IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Jason Patzfahl, on behalf of himself and those similarly situated,

Plaintiff,

v.

FSM ZA, LLC, d/b/a Toppers Pizza; Perfect Timing, LLC; Garett Burns; Doe Corporation 1-10; John Doe 1-10,

Defendants.

Court File No.: 2:20-cv-01202

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION OF PLAINTIFF'S MOTION FOR RULE 23 CLASS CERTIFICATION

INTRODUCTION

Plaintiff requests this Court radically expand the existing FLSA collective action into a class action based on Wisconsin state law. Plaintiff's attempt, however, is contrary to law, practically unworkable and must fail in its entirety. There are two types of alleged minimum wage violation claims at issue in this lawsuit, an under-reimbursement claim and a tip-credit violation claim. Both claims require fact specific analysis and neither is suited to class treatment under the facts presented in this case. Patzfahl's employment was unlike the other members of the purported collective and class and his motion to certify a class action must fail because he is an inadequate class representative. Moreover, the necessary commonality of claims, legal or factual to support a class action is lacking.

First, Patzfahl did not sign a tip disclosure form at the start of his employment. This fact is highlighted by Plaintiff in Paragraph 81 of the Amended Complaint, which provides as follows: "Defendants have also failed to properly inform Plaintiff and similarly situated

delivery drivers of the requirements for taking a tip credit." (Amended Complaint ¶ 81 [ECF No. 18]). Thus, all of his claims are distinctly different than all those members of the putative class who did sign a tip credit notification form at the start of their employment. This is an important defense for Defendants and would be available for certain potential members of the class, but not others.[1]

Second, Plaintiff alleged the following in Paragraph 82 of the Amended Complaint: "Defendants have also failed to have Plaintiff sign a tip declaration each pay period. Wisc. Admin. Code § DWD 272.03(2)(b)." (Amended Complaint ¶ 82 [ECF No. 18]). This will be a hotly contested issue in this case. Contrary to Plaintiff's assertions, the Point of Service system used by the Defendants satisfied the weekly tip declaration requirements of Wisconsin state law, set forth in DWD § 272.03(2)(b). As a result, this dispute will necessarily require an employee by employee analysis of the individualized facts specific to each employee's experience with the Point of Service System, since certain employees in this case dispute the Defendant's contention that the Point of Service System was uniformly utilized in a way that met the requirements of DWD § 272.03(2)(b).

[1] In his Memorandum in Support of Plaintiff's Motion for Rule 23 Class Certification (ECF No. 61) (footnote 1), Plaintiff inaccurately asserts that "[t]o date, federal courts have certified *every* similar Rule 23 class sought" (emphasis in original). In fact, in *Frazier v. PJ Iowa, L.C.*, 337 F. Supp. 3d 848 (S.D. Iowa 2018), the court had before it essentially the same request for Rule 23 class certification. The defendant operated twenty-six pizza franchises, and employed the plaintiffs as hourly tipped delivery drivers. As in this case, the defendant paid the plaintiffs under an FLSA-authorized "tip credit" system, where the defendant applied a tip credit against the minimum wage to calculate the plaintiffs' hourly base wages, and provided the FLSA-required notices to the plaintiffs. The plaintiffs made three class-based claims against the defendants: two claims under the FLSA and state minimum wage laws alleging the defendant improperly applied a tip credit to the delivery drivers' wages, and a claim under the FLSA that the defendant's vehicle reimbursement policy resulted in net wages below the minimum wage. *Id.* at 859. The *Frazier* court denied the plaintiffs' Rule 23 motion to certify a class of pizza delivery drivers employed by the defendant, finding the plaintiffs failed to demonstrate commonality or typicality. *Id.* at 869-73. *See also Wilson v. Wings Over Happy Valley MDF, LLC*, No. 4:17-915, 2020 WL 869889 (M.D. Penn. Feb. 21, 2020) (denying Rule 23 class certification for "claims stem[ming] from Plaintiffs' allegation that Defendants operated an illegal tip pool for delivery drivers at Defendants' restaurant," since the Plaintiffs had failed to show either commonality or predominance).

Third, Patzfahl's claims differ from the class as a whole, because he was always undeniably paid above minimum wage for work he performed in the store. In sharp contrast, other members of the collective allege they were not paid minimum wage for work performed in the store.

Finally, the complete absence of damages or the nominal nature of the damages at issue weigh against expanding this collective action into a class action under Wisconsin law involving employees who have already chosen not to join this lawsuit.

LEGAL STANDARD

Class certification is not automatic; a class may be certified only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites for class certification have been met." *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015) (citing *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 498 (7th Cir. 2013)). A plaintiff seeking certification has the burden of demonstrating that the class and proposed class representative meet various prerequisites, which include the four prongs of Fed. R. Civ. P. 23(a) and one option under 23(b). *See* Fed. R. Civ. P. 23(a-b); *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984). Fed. R. Civ. P. 23(a) provides that a class may be certified only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Fed. R. Civ. P. 23(b)(3), the 23(b) provision which applies to classes seeking monetary damages, requires a finding that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Rules list four items relevant to a determination of whether predominance and superiority under 23(b)(3) exist:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Plaintiff alone has the burden of proving by a preponderance of the evidence that the proposed classes and the proposed class representative meet the requirements of Fed. R. Civ. P. 23(a) and (b). *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 843 (7th Cir. 2022). When deciding a motion for class certification, a court may not "simply assume the truth of the matters as asserted by the plaintiff," but must receive and examine evidence to resolve material factual disputes. *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 811 (7th Cir. 2012). "Failure to meet any of [Rule 23's] requirements precludes class certification." *Orr v. Schicker*, 953 F.3d 490, 497 (7th Cir. 2020) (quoting *Arreola v. Gondinez*, 546 F.3d 788, 794 (7th Cir. 2008)). While the court typically need not delve into the merits of the case at the class certification stage, where

Rule 23's criteria and merit concerns overlap, "the judge must make a preliminary inquiry into the merits." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

ARGUMENT

I. PLAINTIFF'S PROPOSED CLASSES FAIL TO SATISFY MULTIPLE REQUIREMENTS OF FED. R. CIV. P. 23 AND CANNOT BE CERTIFIED.

A. *Plaintiff Cannot Establish Commonality in the Under Reimbursement Claim or the Tip Credit Class Because Plaintiff's "Common Question" Cannot Generate a "Common Answer."*

Fed. R. Civ. P. 23's commonality requirement requires plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). For commonality to exist, "Plaintiffs' claims 'must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Orr*, 953 F.3d at 499 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The Seventh Circuit has noted that "[t]he key to commonality is 'not the raising of common questions, but rather, the capacity of a class-wide proceeding to generate common answers apt to ***drive the resolution of the litigation***.'" *Orr*, 953 F.3d at 498–99 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)) (emphasis added). "[T]he commonality standard requires that plaintiffs do more than 'merely' demonstrate 'that they have all suffered a violation of the same provision of law[]' . . . Plaintiff must show that 'the class members have suffered the same injury.'" *Schilling v. PGA Inc.*, 293 F. Supp. 3d 832, 837 (W.D. Wis. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–350 (2011)). Commonality does not exist where "the answers

to [the common] questions are likely to vary significantly among class members given [the] issues require individualized factual inquiries into the circumstances of each class member." *Torres v. Nutrisystem, Inc*., 289 F.R.D. 587, 592 (C.D. Cal. 2013).

This Court in *Miller v. ThedaCare Inc*., No. 15-C-506, 2018 WL 472818 (E.D. Wis. Jan. 18, 2018), found a common policy did not exist (and denied class certification in turn), where the facts indicated that whether or not an employee was paid was due to a "myriad of factors each employee faced," including "the department in which the employee worked, the supervisor to whom they reported, and each employee's own subjective attitude and intent." *Miller v. ThedaCare Inc*., No. 15-C-506, 2018 WL 472818 (E.D. Wis. Jan. 18, 2018).

Similar to the *ThedaCare* facts, the employment practices to which the majority of the employees were subject to differed significantly from Patzfahl and all require an individualized assessment not amenable to class certification.

1. <u>Patzfahl, Unlike Other Most Opt-Ins and Potential Class Members, Did Not Sign a Tip Disclosure Form at the Commencement of His Employment</u>.

Patzfahl's employment differed from the other class members in a key way. Patzfahl never signed a tip disclosure form at the commencement of his employment, whereas the majority of employees did sign such forms. (Declaration of Garett Burns ("Burns Decl."), ¶2). Indeed, 20 of the 24 opt-in Plaintiffs did sign such a form. (Burns Decl., ¶3). As a result Defendants' defenses to Patzfahl's claims are necessarily distinct from those of the bulk of the requested class and a class action is not appropriate. As an example, opt-in Plaintiffs testified as follows:

Daniel Cooper:

Q:	We were just off the record, meaning the court reporter wasn't typing up everything we said. During that time we were trying to work out a technical issue, make sure you could see what is Exhibit 1, the Tip Credit Form. Now you have those in front of you, correct?
A:	Yes.
Q:	So let's start with the first one. It says Tip Credit Notification Toppers at the top?
A:	Uh-huh.
Q:	And it says the amount of cash wage to be paid to you will be $5. Do you see that?
A:	Yes.
Q:	And then at the bottom it has a signature. Is that your signature?
A:	Yes.
Q:	And do you remember having signed this form?
A:	Vaguely I do.
***	
Q:	We can go to the second page.
A:	Okay.
Q:	At the top of this form it says Delivery Driver Tip Credit Notification and it has your name. Is that your signature on the bottom?
A:	Yes.

(Declaration of Martin D. Kappenman ("Kappenman Decl."), ¶2).

Matthew Alvarez:

Q:	I'm sending you another exhibit. This one we'll mark as Exhibit 2. It's a Tip Credit Form. Let me know when you have those on your screen.
A:	Okay. Give me one second, please. Okay. I do have that.
Q:	It's a one-page document. You will see your signature on the bottom of that page. Correct?
A:	Correct.
Q:	And do you recall receiving this document?
A:	I do not, honestly.
Q:	But you don't dispute that it's your signature, it's just, hey, I don't remember this particular one?
A:	That is correct, yes.

(Kappenman Decl., ¶3).

Ian Mundt:

Q:	Let me share another document with everyone. First I'll share it with the group. I'll pull up a Tip Credit form here. [Exhibit 2 Marked for Identification] Do you see that Tip Credit Notification?
A:	I do. Yeah.
Q:	If you look at the bottom, do you see your signature?
A:	Yes, I do.
Q:	Do you remember signing this form?
A:	Yep.
Q:	And was there any discussion of this form when you signed it?
A:	I'm sure there probably was. Do I know exactly what we discussed? Not exactly. Yeah, I can assume there probably was.

(Kappenman Decl., ¶4).

For those employees who signed a tip credit disclosure form at commencement of their employment, Defendants have the defense that Defendants have no liability even if their unreimbursed expenses resulted in pay below minimum wage (the evidence will show that they did not), because once the tips are included in the calculation of the wage there would be no violation of the FLSA or Wisconsin law. Thus, the Court would still need to conduct individualized assessments to determine whether these employees have any viable claim against Defendants. Patzfahl's position, having not signed such disclosure is far different than those class members who have indisputably signed a disclosure when their employment commenced.

2. Individual Driver Experiences with the Point of Sale System differ.

Additional individualized assessment is necessary for each particular class member as a result of another essential defense in the case, the existence of a defense that will vary for various Defendants. Consistent with the ruling in *Bruske v. Capitol Watertown*

Sprechers, LLC (W.D. Wisc. August 24, 2021) 2021 WL 3737449, the Defendants utilized a point of service system that meets the requirements of DWD § 272.03(2)(b) and thus Plaintiffs' claims regarding violations of Wisconsin law fail.

The Defendants contend the point of sale ("POS") systems functioned as follows:

Vision POS (in service from the acquisition date by Defendants until July 2020):

All employees, including delivery drivers at Perfect Timing LLC and FSM ZA LLC Toppers Pizza franchises used a Point of Service ("POS") system, through which they (1) punch in under their own name when they reported to work, (2) take a customer's drink/food order in person or over the phone, (3) delivery drivers indicate which orders were being taken for delivery, (4) manually report their cash tips and reconcile money collected on behalf of the business, and (5) punch out at the end of their shift. Employees were given a prompt to enter their cash tips (other than credit card tips collected on the employees behalf that were then paid to them in cash) before checking out of the POS system. The delivery driver employees would take the following steps: (1) go to the "Employee checkout" screen; (2) enter the amount of cash tips received during the shift on the computer screen;(3) Enter/Adjust/confirm credit card transactions for accuracy and to adjust for credit card tips, if any. This process for delivery drivers includes matching every transaction in the POS with the physical credit card slip that was signed by the customer. (4) Reconcile starting bank, credit card tips, cash collected, and delivery reimbursement amounts. (5) Go to the close shift screen; and (6) Finalize the shift and clock out.

PiZmit POS (used from July 2020 until the sale of the businesses on June 28, 2021:

All employees, including delivery drivers at Perfect Timing LLC and FSM ZA LLC Topper Pizza franchises used a Point of Service ("POS") system, through which they (1) punch in under their own name when they reported to work, (2) take a customer's drink/food order in person or over the phone, (3) delivery drivers would indicate which orders were being taken for delivery, (4) manually report their cash tips and reconcile money collected on behalf of the business, and (5) punch out at the end of their shift. Employees were given a prompt to enter their cash tips (other than credit card tips collected on the employees behalf that were then paid to them in cash) before checking out of the POS system. To enter cash tips into the system, the employee would take the following steps: (1) go to the "Shifts" screen select team members shift; (2) go to the "bank" tab - enter the amount of CASH tips received during the shift on the computer screen; (3) Enter/Adjust/confirm credit card transactions for accuracy and to adjust for tips, if any in the "payments" tab. This process for delivery drivers includes matching every transaction in the POS with the physical credit card slip that was signed by the customer. This can also be done upon "check in" from each delivery upon returning to the store. (4) Reconcile starting bank, credit card tips, cash collected, and delivery reimbursement amounts. (5) Go to the "shift segments" tab; and finalize the shift and clock out. See documents produced contemporaneously with this supplement for screen shots of this process. Additionally,

> paychecks with a paystub attached were provided to each tipped employee who worked for toppers pizza every other Friday. These paystubs reflected the employees' hourly cash wages and tips, as well as the amount withheld for taxes and social security.

(Burns Decl., ¶4)

The Defendants believe the POS system was consistently used and applied in a manner consistent with Wisconsin law. Plaintiffs, however, will challenge that defense and certain Plaintiffs will contend the POS system was not used in a manner sufficient to meet the requirements of DWD § 272.03(2)(b). The deposition testimony revealed the following significant differences in how the Plaintiffs will contend the POS system operated:

Kevin Kirk:

Q:	Can you walk me through a typical day when you worked at Toppers?
A:	[…] [A]t the end of the day I would go back to the store, turn in my receipts and stuff and they would calculate how much I had to pay back in tips or if they had to pay me, because you get paid out daily on tips, and I would do dishes, clean the store, usually a couple hours. I got pretty quick at it towards the end there, but help the other people as we all try to get out of there.
Q:	And for the pay for your tips, you would start the day with like $20 cash, right, that the store would provide for change?
A:	Yeah.
Q:	And then when they would check you out, you and the manager would be at the computer and they would go through that information with you?
A:	No. It just had to be a supervisor. It didn't have to be a manager.
Q:	Okay. So a supervisor would be at the computer with you, go through that information?
A:	Actually they would go through it and I'd be working doing dishes or something and they would just tell me how much I had to pay.

(Kappenman Decl., ¶5).

Ian Mundt:

Q:	I want you to take me through a typical workday at Toppers.
A:	Sure. Yeah. […] But then at the end of the day when you're going to clock out you have to gather up all the receipts from your orders, or your deliveries, and then you have to take them in back and find a manager to help count you out, so basically they just kind of double check your receipts and your delivery log and just sort of make sure everything lines up. And then they calculate, you know, if you need to pay anything back to the store or if they need to pay you more based on like the tips that you got.
Q:	That's based on the $20 you would receive at the start of the day as well?
A:	I think so, yeah.
Q:	And would they be doing that by hand on paper or was that using a computer?
A:	Yeah. They used some sort of computer application for it just to like double check everything.
Q:	And did they always do that accurately, as far as you understand?
A:	I mean, yeah, I don't really know how it works so I can't really say it was accurate or not. Yeah. I just know that they used some sort of computer application for it. I'm honestly not entirely sure how it works at all.
Q:	But you never had a problem when they give you the money. They didn't say, oh, wait, that's not the right amount, or some feeling that you were wronged or cheated out of any amount of money?
A:	Yeah. I mean, again, I don't know. I didn't really understand at the time like how that all works so I didn't personally feel that way just because I kind of assumed that they were doing everything like correctly. You know what I mean? Just because I didn't understand the process of it as a whole.
Q:	And were you present when they were doing this calculation?
A:	Correct.

(Kappenman Decl., ¶4).

3. **Patzfahl admits he was always paid at least minimum wage for Work performed in the store, whereas various opt-ins allege they were not paid minimum wage for work performed in the store.**

Patzfahl acknowledges in his Amended Complaint and his deposition testimony that he was paid a higher wage, slightly above minimum wage for his work inside the store. (Amended Complaint ¶ 87 [ECF No. 18]) "Plaintiff was paid slightly above minimum

wage for the hours he works inside the store.") See also (4-20-2021 Declaration of Martin D. Kappenman, Exhibit 1 [ECF No. 25-1, pp 4-5]).

In contrast, other claimants claim not to have been paid at least minimum wage for their in-store work. In this case, Defendants took the deposition testimony of five of the opt–ins, two of those opt-ins, Kevin Kirk and Scott Rehard have far different contentions with respect to whether they were paid minimum wage when working in the store. Each testified as follows:

Kevin Kirk:

Q:	When you factor in your expenses, do you think you ever made less than minimum wage when working for Toppers?
A:	Oh, yeah. Several times.
Q:	Describe those times for me.
A:	You could have just a weird slow day where you get 30 bucks in tips and, you know, you're making a couple dollars an hour, you don't do many deliveries. You might get like eight deliveries the whole frickin' night or something, $18. I've had that happen. And then you work a ten-hour day and you bring 18 bucks home for the day. That's with your stop pay. That's happened.
Q:	So help me through that math. If you work ten hours, what was your in-the-store pay rate?
A:	I got paid my driver wage when I was in the store.
Q:	And what was your drive rate?
A:	I don't recall exactly. I could guesstimate, but I'm not sure.
Q:	I understand it's a guess, but give me your best guess.
A:	Like four or five bucks an hour.
Q:	And you think you made that rate for the hours you were working in the store?
A:	Yeah, because you're still clocked in as a driver.
Q:	And did you understand the system was you were supposed to, when you were working in the store, clock in as working in the store and then at different times when you go on deliveries clock as though you were a driver?
A:	Like I only ever did that when I was told to by management, and that was only a couple times. Like when the store was closed, I would go in and I would clean the store. You know, we would take apart the pizza oven to clean that, that kind of thing, but other than that I was pretty much always clocked in as a driver.

(Kappenman Decl., ¶5).

Scott Rehard:

Q:	Walk me though a typical day at Toppers.
A:	A typical day at Toppers would start off in the morning. We would get there and the drivers, before any orders were ready, would do any dishes that were left over from the previous night, we would prep vegetables and foods for the day, for the coming days. We would make dough and take deliveries all in the whole prep shift.
Q:	And for those periods you would be paid the higher rate, the minimum wage rate. Correct?
A:	That is not correct.
Q:	I'm sorry. We talked over each other. I'll try to ask it again. Tell me what was incorrect about that.
A:	We would be punched in as a driver.
Q:	Did anyone ever tell you that when you're doing the in-the-store work you should be punched in at a different rate so you get the minimum wage because you're not getting tips during the time you're working in the store?
A:	No, they have not told us that, and I'm not sure how that would work because when we are doing the prep work, there is that possibility of an order coming up.
Q:	As I understand it from certain employees and other people involved with Toppers is that there was a way to essentially swipe in for the in-house duty and then swipe out for those, to swipe in for the deliveries and when you get back either swipe or use the computer system to change which one you're in. Were you familiar with that sort of system?
A:	I've never heard of that.

(Kappenman Decl., ¶6).

It is clear from the diverging testimony of each of these three delivery driver employees that individualized inquiries will be absolutely necessary in this case. Under the WWPCL and Wisconsin's Administrative Code, as well as relevant case law, it is apparent that Plaintiff's argument evidences only wishful thinking—Federal Courts in Wisconsin have found that individual inquiries are necessary to determine both liability and damages under the WWPCL and have routinely denied class certification on that basis.

See Boelk v. AT&T Teleholdings, Inc., No. 12-cv-40-bbc, 2013 WL 261 261265 (W.D. Wis. Jan. 10, 2013)*; Drake v. Aerotek, Inc*., No. 14-cv-216-bbc, 2015 WL 6554592 (W.D. Wis. Oct. 29, 2015).

Ultimately, Plaintiff has failed to identify a common question capable of generating an answer that would "drive the resolution of the litigation." In light of the substantive requirements of the WWPCL and Wisconsin's Administrative Code, as well as the wide-ranging types of claims, conditions or employment and experiences of the various employees, for which liability may depend, resolution of the claims presented by Patzfahl and sought to be imposed on a class of employees who already decided not to opt into the existing collective action under Federal law cannot be decided from one—or even a small number—of inquiries. Common issues of law and fact do not exist in such a way that Plaintiff's claims under Wisconsin state law are capable of determination on a classwide basis. For this reason, and for the reasons below, Plaintiff's Motion for Certification must be denied.

B. *Plaintiff Patzfahl's Claims are Not Typical of the Classes He Seeks to Represent.*

Rule 23 further requires a plaintiff to demonstrate that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3) . It is well-settled that a class representative "must be part of the class and 'possess the same interest and suffer the same injury' as the class members [he seeks to represent]." *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). A

class representative's claims must have "enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). Even the presence of a defense particular to the class representative may preclude a finding of typicality: "A named plaintiff … who is likely to devote too much attention to rebutting an individual defense may not be an adequate class representative." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011). In the absence of this congruence between the named representative and the class, the trial becomes completely unmanageable and the interests of the class cannot be fairly represented by an individual with far different claims. The entire purpose of class treatment is undermined.

II. PLAINTIFF FAILS TO SATISFY BOTH PRONGS OF FED. R. CIV. P. 23(B)(3).

A. No Common Questions of Law or Fact Predominate Over the Class Claims.

In addition to the requirements set forth in Fed. R. Civ. P. 23(a), Plaintiff must prove the proposed Classes meet the predominance and superiority requirements of Fed. R. Civ. P. 23(b)(3). Four items are relevant to a determination of predominance and superiority:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). As part of the four considerations of Fed. R. Civ. P. 23(b)(3), a plaintiff seeking to certify a class through Fed. R. Civ. P. 23(b) must show that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3). "Rule 23(b)(3)'s predominance requirement is satisfied when 'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) (citing 7AA Wright & Miller Federal Practice & Procedure § 1778 (3d ed. 2011)). Common questions are those where "the same evidence will suffice for each member to make a prima facie showing[.]" *Id.* at 815. Conversely, individual issues are those which require the various members of a class "to present evidence that varies from member to member[.]" *Id.*

Courts, including the Seventh Circuit, hold that the "[m]ere assertion by class counsel that common issues predominate is not enough." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). Plaintiff, however, does just this in his Brief, by asserting that "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?" Yet Plaintiff does not articulate how either of these "possible common questions" about vehicle reimbursement could "drive resolution of all claims asserted" about alleged failure

to pay minimum wage. Each of the two cases Plaintiff cites as support for these "possible common questions" is distinguishable, because in each case the plaintiffs (unlike Plaintiff, who conceded in his deposition that he was paid at least the minimum wage) claimed to have been paid less than the minimum wage. *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 WL 5725043 at *1 (S.D. Ohio Nov. 5, 2019); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09-cv-1335, 2014 WL 4749547 at *1 (E.D. Mo. Sept. 24, 2014).

Plaintiff also asserts that the commonality requirement is satisfied because "all class members … were compensated by hourly pay rates near, or lower than, the Wisconsin minimum wage … ." But this statement is self-contradictory: class members who allege they were compensated by hourly rates "lower than" the Wisconsin minimum wage cannot possibly have the same type of claim as class members who (like Plaintiff) concede that they were compensated by rates at or above (i.e., "near") the Wisconsin minimum wage. Indeed, Plaintiff's proposed "near, or lower than" the minimum wage standard for commonality differs from the "hourly wage at or close to the minimum wage" standard discussed in *Waters v. Pizza to You, LLC*, No. 3:19-cv-372, 2021 WL 229040 (W.D. Ohio Jan. 22, 2021) (the case Plaintiff cites to support his statement that "the finding of commonality should be straightforward"). In the context of an alleged minimum wage violation, being compensated "at" the minimum hourly rate is very different from being compensated at a rate which is "near" the minimum wage. Employees compensated "at" the minimum hourly rate can show a minimum wage violation by demonstrating they were not properly reimbursed for business expenses, while employees compensated "near" the minimum hourly rate would need to demonstrate both (1) that they were not properly

reimbursed for business expenses and (2) that the dollar amount of the improper reimbursements was greater than the amount by which their aggregated hourly compensation exceeded the minimum wage. For example, certain employees allege they were not even paid minimum wage for work inside the store, those claims are far different than class members who admit receiving the nominal minimum wage, yet claim expenses drove their wage below the required minimum. Likewise, Patzfahl did not sign a tip credit disclosure form at the commencement of employment, while most delivery drivers did.

Although courts typically do not need to examine the merits of a case at the class certification stage, where the requirements of Rule 23 become intertwined with the merits of a case "the judge must make a preliminary inquiry into the merits." *Szabo v. Bridgeport Machines, Inc*., 249 F.3d 672, 676 (7th Cir. 2001). "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Messner*, 669 F.3d at 815 (7th Cir. 2012) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). As noted above, Plaintiff and the other class members would need to present different evidence: some class members apparently plan to present evidence suggesting that they were paid less than the Wisconsin minimum wage (Defendants deny any class member was paid less than the Wisconsin minimum wage), while Plaintiff himself has conceded that he was paid the minimum wage while working in the store.

B. A Class Action is not a Superior Means of Adjudicating the Claims Presented by Plaintiff.

In addition to the four considerations of Fed. R. Civ. P. 23(b)(3), when evaluating superiority court must consider whether "a class action is the best method of achieving a 'fair and efficient adjudication of the controversy.'" *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 186 (3d Cir. 2001). "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how . . . a class action would be the superior means to adjudicate the claims." *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008).

1. Plaintiff Does Not Satisfy His Burden to Demonstrate Adjudication of Rule 23 Class is Manageable.

In order for claims to be adjudicated on a classwide basis, a Plaintiff must demonstrate that adjudication on a classwide basis is manageable for the Court. *See* Fed. R. Civ. P. 23(b)(3)(D). As discussed above in Part II.A, individual proceedings are necessary here to allow a factfinder to make liability and damage determinations with respect to each member of the Rule 23 Classes. The existence of these individualized factual issues does not, contrary to Plaintiff's empty assertions, "promote[] judicial efficiency in satisfaction of Rule 24(b)(3)" (Pl.'s Brf. at 3), but instead presents problems which Defendants argues are incapable of resolution.

Notably, Plaintiff's counsel offers no solutions to these manageability issues. To aid the court in its determination of manageability, many courts encourage the plaintiff to propose a trial plan concurrently with plaintiff's motion for Rule 23 certification to

demonstrate to the court that adjudication of the proposed issues is manageable as a class action. *See Bitner v. Wyndham Vacation Resorts, Inc*., 2016 WL 7480428, at *13 (W.D. Wis. Dec. 29, 2016). Courts have consistently required plaintiffs to prove manageability of Rule 23 classes or risk denial of certification or class decertification. *See, e.g., Espenscheid v. DirectSat USA, LLC*, No. 09-cv-625, 2011 WL 2009967 at *8 (W.D. Wis. May 23, 2011) (decertifying FLSA collective and Rule 23 class actions, citing plaintiff's inability to propose manageable trial plan); *affirmed*, 705 F.3d 770, 775-76 (7th Cir. 2013) (Posner, J.) (noting it was "reasonable" for the trial judge to expect "plaintiffs' lawyer to propose a specific plan for litigating the case within the framework [the trial judge] had established," and holding that "[I]f class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end.").

Here, Plaintiff did not include a proposed trial plan along with his Motion for Certification, nor has Plaintiff proposed how this Court will manage resolving the individualized liability and factual determinations for the Wisconsin state law based Rule 23 classes. Looking to the definitions of the proposed Classes as well as the Plaintiff's legal theories and the requirements of Wisconsin statutory and administrative law at issue, it is clear that the instant case presents substantial manageability issues exist, as well as issues which may present a total bar to adjudication of certain Class claims. Because Plaintiff provided no guidance or a workable trial plan indicating how these issues would be manageably adjudicated, the Court should decline to certify Plaintiff's proposed Rule 23 Classes.

2. It is Not Desirable to Concentrate the Litigation in this Forum.

While separate from a Rule 23 Class Certification analysis, a supplemental jurisdiction analysis under 28 U.S.C. § 1367(c) provides further argument as to why the state law class claims at issue should not proceed in this forum. At the moment, this Court's jurisdiction over Plaintiff's state law claims is premised on federal causes of action—the FLSA claims alleged by Plaintiff. The United States Supreme Court has described supplemental jurisdiction as "a doctrine of discretion, not of plaintiff's right." *International College of Surgeons*, 522 U.S. 156, 172 (1997). 28 U.S.C. § 1367(c) directs that a court may decline to exercise supplemental jurisdiction over state law claims where:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). District courts have inherent authority to manage complex litigation and to determine "whether to exercise supplemental jurisdiction over pendant claims and parties." *Id.* at 308. "[T]he question [of] whether to retain or relinquish supplemental jurisdiction over state law claims remains open 'at every stage of the litigation.'" *Kneipp v. Re-Vi Design, LLC*, No. 17-cv-857, 2019 WL 1244903, *3 (W.D. Wis. Mar. 18, 2019) (citing *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 173 (1997)).

Here, Plaintiff alleged both FLSA collective and state law class claims in his initial and first amended complaints, which justified only the Court's ***initial*** exercise of jurisdiction over the state law class claims. The number of potential state law class members now greatly exceeds the size of the collective. There are 24 current opt-ins and 89 potential members of the class, thus, the state law claims quickly would predominate over the current FLSA collective. Moreover, each of those remaining potential class members has already declined to participate in this lawsuit and there is no reason to bring them into a case they want no part of, especially when it will needlessly complicate the case.

The considerations set forth in 28 U.S.C. § 1376(c) demonstrate why it is not desirable for this Court, or any federal court, to adjudicate the state law claims at issue. First, the state law claims at issue raise novel issues of state law in light of the fact that the issue of whether the POS system utilized by Defendants satisfies the requirements of DWD § 272.03(2)(b).

Second, the time, effort, and resources required to adjudicate the state law claims would vastly outweigh the time, effort, and resources required to adjudicate Plaintiff's federal cause of action such that the state-law causes of action would substantially predominate over the federal causes. Moreover, the alleged damages do not actually exist or are de minimus[2].

[2] Defendants have calculated the mileage driven by each of the opt-in Plaintiffs and factored in the reimbursements amounts each was paid along with their other compensation and tips received. The analysis demonstrates that there are no damages owing because the length of the delivery trips was far shorter than Plaintiff's estimate. The calculation of actual miles driven is based upon contemporaneous business records identifying the location of each delivery (Burns Decl., ¶ 5, Exhibit B).

Federal Courts in Wisconsin have declined to exercise supplemental jurisdiction over state law class claims under circumstances which are almost identical to this case. For example, in *Wicke v. L & C Insulation, Inc.*, No. 12-cv-638-wmc, 2013 WL 5276112 (W.D. Wis. Sept. 18, 2013), the Court declined to exercise supplemental jurisdiction over a plaintiff's state law class claims, citing substantial predominance concerns, where the plaintiff alleged both FLSA collective and Rule 23 class claims in his complaint, but later dropped the collective action in favor of pursuing individual FLSA claims. *Wicke*, 2013 WL 5276112, at *1. Ultimately, the Court found that it would be unwise for the Court to exercise supplemental jurisdiction over the plaintiff's state law class claims because the individual FLSA claims would "necessarily interject[] the class certification process and all the complexity that adjudicating a class action entails." *Id.* This Court further noted that the substantial effort required to adjudicate the class claims presented another "compelling reason[] for declining jurisdiction." *Id.*

The Court reached the same result again in *Kneipp v. Re-Vi Design, LLC.*, No. 17-cv-857, 2019 WL 1244903 (W.D. Wis. Mar. 18, 2019). In *Kneipp* the plaintiff initially alleged both FLSA collective and state law Rule 23 class action claims, but was unsuccessful in obtaining any additional opt-in plaintiffs during the notice period, effectively ending his FLSA collective action. *Id.* at *1. The defendant challenged the district court's exercise of supplemental jurisdiction over plaintiff's state law class claims in light of plaintiff's failed collective action. *Id.* The Court found that the disproportionate and extensive time and resources which would be required of the Court to adjudicate the state law class claims justified dismissing the claims from the case, concluding that the two

to four weeks required to complete the damages "mini trials" would be "a huge commitment of this court's resources . . . [and] weighs heavily in favor of finding substantial predominance under § 1367(c)(2)." *Id.*

Again, in a case decided just last month, the Western District of Wisconsin declined to expand an FLSA action into a class action noting that "given the very small size of the FLSA opt-in collective, certification of an opt-out class for a supplemental state claim would not be justified. Were this court "to certify a class action for [plaintiff's] supplemental state claims based on the same facts and issues underlying [plaintiff's] federal claim, we could very well be left 'with the rather incongruous situation of an FLSA 'class' including only a tiny number of employees ... with a state-law class that nonetheless includes all or nearly all of the companies' present or former employees.' " *Morgan v. Crush City Construction, LLC*, (W.D. Wisconsin July 14, 2022) 2022 WL 2752614 citing *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004) (quoting *Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*, No. 01 C 2361, 2002 WL 1359411, at *2 (N.D. Ill. June 21, 2002)).

The Court is faced with a very likely and very substantial expenditure of effort, time, and resources that vastly exceeds the effort, time, and resources needed to adjudicate the individual FLSA causes of action. Thus, many factors which weigh against the Court's exercise of supplemental jurisdiction over the state law class claims also weigh against a finding that this forum is the appropriate forum to adjudicate the claims of the two putative Rule 23 state law classes.

3. Demonstrable Lack of Interest in the Litigation Indicates Resolution as Class Action Not Superior Method of Adjudication.

Manageability issues present in the instant case are further compounded by the demonstrable lack of interest in the litigation from putative Class members—especially in light of the fact that Class member participation is ***necessary*** for resolution of damages issues. This leads to additional problems given the nature of Rule 23 Classes as "opt-out" classes. The Seventh Circuit has recognized that "potential members of a Rule 23(b)(3) class . . . will automatically be included in the class if they do not speak up." *Ervin v. OS Restaurant Serv., Inc*., 632 F.3d 971, 976 (7th Cir. 2011). Here, individualized testimony is needed to prove both liability and damages. Given the small size of the opt-in class in this case, the record strongly suggests that there is low engagement among putative Class members. Thus, it is highly unlikely that the Court will be able to easily obtain the member-by-member testimony needed to establish liability and damages from all members that fail to "opt-out" of the class action litigation.

This Court is faced with a situation analogous to other such situations where courts have declined to impose a class action upon those employees who chose not to opt-in to this case. Those courts have recognized that if they were "to certify a class action for [plaintiff's] supplemental state claims based on the same facts and issues underlying [plaintiff's] federal claim, we could very well be left 'with the rather incongruous situation of an FLSA 'class' including only a tiny number of employees . . . with a state-law class that nonetheless includes all or nearly all of the companies' present or former employees.'" *McClain v. Leona's Pizzeria, Inc*., 222 F.R.D. 574, 577 (N.D. Ill. 2004) (quoting *Muecke*

v. A-Reliable Auto Parts & Wreckers, Inc., No. 01 C 2361, 2002 WL 1359411, at *2 (N.D. Ill. June 21, 2002)); *See also Morgan*, 2022 WL 2752614 (reaching same conclusion).

CONCLUSION

For the foregoing reasons, Plaintiff has failed to satisfy his burden to demonstrate that Class certification of his Wisconsin state law claims is warranted under Fed. R. Civ. P. 23. Defendants respectfully requests this Court deny Plaintiff's Motion for Certification and allow the case to proceed to adjudicate the individual claims of Plaintiff Jason Patzfahl.

Dated: August 10, 2022

s/ Martin D. Kappenman

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