IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Jason Patzfahl, *On behalf of himself and those similarly situated*, Plaintiff, v. FSM ZA, LLC, *et al.*, Defendants.	Case No. 2:20-cv-1202 Judge Lynn S. Adelman

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

Plaintiff seeks certification of a Rule 23 Class of delivery drivers who have common Wisconsin wage and hour law claims based on Defendants' policy of (1) requiring delivery drivers to provide cars to use at work, (2) reimbursing for the delivery drivers' vehicle expenses using a per-delivery reimbursement rate that was inadequate to cover the drivers' expenses, and (3) otherwise paying the drivers at or near minimum wage.

Vehicle reimbursement cases like this one are well-suited for class certification. To date, federal courts have certified *every* similar Rule 23 class sought.[1] The consistent judicial decisions

[1] *Branning v. Romeo's Pizza, Inc.*, No. 1:19 CV 2092, 2022 U.S. Dist. LEXIS 59262, at *12–24 (N.D. Ohio Mar. 29, 2022); *Waters v. Pizza to You , L.L.C.*, 2021 U.S. Dist. LEXIS 11743, at *7–27 (S.D. Ohio Jan. 22, 2021) [hereinafter *Waters I*]; *Brandenburg v. Cousin Vinny's Pizza*, 2018 U.S. Dist. LEXIS 189878, at *6–20 (S.D. Ohio Nov. 6, 2018); *McFarlin v. The Word Enterprises, LLC*, 2017 U.S. Dist. LEXIS 164968, at *3–13 (E.D. Mich. Oct. 5, 2017); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09CV01335 AGF, 2013 U.S. Dist. LEXIS 181749, at *15–27 (E.D. Mo. Dec. 31, 2013) [hereinafter *Perrin I*]; *Bass v. PJ COMN Acq. Corp.,* 2011 U.S. Dist. LEXIS 58352, at *1–12 (D. Colo. Jun. 1, 2011).

granting class certification in nearly identical circumstances provide compelling support for certification in this case.

Discovery has revealed that, indeed, the employer has subjected all of their pizza delivery drivers to the same basic terms and conditions of employment. As this Court has already recognized, "[i]n response to Patzfahl's interrogatories, Defendants acknowledge that delivery drivers at their Toppers Pizza stores were paid according to the same compensation and reimbursement policies." Doc. 33 at Page 9. Plaintiff now asks this Court to grant his motion and certify the Wisconsin claims asserted in this case under Rule 23.

1. Background

Plaintiff Jason Patzfahl filed this hybrid FLSA collective action/Rule 23 class action on behalf of his fellow pizza delivery drivers on August 6, 2020. Doc. 1. This case challenges Defendants' company-wide pizza delivery driver compensation and policies.

On September 9, 2020, shortly after this case was filed, Plaintiff filed a Motion to Send Notice to Similarly Situated Employees, i.e., a motion for conditional certification of an FLSA collective action. Doc. 4.

On April 12, 2020, Defendants filed a motion to dismiss the claims asserted against Perfect Timing, LLC. Doc. 21.

On October 21, 2021, the Court granted Plaintiff's Motion to Send Notice. Doc. 33. Notice was disseminated to 89 individuals on December 23, 2021. 24 individuals returned consent to join forms and are now part of the case for purposes of the FLSA claims.

Plaintiff now moves for Rule 23 class certification of his Wisconsin claims.

2. Delivery Drivers' Claims

2.1. Relevant Facts

Plaintiff's claims are straightforward. He alleges that the compensation and reimbursement policies Defendants apply to their pizza delivery drivers results in a violation of the delivery drivers' minimum wage rights. First, Plaintiff alleges that he and other delivery drivers are denied minimum wage because, after factoring in expenses incurred by the drivers for the benefit of the company, they are paid an effective wage rate that is less than the legal minimum. Second, Plaintiff alleges that Defendants failed to collect signed tip declarations from delivery drivers during workweeks when they claimed a tip credit from the drivers' wages in violation of Wisconsin wage law.

Plaintiff's first claim is that Defendants' vehicle expense reimbursement policy results in a minimum wage violation. The facts relevant to Plaintiff's claims are largely not in dispute.

First, all of the delivery drivers had the same job duties: "Delivering pizza and potentially a handful of other simple tasks." Rule 30(b)(6) Deposition Testimony of Garett Burns attached as Exhibit 1 at 65:15, 63:23–65:16. The delivery drivers were primarily required to deliver food to Defendants' customers. *Id.* at 64:25–65:1. When they were not making deliveries, the delivery drivers were required to help out around the store, completing various tasks to help the store function, such as folding boxes, washing dishes, wiping countertops, sweeping the floor. *Id.* at 65:3–9. To be hired for the job, all delivery drivers were required to have a valid driver's license, valid insurance, and to pass a vehicle inspection report. *Id.* at 54:6–56:11. Once hired, all delivery drivers are required to work in accordance with the company's Employee Handbook. *Id.* at 83:24–84:1.

Second, all of the delivery drivers were paid at or near the minimum wage. FSM ZA, LLC Discovery Responses of December 22, 2020, Interrogatory Response No. 6 (attached as Exhibit 2); Response to Interrogatories to Perfect Timing LLC Discovery Responses of December 3, 2021, Interrogatory Responses No. 5 (attached as Exhibit 3). Specifically, when they were inside the store working in a non-tipped capacity, Defendants paid delivery drivers at or near $7.25 per hour. Ex. 2 at Interrogatory Response No. 6 ("[D]rivers received $7.25 an hour with some paid more than that for certain hard to fill shifts"); Ex. 3 at Interrogatory Responses No. 5 (same); Ex. 1 at 85:17–93:20; Patzfahl Payroll Records, DEF 83–101 (showing Patzfahl made between $7.50 and $8.00 per hour when working in a non-tipped capacity) (attached at Exhibit 5). When they were on the road making deliveries, Defendants claimed a tip credit from their minimum wage obligation and paid the delivery drivers between $5.00 and $5.50 per hour. Ex. 2 at Interrogatory Response No. 6; Ex. 3 at Interrogatory Responses No. 5; *see also* Ex. 5 (showing Patzfahl normally made $5.00 per hour when working in a tipped capacity); 85:17–93:20 (suggesting some other rates may have been used). Further, all delivery drivers were "paid through the same payroll provider with the same accounting firm" and everybody's pay stubs would have been in the same format." Ex. 1 at 124:4–15.

Third, Defendants' delivery drivers were required to use a personal vehicle to complete deliveries rather than being provided with a vehicle by Defendants. Ex. 1 at 61:20–24 ("Q. Can you give me an approximate number of the number of delivery drivers that were hired who did not drive their own vehicle? A. Zero."); *see also* Ex. 3 at Request for Admission 2 ("Request for Admission 2. Admit that Perfect Timing, LLC requires delivery drivers to provide automobiles to use to complete deliveries at the Toppers Pizza stores. RESPONSE: Deny. Delivery drivers may

use other vehicles, it is the delivery driver's decision."); FSM ZA, LLC Discovery Responses of December 3, 2021, Request for Admission 2 ("Request for Admission 2. Admit that FSM ZA, LLC requires delivery drivers to provide automobiles to use to complete deliveries at the Toppers Pizza stores. RESPONSE: Defendant denies the allegation. FSM ZA, LLC did not provide a vehicle, but delivery drivers could select the transportation method of their choosing.") (attached as Exhibit 4). "The fact that the parties agree that motor vehicles were used to deliver the pizzas suffices to prove that costs were incurred in their delivery. The pizzas were not walked to homes and we are not dealing with bicycle delivery." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2020 U.S. Dist. LEXIS 39715, at *4 (S.D. Ohio Mar. 6, 2020).

Fourth, Defendants reimbursed the delivery drivers for their vehicle expenses using a common, but inadequate, reimbursement policy. Ex. 1 at 93:21–95:7; Defendants' Supplemental Discovery Responses of May 10, 2022, Interrogatory Response Nos. 5–7 (attached as Exhibit 6). Specifically, all of Defendants' delivery drivers were reimbursed the same amount for each delivery they completed, no matter how many miles they drove to complete the delivery or what expenses they incurred in the process. 100:13–101:16. Prior to January 1, 2020, Defendants reimbursed all delivery drivers at $1.00 per order. On January 1, 2020, Defendants changed their reimbursement policy across the board. Ex. 1 at 94:24–95:7. From that point forward, Defendants reimbursed $2.00 per delivery. *Id.*; Ex. 6 at Interrogatory Response Nos. 5–7.

Fifth, Defendants did not collect signed tip declarations from each delivery driver as they were required to by Wis. Admin. Code DWD § 272.03(2)(b). Specifically, declarations "were provided but never returned. Almost universally never returned." Ex. 1 at 195:21–196:3.

2.2. Under-Reimbursement Claim

To operate its pizza delivery business, Defendants need functioning automobiles to deliver their pizzas. Rather than maintaining a fleet of cars themselves, or renting cars on an as-needed basis, Defendants shifted this expense to their minimum-wage delivery drivers.

Defendants recognized that wage and hour laws prohibited them from passing these expenses onto their drivers, so Defendants reimbursed the drivers *something*—a set amount per order—initially $1.00, then (after January 1, 2020) $2.00. Ex. 1 at 93:21–95:7; Ex. 6 at Interrogatory Response Nos. 5–7. But the reimbursement payments were not enough to cover the drivers' vehicle expenses. To the extent that those un- or under-reimbursed expenses drop a delivery driver's effective wage rate below minimum wage, a minimum wage violation was triggered. Defendants' compensation arrangement resulted in the systematic under-payment of Defendants' delivery drivers in violation of the Wisconsin wage and hour laws.

Like the FLSA, Wisconsin law requires employers to pay their employees minimum wage of $7.25 per hour for all hours worked. *See* Wis. Stat. Ann. § 104.02.[2] When an employer requires minimum wage employees to incur expenses for the benefit of the company, the expenses incurred by the employees function as a reduction of the wages paid to them. Such unreimbursed expenses are considered "de facto" deductions. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1237 (11th Cir. 2002). There "is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear." *Jimenez v. Glk*

[2] "Wisconsin's wage law is modeled after the FLSA." *Piper v. Jones Dairy Farm*, 2020 WI 28, ¶20, 390 Wis. 2d 762, 775, 940 N.W.2d 701, 707 (2020). Courts have consistently interpreted Wisconsin minimum wage law in line with the FLSA. *See, e.g., Jimenez v. GLK Foods LLC*, No. 12-CV-209, 2016 U.S. Dist. LEXIS 69007, at *91–92 (E.D. Wis. May 23, 2016) [hereinafter *Jimenez II*]; Doc. 33 at Pages 4–5; *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 891 (W.D. Wis. 2017); *Montana v. JTK Restorations, LLC*, No. 14-C-487, 2015 U.S. Dist. LEXIS 122920, at *4 (E.D. Wis. Sep. 14, 2015).

Foods Llc & Ryan A. Downs, No. 12-CV-209, 2015 U.S. Dist. LEXIS 199519, at *18–19 (E.D. Wis. Mar. 24, 2015) (quoting *Arriaga*). "In the pizza delivery context, the cost associated with delivering food for an employer is a 'kickback' to the employer that must be fully reimbursed, lest a minimum wage violated be triggered." *Hatmaker v. PJ Ohio, LLC*, 2019 U.S. Dist. LEXIS 191790, at *21 (S.D. Ohio Nov. 5, 2019) [hereinafter *Hatmaker I*].

Whether under the FLSA, or Wisconsin state law, wage requirements are rendered meaningless if employers can force employees to "kick back" money to the employer. *Jimenez II*, 2016 U.S. Dist. LEXIS 69007, at *91–92 (recognizing that the "free and clear" anti-kick-back rule is incorporated into "Wisconsin wage and hour law [because it is] generally interpreted consistently with the FLSA and federal regulations"). Put simply, an employer cannot tell an employee, "I will pay you minimum wage if you give *me* $2 per hour." Thus, wages must be paid to employees "free and clear," *i.e.*, without a "kickback" or deduction made for the employers' benefit. The same concept applies to an employer that requires a worker to purchase or maintain a set of tools, office supplies, or other equipment for the employer's benefit. As the Code of Federal Regulations explains:

> Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

29 C.F.R. § 531.35.

Defendants' reimbursement policies resulted in systematic minimum wage violations.

From the recent briefing on Defendants' Defendants' L.R. 7(h) Expedited Motion to Compel Discovery and Plaintiff's Response in Opposition (Docs. 56–59), the Court can see that Parties disagree on how an employer's compliance with wage laws is measured. There is currently a split of authority among various district courts throughout the country regarding what legal standard applies to the drivers' claims. Plaintiff asserts employers in the minimum wage delivery driver context must either track and pay actual expenses or pay the IRS mileage rate. *See, e.g.,* Department of Labor Field Operations Handbook § 30c15; *see also Parker v. Battle Creek Pizza, Inc.*, No. 1:20-cv-277, 2022 U.S. Dist. LEXIS 76990, at *11 (W.D. Mich. Apr. 28, 2022); *Waters v. Pizza to You, L.L.C.*, 538 F. Supp. 3d 785, 800 (S.D. Ohio 2021) [hereinafter *Waters II*]; *Hatmaker I*, 2019 U.S. Dist. LEXIS 191790, at *21. As applied to the present case, Defendants acknowledge that they did not keep records of the delivery drivers' actual vehicle expenses. Ex. 3 at Request for Admission Response No. 3; Ex. 4 at Request for Admission Response No. 3. As such, liability will be determined by determining the per-mile reimbursement rate paid to each delivery driver in any particular workweek and comparing that number to the IRS standard business mileage rate.

Defendants seem to believe that they are entitled to "reasonably approximate" delivery expenses. Doc. 56 at Page 3; *see also Kennedy v. Mountainside Pizza, Inc.*, 2021 U.S. Dist. LEXIS 154792, at *2–15 (D. Colo. Aug. 26, 2020); *but see Parker*, 2022 U.S. Dist. LEXIS 76990, at *8 ("The reasonably approximate standard is not defined and has no discernable limits. It is more than simply vague. Telling a company to reimburse a delivery driver a 'reasonably approximate' amount for vehicle expenses amounts to no standard at all."). And Defendants appear to take this

position despite the fact that they "[d]idn't consider" delivery drivers' expenses in setting reimbursement rates. Ex. 1 at 93:21–102:13. If the Court permits Defendants to "approximate," the parties will likely retain competing vehicle-costing experts to opine on the adequacy of Defendants' reimbursement policy and reimbursement payments.

That dispute, however, does not bear on class certification because class certification is appropriate under *either* legal standard. Either standard entails common proof of every class member's claim. *Perrin v. Papa John's Int'l., Inc.*, 2014 U.S. Dist. LEXIS 133974, at *5, *12–13 (E.D. Mo. Sept. 24, 2014) [hereinafter *Perrin II*] ("'Defendant's assertion that individualized showings of each Plaintiff's vehicle expenses will be required to prove Plaintiffs' claims is without merit' because 'Defendant's own reimbursement methodology does not depend upon the drivers' actual expenses and the regulatory framework does not require that reimbursement be based on actual expenses.'"); *see also Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *22–23;[3] *Villalpando v. Exel Direct Inc.*, 2016 Dist. LEXIS 53773, at *45 (N.D. Cal. Apr. 21, 2016); Perrin II, 2014 U.S. Dist. LEXIS 133974, at *5, *12; *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *9; *Bass*, 2011 U.S. Dist. LEXIS 58352, at *1–12.

In sum, courts recognize that the question of whether Defendants sufficiently reimbursed delivery drivers is answerable on a class-wide basis, even when the question is whether the employer "reasonably approximated" vehicle expenses. Likewise, courts adjudicating under-reimbursement cases under the DOL Handbook standard have also held that class certification is appropriate. *See, e.g., Waters I*, 2021 U.S. Dist. LEXIS 11743, at * 7–27; *Brandenburg*, 2018 U.S.

[3] The Perrin court also rejected defendant's argument that each delivery driver had to prove, or reasonably approximate, their own vehicle costs. *Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *23–24.

Dist. LEXIS 189878, at *6–20. Regardless of the standard the Court ultimately adopts, the under-reimbursement claims asserted by the class can be adjudicated on a class-wide basis.

To calculate their underlying damages the delivery drivers will use the following formula:

[IRS rate] × [miles driven] = [reimbursement at IRS rate]

[reimbursement at IRS rate] - [reimbursements paid] = [under-reimbursement damages]

To the extent that a driver was paid minimum wage or a tipped minimum wage, a finding of any under-reimbursement damages will trigger a minimum wage violation, which will, in turn, trigger additional potential damages, such as damages due to tip-credit violations and liquidated damages.

2.3. Tip Credit Declaration Violation

In addition to his under-reimbursement claim, Plaintiff also alleges that Defendants did not collect signed tip declarations as required by Wis. Admin. Code DWD § 272.03(2)(b). Doc. 18 at ¶ 148–49.

"Under DWD regulations, an employer taking a tip credit 'must have a tip declaration signed by the tipped employee each pay period… to show that when adding the tips received to the wages paid by the employer, no less than the minimum rate was received by the employee.' When the employer's time and payroll records do not contain these requirements, no tip credit shall be allowed." *Hussein v. Jun-Yan, LLC*, 502 F. Supp. 3d 1366, 1371 (E.D. Wis. 2020) (Adleman, J.) (internal citation and footnote omitted) (citing Wis. Admin. Code DWD § 272.03(2)(b)(1)).

Here, Defendants admit to failing to collect tip credit declarations. Ex. 1 at 195:21–196:3. Plaintiff's payroll records show no signature or declaration. *See* Ex. 5. Defendants' recent supplemental discovery response claims to have kept valid records by a different method. Ex. 6 at Interrogatory Response No. 12. Regardless of the merit of Defendants' claim, Defendants state

that "All employees, including delivery drivers at Perfect Timing LLC and FSM ZA LLC Toppers Pizza franchises" followed the same system. Thus, the validity of Defendants' tip declaration procedures are appropriate for adjudication on a class wide basis.

To the extent that Defendants argue that their payroll procedures were valid based on *Bruske v. Capitol Watertown Sprechers, LLC*, No. 19-cv-851-wmc, 2021 U.S. Dist. LEXIS 159562, *29–31 (W.D. Wis. Aug. 23, 2021), such a legal dispute demonstrates the necessity of class certification on this issue to determine the legality of Defendants' practice on a class wide basis.

3. Legal Standard for Class Certification

A party seeking class certification must meet all the requirements of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). "The history of class suit litigation, its development over a century of growth, the origin and status of present Rule 23 of the Federal Rules of Civil Procedure, are all persuasive of the necessity of a liberal construction of this Rule 23, and its application to this class of litigation. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88 (7th Cir. 1941). This Court has previously stated that it "interpret[s] Rule 23 liberally in favor of maintaining class actions." *Barden v. Hurd Millwork Co.*, 249 F.R.D. 316, 319 (E.D. Wis. 2008) (Adleman, J.) (citing *King v. Kan. City S. Indus., Inc.*, 519 F.2d 20, 25–26 (7th Cir. 1975)). Any "doubts should be resolved in favor of certification." *Turner v. First Wis. Mortg. Tr.*, 454 F. Supp. 899, 908 (E.D. Wis. 1978) (citing *Kahan v. Rosensteil*, 425 F.2d 161 (3d Cir. 1970)). "Broad flexibility to modify an initial class ruling is built into Rule 23, so that courts have concluded that when any doubt exists concerning the propriety of class certification, it should be resolved in favor of upholding the class." *Day v. Check Brokerage Corp.*, 240 F.R.D. 414, 417 (N.D. Ill. 2007) (quoting 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 7:17 (4th ed. 2002)).

"First, Rule 23(a) enumerates four—and only four—requirements for class certification: numerosity, commonality, typicality, and adequacy of representation. Likelihood of success on the merits is not among them." *Simpson v. Dart*, No. 21-8028, 2022 U.S. App. LEXIS 420, at *8 (7th Cir. Jan. 6, 2022) (internal citation omitted) (citing Fed. R. Civ. P. 23(a)(1)-(4); *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002).

Second, the "class must fall within one of three permissible 'types of class actions' set out in Rule 23(b). *Simpson*, 2022 U.S. App. LEXIS 420, at *8.

Then, "if a class plaintiff satisfies all the requirements of Rule 23(a) and Rule 23(b), the class *must* be certified, even if it is sure to fail on the merits." *Simpson*, 2022 U.S. App. LEXIS 420, at *8 (emphasis in original) (citing cases). "Put another way, properly certified classes can lose as well as win." *Id.* "To be sure, the Supreme Court has recognized that the 'rigorous analysis' required at the class certification stage may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Simpson*, 2022 U.S. App. LEXIS 420, at *8–9 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). "But the Court has also taken care to emphasize that '[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'" *Simpson*, 2022 U.S. App. LEXIS 420, at *8–9 (citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)).

4. Proposed Class

Plaintiff seeks certification of the following class pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> All current and former delivery drivers employed by Defendants at the Defendants' Toppers Pizza stores in the State of Wisconsin between the date two years prior to

the filing of the original complaint and the date of final judgment in this matter ("Rule 23 Class").

Plaintiff Jason Patzfahl is a member of the class he seeks to represent and was subject to the same pay polices at issue in this lawsuit. Plaintiff worked as a delivery driver at Defendants' Toppers Pizza store in Franklin, Wisconsin from October 2019 to July 2020. Doc. 36 at ¶ 84. Plaintiff was paid minimum wage minus a tip credit during the time he spent performing deliveries for Defendants. *See* Ex. 5. Plaintiff's payroll records to not show signed tip declarations. *See id.* Plaintiff used his own vehicle for work. Doc. 18 at ¶ 88; Ex.1 at 61:20–24. Defendants did not track Plaintiff's actual expenses and, instead, reimbursed him at a flat per-order rate that, on average, was less than the IRS standard business mileage rate. Doc. 18 at ¶ 104; Doc. 36 at ¶ 97; Ex. 1 at 93:21–102:13; Ex. 6 at Interrogatory Response Nos. 5–7.

5. Argument

Like the other cases addressing class certification in the delivery driver context, this case meets the requirements of Rule 23 for class certification. *See* Footnote 1, *supra*. Plaintiff discusses each requirement below.

5.1. Each of the Rule 23(a) requirements is met.

5.1.1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no bright-line test or cut-off point for numerosity. "To satisfy this requirement, a plaintiff need only show that joinder would be difficult or inconvenient." *Barden*, 249 F.R.D. at 319. "A plaintiff will generally meet the requirement by showing that the class consists of forty or more." *Id.* (citing *Clarke v. Ford Motor Co.*, 220 F.R.D. 568, 578 (E.D. Wis. 2004); *see also Temme v. Bemis Co.*, No. 08-CV-090, 2009 U.S. Dist. LEXIS

49894, at *4–5 (E.D. Wis. May 28, 2009) (certifying a class of between 50 and 53 members). Further, "plaintiff need not specify an exact number of potential class members to prove numerosity. *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 281 F.R.D. 327, 332 (E.D. Wis. 2012) (citing *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989).

Here, for purposes of sending FLSA collective action notice, Defendants provided Plaintiff with a list of all of their delivery drivers employed from August 6, 2017, to October 21, 2021. Doc. 33 at Page 13. That list contained 89 names. There are at least 89 pizza delivery drives who worked at Defendants' four Toppers Pizza stores during the relevant time period. A putative class of this size meets the standard for numerosity.

5.1.2. Commonality

Rule 23(a)(2) requires the Court to find that "there are questions of law or fact common to the class," which "is ordinarily satisfied where there is a 'common nucleus of operative fact.'" "[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Sundstrom v. Frank*, No. 06-C-112, 2007 U.S. Dist. LEXIS 114113, at *5 (E.D. Wis. Feb. 16, 2007) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). "A common nucleus of operative fact is typically found where the 'defendants have engaged in standardized conduct towards members of the proposed class.'" *Sundstrom*, 2007 U.S. Dist. LEXIS 114113, at *5 (quoting; *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)). "Commonality is satisfied by even a single common question among the class members, where the 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Dokey v. Spancrete, Inc.*, No. 19-CV-921-JPS, 2021 U.S. Dist. LEXIS 27715, at *11–12 (E.D. Wis. Feb. 12, 2021) (quoting *Dukes*, 564 U.S. at 350, 359).

Further, a "plaintiff's claim is considered typical 'if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members" and if his "claims are based on the same legal theory." *Dokey*, 2021 U.S. Dist. LEXIS 27715, at *12 (quoting *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006). "Even though some factual variations may not defeat typicality, the requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large." *Id.* (quoting *Oshana*); *see also Barden*, 249 F.R.D. at 319 ("The commonality requirement is easily met… even when damages vary.").

Put succinctly, "[t]his is a permissive standard." *Blihovde v. St. Croix Cty.*, 219 F.R.D. 607, 616 (W.D. Wis. 2003) (quoting *Markham v. White*, 171 F.R.D. 217, 222 (N.D. Ill. 1997)).

Plaintiffs' Wisconsin claims satisfy the "commonality" requirement because all class members held the same job; performed the same primary job duty of delivering pizzas to Defendants' customers using their personal vehicles; were compensated by hourly pay rates near, or lower than, the Wisconsin minimum wage; Defendants reimbursed all of them according to the same per-order method; Defendants did not track their actual vehicle costs; Defendants did not sign tip-credit declarations from them; and all their claims are based on the same legal theory. *See* § 2, *supra*.

Benton v. Deli Mgmt., Inc. d/b/a "Jason's Deli," provides a helpful illustration, 2019 U.S. Dist. LEXIS 135522, at *1 (N.D. Ga. Aug. 8, 2019). In that case, the court rejected an attempt to decertify a nation-wide collective action asserting the exact same claim because "[t]he existence of so many" commonalities among the delivery drivers, "including job descriptions, duties, and pay provisions (e.g., they were all paid hourly), as well as the ***central question*** of the reasonableness of

Jason's Deli's current reimbursement." *Id.* at *45–46 (emphasis added). Thus, *Benton* not only recognized that the reasonableness of an employer's reimbursements is a common question, but also recognized that it is the "central question" determinative of every class member's claim. *Id.*

In this case, the finding of commonality should be straightforward:

> [T]he legal theories and relevant facts are common to the class because the class consists of workers that were allegedly harmed in the same way. With respect to all of their delivery drivers, Defendants (1) required the delivery drivers to provide cars to complete their job duties; (2) did not keep track of or reimburse for the delivery drivers' actual expenses; (3) did not reimburse the delivery drivers at the IRS standard business mileage rate; and (4) paid an hourly wage rate at or close to minimum wage.

Waters I, 2021 U.S. Dist. LEXIS 11743, at *18–19. Further, class certification is appropriate under *either* the IRS rate standard *or* the "reasonable approximation" standard. *Id.* at *13–14 (observing that courts grand class certification under both standards). Earlier this year, after analyzing pizza delivery driver cases granting class certification, the *Branning* court found that "these decisions are well-reasoned and persuasive, and support the court's conclusion that the question of whether Defendants' reimbursement policy caused their delivery drivers' wages to fall below the minimum wage is a common question that is capable of class-wide resolution." *Branning v. Romeo's Pizza, Inc.*, No. 1:19 CV 2092, 2022 U.S. Dist. LEXIS 59262, at *16–17 (N.D. Ohio Mar. 29, 2022) (citing cases).

As explained above, the answer to either of two possible common questions will drive resolution of all claims asserted: (1) what is a reasonable vehicle reimbursement rate for the class? or (2) did Defendants either track and reimburse actual vehicle costs or reimburse at the IRS rate? *See, e.g., Hatmaker I*, 2019 U.S. Dist. LEXIS 191790, at *21 (IRS rate); *Perrin II,* 2014 U.S. Dist. LEXIS 133974, at *12 (reasonable approximation). Moreover, courts recognize that the answer to

either question comes from class-wide proof. *See, e.g., Waters II*, 538 F. Supp. 3d at 790–800 (reinforcing view that IRS rate governs every delivery driver's claim); *Perrin II,* 2014 U.S. Dist. LEXIS 133974, at *12–13 (recognizing reasonable approximation boils down to battle of experts who will determine reasonable company-wide reimbursement rates). The combination of common questions and common proof clearly supports a finding of commonality. In fact, for that reason, this claim is ideal for class-wide treatment.

5.1.3. Typicality

"Rule 23(a)(3) requires a showing that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Barden*, 249 F.R.D. at 319 (internal quotation marks omitted). And "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Blihovde*, 219 F.R.D. at 616 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *Rosario*, 963 F.2d at 1018 ("The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality."); *see also Dokey*, 2021 U.S. Dist. LEXIS 27715, at *11–12 ("address[ing] Rule 23's commonality and typicality requirements" in the same paragraph); *Sundstrom*, 2007 U.S. Dist. LEXIS 114113, at *5-6 (analyzing "1. Commonality and Typicality" under the same heading).

"Generally, a class representative's claims are considered 'typical' when they arise from the same course of conduct or are based on the same theory as the claims of class members. *Barden*, 249 F.R.D. at 319 (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). "Although '[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members,' the court should direct its focus on whether 'the named representatives' claims have the same essential

characteristics as the claims of the class at large.'" *Reliable Money Order*, 281 F.R.D. at 333 (quoting *De La Fuente*). "The Court should concentrate on defendants' alleged conduct and plaintiffs' legal theory to satisfy Rule 23(a)(3)." *Clay v. Am. Tobacco Corp.*, 188 F.R.D. 483, 491 (S.D. Ill. 1999).

If Defendants' business practices resulted in a wage and hour violation with respect to Plaintiff Patzfahl, so too the class. All delivery drivers (1) have the same job duties, (2) are nominally paid at or near state minimum wage, (3) incur similar vehicle-related costs when performing deliveries for Defendants, (4) are subject to the same reimbursement policy that, (5) results in under-reimbursement, and (6) did not sign tip credit declarations required by Wisconsin law. *See* § 2.1, *supra*. Moreover, the proposed representative's claims are based on the exact same legal theory as all other putative class members. These same facts have satisfied the "typicality" requirement under Rule 23 in other pizza delivery driver cases. *Branning*, 2022 U.S. Dist. LEXIS 59262, at *13–18; *Waters I*, 2021 U.S. Dist. LEXIS 11743, at *20–22; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *9–13; *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *7–11; *Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *16–18. Therefore, the Court should find that the typicality requirement is met.

5.1.4. Adequacy of Representatives

Rule 23(a)(4) requires that representative parties in a class action "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To meet this standard, plaintiff must show an absence of potential conflict between himself and class members and that he will vigorously prosecute the case." *Barden*, 249 F.R.D. at 319.

Plaintiff has no apparent conflict with the other class members' interests. To the contrary, he has the same interests in this litigation as the putative class members that he is seeking to represent. Plaintiff has and will continue to contribute to the prosecution of this litigation. He has led this case since it was first filed in 2020, and has responded to written discovery requests, has compiled and produced documents to Defendants, and has been deposed. Since launching this case, Plaintiff has actively participated and contributed to this litigation and can be expected to continue to do so.

Plaintiff is represented by two law firms with extensive experience in wage and hour class and collective action litigation. "Absent contrary proof, class counsel are presumed competent and sufficiently experienced to prosecute the action on behalf of the class." *Matthews v. Buel, Inc.*, 2012 U.S. Dist. LEXIS 69461, at *7 (D.S.C. May 18, 2012). Each firm is well-qualified to handle this matter.[4] In addition, Plaintiffs' Counsel has committed, and will continue to commit, the resources, skill, and expertise necessary to represent the Rule 23 putative class. The attorneys and class representative present no conflicts of interest and can be relied upon to vigorously prosecute this case.

5.2. Plaintiffs satisfy the requirements of Rule 23(b)(3).

5.2.1. Common questions of law and fact predominate.

Plaintiff's Wisconsin claims satisfy Rule 23(b)(3) in that questions of law or fact common to Plaintiff's claim and Defendants defenses are subject to generalized proof applicable to the class as a whole that predominate over any question of law or fact affecting only individual members of

[4] Biller & Kimble, LLC has established an expertise in pursuing wage and hour class actions. *See, e.g., Waters I*, 2021 U.S. Dist. LEXIS 11743, at *19. Walcheske & Luzi is experienced in wage and hour class and collective action litigation. *Weninger v. Gen. Mills Operations, LLC*, No. 18-CV-321-JPS, 2019 U.S. Dist. LEXIS 68814, at *3 (E.D. Wis. Apr. 18, 2019).

the class or subject to individualized proof. *Barden*, 249 F.R.D. at 320 (citing *Kerr*, 875 F.2d at 1557–58 (11th Cir. 1989)). "Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. [T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 376 (7th Cir. 2015) (quoting *Amgen*, 133 S. Ct. at 1191).

Again, the predominant question for *every* class member is either (1) the reasonableness of Defendants' class-wide vehicle reimbursement rate or (2) did Defendants reimburse at the IRS rate. *See, e.g., Hatmaker I*, 2019 U.S. Dist. LEXIS 191790, at *21 (IRS method); *Perrin II,* 2014 U.S. Dist. LEXIS 133974, at *12 (reasonable approximation method). As explained above, in the "reasonable approximation" context, *Benton* recently recognized that the "central" and predominant question dispositive of all class members claims is the reasonableness of an employer's vehicle reimbursements, and that question easily eclipses any differences between class members than an employer can identify. *Id.*, 2019 U.S. Dist. LEXIS 135522, at *45–46. The Seventh Circuit recently observed that "[i]t is generally true that individual damages issues are no barrier to Rule 23 class certification." *Landon v. BlueGreen Vacations Unlimited Inc.*, No. 18-cv-0994-bhl, 2021 U.S. Dist. LEXIS 214275, at *19–20 (E.D. Wis. Nov. 5, 2021) (citing *Arreola v. Godinez*, 546 F.3d 788, 800–01 (7th Cir. 2008). Denial is only appropriate if "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." But, "as several other courts have explained, '[a]lthough the damages for each delivery driver will be an individual determination, the damages arise from a course of conduct that is applicable to the

entire class: Defendants' payroll practices.'" *Branning*, 2022 U.S. Dist. LEXIS 59262, at *21–22. (citing *Waters I* and *McFarlin*).

Courts have repeatedly recognized that, regardless of the appropriate legal standard for vehicle reimbursement:

> Because Defendants subjected their delivery drivers to the same reimbursement policy and because liability turns on what the proper reimbursement rate is for pizza delivery drivers and whether Defendants paid that rate, the court concludes that Plaintiff has met his burden to show that these issues can be determined by common proof and common questions predominate.

Branning, 2022 U.S. Dist. LEXIS 59262, at *21–22; *see also Waters I*, 2021 U.S. Dist. LEXIS 11743, at *24–25 ("There are numerous common questions of law and fact arising out of Defendants' conduct… [t]he adequacy of Defendants' reimbursement policy will predominate."); *McFarlin*, 2017 U.S. Dist. LEXIS 164968 (deciding under the reasonably approximate standard that "the general issue of the adequacy of the reimbursement policy/policies maintained by Defendants predominate over individual inquiries. Although the damages for each delivery driver will be an individual determination, the damages arise from a course of conduct that is applicable to the entire class: Defendants' payroll practices. Therefore, the predominance requirement is met.").

More generally, courts have often found that common issues predominate where an employer treats the putative class members uniformly with respect to compensation, even where the party opposing class certification presents evidence of individualized variations. *See, e.g.*, *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, No. 21-1358, 2022 U.S. App. LEXIS 7774, at *16 (7th Cir. Mar. 24, 2022) ("Rule 23(b)(3) requires common evidence and methodology, but not common results."); *Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.)*, 571 F.3d 953, 958

(9th Cir. 2009) (observing that "courts have long found that comprehensive uniform policies detailing the job duties and responsibilities of employees carry great weight for certification purposes."); *Lewis v. Alert Ambulette Serv. Corp.,* 2012 U.S. Dist. LEXIS 6269, at *35 (E.D.N.Y Jan. 19, 2012)("[n]umerous courts have found that wage claims are especially suited to class litigation - perhaps the most perfect questions for class treatment…."); *Ramos* v. *SimplexGrinnell, LP*, 796 F. Supp. 2d 346, 355–56 (E.D.N.Y. 2011) ("[c]laims by workers that their employers have unlawfully denied them wages to which they are legally entitled have repeatedly been held to meet the prerequisites for class certification"); *Garcia v. Tyson Foods, Inc.*, 255 F.R.D. 678, 690–92 (D. Kan. 2009); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 903–04 & 908-09 (N.D. Iowa 2008) (compensation policy lent itself to use of common evidence to establish a prima facie case for the class); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 224–26 (Mo. Ct. App. 2007).

Courts have reached the same conclusion in deciding predominance questions in every similar class action claim by delivery drivers.[5] All claims will rise and fall on the determination of whether Defendants' policies and practices did or did not sufficiently reimburse workers for their vehicle costs.

5.2.2. A class action is a superior method of adjudication.

The superiority requirement of Rule 23(b)(3) requires the Court to consider whether the class action is superior to other methods of adjudication. Rule 23(b)(3) lists four factors to be considered: (1) the interest of class members in individually controlling the prosecution of separate action, (2) the extent and nature of any litigation concerning the controversy already commenced,

[5] *Branning*, 2022 U.S. Dist. LEXIS 59262, at *20–23; *Waters I*, 2021 U.S. Dist. LEXIS 11743, at *23–25; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *14–15; *McFarlin v. The Word Enterprises, LLC*, 2017 U.S. Dist. LEXIS 164968, at *3–13 (E.D. Mich. Oct. 5, 2017); *Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *20–24; *Bass v. PJCOMN Acquisition Corp.*, No. 09-cv-01614-REB-MEH, 2011 U.S. Dist. LEXIS 58352, at *9–11 (D. Colo. June 1, 2011).

(3) the desirability of having the litigation of the claims in the particular forum where it has been filed, and (4) the difficulties likely to be encountered in management of the class action. Fed. R. Civ. P. 23(b)(3)(A)–(D).

In similar claims, courts routinely find Rule 23 class actions as superior to other methods of adjudication. *Branning*, 2022 U.S. Dist. LEXIS 59262, at *22–23; *Waters I*, 2021 U.S. Dist. LEXIS 11743, at *25–26; *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *14–15; *McFarlin*, 2017 U.S. Dist. LEXIS 164968, at *12–13; *Perrin I*, 2013 U.S. Dist. LEXIS 181749, at *25–26. There are no difficulties to be encountered in managing the Wisconsin law class. There is no evidence that any putative class member has any interest in maintaining this litigation in a separate action and there is no other litigation concerning the any putative classes' state wage and hour law claims against Defendants.

This Court has recognized that "[t]he desirability of a class action is greater if individual litigation is impractical" and when "[t]he recovery in individual cases would be less than the litigation expenses," then, "unless the claims are aggregated into a class action, they would not be pursued." *Barden*, 249 F.R.D. at 321. A final resolution of Defendants' liability is also fair because the case deals with policies similarly impacting a significant number of employees. It avoids competing decisions on the issues and offers finality. There is no device that can resolve these matters as efficiently or fairly as a class action.

No major difficulty is likely to arise in management of a class action as all class members assert the same claim, which will be subject to the same legal standard and decided based on common evidence, and the putative class is a defined size. *See, e.g.*, *Brandenburg*, 2018 U.S. Dist. LEXIS 189878, at *5 (finding in pizza delivery driver under-reimbursement case, "there are no

likely difficulties in managing a class action."). "Although there will no doubt be some variations between individual" drivers, (i.e., the location worked, type of vehicle driven, specific number of hours worked, and specific miles driven) "a class action is a superior method of resolving the claims asserted." *Barden*, 249 F.R.D. at 321.

Additionally, class certification here promotes consistent results, giving Defendants "the benefit of finality and repose," a benefit of the class action mechanism. *McKinney v. United States Postal Serv.*, 292 F.R.D. 62, 67 n.5 (D.D.C. 2013) (quoting *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 427 (4th Cir. 2003).

6. The Court should approve Plaintiffs' Proposed Notice.

Plaintiffs' proposed notice complies with all of the requirements of Rule 23(c)(2). *See* Proposed Notice of Class Action Certification (attached as Exhibit 7); Proposed Notice of Class Action Certification Email (attached as Exhibit 8). Plaintiff asks that the Court grant Plaintiff's request to send the notice to all delivery drivers by mail and email. For individuals for whom mail or email may be returned as undeliverable, Plaintiff proposes that they run the class members' name through a change of address database and re-send the notice to any new address identified. Plaintiff additionally proposes that the notice period be 60 days.

7. Conclusion

For the foregoing reasons, Plaintiff requests that the Court:

(1) Grant this Motion;

(2) Certify the Wisconsin state claims as a class action under Rule 23;

(3) Appoint Jason Patzfahl as class representative;

(4) Appoint Biller & Kimble, LLC and Walcheske & Luzi, LLC as class counsel;

(5) Approve the attached notices to be delivered to class members by mail and email; and

(6) Order a during a 60-day class action certification notice period.

Respectfully submitted,

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Counsel for Plaintiff and the putative class

Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically on May 11, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ *Riley Kane*
Riley E. Kane