference to three-paragraphs in the DOL's Field Operations Handbook ("FOH"). Plaintiff's only support is *Hatmaker v. PJ Ohio*, No. 3:17-CV-146, 2019 WL 5725043 (S.D. Ohio Nov. 5, 2019) ("*Hatmaker*"). But the FOH does not set forth the DOL's official position about the IRS Rate (much less require its use) and *Hatmaker* has already been rejected three times – once by the DOL and twice by the District of Colorado.

[1] 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" together with PJI, "Defendants").

Based on the plain language of the applicable regulations, the Court should find that employers may "reasonably approximate" employees' vehicle expenses and grant Defendants' Motion to Compel.

I. THE COURT SHOULD GRANT DEFENDANTS' MOTION TO COMPEL

A. Employers May Reasonably Approximate Expenses

Even if the Court is inclined to consider Plaintiff's untimely and oversized Opposition, Defendants' Motion to Compel should still be granted.[2] Plaintiff's Opposition to putative and class member discovery centers around his argument that individual vehicle records are not relevant to any issue in this case because employers are either required to track vehicle expense and reimburse for actual vehicle costs, or reimburse at the IRS rate. (ECF No, 91 PageID 1548.) None of these contentions is correct.

Courts in jurisdictions around the country have made clear that employers may reimburse delivery drivers using a "reasonable approximation" of their actual expenses, and that the IRS Rate is *not* required. This has been true for at least a decade, and is consistent with the plain language of the applicable regulations. There is no reason to depart from this overwhelming weight of authority.

1. Section 778. 217's Unambiguous Language Provides For Reimbursement Of Vehicle Expenses Based On A "Reasonable Approximation."

The regulations are not ambiguous. Rather, as other courts have done, this Court can decide the question before it based on the plain language of the applicable regulations. 29 C.F.R. § 778.217 is entitled, "*Reimbursement for Expenses*[,]" for logical reasons: *it concerns reimbursement for expenses*. Section 778.217 specifically contemplates an employer reimbursing

[2] On December 14, 2020, Defendants moved to strike Plaintiff's Opposition, ECF No. 91, as untimely and noncompliant with the Local Rule's page limitations; and alternatively sought leave for an extension of time and commensurate page increase. (ECF No. 92.)

"[t]he actual or reasonably approximate amount expended" by employees, "who [are] traveling 'over the road' on his employer's business." 29 C.F.R. § 778.217(a), (b)(3). Section 778.217 also expressly allows employers to reimburse *at less than the IRS Rate*. This section states that "[a] reimbursement amount for an employee traveling on his or her employer's business is per se reasonable if it [i]s the same or ***less than*** the maximum reimbursement payment or per diem allowance permitted for the same type of expense under . . . IRS guidance issued under 26 CFR 1.274-5(g) or (j) . . . ."[3] 29 C.F.R. § 778.217(c)(2)(i). (emphasis added).

Unwilling to accept this straightforward construction, Plaintiff attempts to inject ambiguity by claiming that § 778.217 concerns only the regular rate calculation for overtime. (ECF No. 91, Page ID 1621.) Plaintiff's claim in this case, however, is based on an alleged "kickback" violation under 29 C.F.R. § 531.35. (Compl. ¶¶ 107, 126.) And § 531.35 – entitled "'Free and clear' payment; 'kickbacks'" – specifically cross-references 29 C.F.R. § 531.32(c), entitled "Other facilities." Section 531.32(c), in turn, specifically refers to § 778.217. Plaintiff thus ignores this *unambiguous* and explicit link between § 531.35's "free and clear" minimum wage provision and § 778.217's "expense reimbursement" provision.

Far from being "confusingly-named" or "ambiguous," these regulations are clear on their face and the above construction is the only logical one that "give[s] effect to . . . every clause and word." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, (2001) (internal quotation marks omitted). By contrast, Plaintiff's construction impermissibly renders § 531.35's internal cross-reference to § 778.217's "expense reimbursement" provision meaningless, in violation of the "cardinal principal of statutory construction." *See id.* (statutes should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant.").

[3] 26 C.F.R. § 1.27405(g) and (j)(2) permit the IRS Commissioner to establish mileage reimbursement rates of general applicability.

Not surprisingly, courts have rejected Plaintiff's construction (and the reasoning in *Hatmaker*) in favor of a harmonious reading of the interplay between § 531.35, § 778.217, and FOH § 30c15. In *Kennedy v. Mountainside Pizza* (decided before the issuance of FLSA2020-12), the court held that "Defendants may reimburse delivery drivers using a reasonable approximation of expenses incurred . . . ." No. 19-CV-01199, 2020 WL 5076756, at *2 (D. Colo. Aug. 25, 2020). Specifically, the court recognized the unambiguous link between § 531.32(c) and § 778.217:

> Section 531.35 specifically incorporates § 531.32(c), which in turn incorporates § 778.217 . . . . [T]his Court has previously applied 29 C.F.R. § 531.35 in the delivery driver context without finding that it is ambiguous because § 531.35 specifically incorporates § 531.32(c), which in turn incorporates § 778.217. Because the text and structure of the regulation assist the Court in understanding what "costs of tools" means in the context of expense reimbursement, the term is not ambiguous.

Id. at *4. Likewise, the court in *Blose v. Jarinc, Ltd.* reached the same conclusion, recognizing that "the reasonable approximation standard has acquired traction in district courts around the country" and that "numerous courts in this district and others have allowed employers to reasonably approximate vehicle expenses under similar circumstances." No. 1:18-CV-02184-RM-SKC, 2020 WL 5513383, at *2 (D. Colo. Sept. 14, 2020) (collecting cases). Consistent with this authority – and every court that has meaningfully considered the question, with the *sole* exception of *Hatmaker* – the Court should conclude that, based on the unambiguous language and framework of the applicable regulations, the "reasonable approximation" standard applies.

2. The Terms "Cost" and "Reasonably Approximate" Do Not Render the Regulations "Genuinely Ambiguous."

Plaintiff argues that the regulations are "genuinely ambiguous" and urges the Court to defer to Section 30c15 of the FOH. But under the framework established in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("*Kisor*"), there is no reason to defer to the FOH because there is no ambiguity that warrants *Auer* deference. *Id*.; *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("*Auer*"). In *Kisor*,

the Supreme Court limited when a court should defer to an agency's interpretation of its regulations and warned that a court should apply *Auer* deference only after it "exhaust[s] all the 'traditional tools' of construction" but "real uncertainties about a regulation's meaning" still remain. *Id*. at 2410, 2415.

Here, Plaintiff manufactures ambiguity, arguing that the '"Free and Clear' regulation does not set forth a methodology for calculating mileage rates." (ECF No. 91, PageID 1572.) But Plaintiff's preference for a precise methodology does not *ipso facto* create genuine ambiguity under *Kisor* because there is no uncertainty as to the correct "textual interpretation" of the regulations. The regulations use plainly understood terms: "costs" and "reasonable approximate." The Sixth Circuit has interpreted the terms "reasonable cost" and "reasonable expenses" for purposes of minimum wage compliance – as opposed to declaring them ambiguous, which is what Plaintiff urges. *See Herman v. Collis Foods, Inc.*, 176 F.3d 912, 918–21 (6th Cir. 1999) (defining "reasonable costs" for calculating deductions for meals); *Myers v. The Copper Cellar Corporation.*, 192 F. 3d 546, 555 (6th Cir. 1999) (permitting deductions from tips that "reasonably reimburse" employer for processing fees).

Moreover, if Plaintiff were correct that the "reasonably approximate" language is ambiguous, then it would also be ambiguous in the context of determining whether an expense should be included in an employee's regular rate of pay. Yet courts routinely apply § 778.217's "reasonably approximate" standard to resolve alleged overtime violations – without declaring ambiguity. *See e.g., Hanson v. Camin Cargo Control, Inc.*, No. CIV.A. H-13-0027, 2015 WL 1737394, at *4 (S.D. Tex. Apr. 16, 2015) (finding reimbursement for mileage that did not reasonably approximate actual expenses must be included in the regular rate of pay); *Gagnon v. United Technisource, Inc*., 607 F.3d 1036, 1041 (5th Cir. 2010) (finding per diem reimbursement

did not reasonably approximate expenses); *Acosta v. Mountain Masonry, Inc.*, No. 1:16CV00042, 2018 WL 259773, at *4 (W.D. Va. Jan. 2, 2018) (finding meal reimbursements reasonably approximated employees' expenses). It makes no sense that § 778.217's language would be ambiguous in the context of expense reimbursements for minimum wage compliance but not ambiguous in the context of expense reimbursements for calculating the regular rate of pay and determining overtime compliance. Yet that is the logic of Plaintiff's interpretation.

The real issue for Plaintiff is that the regulations provide a flexible standard that is tailorable to the unique circumstances impacting an employee's individual vehicle costs. Yet this was the selling point in *Kennedy*, where the court emphasized:

> The term "reasonable" allows the Court the discretion to tailor the regulation to the circumstances before it, and this Court routinely applies statutory standards of reasonableness without finding ambiguity. In this case, the Court finds that the regulations are not ambiguous and, therefore, does not defer to [the plaintiff's interpretation of] the DOL's interpretation of the regulations as written in the FOH.

2020 WL 5076756, at *5. Because this standard is not suitable for resolving claims on a class-wide basis, Plaintiff resorts to fabricating ambiguity. *Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrecoverable Tr.*, 410 F.3d 304, 318 (6th Cir. 2005) (rejecting "read[ing] into the law ambiguity where there is none in order to justify an alternative interpretation").

3. Courts Overwhelmingly Apply The "Reasonably Approximate Standard."

Plaintiff attempts to align his position with a "majority" view and argues that after *Hatmaker* "it became apparent that the law was moving in a direction that favored" Plaintiff's IRS theory. (ECF No. 91, PageID 1593.) But no such majority exists. Almost none of Plaintiff's cited opinions were the product of any briefing or meaningful analysis concerning the reimbursement standard because they arose in the context of non-adversarial, unopposed motions for settlement

approval or default judgments.[4] The only two that were contested are *Hatmake*r, which was incorrectly decided, and *Orth v. J & J & J Pizza, Inc.*, No. 19-CV-10709-ADB, 2020 WL 1446735 (D. Mass. Mar. 25, 2020), which actually supports Defendants' position. There, the court in essence applied the reasonably approximation standard because it found that plaintiff's allegation that he was paid below the IRS Rate, "supports a plausible claim that [d]efendants did not provide a reasonable approximation of his expenses." 2020 WL 1446735, at *4.

Plaintiff's portrayal of his position as growing or aligning with a majority view is simply not credible and is belied by the overwhelming number courts that have rejected his IRS theory after meaningful briefing and analysis.[5] Indeed, in *Blose*, the court concluded that the "reasonable approximation" standard has "acquired traction in district courts around the country." *Blose*, 2020 WL 5513383, at *2. Because every federal court (except *Hatmaker*) that has meaningfully considered this issue has concluded that the IRS rate is not mandatory and that employers need only "reasonably approximate" employees' vehicle expenses, the Court should reject Plaintiff' attempt to inject ambiguity into what is otherwise a straightforward analysis and interpretation.

B. Even If The Regulations Are "Genuinely Ambiguous," The Court Should Defer To FLSA2020-12

The plain language of the regulations establishes that employers may "reasonably approximate" employees' driving expenses. *See* 29 C.F.R. §§ 531.35; 531.32(c); 778.217(b)(3).

[4] *See Wuzi Jiao v. Kitaku Japanese Rest., Inc.*, No. 16-CV-2694, 2020 WL 2527588 (E.D.N.Y. Mar. 13, 2020) (unopposed motion for default judgment); *Young v. Rolling in the Dough, Inc.*, No. 1:17-CV-07825, 2020 WL 969616 (N.D. Ill. Feb. 27, 2020) (unopposed motion for approval of class action settlement); *Brandenburg*, 2019 WL 6310376 (same); *Xin Long Lin v. New Fresca Tortillas, Inc.*, No. 18-CV-3246, 2019 WL 3716199 (E.D.N.Y. May 1, 2019) (unopposed motion for default judgment); *Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712 (E.D. Pa. 2014) (same); *Burton v. DRAS Partners, LLC*, No. 19-CV-02949, 2019 WL 5550579 (N.D. Ill. Oct. 27, 2019) (same).

[5] *Kennedy*, 2020 WL 5076756 (partial summary judgment); *Blose*, 2020 WL 5513383 (same); *Benton v. Deli Mgmt., Inc.*, 396 F. Supp. 3d 1261 (N.D. Ga. 2019) (resolving motions for decertification of collective action, for summary judgment, and to exclude expert testimony); *Sullivan v. PJ United, Inc.*, 362 F. Supp. 3d 1139 (N.D. Ala. 2018) (summary judgment); *Tyler v. JP Operations, LLC*, 342 F. Supp. 3d 837 (S.D. Ind. 2018) (partial summary judgment); *Perrin*, 114 F. Supp. at 707 (same); *Wass*, 688 F. Supp. 2d 1282 (motion for judgment on the pleadings).

But if the Court is persuaded that "genuine ambiguity" exists, FLSA2020-12 is entitled to "controlling weight" under *Auer* because the DOL's interpretation is "reasonable" and is of the "character and context" entitled to controlling deference. *Kisor*, 139 S. Ct. at 2416.

A. FLSA2020-12 Is Reasonable.

The DOL's interpretation of its regulations is reasonable, because it "come[s] within the zone of ambiguity the court has identified after employing all its interpretative tools." *See id*. at 2415-16. Although Plaintiff argues that the *Auer* deference is inappropriate because FLSA2020-12 "misconstrues the law" and "elects to apply one regulation over another," FLSA2020-12 does no such thing. (ECF No. 91 PageID 1595.)

Both the DOL and the District of Colorado independently reached the same conclusion for nearly identical reasons less than a week apart: the "reasonably approximate" standard applies to reimbursement of vehicle-related expenses because § 531.35 specifically incorporates § 531.32(c), which in turn incorporates § 778.217, and § 778.217 permits reimbursement based on a reasonable approximation. *Kennedy*, 2020 WL 5076756, at *2; FLSA2020-12 at 2 & n.2.

Reaching this conclusion is not, as Plaintiff argues, applying one regulation over another. Rather, FLSA2020-12 harmonizes a regulatory framework, and explains the interplay between, on the one hand, the regulations (§ 531.35, § 531.32(c), and § 778.217) and, on the other hand, the FOH. FLSA2020-12 specifically clarifies the interaction between the FOH and the regulations by explaining that the FOH "reflects" 778.217(c) because the FOH states that the "IRS rate 'may be used (in lieu of actual costs and associated recordkeeping)'" and "778.217(c) states that reimbursements at the same or less than the IRS rate can qualify as reasonable per se." FLSA2020-12 at 4. The DOL further explained this relationship by noting that, ultimately, the IRS Rate

incorporated by the FOH is "presumptively reasonable." FLSA2020-12, at 1-2. Thus, the IRS Rate is still relevant and functions as a safe harbor for employers wanting the clarity that Plaintiff seeks.

It is not unreasonable to construe the regulations and the FOH in this way, as this is the exact kind of guidance entitled to deference. *Kisor*, 139 S. at 2418 ("*Auer* deference gives an agency significant leeway to say what its own rules mean."). In *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 285–86 (2009), the Supreme Court applied *Auer* deference to the EPA's interpretation because it was a "rational construction that reconciles [various statutes] and the regulations implementing them." *See also, Singh v. Mukasey*, 536 F.3d 149, 154 (2d Cir. 2008) ("BIA has permissibly construed the regulation so as to harmonize it with the statute").

By contrast, Plaintiff's position harmonizes nothing and would create conflicting standards for reimbursing vehicle expenses – one for minimum wage compliance, which would require the IRS Rate, and one for calculating the regular rate of overtime pay, which does allow a reasonable approximation. *Wass*, 688 F. Supp. 2d at 1287 (rejecting plaintiff's argument that "expenses should be treated differently for purposes of the minimum wage than they should be for purposes of overtime"); *Morangelli v. Chemed Corp*., 922 F. Supp. 2d 278, 301 (E.D.N.Y. 2013) (same).

Lastly, there is nothing unreasonable with the DOL's position concerning reimbursement of fixed costs. Nor does it conflict with the FOH. The DOL outlines a sensible, fact-specific framework that stands for the unremarkable proposition that "[e]mployers are expected to reimburse employees for fixed vehicle expenses only to the extent that the employee uses the vehicle as a tool of the trade, *i.e.*, primarily for the benefit of his or her employer." FLSA2020-12 at 6. The DOL's position is entirely consistent with the rationale for *why* the IRS Rate is not mandatory: *because* it may incorporate inapplicable cost considerations.

B. FLSA2020-12 Has The "Character And Context" Entitling To Controlling Weight.

FLSA2020-12 is entitled to controlling weight because it is of the "character and context" required under *Kisor*. For an interpretation to have the "character and context" to warrant *Auer* deference, it must (1) be the agency's "authoritative" or "official" position, (2) implicate the agency's "substantive expertise," rather than concern matters "distant from the agency's ordinary duties," and (3) reflect "fair and considered judgment" that does not advance a "post hoc rationalization" or otherwise create "unfair surprise" to the regulated parties. *Kisor,* 139 S. Ct. at 2416-18. FLAS2020-12 meets all of these criteria.

First, FLSA2020-12 expressly states it is the "official interpretation of the governing statutes and regulations by the Administrator of the WHD." FLSA2020-12 at 7. Second, the DOL is best suited to opine on the meaning of its own expense reimbursement regulations and § 30c15 of the FOH. *Kisor,* 139 S. Ct. at 2417("Generally, agencies have a nuanced understanding of the regulations they administer."). Third, the thoroughness and harmony of FLSA2020-12's interpretation reflects the DOL's "fair and considered judgment" of the question. *Id.* Fourth, FLSA2020-12 does not conflict with any prior-held views or interpretations of the DOL. *See O'Neal v. Denn-Ohio, LLC*, No. 3:19-CV-280, 2020 WL 210801, at *7 (N.D. Ohio Jan. 14, 2020). To the contrary, the DOL took specific care to demonstrate how FLSA2020-12 is internally consistent with other FLSA regulations and earlier DOL pronouncements (including the FOH) and the view held by a majority of federal courts. *See, e.g.*, FLSA2020-12, at 2 (referencing FLSA recordkeeping regulations to support plain meaning of 29 C.F.R. § 778.217); *id.* at 3 & n.4 (referencing 29 C.F.R. § 778.217(c)(2)(i) to reject strict reading of FOH § 30c15); *id.* at 6 (referencing earlier opinion letters); *see also Stein v. HHGREGG, Inc.*, 873 F.3d 523, 533-34 (6th Cir. 2017) (finding interpretation persuasive because consistent with earlier pronouncements).

Nevertheless, Plaintiff launches a misguided attack against FLSA2020-12, arguing that it is not the "type of interpretation afforded deference." (ECF No. 91, PageID 1595.) Plaintiff first criticizes the DOL for making "flawed legal judgment, rather than applying policy to specific factual scenario." But this criticism is incorrect because FLSA2020-12 expressly states that the "opinion is based exclusively on the facts . . . presented." FLSA2020-12 at 1.

Next, Plaintiff takes issue with FLSA2020-12's ultimate interpretation, calling it erroneous and mischaracterizing it as following a "trail of regulatory breadcrumbs" (ECF No. 91, PageID 1595.) This criticism is irrelevant to the "character and context" analysis, and as discussed, the DOL's interpretation logically construed the regulations with the FOH, and such construction aligns with the majority view. *See supra* 8-9. Plaintiff offers no authority that indicates that such a construction – which he ominously dubs "legal judgments" – is unworthy of deference. Quite the opposite, in *Auer*, the Supreme Court afforded deference to the DOL's interpretation of language in a regulation being applied to the "salary basis" test in the context of a specific factual scenario. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Indeed, everything about the DOL's interpretation in *Auer* involved "legal judgment." The DOL operated no differently here; it published its official position on the meaning of related regulations in the context of a specific factual scenario.[6]

1. FLSA2020-12 Is Not A Convenient Litigating Position Or Inconsistent With Prior Interpretations.

Plaintiff contends that FLSA2020-12 does not reflect "fair and considered judgment" because the DOL has taken a "convenient litigating position." (ECF No. 91, PageID 1600).

[6] Plaintiff also complains that FLSA2020-12 wrongly criticized *Hatmaker* for failing to consider § 778.217. (ECF No. 91 PageID 1596.) Plaintiff's argument is nonsensical semantics, as there is no way around the fact that FLSA2020-12 *correctly* points out that the *Hatmaker* decision did *not* analyze § 778.217 or how the FOH may be interpreted to support that regulatory text. FLSA2020-12 n.4. Although the parties may have briefed § 778.217, the court in *Hatmaker* failed to include *any* discussion about it in its opinion.

Plaintiff is mistaken. An agency takes a "convenient litigating position" when it advances a *self-serving* position and after-the-fact defense of a prior agency decision. *Kisor*, 139 S. Ct. 2418; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (defendant-agency not entitled to deference as to "convenient" interpretation made for first time during litigation supporting retroactive action to the detriment of the regulated party). Here, there is no evidence that FLSA2020-12 is a "post hoc rationalization." *Auer*, 519 U.S. at 462. That the DOL's interpretation aligns with the pizza industry's does not mean that it does not reflect fair or considered judgment.

Nor is FLSA2020-12 inconsistent with any present or former DOL position. First, FLSA2020-12 does not conflict with FOH § 30c15 – the *only other* prior-held "view" expressed by the agency on the matter. *See supr*a 8-9. And even if a conflict did exist, Plaintiff offers no compelling justification for why his preferred interpretation of FOH § 30c15, which is not authoritative, trumps the DOL's "official" interpretation adopting the majority-held view. *Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007, 1012 (9th Cir. 2011)* ("[I]t does not appear to us that the FOH is a proper source of interpretive guidance."). Second, although the DOL used the IRS Rate as a reasonable approximation in a prior enforcement action, that does not render FLSA2020-12 inconsistent. Plaintiff makes too much of the DOL's enforcement action in *Scalia v. Arizona Logistics, Inc.*, Case No. 2:15-cv-04499-DLR (D. Ariz. Jul. 8, 2020). Nowhere in *Scalia* did the DOL take the position that employers (1) cannot reasonably approximate vehicle expenses; or (2) are required to reimburse at the IRS Rate. Also, FLSA2020-12 is not inconsistent with the DOL's position in *Scalia* because, as already explained, it is consistent with FOH § 30c15. *See supra*. 9.

Finally, contrary to Plaintiff's belief, the publication of FLSA2020-12 is not analogous to the situation in *O'Neal*. (ECF No. 91, PageID 1600.) There, the DOL sought to eliminate the long-

standing "twenty percent rule." *O'Neal*, 2020 WL 210801, at *5–7. Here, by contrast, FLSA2020-12 is not replacing three decades worth of agency guidance and legal jurisprudence with a conflicting view. *Id.* Plaintiff concedes that his IRS Rate standard did not exist until "recently" while the "reasonable approximation" is at least nine years old. (ECF No. 91, PageID 1567.)

2. FLSA2020-12 Has No Retroactive Effect

Plaintiff argues that, even if afforded deference, FLSA202-12 should not apply retroactively; however, this argument misunderstands the law. To be retroactive, a rule must impose a new duty, or attach "new legal consequences to events completed before its enactment" *with respect to the regulated party*. *Elim Church of God v. Harris*, 722 F.3d 1137, 1141 (9th Cir. 2013); *Kisor*, 139 S. Ct. 2417-18 ('"unfair surprise' to regulated parties"). Contrary to Plaintiff's position, a rule "does not operate 'retroactively' merely because it is applied in a case arising from conduct antedating [its] enactment, or upsets expectations based in prior law." *Harris*, 722 F.3d at 1141. Here, FLSA2020-12 imposes no retroactive obligations or consequences on Defendants, the *regulated parties*, because they were already adhering to the DOL's position in FLSA2020-12.

C. FLSA2020-12 Is Entitled To Substantial Persuasive Weight Under *Skidmore*.

Assuming *Auer* deference is improper, the Court should give FLSA2020-12 *Skidmore*, or persuasive, deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The level of deference afforded should be "proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *O'Neal*, 2020 WL 210801, at *7 (citation omitted). Here, in contrast to FOH § 30c15, FLSA2020-12 is the DOL's official interpretation and reflects careful consideration because it demonstrates how FLSA2020-12 is internally consistent with other FLSA

regulations and earlier DOL pronouncements (including FOH § 30c15). As such, it is the definition of "thoroughness" and has the power to persuade.

IV. *HATMAKER* SHOULD BE DISREGARDED AND IS NOT BINDING.

Plaintiff's Opposition relies almost exclusively on *Hatmaker* to support his IRS Rate theory. *Hatmaker*, however, was incorrectly decided for several critical reasons.

First, as discussed above (and recognized by the DOL), *Hatmaker* failed to cite 29 C.F.R. § 778.217, much less analyze its impact on the FOH. *See* FLSA2020-12, at 3 & n.4. By not even trying to construe § 778.217 alongside the FOH, *Hatmaker* ignored *Kisor*'s demand to carefully consider "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Kisor*, 139 S. Ct. at 2415.[7] Compounding this error, *Hatmaker* simply declared there was ambiguity, where there is none, and then misapplied *Auer* by concluding that the IRS Rate is required because it was not "plainly erroneous nor inconsistent with the regulation." 2019 WL 5725043 at *4–5. But, as explained below, this conclusion *is inconsistent* with the plain text of the regulations, and the DOL explicitly said as much. *See* FLSA2020-12 at n4.

Second, *Hatmaker* misstates what § 30c15 of the FOH says, by transforming the permissive "*may* be used" into the imperative "*is* used" and "*applies*."[8] It is undisputed that FOH § 30c15 contains permissive language: "The IRS standard business mileage rate *may* be used in lieu of actual costs for FLSA purposes . . . ." § 30c15. (emphasis added). Nevertheless, without any analysis or explanation, *Hatmaker* concluded that the IRS rate is mandatory. Construing the FOH

[7] *Hatmaker* also misinterpreted the FOH's purpose, which is not to relieve or ease a plaintiff's burden of proof in private litigation. "The FOH does not establish a binding legal standard on the public. . . . Rather, the FOH is an operations manual that provides DOL investigators and staff with [already-established policies]." FLSA2020-12 at 4.

[8] *Hatmaker* stated that "[i]n this case, *the DOL Handbook states that when actual expenses have not been maintained, the IRS mileage rate is used* to determine minimum wage compliance. . . . Since 2000, the DOL Handbook has provided that in the absence of actual costs, the IRS mileage rate *applies*." *Hatmaker*, 2019 WL 5725043 at *5 (emphasis added).

in this way is error. *Quaid v. United States*, 386 F.2d 25, 29 (10th Cir. 1967) (invalidating regulation where "it changes the [permissive] statutory word 'may' to the imperative 'shall'").

Third, *Hatmaker* inaccurately opines that "the IRS . . . rate . . . favors neither employers nor employees." 2019 WL 5725043, at *6. This is incorrect because, as a "nationwide average," the IRS rate has the potential to overcompensate or undercompensate particular employees depending on their vehicles and the vehicle costs of their communities. The court in *Kennedy* recognized this very possibility: "The 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." *Kennedy*, 2020 WL 5076756, at *5.

Fourth, *Hatmaker* held an employer had a duty to keep records of its employees' vehicle-related expenses, but there is no such duty. The court in *Sullivan v. PJ United, Inc.* explained:

> Sullivan has not shown convincing authority to the Court that *Mt. Clemens* burden shifting should apply by reason of Defendants' failure to record Sullivan's actual expenses. Additions and deductions that Defendants have made from Sullivan's paychecks are not the same as expenses that Sullivan incurred in operating his vehicles. The DOL surely could have specified such, especially considering the overwhelming burden this would impose on employers . . . .

362 F. Supp. 3d 1139, 1151 (N.D. Ala. 2018); *Morangelli*, 922 F. Supp. 2d at 302 ("[I]t would not make sense for the FLSA to impose on an employer the obligation to keep a record when control over that record is exercised by the employee, rather than the employer"); 29 C.F.R. § 516.2 (not including employee expenses in list of required employer records); FLSA2020-12 at 3 (no requirement "to keep track of employees' actual expenses."); *id.* at 2 ("neither the FLSA nor DOL's regulations require them to keep records of employees' actual expenses."); *id.* at 3 (when employees purchase required uniforms . . . "no record of such private transactions need be kept [by the employer] under the FLSA").

More important, *Hatmaker* no longer stands for the proposition that an employer has a duty to keep records of its employees' vehicle-related expenses. Reversing course, on September 28, 2020 – after being presented with FLSA2020-12 as supplemental authority – Judge Rose held that "Section 516.6(c)(2) does not purport to require that employers keep records of each employee's expenses, but rather the methodology used to arrive at the additions or deductions from wages paid" and "Defendants are not required to use the IRS rate; they are required to keep records of the method they did use." *Hatmaker*, ECF No. 165, at 3.

Fifth, *Hatmaker* improperly shifted to employers the burden of showing that the reimbursement amounts sufficiently reimbursed employees for their actual expenses. But the only case it cited for this proposition, *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959), did not say this. *Caserta* stands for the uncontroversial proposition that an employer has an "absolute" obligation to pay employees for overtime and "the employer 'at its peril, had to keep track of the amount of overtime worked by those of its employees[.]'" 273 F.2d at 946 (internal edits omitted). As discussed below, it is the employee's burden to demonstrate that a minimum wage violation occurred as a result of insufficient reimbursements. *See infra* 17-19.

Lastly, *Hatmaker* is not binding on this Court. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, [or] the same judicial district." (quotation omitted). Accordingly, the Court should decline to follow *Hatmaker*.

V. MT. CLEMENS BURDEN SHIFTING DOES NOT APPLY

Burden shifting under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946) does not apply. A plaintiff's burden in FLSA cases is only reduced when the employer is in position "to know and to produce the most probative facts concerning the … work performed" and the

employee "produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687–88.

This case does not fit this framework. Defendants are not in position "to know and to produce the most probative facts concerning" Plaintiff's vehicle costs. *See* FLSA2020-12, at 3. Rather, Plaintiff is in the best position to know his vehicle costs, and it precisely why Defendants seek such discovery. Plaintiff's argument that drivers do not know their vehicle expenses and would not know what the "proper reimbursement rate is until a jury determines it" (ECF No. 91 PageID 1589) defies common sense and is belied by the fact that delivery drivers (and Plaintiff's counsel) have repeatedly brought lawsuits alleging that their employers failed to reasonably approximate their vehicle expenses. *See e.g.*, *Perrin v. Papa John's*, No. 09-1335, (E.D. Mo.); *Durling v. Papa John's*, No. 7:16-cv-03592 (S.D.N.Y.); *Benton v. Deli Mgmt., Inc.*, No. 1:17-cv-296 (N.D. Ga.); *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516 (S.D. Ohio).

Even if *Mt. Clemen*s burden shifting applied, it would not override Plaintiff's burden to prove *liability* or his obligation to participate in discovery. *Mt. Clemens* does not shift the burden of proof on the issue of *liability.* Instead, it only applies to calculating damages and assumes that plaintiffs have proven liability. *See Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013) ("[*Mt. Clemens*] only applies where the existence of damages is certain [and] allows uncertainty only for the amount of damages."). The Sixth Circuit is clear on this point:

> However, *Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are. . . . In short, *Mt. Clemens Pottery* does not help plaintiffs show that there was a violation under the FLSA. It would only allow them to prove damages by way of estimate, if they had already established liability.

O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567, 602–03 (6th Cir. 2009). Thus, Plaintiff has the burden to prove that his expenses exceeded the reimbursements he received, and absent some evidence of his expenses, Plaintiff cannot meet this burden.

VI. OPT-IN AND PUTATIVE CLASS MEMBER DISCOVERY IS PROPER

Plaintiff's Opposition offers no legitimate basis to depart from the well-established rule that, as parties to the litigation, opt-ins are subject to discovery. Indeed, nowhere does Plaintiff's Opposition address, much less distinguish the overwhelming authority from jurisdictions around the country permitting – if not requiring – individualized discovery addressed to all opt-in plaintiffs. (ECF No. 85 at 7-8.) Although Plaintiff complains the discovery demands are burdensome and designed to "harass and intimidate" (ECF No. 91 PageID 1611), Defendants seek precisely the type of discovery sought and required in cases throughout the country.[9]

Even if Plaintiff were correct that delivery drivers must be reimbursed their actual costs or at the IRS mileage rate, Defendants are not foreclosed from proving that delivery drivers were reimbursed their actual costs. Under the FLSA, an employer "would not be in violation of the minimum wage laws merely by failing to reimburse plaintiffs for expenses; rather, such failure must be in an amount great enough to bring plaintiffs' wages for a particular time period below the legal minimums." *Wass*, 688 F. Supp. 2d at 1288.

Plaintiff and the opt-ins cannot succeed on their minimum wage claims by simply claiming that their actual costs exceeded the Franchisee Defendants' reimbursement rates. Rather, irrespective of how their vehicle reimbursement is calculated, they must provide documents and

[9] *Sullivan*, No. 7:13-cv-01275 (N.D. Ala.), *Perrin*, No. 09-1335, (E.D. Mo.), *Durling*, No. 7:16-cv-03592 (S.D.N.Y.), *Benton v. Deli Mgmt., Inc.*, No. 1:17-cv-296 (N.D. Ga.), *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516 (S.D. Ohio), *Shell v. PieKingz, LLC*, No. 1:19-cv-02043 (N.D. Ohio), *Arp v. Hohla & Wyss Enterps., LLC*, No. 3:18-cv-00119 (S.D. Ohio), *Estes v. Willis & Brock Foods, Inc.*, No. 6:18-cv-00197 (E.D. Ky.), Dotson v. P.S. Mgmt., Inc., No. 2:17-cv-00896 (S.D. W. Va), *McFarlin v. Dittrich*, No. 2:16-cv-12536 (E.D. Mich.).

information in discovery to prove which expenses were incurred that they were not reimbursed for, and whether that dropped their wages below minimum wage in any given workweek. *See O'Brien,* 575 F.3d at 602 ("FLSA plaintiff must prove by a preponderance of the evidence that he or she performed work for which he or she was not properly compensated").

Regardless of whether the Franchisee Defendants maintained records of drivers' actual vehicle costs, Defendants are not prevented from demonstrating that drivers were sufficiently reimbursed for those costs. Indeed, the Franchisee Defendants maintain that they were because their reimbursement methodologies were designed by third party vehicle costing experts to cover the drivers' actual expenses after considering fluctuating market-specific gas prices, the size of the delivery area, the geography/terrain, and other economic factors.

C. PJI Is Entitled To Joint Employer Discovery

Plaintiff similarly fails to provide a basis for why PJI would not be entitled to joint employer discovery. In fact, Plaintiff's explanation for opposing such discovery makes no sense at all. Plaintiff's argument goes astray from the start, arguing that his joint employer theory "does not rely on each delivery driver having individually been terminated or hired by a PJI representative" and instead focuses on PJI's relationship with the franchisees. (ECF 91, PageID 1605.) Even assuming that this were a proper inquiry under the FLSA or Ohio minimum wage law, which it is not, it does not render other factors – hiring, firing, disciplining, etc. – considered by courts within the Sixth Circuit and across the country irrelevant.[10] There is no authority, and Plaintiff cites none, that limits the joint employer inquiry to the relationship between PJI and its

[10] The Sixth Circuit recently applied the DOL's joint employer factors to conclude that defendant was not a joint employer. *See Rhea v. W. Tennessee Violent Crime & Drug Task Force*, 825 F. App'x 272, 277 & n.4 (6th Cir. 2020) ("[DOL's] regulation states that four factors are relevant to the determination, including whether the alleged 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.") (citing 29 C.F.R. § 791.2(a)(1).).

franchisees. Perhaps recognizing as much, Plaintiff then walks back his position, claiming that limited depositions of opt-ins may be appropriate when the parties reach the liability stage of the case. (*Id*.) But this makes no sense because the Court has not bifurcated discovery into *any* stages.[11]

PJI is permitted to test Plaintiff's assertion that it was the opt-in plaintiffs' joint employer and to obtain affirmative evidence that it did not engage in any of the joint employer factors vis a vis the opt-in plaintiffs. Plaintiff's position deprives PJI of putting on an adequate defense, and is contrary to other cases. *See e.g., In Re: Jimmy John's Overtime Litigation*, Nos: 14-CV-5509, ECF No. 331, (N.D. Ill. Jul. 18, 2016) (30 depositions of opt-ins regarding the joint employer issues). Plaintiff offers no compelling reason why the same is not appropriate here.

Regarding discovery of putative class members, it should be permitted because Defendants proposed a simple and streamlined questionnaire, which could be mass emailed to putative members and is user friendly. Such discovery is reasonable and well within bounds permitted by courts because "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, In*c., No. 1-02-1111-JPM-egb, 2009 WL 3103161, at*1 (W.D. Tenn. 2009).

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion to Compel Opt-In and Putative Class Member Discovery, and grant such other relief as just and appropriate.

[11] Plaintiff then concedes that if discovery does proceed it should be limited to a representative sampling. (ECF No. 91, PageID 1615.) But this is exactly what Defendants proposed in their discovery stipulation, limiting opt-in depositions to 30. (ECF No. 85, Page ID 1478, Ex. A.)

DATED: December 22, 2020

Respectfully submitted,

/s/ *Gerald L. Maatman, Jr.*
Gerald L. Maatman, Jr. (*pro hac vice*)
gmaatman@seyfarth.com
Michael L. DeMarino (*pro hac vice*)
mdemarino@seyfath.com
SEYFARTH SHAW LLP
233 S. Wacker Drive, Suite 8000
Chicago, IL 60606-6448
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

Attorneys for Papa John's International, Inc.

Brian P. O'Connor (0086646)
SANTEN & HUGHES
600 Vine Street, Suite 2700
Cincinnati, OH 45202
Telephone: (513) 721-4450
Facsimile: (513)721-0109
bpo@santenhughes.com

Attorney for Franchisee Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record, including the following:

Andrew Biller
Andrew P Kimble
Markovits, Stock & DeMarco, LLC
4200 Regent Street, Suite 200
Columbus, OH 43219
Telephone: 614-604-8759
Fax: 614-583-8107
Email: abiller@msdlegal.com
Email: akimble@msdlegal.com

Brian Patrick O'Connor
Santen & Hughes
600 Vine St.
Ste. 2700
Cincinnati, OH 452052
513-721-4450
Fax: 513-721-0109
Email: bpo@santen-hughes.com

/s/ Gerald L. Maatman, Jr.
Gerald L. Maatman, Jr.