Nos. 17-5995 and 17-6071

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR,
R. ALEXANDER ACOSTA, SECRETARY OF LABOR,

Plaintiff – Appellant Cross-Appellee,

v.

OFF DUTY POLICE SERVICES, INC.,
DARRELL SPURGEON, and BONNIE SPURGEON,

Defendants – Appellees Cross-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky (No. 3-13-cv-935-DJH, Honorable David J. Hale)

SECRETARY OF LABOR'S RESPONSE AND REPLY BRIEF

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SECRETARY OF LABOR'S RESPONSE AND REPLY BRIEF

The Secretary of Labor ("Secretary") submits this brief in response to the brief filed by Off Duty Police Services, Inc. ("ODPS"), Darrell Spurgeon ("Spurgeon"), and Bonnie Spurgeon (collectively, "Defendants") and as a reply in support of his Opening Brief. This Court should affirm the district court's decision that the "nonsworn" officers were Defendants' employees under the Fair Labor Standards Act ("FLSA" or "Act") and the damages awarded to them – the subjects of Defendants' cross-appeal. And for the reasons set forth in the Secretary's

Opening Brief, this Court should reverse the district court's rulings that: (1) the "sworn" officers were not economically dependent on, and thus not employees of, Defendants under the FLSA based on their employment with and income from local police departments; and (2) the Secretary must show that Defendants "knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations.

STATEMENT OF JURISDICTION

In his Opening Brief, the Secretary set forth the jurisdictional bases for both his appeal and Defendants' cross-appeal.

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1. Whether the district court correctly ruled that the nonsworn officers were Defendants' employees under the FLSA as opposed to independent contractors where the applicable economic realities factors uniformly indicated that the officers were economically dependent on ODPS.

2. Whether the district court abused its discretion in awarding damages to three officers whom it ruled were Defendants' employees.

STATEMENT OF THE CASE

In his Opening Brief, the Secretary set forth the FLSA provisions, the facts, and the procedural history relevant to both his appeal and Defendants' cross-appeal.

STANDARD OF REVIEW

This Court reviews a district court's factual findings after a bench trial for clear error and its legal conclusions de novo. See Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 522 (6th Cir. 2011). Whether the officers were Defendants' employees under the FLSA is ultimately a question of law and reviewed de novo. See Fegley v. Higgins, 19 F.3d 1126, 1132 (6th Cir. 1994). The district court's damages award, which Defendants unsuccessfully challenged pursuant to a Rule 59(e) motion to alter or amend judgment, is reviewed for abuse of discretion. See Nolfi v. Ohio Kentucky Oil Corp., 675 F.3d 538, 552 (6th Cir. 2012) ("We review the denial of a Rule 59(e) motion for abuse of discretion, which occurs when a district court relies on clearly erroneous findings of fact or when it improperly applies the law.").

SUMMARY OF ARGUMENT IN RESPONSE TO CROSS-APPEAL

1. In determining whether a worker is an employee under the FLSA or an independent contractor, this Court looks at whether, as a matter of economic reality, the worker is economically dependent on the business to which he renders service or is in business for himself. The district court applied the economic realities factors set forth by this Court, and *each* factor indicated that the nonsworn officers were Defendants' employees.

Defendants argue that the district court erred by concluding that the nonsworn officers were Defendants' employees based on ODPS' being their sole source of income. This mischaracterizes the district court's decision. The district court did wrongly conflate a worker's economic dependence for purposes of the FLSA with the worker's source of income when concluding that the *sworn officers* were not Defendants' employees by determinatively relying on their income from sources other than ODPS to reach that conclusion. However, it did not make the same error with respect to the nonsworn officers. Although it did reference the nonsworn officers' income from ODPS, the economic realities of the nonsworn officers' relationships with ODPS overwhelmingly demonstrated, as the district court concluded, that they were employees; not a single factor indicated otherwise. Indeed, the nonsworn officers performed relatively unskilled work as directed by ODPS for years on a regular basis such that they were integral to ODPS' business, and their relatively minimal investment and the fixed hourly rate paid to them by ODPS prevented an opportunity for profit or loss. The district court's factual findings on each factor were supported by the record evidence, and none were clearly erroneous. The district court's ruling that the nonsworn officers were Defendants' employees was free from reversible error and should be affirmed.

2. The district court did not abuse its discretion in awarding unpaid overtime to Frank Medieros, Steven Newman, and Jason Petra. Because ODPS did

not keep adequate records regarding their hours worked as required, the Secretary reasonably estimated their overtime hours in calculating their unpaid overtime consistent with longstanding FLSA caselaw first enunciated in the Supreme Court's Mt. Clemens decision.

Defendants argue that testimony that Medieros was paid differently than other officers was sufficient to negate the reasonableness of the Secretary's calculation of unpaid overtime due him. However, ODPS has not provided the actual number of hours worked by Medieros, how much of his pay resulted from different pay rates, any explanation of how the different pay rates affected the overtime pay due him, or any alternative calculation of the overtime pay due him. Merely asserting that Medieros was paid differently fails to negate the reasonableness of the Secretary's calculations.

Defendants do not challenge the Secretary's calculation of Newman's or Petra's overtime hours worked, rate of pay, or overtime pay due. They instead argue that Newman and Petra were sworn officers while working for ODPS and therefore are not entitled to any unpaid overtime. However, whether they were sworn officers and whether they had income from other sources do not determine whether they were ODPS' employees under the FLSA. In any event, the district court twice reviewed their testimony and found it to be inconclusive as to when they were sworn officers. This finding was not clearly erroneous.

ARGUMENT IN RESPONSE TO CROSS-APPEAL

I. THE DISTRICT COURT CORRECTLY RULED THAT THE NONSWORN OFFICERS WERE EMPLOYEES UNDER THE FLSA; EACH ECONOMIC REALITIES FACTOR INDICATED THAT THEY WERE ECONOMICALLY DEPENDENT ON ODPS AND THUS EMPLOYEES

A. The Correct Legal Standards for Determining whether the Nonsworn Officers Were Employees or Independent Contractors

The scope of employment under the FLSA is broad and includes workers who may not be employees at common law. See Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 326 (1992) (FLSA defines "employ" with "striking breadth"); United States v. Rosenwasser, 323 U.S. 360, 362 (1945) (a "broader or more comprehensive coverage of employees . . . would be difficult to frame"); Keller v. Miri Microsystems LLC, 781 F.3d 799, 804 (6th Cir. 2015) (FLSA's definition of "employee" is "strikingly broad") (citing Darden, 503 U.S. at 326); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143-44 (6th Cir. 1977) (It was the "'Congressional intention to include all employees within the scope of the Act unless specifically excluded.'") (quoting Rosenwasser, 323 U.S. at 363).

Given the FLSA's broad scope of employment, an economic realities analysis applies when determining whether a worker is an employee under the Act. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985); Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947). In the context of determining

whether a worker is an employee under the FLSA or an independent contractor, this Court looks at whether, as a matter of economic reality, the worker is economically dependent on the business to which he renders service or is in business for himself. See Keller, 781 F.3d at 806-07; Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27, 1998 WL 598778, at *3 (6th Cir. Aug. 24, 1998) (per curiam); Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir. 1984).

Specifically, this Court considers the following economic realities factors when making that determination: (1) the permanency of the relationship between the parties; (2) the degree of skill required for rendering the services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon his skill; (5) the degree of the employer's right to control the manner in which the work is performed; and (6) whether the service rendered is an integral part of the employer's business. See Keller, 781 F.3d at 807; Brandel, 736 F.2d at 1117 & n.5. "No one factor is determinative," and this Court considers each factor "with an eye toward the ultimate question—[the worker's] economic dependence on or independence from [the employer]." Keller, 781 F.3d at 807; see Brandel, 736 F.2d at 1116.

In his Opening Brief, the Secretary argued that the district court erred in ruling that the *sworn officers* were not ODPS' employees by considering economic dependence in terms of whether ODPS was the sworn officers' primary employer

and source of income and by allowing their other employment and income to determine that they were independent contractors instead. Although Defendants agree that the district court erred to the extent that it considered economic dependence in that manner, see Defendants' Br., 10, 15, they nevertheless assume that the district court similarly erred in determining that the *nonsworn officers* were employees. Specifically, Defendants argue that the district court erred by ruling that the nonsworn officers were employees *solely* because they "chose to rely principally upon customers of ODPS for their income." Id. at 2, 11.

The district court's decision, however, refutes that assumption. Although the district court erred by determinatively relying on an incorrect view of the meaning of economic dependence under the FLSA to rule that the sworn officers were not employees, it made no such error in ruling that the nonsworn officers were employees. Even if the district court referenced ODPS as the nonsworn officers' primary source of income, it found that *each* of the economic realities factors indicated that they were employees. Thus, the district court ultimately ruled that the nonsworn officers were employees based on the totality of the economic realities of their working relationships with ODPS and not merely because ODPS was their primary source of income. As set forth below, this ruling was free from any reversible error and should be affirmed.

B. The Economic Realities Factors Uniformly Indicated that the Nonsworn Officers Were Defendants' Employees.

The district court correctly found that each of the economic realities factors applied by this Court indicated that the nonsworn officers were Defendants' employees under the FLSA.

Degree of Skill Required. The district court noted that "the skill required is judged against the task being performed" and that this "factor gets at whether the workers' profits increased because of things like initiative and judgment or whether their work 'was more like piecework.'" Decision on Liability, R. 62, Page ID #1887 (quoting Keller, 781 F.3d at 809). The district court identified no evidence that the nonsworn officers used business-like initiative or judgment regarding their work for ODPS. Instead, the district court found:

- "these jobs would sometimes require only that the worker sit in a police-style vehicle with the lights on," id.;
- "doing jobs for ODPS required only common sense," id. (citing Trial Tr. Vol. 3, R. 54, Page ID #1537);
- "the testimony presented at trial was about routine security guard and traffic control work," id. at Page ID #1888; and
- "the most common tasks ODPS called upon its workers to perform" involved "sitting in a car with lights on and toggling between 'stop' and 'go' paddles," id. at Page ID #1888-89.

These findings were supported by the evidence. See, e.g., Trial Tr. Vol. 1, R. 52, Page ID #894 (worker had "no training" to do security work but was able to do the work satisfactorily by using "[c]ommon sense"), 925 (no prior experience was necessary), 954-55 (traffic control work was 90% of the work and involved directing traffic "with a stop-and-slow sign," and security work involved "[p]retty much just sitting" in a vehicle), 997-98 (no prior experience was necessary; traffic control work was 90% of the work and involved flagging traffic for construction companies); Trial Tr. Vol. 2, R. 53, Page ID #1151-52 (worker had no prior experience; security work did not require any training, was "[p]retty cut and dried," and involved "[j]ust rid[ing] around and watch[ing] the cars, watching the people, [and] making sure [there were] no problems"), 1174-75 (officer had no prior traffic control experience, worked with Medieros five or six times to learn how to do it, "[i]t wasn't really rocket science"), 1194 (most of the work was traffic control, which involved "a car with lights to divert traffic," "a stop-and-slow paddle," and "maybe put[ting] your car in the road to block it"); Trial Tr. Vol. 3, R. 54, Page ID #1537 ("truthfully, [traffic control is] common sense, paying attention"). Thus, the district court correctly concluded that the work "required little skill, initiative, or know-how." Decision on Liability, R. 62, Page ID #1889.

Defendants' main argument to the contrary – that the district court wrongly ignored the workers' high degree of police skill and training (see Defendants' Br.,

25-26) – is relevant only to the sworn officers and in any event is misplaced as explained in the Reply section of this brief (pg. 42, infra).

Defendants also argue that "each officer was required to use their discretion and experience to successfully perform the duties." Defendants' Br., 26. However, Defendants rely primarily on Spurgeon's testimony to make this argument. See id. at 26-27 (citing Trial Tr. Vol. 2, R. 53, Page ID #1308-09, 1311-12, 1347-49). The testimony of one nonsworn officer relied on by Defendants (see id. at 26 (citing Trial Tr. Vol. 3, R. 54, Page ID #1555-56)) was underwhelming given that the officer's experience was acquired on-the-job while working for ODPS and that he acknowledged that "a lot of the information as far as setups and road situations are covered in the state training handbook that we use in our training as far as getting traffic control certification through the state." The other nonsworn officer relied on by Defendants (see id. at 26-27 (citing Trial Tr. Vol. 1, R. 52, Page ID #878)) simply testified that he had a relationship with a foreman at one of ODPS' customers and the customer requested him because of that relationship. This testimony fails to overcome the ample evidence that the work was relatively unskilled. Thus, Defendants fail to show that the district court's finding that the work "required little skill, initiative, or know-how" was clearly erroneous. And in any event, even if some officers used some discretion and experience in performing the work assigned to them by ODPS and/or received four

hours of traffic control training from the state, that evidence does not show that the nonsworn officers used business-like initiative or judgment indicative of being independent contractors. See Keller, 781 F.3d at 809. Thus, the district court did not err in finding that this factor indicated that the nonsworn officers were employees.

Investment in Equipment or Materials for the Task. The district court noted that this factor "considers 'whether the worker has made a significant capital investment'" and that the "workers' investment in equipment must be compared 'with the company's total investment, including office rental, space, advertising, software, phone systems, or insurance.'" Decision on Liability, R. 62, Page ID #1889 (quoting Keller, 781 F.3d at 810). The district court found:

- most of the nonsworn officers "spent from $3,000 to $5,000 on investments needed to perform their job," id.;
- "the one expenditure that most inflated" their investment amount was the police-style vehicles, id.;
- the investment in police-style vehicles is "less impactful" because the vehicles are not so specialized and can be used by most officers for personal purposes, id. at Page ID #1889-1890;

- that was "certainly" the case here as "numerous witnesses testified that they would use their police-style car as they would any other," id. at Page ID #1890 (citing Trial Tr. Vol. 1, R. 52, Page ID #898-99, 929, 962);[1]
- their "other investments mostly related to uniforms, boots, and other attire," which, for "obvious reasons, . . . do not themselves evince a specialized purpose," id.; and
- by comparison, ODPS spent about $200,000 annually to operate the business, see id. at Page ID #1889.

The district court concluded that the nonsworn officers' investments "pale[d] in comparison" to the $200,000 spent annually by ODPS and that this factor indicated that they were employees. Id. at Page ID #1889-1890.

Defendants fail to show that the district court plainly erred in making these factual findings. Defendants assert that the "[o]fficers' investments were made for the purpose of providing services to ODPS' customers and not for personal use." Defendants' Br., 30. However, on one of the pages of the trial transcript cited by

[1] Significantly, each of these officers bought the police-style vehicle because Spurgeon required him to do so to work for ODPS. See Trial Tr. Vol. 1, R. 52, Page ID #898, 928-29, 961-62. Additional nonsworn officers testified that they were required to purchase police-style vehicles to work for ODPS and that they also used the vehicles for personal purposes. See Trial Tr. Vol. 1, R. 52, Page ID #1000-01; Trial Tr. Vol. 2, R. 53, Page ID #1197, 1217-18.

Defendants to support this assertion (see id. (citing Trial Tr. Vol. 1, R. 52, Page ID #929)), the officer testified:

Q. Did you ever drive the vehicle on personal errands?

A. Oh, yes.

That officer also responded affirmatively when asked if he took the vehicle to "the mall or the grocery store." Trial Tr. Vol. 1, R. 52, Page ID #930. And another officer relied on by Defendants acknowledged that, even though he did not use his vehicle for personal purposes, "a lot of guys did." Id. at Page ID #853. As explained above, the evidence at trial supported the district court's conclusion that numerous nonsworn officers used their vehicles for personal purposes.[2] But even if the evidence showed that they did not, the nonsworn officers' investments in their vehicles would still not compare to ODPS' investment in its business.

Defendants also assert that nonsworn officers "expended upwards of $10,000." Defendants' Br., 31. However, of the six nonsworn officers whose testimony Defendants cite in support of this assertion (see id. (citing Trial Tr. Vol. 1, R. 52, Page ID #928-29, 1000; Trial Tr. Vol. 2, R. 53, Page ID #1178, 1217-18;

[2] This finding is significant because, to the extent that a worker's investment is used for personal purposes, it is not a capital investment indicating independent contractor status. See Keller, 781 F.3d at 810 (although an investment in a vehicle "'is no small matter,'" that investment "'is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes'") (quoting Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 304 (5th Cir. 1998)).

Trial Tr. Vol. 3, R. 54, Page ID #1525, 1566)), four testified that their investment was well below $10,000. See Trial Tr. Vol. 1, R. 52, Page ID #928-29 ($3,500), 1000 ($3,500); Trial Tr. Vol. 2, R. 53, Page ID #1178 ($4,000), 1217-18 ($3,000).[3] The testimony of these nonsworn officers and others (see Trial Tr. Vol. 1, R. 52, Page ID #852-53 ($2,500 to $3,000), 962 (around $5,000)) refutes Defendants' assertion and confirms the district court's finding that most of the nonsworn officers "spent from $3,000 to $5,000 on investments needed to perform their job." Decision on Liability, R. 62, Page ID #1889.

Defendants argue that the district court erred by comparing the officers' investment in equipment with ODPS' annual expenditures in operating the business, a "large portion" of which was attributable to commercial liability insurance. Defendants' Br., 31-33.[4] However, the district court's reliance on a comparison of the amounts of the respective investments is squarely in line with Keller: "We agree that courts must compare the worker's investment in the equipment to perform his job with the company's *total* investment, including office

[3] A fifth nonsworn officer testified that he spent over $7,000, including $6,900 for a police-style vehicle. See Trial Tr. Vol. 3, R. 54, Page ID #1524-27. The officer bought the vehicle for personal use, in particular because "it had room" for his "twin nephews" who "were getting to that point where they can hang out with their uncle" – "[t]hat's the reason why I bought it." Id. at Page ID #1524.

[4] Spurgeon testified that the insurance policy cost $56,000 in 2015, see Trial Tr. Vol. 2, R. 53, Page ID #1325, just over one-fourth of ODPS' annual expenditures to operate the business.

rental space, advertising, software, phone systems, or *insurance*." 781 F.3d at 810 (emphases added) (citing Hopkins v. Cornerstone Am., 545 F.3d 338, 344 (5th Cir. 2008)). This Court's earlier decision in Brandel provides no support for Defendants' argument. In that case, the employer had "a substantial capital investment in specialized equipment" while the migrant farmworkers had a "relatively small investment." 736 F.2d at 1118. This Court did not suggest that the relative investments indicated that the farmworkers were not employees, but instead found that, in the context of pickle harvesting (which does not require a "heavy capital investment"), the relative investments did not establish that the farmworkers were employees. See id. at 1119 ("While the factor may be important in other contexts, we agree with the trial court that it is not determinative of the issue of employment in this case.").

For these reasons, the district court correctly concluded that the nonsworn officers' investments, based on the nature and amounts of those investments, were made in order to perform ODPS' work, were not a significant capital investment, and paled in comparison to ODPS' expenditures. Thus, the district court correctly ruled that this factor weighed in favor of the nonsworn officers' being Defendants' employees.

Whether the Work Was an Integral Part of ODPS' Business. The district court correctly recognized that, when a worker is an integral part of the services

provided by an employer, he is more likely to be its employee. See Decision on Liability, R. 62, Page ID #1890 (citing Keller, 781 F.3d at 815). The district court found no evidence of services provided by ODPS for which the officers were not integral and ruled that this factor "strongly favors" employee status for them. Id.

In response, Defendants argue briefly that ODPS' business *does not* consist of providing traffic patrol and safety services, and that the district court wrongly assumed that it *did*; claim that ODPS is like a talent agent who simply matches officers with customers who need their services; and assert that ODPS would lose no business in the officers' absence. See Defendants' Br., 44-45. Spurgeon's own testimony, however, dispels any argument that the officers' work was not integral to ODPS' business:

> Q. It's my understanding that ODPS is a company that provides security guards and traffic control officers to companies that need those services?
>
> A. That's correct. It progressed over the years. When it first started, I did only police officers.
>
> Q. And 95 percent of ODPS's business is security and traffic control?
>
> A. Yeah. Off-duty-type police services, I would say, yeah, about 98 percent.

Trial Tr. Vol. 2, R. 53, Page ID #1305-06. Moreover, the analogy to a talent agent lacks factual support as the officers perform relatively unskilled work for a fixed

hourly wage and are largely interchangeable, thereby making any actual matching of officers with customers based on a particular skill level unnecessary. Indeed, ODPS does not provide any software, technology platform, or database to its customers. Instead, it agrees to provide its customers with security or traffic control services and fulfills those obligations by providing officers. See id. at Page ID #1305-08; Secretary's App., 14-37. And as discussed below, it remains involved to ensure performance of the services: it oversees the officers' work, is paid directly by its customers for the officers' work, and then pays the officers. In any event, it is not at all clear that even if ODPS' sole function were to match officers with customers that the officers' work would not be integral to ODPS' business. The assertion that ODPS would not lose business in the officers' absence defies logic; the officers are clearly integral to ODPS' business.

Permanency of the Relationship. The district court recognized that, the "'more permanent the relationship, the more likely the worker is to be an employee.'" Decision on Liability, R. 62, Page ID #1890 (quoting Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 309 (4th Cir. 2006)). This Court "look[s] at the length and regularity of the working relationship between the parties, but even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship." Keller, 781 F.3d at 807 (internal citation omitted). Although an exclusive relationship suggests that the

worker is an employee, this Court has affirmed that "'employees may work for more than one employer without losing their benefits under the FLSA.'" Id. at 808 (quoting Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988)).

To the extent that the district court found a degree of permanence in the relationships between the nonsworn officers and ODPS *because* ODPS was their sole source of income, the district court was mistaken. In any event, the degree of permanence in the relationships between the nonsworn officers and ODPS was established by evidence that they regularly worked for ODPS for long periods of time regardless whether ODPS was their primary source of income. Specifically, nonsworn officers worked for ODPS for years, and they often worked on a regular basis. See Trial Tr. Vol. 1, R. 52, Page ID #845-46 (five or six years working 48 to 50 hours per week), 891 (five or six years), 923-25 (for five years on and off worked 40 or more hours per week depending on the week), 950-51 (five or six years), 996 (four years sometimes working 40 hours per week, sometimes 80 hours per week, and over 100 hours per week a couple of times), 1049-1050 (seven years); Trial Tr. Vol. 2, R. 53, Page ID #1149-1150 (five years off and on, including full-time for almost one year and currently 16 to 32 hours per week), 1172-73 (three or three and a half years working about 48 hours per week at first and about 40 hours per week later), 1215-16 (eleven years); Trial Tr. Vol. 3, R. 54,

Page ID #1536 (had been working for seven years, "usually work[s] every week"), 1575-76 (nine years working 35 to 40 hours per week for most of that period).[5]

In addition, ODPS assigned nonsworn officers to do traffic control work for the same foremen or crews at the same customer for months or years and otherwise gave them set schedules. See Trial Tr. Vol. 1, R. 52, Page ID #861-62 ("Primarily my job was at Miller Pipeline for several years, so I knew every day where I was going."), 904-05 ("[Spurgeon] would call and tell me to stay with [Miller Pipeline] till further notice. Sometimes I was with them six months, nine months, even a year plus with the same guys. . . . I think we were putting like 10 and a half hour days in and eight and a half on a Friday was kind of typical."), 934 (assigned by Spurgeon to the same Miller Pipeline crew for four or five months), 967 (assigned to the same Miller Pipeline crew for more than a year, "Spurgeon called me and told me to stay with the crew until further notice"), 1004 (assigned to Miller Pipeline crew for almost three years, was told to stay there until told differently); Trial Tr. Vol. 2, R. 53, Page ID #1158-59 (Spurgeon gives him a schedule once per month), 1180 (assigned to same Miller Pipeline crew for eight to twelve months), 1202-03 (had set schedule for months); Trial Tr. Vol. 3, R. 54, Page ID #1580-81

[5] Moreover, as noted in his Opening Brief (pg. 40), the Secretary's claim is for violations of the FLSA's overtime pay requirements. See Compl., R. 1, Page ID #4. Each of the officers for whom the Secretary seeks relief worked more than 40 hours for ODPS in at least one week, and most worked overtime hours in more than one week.

(worked same location Monday to Friday from 10 p.m. to 6 a.m. for almost one year).

Defendants' arguments that there was not a degree of permanency in the nonsworn officers' working relationships with ODPS are unpersuasive in light of this evidence and this Court's decisions. Defendants note that ODPS provided the Secretary with a list of about 200 officers and the Secretary sued on behalf of 76 of them; they assert that the circumstances of the other 124 officers demonstrate a lack of permanence in the relationships of the 76 with ODPS. See Defendants' Br., 35-36. However, there was no evidence presented at trial of the circumstances of the other 124 officers, and the employment status of the 76 officers for whom the Secretary brought suit is determined by those 76 officers' working relationships with ODPS.[6]

Defendants further argue that the officers did not have an exclusive relationship with ODPS and that the district court "erred in failing to consider the lack of an exclusive relationship between ODPS and the nonsworn officers." Defendants' Br., 35-37. As the district court correctly noted, however, this Court has rejected that argument. See Decision on Liability, R. 62, Page ID #1892 (citing Keller, 781 F.3d at 808). In Keller, the worker did not have an exclusive relationship with the employer. See 781 F.3d at 808. Although a "de facto

[6] There was not sufficient evidence that the other 124 officers worked overtime hours during the applicable limitations period.

exclusive working relationship" may indicate that the worker is an employee, this Court recognized that the lack of an exclusive working relationship does not necessarily mean that the permanence factor supports a finding that the worker is an independent contractor. Id. (Workers "'may work for more than one employer'" and still be employees under the FLSA.) (quoting Superior Care, 840 F.2d at 1060). Moreover, the faulty logic in Defendants' argument was explained in the Secretary's Opening Brief (pgs. 33-34). If an exclusive working relationship were necessary for a worker to be an employee, then a worker could have no more than one employer, and any worker with two or more jobs would have no employer under the FLSA. Likewise, if an employee of a company took a second job, then he would become an independent contractor of the company as opposed to an employee because of that second job even though nothing about his working relationship with the company changed.[7]

Defendants also argue that the nonsworn officers' relationships with ODPS were "episodic" and "temporary." Defendants' Br., 37-38. However, the above-cited evidence of the long-term and regular work by the nonsworn officers for

[7] Defendants cite testimony from Steven Newman and Jason Petra that they worked for companies other than ODPS. See Defendants' Br., 36-37. Significantly, Newman worked for ODPS for five or six years (see Trial Tr. Vol. 1, R. 52, Page ID #950-51), Petra worked for ODPS for six or seven years – some of which was full-time (see id. at Page ID #1049-1050), and both worked overtime hours during the applicable limitations period. Whatever other work they performed, their working relationships with *ODPS* indicated a degree of permanency.

ODPS rebuts that argument. Thus, the officers were not like the farmworkers in Brandel, the majority of whom worked for only one harvest season and who potentially renegotiated the terms of their arrangement if they worked another season. See 736 F.2d at 1117; see also Imars, 1998 WL 598778, at *3 ("relationship between pickers and growers" in Brandel was "a temporary one, potentially renegotiated every year").

Defendants additionally argue that the independent contractor agreement which ODPS had the officers sign, although not "conclusive as to the nature of [their] relationship[s]," suggests that the officers worked for ODPS on a "temporary, as-needed basis." Defendants' Br., 38-39. However, this Court does not consider such agreements, or the lack of such agreements, when determining employment status under the FLSA. See Keller, 781 F.3d at 808 (fact that worker did not have a contract "cannot inform our analysis," and "we do not consider this fact in our analysis"); Imars, 1998 WL 598778, at *5 ("We agree that it makes very good sense to reject contractual intention as a dispositive consideration in our analysis. The reason is simple: 'The FLSA is designed to defeat rather than implement contractual arrangements.'") (quoting Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1544-45 (7th Cir. 1987)). In any event and contrary to Defendants' argument, the agreement does not address the regularity, consistency, or length of the officers' work for ODPS or state that the work is temporary or as-needed. See

Defendants' App., 49-51. Indeed, the agreement does not appear to have any fixed term, suggesting that the working relationship was indefinite. See id.[8]

Because the nonsworn officers worked for ODPS regularly during long periods of time, the district court did not err in concluding that there was a degree of permanency in their working relationships indicating that they were employees.

Opportunity for Profit or Loss Depending on Skill. The district court correctly ruled that the nonsworn officers did not use managerial skill to affect their profit or loss and that this factor indicated that they were employees. To the extent that the district court reached its conclusion by relying on testimony from the nonsworn officers that ODPS was their sole source of income, the district court was again mistaken. Nonetheless, the evidence and caselaw demonstrate that this factor indicated that the nonsworn officers were employees.

ODPS almost always paid the nonsworn officers at an hourly rate that it set. See Trial Tr. Vol. 1, R. 52, Page ID #849, 896, 927-28, 1060-61; Trial Tr. Vol. 2, R. 53, Page ID #1177, 1195; Trial Tr. Vol. 3, R. 54, Page ID #1576. The district court correctly recognized that "courts have questioned whether hourly workers, like the ones in this case, have the opportunity for profit or loss through managerial

[8] The agreement obligates the officers to: personally perform the work; not subcontract the work to others without ODPS' prior written consent; never use or disclose ODPS' confidential information; and while working for ODPS and for two years thereafter, not do any business of any type with any ODPS customer whom the officer contacted, communicated with, or worked for while at ODPS. See Defendants' App., 49-51.

skill." Decision on Liability, R. 62, Page ID #1893 (citing Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1316-17 (11th Cir. 2013); Schultz, 466 F.3d at 308); see Solis v. Int'l Detective & Protective Serv., Ltd., 819 F. Supp. 2d 740, 751 (N.D. Ill. 2011) (security guards paid by the hour "had no opportunity, by performing their tasks efficiently and skillfully, to earn additional profit"); Chao v. Westside Drywall, Inc., 709 F. Supp. 2d 1037, 1065 (D. Or. 2010) ("Where workers are paid a fixed hourly wage with no opportunity for commission or bonus, this weighs in favor of employee status.").

Defendants argue that, because the officers "had the ability to control their schedules and to select work opportunities," this factor indicated that they were independent contractors. Defendants' Br., 41-42. As a threshold matter, it is not clear how this shows that they utilized managerial skill to affect their opportunity for profit or loss. The officers' alleged control over their schedules depended on the degree to which ODPS made work available. And as discussed infra (pgs. 30-31), turning down work resulted in some officers' not being assigned more work for a period of time. Moreover, although there was testimony that officers could turn down assignments, several testified that they did not do so. See Trial Tr. Vol. 1, R. 52, Page ID #935 ("I could, but I never did."), 968 ("Yes, you could, but I never would turn down the work."), 1007 (did not turn down many assignments; "most every time they called, I would work"); Trial Tr. Vol. 2, R. 53, Page ID

#1203 (did not turn down work unless he was ill). Defendants also cite testimony that they claim "clearly shows" that the officers "exercised business management," Defendants' Br., 42 (citing Trial Tr. Vol. 1, R. 52, Page ID #1004-06, 1037-38, 1073-74); however, the cited testimony instead shows how ODPS assigned emergency work to the officers and how they could not swap shifts with other officers.

Defendants assert that "officers managed their schedules as independent businesses based on their own preferences and other commitments," Defendants' Br., 43; however, the one nonsworn officer's testimony cited in support of this assertion reveals otherwise:

> Q. Do you have any preference for certain types of jobs over others?
>
> A. It depends on the time of year. Naturally, traffic control is a little bit easier when it's a little bit cooler. And the security jobs don't require as much standing. So that would also be preferable. But no, not really. Work is work.

Trial Tr. Vol. 3, R. 54, Page ID #1551. Plainly, this nonsworn officer's preferences were driven by personal comfort as opposed to any use of managerial skill to affect profit or loss. Thus, although this Court has suggested that the ability to work more efficiently to complete more jobs can be an example of using

managerial skill to affect profit or loss, see Keller, 781 F.3d at 813, the nonsworn officers did not exercise such ability.

Instead, the nonsworn officers could earn more from ODPS by working additional hours, subject to more work being available from ODPS. Yet, the ability of workers who are paid by the hour to work more or fewer hours is not evidence of managerial skill and does not separate employees from independent contractors, both of whom will earn more if they work more. See Scantland, 721 F.3d at 1316-17 ("Plaintiffs' opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces."); Dole v. Snell, 875 F.2d 802, 810 (10th Cir. 1989) (cake decorators' "earnings did not depend upon their judgment or initiative, but on the [employer's] need for their work"); Solis v. Cascom, Inc., No. 3:09-cv-257, 2011 WL 10501391, at *6 (S.D. Ohio Sept. 21, 2011) (there was no opportunity for increased profit depending on the workers' managerial skills; although they could work additional hours to increase their income, they made no decisions regarding routes, acquisition of materials, or any facet normally associated with operating an independent business); Int'l Detective & Protective Serv., 819 F. Supp. 2d at 751.

In sum, when the employer controls the rate of pay and the availability of work (as ODPS did) and it is not possible to finish the work more efficiently in

order to perform additional work (as was the case given that the officers were almost always paid a fixed hourly rate), the workers do not exercise managerial skill affecting their profit or loss. See Schultz, 466 F.3d at 308 (cited approvingly by Keller, 781 F.3d at 813).

Right to Control. The district court found that "the nonsworn officers typically testified that they faced supervision from either [Spurgeon] or [Frank] Medieros and were more likely to be disciplined on the jobsite or reprimanded for turning down work." Decision on Liability, R. 62, Page ID #1896 (citing Trial Tr. Vol. 1, R. 52, Page ID #908, 1001; Trial Tr. Vol. 2, R. 53, Page ID #1161). The district court concluded that this degree of control indicated that the nonsworn officers were employees. See id.

The district court's finding is supported by the evidence. ODPS directed and checked on the nonsworn officers' performance. See Secretary's App., 11 (Medieros went out to the sites to "make sure the guys are doing what they are supposed to do"); Trial Tr. Vol. 1, R. 52, Page ID #848 (Medieros would sometimes "come on the job to check . . . to see if everything was set up properly and stuff."), 906-07 (Medieros came to worksite and removed officer who was wearing shorts and t-shirt), 926 (Medieros was my supervisor and "[f]rom time to time he would show up to make sure we were doing our job properly."), 957 (Medieros would occasionally "show up and survey the jobs and make sure we

were set up properly."), 1057-58 (Medieros would sometimes "come out to the job sites and check on you. He would call and stuff and check and ask how everything was set up and whatnot. Sometimes they would actually show up at the job site as well."); Trial Tr. Vol. 2, R. 53, Page ID #1152 (Medieros trained officer to do traffic control work by working several jobs with him), 1175 (Medieros came by and checked on him), 1195 (Spurgeon and another supervisor came by worksites "[t]o check on us."); Trial Tr. Vol. 3, R. 54, Page ID #1537 ("[Spurgeon] would tell me what the customers want me to do when he called me to do the job. 'This is what they want, and this is what you need to do.'"), 1557-58 (Spurgeon and other supervisors would come by worksites from time to time to check on officer).

Indeed, the officers could not choose when to perform the work; they performed the work when directed by ODPS. See Decision on Liability, R. 62, Page ID #1881 (ODPS assigned and scheduled the officers); Trial Tr. Vol. 1, R. 52, Page ID #905 (officers could not swap shifts with co-workers "[b]ecause [Spurgeon] told me I have to do the job and that I can't have someone work for me"), 1005 (For emergency traffic control work, ODPS "would call and say, 'We need you right there.' Because usually on an emergency situation, they would need you there. They would say, 'You got half an hour, 45 minutes. Please get there as soon as you can.'"); Trial Tr. Vol. 2, R. 53, Page ID #1116 ("[T]here was plenty of times where I would be in the middle of a family activity, and he would

call, 'I need you to go here.' And you are like, 'I'm in the middle of this.' He's like, 'Reschedule that. Do that later. Do this.' I had that happen with a dentist appointment."), 1160 (officer was called while at worksite and was directed to go to another worksite when he was done), 1203 (officer was instructed by Spurgeon and other supervisors to leave a worksite and report to another location). The customers were ODPS' customers, see Trial Tr. Vol. 2, R. 53, Page ID #1267, 1306-08, and ODPS controlled its customer relationships, including by prohibiting the officers from doing any business on their own with those customers while working for ODPS and for two years thereafter, see Defendants' App., 50.

In addition, ODPS put nonsworn officers in "time-out" (i.e., did not let them work for a period of time if they turned down work) and reprimanded them for other reasons. See Trial Tr. Vol. 1, R. 52, Page ID #907-08 (describing facial hair requirements and how he was told to shave off goatee), 957 (Medieros came to worksite and reprimanded officer for not being clean shaven and not wearing ODPS jacket), 968-970 (Spurgeon put nonsworn officer in time-out and did not give him work for two and a half weeks after he went on vacation), 1001-02 ("I got in trouble a couple of times because I had a goatee. I had to shave off the goatee."), 1007 ("They didn't like it when you turned [work] down. . . . – [S]ometimes if it would happen more than once or so, they would get upset about it, and you might not get a job the next day or so."), 1057-58 (ODPS supervisor

came to worksite and reprimanded officer for wearing unapproved uniform), 1067-68 ("If we done something against the rules or got in trouble, we wouldn't get work for a couple of days. That's something we all called it, was either the Spurgeon penalty box or time-out."); Trial Tr. Vol. 2, R. 53, Page ID #1091 ("If you turned him down, you know, you could almost guarantee you wouldn't work for a day or two."), 1160 (was put in time-out a few times for turning down work).

ODPS also required officers to submit reports describing the security work performed. See Trial Tr. Vol. 1, R. 52, Page ID #957-59 (submitted activity reports to ODPS); Trial Tr. Vol. 2, R. 53, Page ID #1153 (submitted activity reports to ODPS following security work detailing information such as "what you did" and "if anything happened that night"); Trial Tr. Vol. 3, R. 54, Page ID #1563-64 ("I fill out an activity log every night and submit it."). Moreover, as explained in the Secretary's Opening Brief (pgs. 43-44), ODPS also controlled the economic terms of the officers' working relationships with it. ODPS set the rates at which the officers were paid and paid them for their work. See Trial Tr. Vol. 2, R. 53, Page ID #1304-05 (Spurgeon set the pay rates for the officers); see also Trial Tr. Vol. 1, R. 52, Page ID #927-28, 959-960; Trial Tr. Vol. 2, R. 53, Page ID #1100, 1313; Trial Tr. Vol. 3, R. 54, Page ID #1507. And as also explained in the Opening Brief (pgs. 44-45), ODPS maintained a policies and procedures document stating that non-compliance with any of the policies and procedures "will result in

immediate termination," and it provided officers working for certain of its customers with lists of specific duties and responsibilities for them to follow.

Defendants argue that the officers controlled their schedules. See Defendants' Br., 16-18. "A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee." Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984); see Dole, 875 F.2d at 806 ("Of course, flexibility in work schedules is common to many businesses and is not significant in and of itself."). In any event and as discussed above, ODPS controlled the customers and the availability of work, directed the officers when to work, gave some of the officers set schedules, directed the officers at times to leave one job to go to another job, did not allow officers to have someone else work their shifts, and sometimes directed officers to come in to work regardless of other activities that they had. Given ODPS' control over the work and its payment of a fixed hourly rate for the work, the extent to which the officers could decide how much to work did not suggest independent business initiative on their part; instead, they earned more by working more hours – like an employee. See Scantland, 721 F.3d at 1316-17; Dole, 875 F.2d at 810; Cascom, 2011 WL 10501391, at *6; Int'l Detective & Protective Serv., 819 F. Supp. 2d at 751. These facts serve to distinguish the decision regarding process servers cited by Defendants. See Defendants' Br., 17-18 (citing Karlson v. Action Process Serv. &

Private Investigations, LLC, 860 F.3d 1089 (8th Cir. 2017)). In Karlson, the process servers were paid a flat rate for each job, the job could take anywhere from "a few minutes to several hours," and some jobs had "'priority' status." 860 F.3d at 1094. Under those different circumstances, the process servers' decisions regarding how many and which jobs to work could suggest independent business initiative on their part.

Defendants also argue that ODPS never put any officers in time-out or otherwise disciplined them and that ODPS did not institute or enforce work rules. See Defendants' Br., 18-22. However, as discussed above, there was an abundance of testimony from nonsworn officers that they were not given work for a period of time when they turned down work. See Trial Tr. Vol. 1, R. 52, Page ID #968-970, 1007, 1067-68; Trial Tr. Vol. 2, R. 53, Page ID #1091, 1160. Other nonsworn officers testified that they never turned down work. See Trial Tr. Vol. 1, R. 52, Page ID #935, 968; Trial Tr. Vol. 2, R. 53, Page ID #1203 (unless he was ill). Even if some officers never experienced a time-out, either because they never turned down work or for other reasons, the evidence that ODPS put some nonsworn officers in time-out indicated control over them. Likewise, as discussed above, there was an abundance of evidence that ODPS disciplined nonsworn officers and enforced work rules. See Trial Tr. Vol. 1, R. 52, Page ID #907-08,

957, 1001-02, 1057-58, 1067-68; Opening Br., 44-45 (citing Secretary's App., 14, 17, 20, 30, 33-34, 35-37, 39-40).

Defendants further argue that ODPS did not supervise the officers or, if it did, the supervision was only sporadic. See Defendants' Br., 22-24. As an initial matter, Spurgeon's testimony that he "never went out and supervised anyone" (Trial Tr. Vol. 2, R. 53, Page ID #1347) is not credible. As discussed above, nonsworn officers repeatedly testified that he, Medieros, and others would come to their worksites and supervise or direct their work. See Trial Tr. Vol. 1, R. 52, Page ID #848, 906-07, 926, 957, 1057-58; Trial Tr. Vol. 2, R. 53, Page ID #1152, 1175, 1195; Trial Tr. Vol. 3, R. 54, Page ID #1557-58. Medieros admitted the supervision that he undertook. See Secretary's App., 11 ("I go out at the sites and make sure the guys are doing what they are supposed to do."); Trial Tr. Vol. 2, R. 53, Page ID #1235-37. Even if the supervision was not day-to-day, it was still indicative of control. See Superior Care, 840 F.2d at 1060 ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1383-84 (3d Cir. 1985) (district court's emphasis on how little control the employer exercised over the manner in which *home* researchers performed their work was misplaced; its emphasis would have been appropriate had it been analyzing "the status of a group of *in-house* workers") (emphasis added). In sum, the district court's finding that

ODPS exercised a degree of control over the nonsworn officers indicating that they were employees is not clearly erroneous.

For all of these reasons, the totality of the economic realities of the nonsworn officers' working relationships with ODPS overwhelmingly indicated that they were Defendants' employees under the FLSA, and the district court's ruling to that effect should be affirmed.

II. THE DISTRICT COURT'S DAMAGES AWARDS TO THREE OFFICERS WERE NOT AN ABUSE OF DISCRETION

A longstanding burden-shifting framework applies in FLSA cases where (as here) the employer fails to comply with the Act's recordkeeping obligations:

> The solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records . . . . In such a situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946) (superseded by statute on other grounds). There is no basis in this framework for Defendants' argument, see Defendants' Br., 45-50, that the district court abused its discretion in awarding unpaid overtime to Frank Medieros, Steven Newman, and Jason Petra.

A. Medieros.

Defendants assert that Medieros was different from the other officers because, in addition to being paid an hourly rate for his security and traffic control work, he was paid a different rate for performing scheduling work and was eligible for a share of profits from any new customer that he brought to ODPS. See Defendants' Br., 47-48. Defendants argue that this assertion negates the reasonableness of the Secretary's damages calculation for Medieros. See id.

The Secretary is well aware that Medieros' damages calculation is not precise; ODPS did not keep records sufficient to allow for a precise calculation. Defendants, however, have not provided the actual number of hours worked by Medieros, how much of his pay resulted from scheduling work, how often he was paid a share of profits from new customers, any explanation of how his different pay rates affected the unpaid overtime due him, or any alternative calculation of the unpaid overtime due him. By merely asserting that the calculation is imprecise, Defendants fail to negate the reasonableness of the Secretary's calculation. See Chao v. Akron Insulation & Supply, Inc., 184 F. App'x 508, 513 (6th Cir. 2006) (even if some time may not have been compensable, the employer failed to rebut the reasonableness of the Secretary's calculation of back wages "because it could not offer any evidence of the actual number of hours worked or to negate the reasonableness of the inferences made"); U.S. Dep't of Labor v. Cole Enters., Inc.,

62 F.3d 775, 780-81 (6th Cir. 1995) (employer's argument that the Secretary's calculations of back wages due "may not be precisely accurate" failed to negate the reasonableness of the calculations). Indeed, when the Secretary served Defendants an interrogatory asking them for the officers' hours worked each workweek, Defendants responded that their hours worked could be calculated by dividing the amount paid to them during the workweek by their hourly rate. See Secretary's Supplemental App., 56. The Secretary performed that exact calculation to determine the unpaid overtime due Medieros.

B. Newman and Petra.

The district court ruled that Newman and Petra were improperly classified as independent contractors and were instead employees of ODPS for at least part of the period during which they worked for OPDS, and that they were thus entitled to damages. See Decision on Liability, R. 62, Page ID #1896. As the district court requested, the Secretary submitted evidence and calculations of the unpaid overtime due them. See Secretary's Post-Hearing Br. Regarding Damages, R. 63, Page ID #1900-04. Defendants did not then and do not now challenge the Secretary's calculation of Newman's or Petra's overtime hours worked, their rate of pay, or the unpaid overtime due them. Accordingly, there is no basis to argue that the Secretary has not met its burden under Mt. Clemens of showing their

overtime hours worked as a matter of just and reasonable inference, or that Defendants have met their burden of negating the reasonableness of that inference.

Although Defendants try to fit their argument into the Mt. Clemens framework, they are really arguing that Newman and Petra are not entitled to any unpaid overtime in the first place because they were sworn officers while working for ODPS. See Defendants' Br., 49-50. However, for the reasons set forth in this brief and the Secretary's Opening Brief, whether Newman and Petra were employed by local police departments is immaterial to whether they were ODPS' employees. Their working relationships with ODPS were not meaningfully different when they were sworn officers as compared to when they were nonsworn officers. Regardless of their status as sworn officers or not, the economic realities of their working relationships with ODPS showed that they were employees under the FLSA.

In any event, the district court considered Defendants' argument twice, reviewed Newman's and Petra's trial testimony (the only evidence on this point), and found their testimony as to when they were sworn officers to be inconclusive. See Order Awarding Damages, R. 66, Page ID #1933-34; Mem. Op. & Order, R. 74, Page ID #1974-76. Accordingly, the district court did not abuse its discretion in awarding them unpaid overtime.

REPLY IN SUPPORT OF APPEAL

I. THE DISTRICT COURT ERRED BY RULING THAT THE SWORN OFFICERS WERE NOT EMPLOYEES UNDER THE FLSA

A. Defendants Agree that the District Court Erred to the Extent that It Conflated Economic Dependence with a Worker's Primary Source of Income for Purposes of Determining Employee Status under the FLSA.

The Secretary's main argument in his Opening Brief was that the district court failed to understand the correct meaning of economic dependence for purposes of determining whether a worker is an employee under the FLSA or an independent contractor. Economic dependence is central to that determination; employees under the FLSA are those workers who as a matter of economic reality are dependent on the business to which they render service, as opposed to being in business for themselves. See Keller, 781 F.3d at 806-07; see also Imars, 1998 WL 598778, at *3; Brandel, 736 F.2d at 1116.

In determining whether the sworn officers were ODPS' employees or were independent contractors, the district court, however, relied on their employment by local law enforcement departments and their income from that employment, and concluded that they were not ODPS' employees because those departments were their primary source of income and they worked for ODPS to earn supplemental income. The district court thus considered economic dependence for purposes of determining whether the sworn officers were employees under the FLSA in terms of whether ODPS was the sworn officers' primary employer and source of income,

thereby wrongly allowing their employment with and income from the departments to determine that they were not ODPS' employees. Although the district court found several of the economic realities factors to support a determination that the sworn officers were employees, its erroneous view of the meaning of economic dependence under the FLSA infused its analysis of other factors and ultimately led to its determination that the sworn officers were independent contractors.

In their brief, Defendants agree that the district court erred to the extent that it considered economic dependence in the manner in which the district court did. See Defendants' Br., 10 ("ODPS agrees with the Secretary to the extent the District Court's ruling is erroneous as it misapplies relevant case law, and . . . the division of officers into separate classes solely on the basis of other sources of income is arbitrary."), 15 ("ODPS agrees with the Secretary to the extent it is urged the District Court improperly relied solely on whether or not officers had other sources of income in its determination of employee status."), 34.[9] As explained above and in the Secretary's Opening Brief, the district court's error (which Defendants acknowledge) was actually determinative in its ruling that the sworn officers were

[9] Defendants, of course, argue that the district court's erroneous view of economic dependence mattered only with respect to the nonsworn officers. However, the district court's equating economic dependence with a worker's primary source of income was actually determinative only in its ruling that the sworn officers were not employees. As explained in the Response section of this brief, the economic realities factors overwhelmingly indicated that the nonsworn officers were Defendants' employees (as the district court ruled), and there were no clear errors in the district court's factual findings supporting its ruling.

not employees under the FLSA. Given the district court's error, this Court should, at minimum, reverse the ruling regarding the sworn officers and remand that part of the case for an application of the economic realities factors that is free from that fundamental error. Alternatively, the district court's application of the economic realities factors, stripped of its erroneous reliance on the sworn officers' primary source of income, indicated that they were Defendants' employees under the FLSA.

B. The Economic Realities Factors Indicated that the Sworn Officers Were Defendants' Employees.

Degree of Skill Required. The district court found that the officers performed "routine security guard and traffic control work," their "most common tasks" involved "sitting in a car with lights on and toggling between 'stop' and 'go' paddles," and their work "required little skill, initiative, or know-how." Decision on Liability, R. 62, Page ID #1888-89. The sworn officers' testimony (as did the nonsworn officers' testimony) supported this finding. See Trial Tr. Vol. 1, R. 52, Page ID #1030 (traffic control work involved directing traffic around worksites, and security work "was mainly like watching buildings being built . . . keeping an eye on the equipment, making sure doors remained locked"); Trial Tr. Vol. 2, R. 53, Page ID #1128 (99% of work was traffic control; "sometimes we just had to sit in our cars with the lights flashing," "[s]ometimes I would have to actually get out and stand and be seen, and other times I would have to flag traffic").

In their brief, Defendants make an argument specific to the sworn officers regarding the degree of skill required for the work. Defendants argue that the sworn officers had a "high degree of skill and training required to become a licensed police officer" and that the district court wrongly overlooked this skill. Defendants' Br., 25. This argument, however, fails for two reasons. First, the sworn officers' high degree of law enforcement skill is not considered in the abstract, but "must be evaluated with reference to the task being performed." Brandel, 736 F.2d at 1118. Citing Brandel, the district court did exactly that: it acknowledged the sworn officers' "great deal of training, knowledge and skill in law enforcement"; recognized that the evidence showed that their work was "routine security guard and traffic control work"; and thus correctly concluded that the work did not require their law enforcement skill. Decision on Liability, R. 62, Page ID #1888-89. Second, for the skill to indicate independent contractor status, it typically must be managerial instead of technical and be used by the worker to affect his opportunity for profit. See Keller, 781 F.3d at 809 (asking whether the worker's profits increased because of the initiative, judgment, or foresight of the typical independent contractor). The skill necessary to become a licensed police officer does not itself affirmatively answer the question posed by this Court in Keller.

In the Response section of this brief, the Secretary addresses Defendants' remaining arguments regarding the degree of skill required for the work. Accordingly, the district court correctly concluded that the degree of skill required for the particular work being performed (routine security guard and traffic control work) indicated that the sworn officers were employees.

Investment in Equipment or Materials for the Task. The district court found that the sworn officers were "often allowed to use their department equipment—to wear their department uniforms and drive their police cruisers—after they paid their departments a fee," and that "[a]s a result, their expenditures were often minimal compared to the nonsworn officers." Decision on Liability, R. 62, Page ID #1889. The district court further found that the nonsworn officers' investment "pale[d] in comparison to the amount ODPS spent running its business" and thus indicated that they were employees, but concluded that the sworn officers' even more minimal comparative investment was a "non-factor." Id. at Page ID #1889-1890. As explained in the Secretary's Opening Brief (pgs. 37-39), the district court's conclusion cannot be upheld. It was simply illogical for the district court to conclude that the sworn officers' more minimal investment (when compared to that of the nonsworn officers) was a non-factor as opposed to indicating employee status considering its conclusion that the nonsworn officers' investment indicated employee status.

With respect to the sworn officers, Defendants argue that they paid their police departments $200 per month to use their police vehicles for off-duty work in addition to other costs and that this is "a significant investment." Defendants' Br., 31 n.9. The evidence, however, shows that the sworn officers' investments were generally less than the nonsworn officers' investments, which the district court concluded were indicative of employee status. For example, the sworn officer who paid his department $200 per month to use his police vehicle did not have to buy any equipment or supplies to work for ODPS. See Trial Tr. Vol. 4, R. 55, Page ID #1686. Another sworn officer did not have to buy any equipment or supplies to work for ODPS, ODPS gave him a stop-and-go sign, and the "rest of the equipment" was from his police department to whom he paid a $50 fee per month. Trial Tr. Vol. 3, R. 54, Page ID #1492-93, 1507. A third sworn officer spent a "lot less" than $5,000 on the equipment that he had to buy to work at ODPS. Trial Tr. Vol. 1, R. 52, Page ID #1034-35. And according to Spurgeon, the sworn officers had their own car and equipment from their police departments (which charged them a fee) and therefore did not incur other expenses working for ODPS. See Trial Tr. Vol. 2, R. 53, Page ID #1321-22.

Of the three sworn officers whose testimony Defendants cite in support of the assertion that they "expended upwards of $10,000" for equipment (Defendants' Br., 31 (citing Trial Tr. Vol. 4, R. 55, Page ID #1606, 1626, 1643)), one spent

about $15,000 for a vehicle that he also used personally (see Trial Tr. Vol. 4, R. 55, Page ID #1626, 1634), another spent about $10,000 after retiring from the police department – mainly on a Ford Explorer that he also used personally and for his lawn care business (see id. at Page ID #1643-44), and the third spent about $2,700 on his most recent vehicle (see id. at Page ID #1606). Considering the entirety of the evidence, the two sworn officers whose testimony was that they expended $15,000 and $10,000 are outliers (and their larger expenditures were related to the personal use to which they put their vehicles); most spent far less and had the ease of using their police department equipment. Thus, the district court committed no clear error in finding that the sworn officers' investments "were often minimal compared to [the investments of] the nonsworn officers" (Decision on Liability, R. 62, Page ID #1889).

The Secretary addresses in the Response section of this brief (pgs. 15-16, supra) Defendants' remaining arguments on the relative investment factor, including that ODPS' $200,000 in annual expenditures was the wrong baseline with which to compare the officers' investments. For all of these reasons, the district court's ruling that the sworn officers' investments were a "non-factor" in determining their employment status should be reversed, especially considering the district court's factual findings that those investments were minimal compared to the nonsworn officers' investments (which indicated employee status).

Whether the Work Was an Integral Part of ODPS' Business. In the Response section of this brief (pgs. 17-18, supra), the Secretary addresses Defendants' cursory argument (see Defendants' Br., 44-45) that the officers' work was not integral to ODPS' business. Defendants' argument was not specific to the sworn officers, and for the reason given – that the officers' traffic control and security work formed the very essence of the services that ODPS provided – the district court correctly concluded that this factor "strongly favors" employee status for the sworn officers. Decision on Liability, R. 62, Page ID #1890.

Permanency of the Relationship. The district court concluded that the sworn officers lacked a degree of permanency in their relationships with ODPS because of their "other employment and sources of income." Decision on Liability, R. 62, Page ID #1892. As explained in the Secretary's Opening Brief (pgs. 39-40), however, the district court erred in reaching this conclusion because it misunderstood economic dependence for purposes of the FLSA and thus incorrectly determined the sworn officers' employment status with *ODPS* based on their employment with and income from *local police departments*.

Considering the length and regularity of the sworn officers' working relationships with ODPS, the evidence shows a degree of permanence. See Opening Br., 40 (citing Trial Tr. Vol. 3, R. 54, Page ID #1504; Trial Tr. Vol. 4, R. 55, Page ID #1609, 1633, 1651, 1681); see also Trial Tr. Vol. 1, R. 52, Page ID

#1028-29 (worked for ODPS for seven years, worked some other off-duty work on a "hit [or] miss" basis but "[i]t wasn't nothing on a permanent basis like working for ODPS," and worked "at least 50 hours a week or more" for ODPS because his sworn job as a county constable was not full-time); Trial Tr. Vol. 2, R. 53, Page ID #1127, 1137 ("worked for [Spurgeon] for maybe three or four years or so," worked "with one crew for about two years" – going to "the same crew every day").

In the Response section of this brief (pgs. 21-24, supra), the Secretary addresses Defendants' arguments – which were not specific to the sworn officers – that there was a lack of permanence in the officers' relationships with ODPS. For the reasons given, the sworn officers' regular work for ODPS for long periods of time indicated a degree of permanence in their working relationships with ODPS, indicating that they were employees.

Opportunity for Profit or Loss Depending on Skill. The district court concluded that the sworn officers had an opportunity for profit or loss indicating independent contractor status because they "did not depend on ODPS as their sole income." Decision on Liability, R. 62, Page ID #1894. As explained in the Secretary's Opening Brief (pgs. 40-43), the district court erred by focusing on the officers' income from other work and by requiring their primary source of income to come from ODPS to be its employees. As further explained in the Opening Brief (pgs. 41-42): the sworn officers could not suffer a loss (their investment was

relatively minimal); they were paid at a fixed hourly rate and thus could not increase their earnings by being more efficient; and even if they could decide how many hours to work, their ability to work depended on ODPS' making work available to them. These circumstances show that the sworn officers were economically dependent on ODPS and were thus its employees.

In the Response section of this brief (pgs. 25-27, supra), the Secretary addresses Defendants' argument that the officers exercised business initiative affecting their profit or loss by choosing how much to work for ODPS. However, just as the nonsworn officers' testimony showed that their decisions regarding how much to work were not driven by business initiative, so too did the sworn officers' testimony. See Trial Tr. Vol. 4, R. 55, Page ID #1616 ("I've been with [Spurgeon] since 2000. I know what jobs he has, and really just about anything he has, I'm not -- I don't have a problem with it, you know."), 1620 (same officer) (Spurgeon "knows that any opportunity I get to work off-duty, I usually try to take advantage of it. . . . I will call him basically almost every week unless I have something else going on, and I'll ask him does he have work available, and he will tell me whether he does or not."), 1664 ("If [Spurgeon] had not already called me and said, 'I got job I need to take care; will you take care of it for me,' or I would call him if I didn't have anything and ask, 'Have you got anything coming up?'"), 1671 (same officer) (how much the work paid "didn't make a great difference to me," "[i]t's

just if I was available to work," and would do just about any type of work for ODPS); Trial Tr. Vol. 3, R. 54, Page ID #1503 (for traffic control work, "I prefer sometimes the summer just for the simple fact because I don't like being out in the cold"), 1515 ("Well, if I go in there and accept the job, then I do it. If I don't want to do it, I don't. I mean, there's not a whole lot of things I don't mind doing.").

For all of these reasons, the sworn officers' lack of managerial skill affecting their opportunity for profit or loss indicated that they were Defendants' employees.

Right to Control. The district court found that, although ODPS exercised some control over the sworn officers, it was insufficient to suggest that they were employees. See Decision on Liability, R. 62, Page ID #1895-96. ODPS' control over the sworn officers was significant, however. In addition to controlling the customers, how much work was available, when the officers worked, their pay rates, and their ability to work for its customers (as described in the Opening Brief (pgs. 43-44) and the Response section of this brief (pgs. 29-31, supra)), ODPS did exercise control over the sworn officers' performance of their work. See Trial Tr. Vol. 1, R. 52, Page ID #1032 (Spurgeon come to job sites occasionally and Medieros came more often to check on the officers and their set up), 1038-39 (officer was put in "time-out" for a period of time after telling Spurgeon that he was not available for an assignment); Trial Tr. Vol. 2, R. 53, Page ID #1129-1131 (Spurgeon came to job sites once or twice "and checked on us," Medieros came

more often and showed "how [Spurgeon] expected us to do the job"); Trial Tr. Vol. 3, R. 54, Page ID #1488 (Medieros occasionally came to job sites and checked on work); Trial Tr. Vol. 4, R. 55, Page ID #1672 (although rare, Spurgeon came to worksites to review work performed by officer). As explained above, the officers' decisions regarding how much to work do not outweigh this evidence of control.

To the extent that ODPS' supervision of the officers was not substantial (the Secretary believes it was), any lack of control does not under the circumstances here show independence on the officers' part. In Spurgeon's view, ODPS' *customers* "do[] all the supervision," tell the officers what to do, and "have all control of . . . what the officers do when they are there," and ODPS expects the officers to do what its customers want them to do. Trial Tr. Vol. 2, R. 53, Page ID #1310-11. The officers thus did not control the manner in which they performed the work. Cf. Scantland, 721 F.3d at 1313 ("'Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.'") (quoting Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1312-13 (5th Cir. 1976)); Schultz, 466 F.3d at 305 ("[T]he issue is not the degree of control that an alleged employer has over the manner in which the work is performed in comparison to that of *another employer.* Rather, it

is the degree of control that the alleged employer has in comparison to the control exerted by the *worker.*") (emphases in original).

Thus, for all of the reasons given by the Secretary, the totality of ODPS' control (on its own and through its customers) over the sworn officers indicated that they were its employees. However, in the event that ODPS' degree of control is deemed insufficient to indicate that the sworn officers were its employees, the totality of the economic realities nonetheless indicate that they were employees. See Keller, 781 F.3d at 807 ("[n]o one factor is determinative"); DialAmerica, 757 F.2d at 1384-86 (workers who "could generally choose the times during which they would work and were subject to little direct supervision" were employees even though control factor suggested that they were not employees).

II. THE DISTRICT COURT ERRED BY REQUIRING THE SECRETARY TO PROVE THAT DEFENDANTS KNOWINGLY VIOLATED THE FLSA'S RECORDKEEPING OBLIGATIONS

The district court erred by requiring the Secretary to show that Defendants knowingly failed to maintain accurate records to prove that they violated the FLSA's recordkeeping obligations. Specifically, the district court could not "conclude from the evidence produced at trial that [Defendants] *knowingly* failed to maintain accurate records." Decision on Liability, R. 62, Page ID #1897 (emphasis in original). In their brief, Defendants make no attempt to defend the district court's imposition of a "knowledge" requirement (see Defendants' Br., 50-

51), nor can they. As explained in the Secretary's Opening Brief (pgs. 47-51): there is no basis in the FLSA's plain language or its regulations to impose a "knowledge" requirement to prove violations of the recordkeeping obligations; such a requirement is contrary to principles of statutory construction; and other courts have not imposed such a requirement.

Instead of defending the district court's rationale, Defendants argue that the issue is moot because the officers were not employees. See Defendants' Br., 50-51. For the foregoing reasons and the reasons set forth in the Opening Brief, however, the officers (sworn and nonsworn) were employees under the FLSA and thus covered by the Act's recordkeeping obligations. Defendants also make a one-sentence argument, without any support, that they satisfied the recordkeeping obligations "by maintaining time records in the form of the invoices that officers submitted in order to receive payment for services provided." Defendants' Br., 51. This argument is too perfunctory to merit this Court's attention. See White Oak Prop. Dev., LLC v. Wash. Twp., Ohio, 606 F.3d 842, 850 (6th Cir. 2010); United States v. Robinson, 390 F.3d 853, 886 (6th Cir. 2004). In any event, the evidence refutes Defendants' conclusory assertion. The evidence in support of the Secretary's claim included testimony that there were no reliable records of the officers' hours worked for a 12-month period and the records of their hours worked thereafter were not complete. See Opening Br., 48. Defendants provide no

contrary evidence; a statement referring to the officers' invoices does not constitute such evidence.

In sum, there is no basis for the district court's ruling that Defendants did not violate the FLSA's recordkeeping obligations, and the ruling should therefore be reversed.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the district court's ruling that the nonsworn officers were Defendants' employees under the FLSA and the damages awarded to them. The Secretary further requests that this Court reverse the district court's rulings that the sworn officers were not Defendants' employees and that the Secretary did not prove that Defendants violated the Act's recordkeeping obligations and remand the case for further proceedings as it deems necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Secretary of Labor's Response and Reply Brief:

(1) complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font; and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 12,979 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

/s/ Dean A. Romhilt
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Secretary of Labor's Response and Reply Brief was served this 21st day of March, 2018, via this Court's ECF system (with a hard copy to follow), on the following:

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