**No. 18-1763**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

TIMBERLINE SOUTH LLC; JIM PAYNE,

Defendants-Appellants.

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On Appeal from the United States District Court
for the Eastern District of Michigan, Northern Division

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# RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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# RESPONSE BRIEF FOR THE SECRETARY OF LABOR

## STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor ("Secretary") will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on clear judicial precedent and the evidence submitted below, and thus may be decided on the parties' briefs.

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217; 28 U.S.C. 1331 (federal question); and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review each of the district court's orders, including the October 6, 2017 Order Granting Plaintiff's Motion for Summary Judgment in Part (R.33), and the June 5, 2018 Order Granting Summary Judgment as to Damages (R.46), as well as the accompanying Judgment issued that same day (R.47), pursuant to 28 U.S.C. 1291 (final decisions of district courts).[1] Defendants filed a timely Notice of Appeal from those orders on July 3, 2018. *See* R.48.

## STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Timberline South LLC ("Timberline") is a covered enterprise under the FLSA, 29 U.S.C. Section 201 *et seq.*, where its employees are required to handle and use "materials" that have

[1] Pursuant to Local Rules 28(b)(1)(A)(i) and 30(g)(1), the Secretary has included in this brief an Addendum designating the relevant district court documents. Those documents are cited herein as "R._" (district court docket entry) and "Page ID#__" (ECF page number).

traveled in interstate commerce, such as logging and harvesting equipment, in order to perform their jobs.

2. Whether the district court properly determined that Timberline's truck driver employees were not exempt from the FLSA's overtime provisions under the Motor Carrier Act exemption, 29 U.S.C. 213(b)(1), because they drive solely within the state of Michigan.

3. Whether the district court properly calculated and awarded damages based on Timberline's own payroll journals to the extent possible and where such records were not available based on a "just and reasonable inference" of hours worked as permitted by the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), an inference that Defendants failed to rebut.

4. Whether the district court properly awarded liquidated damages as required by law because Defendants failed to prove that they acted in good faith and that they had reasonable grounds for believing that they were not required to pay overtime as required by the FLSA.

## STATEMENT OF THE CASE

### A. Factual Background

1. Defendant-Appellant Timberline is organized as a for-profit corporation in the state of Michigan, and is managed by Defendant Jim Payne. It engages in harvesting and felling raw timber, and delivering that timber to sawmills; it

operates solely within the state of Michigan. R.33, Page ID# 3634. Timberline's employees regularly use harvesters, forwarders, and other logging equipment, all of which were critical to the work performed and all of which were purchased in Michigan but manufactured outside the state; it has had an annual gross volume of sales of more than $500,000 for each year relevant to this litigation. *Id.* at 3635. Timberline employs about 30 employees as equipment operators, loaders, truck drivers, mechanics, and office staff. Its trucks have Department of Transportation ("DOT") registration numbers, and its drivers maintain Commercial Drivers Licenses ("CDLs"). *Id.*

2. Wage and Hour Investigator Jeffrey Wrona investigated Timberline for the Wage and Hour Division of the Department of Labor (""DOL") for the time period of August 25, 2013 through August 20, 2015, which was later extended through March 20, 2017. R.33, Page ID# 3632, 3636; R.43, Order Directing Additional Briefing and Setting Status Conference at Page ID 4182. The investigation revealed that during the relevant period, Timberline employees frequently worked over 40 hours a week, but were not paid overtime at one and one-half times their regular rate, as required by the FLSA at section 207(a)(1), 29 U.S.C. 207(a)(1). R.33 at 3632. The company paid some of its employees on an hourly basis, and properly recorded their hours worked. *Id.* at 3634-35. However, it paid other workers at non-hourly rates, including day, cord, piece, and/or load

rates, and paid other workers according to various combinations of hourly rates and day, cord, piece, and/or load rates, depending on the employee. *Id.* at 3635. The company did not record hours worked for most non-hourly employees, did not compute regular hourly rates for them, and did not record or pay for overtime at one and one-half times the regular hourly rate. *Id.* at 3636.

3. Prior to the formation of Timberline South, LLC, Payne had operated a different timber harvesting company in Tennessee, Timberline Logging, Inc., which went out of business in 2010. R.33, Page ID# 3634-35. Around that time, Defendant Payne asked his office manager to send an email to Mr. Rooyakker, an accountant for the prior company, inquiring "do you know if we would be exempt under FLSA in Tennessee." *Id.* at 3637. According to Payne, Rooyakker later informed him that Timberline Logging, Inc. was exempt from any overtime obligations based on the FLSA's agricultural exemption. *Id.* Rooyakker testified via deposition that the only advice he provided on this subject was in a meeting with Payne in February 2011:

> Q: Okay. … was this the day that you provided the response to the agricultural inquiry … – to Timberline South or Logging?
> A: Yes. So, as I stated, Jim asked hey, did you ever find anything out on that overtime question and my response was yes, it appears that you're exempt.
> Q: Okay. Under the agricultural?
> A: Yes. Something to that extent.

Order Denying Defendants' Motion for Reconsideration, R.42, Page ID # 4172, 4175 (citing Rooyakker Dep. at 61-62).

Rooyakker, however, did not offer any definitive opinion about the applicability of the agricultural exemption to Timberline South, LLC, or its applicability to any particular employee or category of employees of the Michigan company. R.33 at 3637. Payne and Rooyakker never discussed any employees' job duties to verify whether the agricultural exemption applied, and did not discuss any other exemptions vis-à-vis those duties. R.42 at 4177 (citing Rooyakker Dep. at 45). Nor did Rooyakker provide any instructions to Payne regarding whether or not to pay overtime, whether or how to record hours, how to calculate compensation, or how to keep records; he left all those decisions to "Jim Payne and his personnel." R.33 at 3637. Indeed, Payne admitted that he did not believe that his truck drivers or office employees were agricultural employees. *Id.* at 3638 (citing Payne Dep. at 306); R.42 at 4176-77 (quoting Payne Dep. at 306). Payne testified that he had read parts of a DOL Fact Sheet on the motor carrier exemption but could not recall whether he did so prior to the investigation. R.33 at 3638 (citing Payne Dep. at 351-54).

4. Investigator Wrona initially estimated that Timberline owed back wages for unpaid overtime in the amount of $468,595.08 to 50 employees for the period from August 2013 through March 17, 2017. R.33, Page ID# 3637. After

Timberline submitted a second set of payroll journals, and the court ordered additional briefing on damages, Wrona revised and updated his calculations twice, reducing the updated total of back wages due to $445,533.49. R.46, Page ID# 4400.[2] Following the review of additional payroll documents, additional briefing, and adjustments by the district court, the court ultimately awarded back pay in the amount of $439,437.42. *Id.*

Wrona explained that he calculated unpaid overtime hours and back pay differently for each of three groups—hourly workers, non-hourly workers, and those who were paid based on some combination of hourly rates and day rates, cord rates, piece rates, and load rates. R.33, Page ID# 3635; R.43 at 4181. For the 43 hourly workers, Wrona calculated unpaid overtime due based on payroll records produced by the Defendants (including two sets of payroll journals and time cards) in the amount of $266,179.45. R.43 at 4181 (discussing back wage computations contained in R.38, Plaintiff's Supplemental Brief at 9-11).[3] For the period of time

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[2] *See, e.g.*, Wrona Declaration dated Nov. 6, 2017 (R.38-9); Wrona Supplemental Declaration dated May 8, 2018 (R.44-2) (reducing the total estimated overtime due to $456,684.73); Wrona Supplemental Declaration dated May 17, 2018 (R.44-3); Updated Summary of Back Wages (R.44-8) (further reducing the total to $445,533.49).

[3] Wrona initially relied on employee interviews as well as payroll journals to perform his calculations, but later clarified that he based his calculations for hourly employees solely on payroll data. R.43 at 4181 & n. 1.

covered by the first payroll journal, Wrona simply multiplied hours worked over 40 in each workweek by one half of the employee's hourly rate to calculate overtime back wages due. *Id.* at 4182. For the period of time covered by the second payroll journal, which did not contain weekly hours worked, Wrona had to deduce the hours worked by dividing gross wages by the hourly rate, then compute unpaid overtime by multiplying any hours over 40 by .5 to get to time and one-half. *Id.* After Defendants objected that calculations for certain hourly employees seemed to contain overlapping workweeks, Wrona deducted $20.63 from the estimates for Randy Newberry, and the court further reduced the amount of back wages for Mike Lube by $6,060 to correct an apparent typographical error. R.46 at 4396-98 (discussing back wages computations contained in R.44, Plaintiff's Second Supplemental Brief at 2-3).[4]

Wrona identified three employees paid on a non-hourly basis -- truck driver Gayle Baur and equipment operators Don Crawford and Shawn Hinz -- and initially calculated that they were owed a total of $43,142.47 in unpaid overtime, based on employee interviews and estimated hours worked by each individual. R.43, Page ID# 4185. Wrona had to reconstruct the back wages owed because

[4] See also R.44-3 (explaining source of overlapping dates and reason for reduction of $20.63 for Newberry).

Defendants' payroll journals did not include hours worked or regular rates for these employees, but only gross wages paid; Wrona ultimately recalculated their hours and back pay based on the average weekly hours worked -- 55 hours per week for drivers and 48 hours per week for equipment operators. R.46 at 4397.[5] To calculate their regular rate of pay, Wrona divided the gross wages earned each week by the estimated hours worked each week, then multiplied estimated hours over 40 by one half the regular rate to determine overtime back wages due. R.43 at 4185. For Crawford, Wrona initially calculated that $780.15 was due based on a "day rate" listed in the payroll journal, but later recalculated the amount due to him as $2,037.26 after it became clear that Defendants had not recorded either his hourly rate or his hours worked. R.46 at 4398.[6]

Finally, Wrona identified four employees who were paid some combination of hourly and non-hourly rates -- William Axford, Tom Freeman, Jeremy Krzemien, and Gary Payne -- and calculated that they were owed a total of

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[5] Wrona had initially relied on employee interviews to estimate hours worked for these employees at 60 hours/week for drivers, and 51 hours/week for equipment operators. R.33 at 3636. He later revised the estimates based on hours worked by "similarly situated employees," R.43 at 4185, and then revised and reduced them a third time based on updated data from the second payroll journal. *See* R.44-3 at 4215-17; R.46 at 4397 (acknowledging lower estimated hours worked for Baur, Crawford, and Hinz).

[6] See also R.44-3 at 4217-18 (explaining that payroll records for Crawford contained only "day rate," not hourly rate or hours worked).

$145,362.81 in unpaid overtime. R.43, Page ID# 4186. For periods of time where Defendants recorded hours worked and hourly rates in their payroll journals for these employees, Wrona relied on those records. For weeks when Defendants paid by the cord and recorded only gross weekly wages, Wrona estimated their hours worked by calculating their average work hours during prior weeks (when the hours were actually recorded). He then divided their gross weekly wages by the estimated hours worked to obtain an hourly rate, and then multiplied any estimated hours over 40 by one half the regular rate to determine the amount of overtime back wages due. *Id.* For example, Wrona determined that Gary Payne worked 66.5 hours a week on average when he was being paid by the hour, and used this individualized average to calculate his weekly hours and unpaid overtime hours after Timberline stopped recording his hours. *Id.* at 4187-88.

Based on Wrona's revised calculations, additional payroll documents, and corrections by both the Secretary and the district court, the amount of unpaid overtime due to all three groups of employees, including the hourly, non-hourly, and combination workers, was found by the court to be $439,437.42. R.46, Page ID# 4400.[7]

[7] This total amount was substantially reduced, both from Wrona's initial estimate of $468,595.08, and from his final estimate of $445,533.49. *Compare* R.33 at 3637 *with* R.46 at 4400. The final amount also included reductions of $6,060 and

B. Procedural History

1. On April 29, 2016, the Secretary commenced this lawsuit by filing a complaint alleging that Defendants had violated the overtime and recordkeeping provisions of the FLSA, and seeking to recover back wages and an equal amount in liquidated damages, as well as a permanent injunction to enjoin Defendants from committing future violations of the Act. *See* R.1, Complaint; 29 U.S.C. 216(c), 217.

2. After discovery, both parties filed cross-motions for summary judgment. On October 6, 2017, the district court issued an order granting the Secretary's motion in part, and denying Defendants' motion. R.33. It also granted the Secretary's motion to amend the pleadings to include additional employees and FLSA violations which had occurred during 2016 and 2017, enjoined Defendants from continuing to violate the overtime and recordkeeping provisions of the Act, awarded liquidated damages, and ordered further briefing by the parties on the amounts of back pay due, requesting that the Secretary explain seven specific aspects of his calculations in regard to the hourly employees and nine specific aspects of his calculations in regard to the non-hourly employees. *Id.* Defendants

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$36.07, to account for alleged miscalculations for Lube, Newberry, Baur, Crawford, and Hinz. R.46 at 4397-99.

filed a motion for reconsideration on the issue of liquidated damages, which was denied on February 14, 2018. R.42.

3. The district court found that the supplemental briefing of the parties had resolved certain issues, but requested the Secretary to provide a second supplemental brief explaining its calculations on three additional issues and a Declaration signed by the investigator. R.43, Order dated May 2, 2018. After considering the Secretary's second supplemental brief, which included revised and updated calculations regarding the amounts of back pay due to certain employees, the court issued a final summary judgment decision awarding $439,437.42 in back pay damages and an equal amount in liquidated damages, and entered judgment in favor of the Secretary. R. 46, Order dated June 5, 2018.

C. Decisions of the District Court

1. *Order Granting Summary Judgment on Liability, Liquidated Damages, and Injunctive Relief*

On October 6, 2017, the district court granted the Secretary's motion for summary judgment on liability, awarded liquidated damages, and enjoined Defendants from continuing to violate the overtime and recordkeeping provisions of the Act. R.33. It also denied Defendants' motion for summary judgment, and granted the Secretary's motion to amend the pleadings to include additional employees and FLSA violations which occurred during 2016 and 2017.

1. The district court first concluded that Defendant Timberline was a covered enterprise under the FLSA. R.33, Page ID# 3648-52. After reviewing the legislative history and judicial interpretation of the FLSA's enterprise coverage provision, the court agreed with Timberline that the company is not "engaged in the production of goods for [interstate] commerce" since it does not sell the "goods" it produces, raw timber, across state lines. *Id.* at 3648 (citing 29 U.S.C. 203(s)(1)(A)(i)). However, the court noted that Congress had repeatedly expanded other parts of the enterprise coverage provision, including its "handling clause," so that the FLSA now covers all enterprises which have "employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for [interstate] commerce by any person," if they meet the statutory threshold. *Id.* at 3639-43 (discussing 1961 and 1974 amendments) (citing *Polycarpe v. E & S Landscaping Serv., Inc*., 616 F.3d 1217, 1221 (11th Cir. 2010)). The court found that Timberline's employees handled and used "materials" that had traveled in interstate commerce, i.e., commercial logging and harvesting equipment that had been manufactured outside of Michigan, and concluded that the enterprise was therefore covered under the "handling clause." *Id.*

The district court rejected Defendants' argument that coverage was defeated by the "ultimate consumer exception."[8] The court explained that the exception applies only to consumer goods such as gasoline and oil, but does not apply to "materials" such as logging equipment: "the use of heavy machinery manufactured out of state in virtually all facets of Timberline business operations cannot properly be characterized as 'incidental consumption' of a consumer good so as to fall within the ultimate consumer exception." R.33, Page ID# 3649 (citing *Polycarpe*, 616 F.3d at 1222). It also rejected Timberline's assertions that the term "materials" was limited to small items provided to customers, such as the window shutters, paint, and alarms discussed in *Polycarpe*, 616 F.3d at 1227. The court noted that *Polycarpe* also included lawnmowers, trucks, and other landscaping equipment in its definition of "materials," and had remanded only for a determination of whether such equipment had moved in interstate commerce prior to purchase. *Id.* at 3650 (citing *Polycarpe*, 616 F.3d at 1228). The district court further rejected Timberline's objections that its involvement in commerce was de minimis and that it did not place the equipment into commerce itself, holding that neither argument was relevant to the post-1974 handling clause analysis. *Id.* at

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[8] The FLSA contains a definition of "goods" which excepts an employer from FLSA coverage if it is the ultimate consumer of all of its goods moved in or produced for interstate commerce and is not a "producer, manufacturer, or processor" of those goods. 29 U.S.C. 203(i).

3650-51. Because Timberline's employees used logging equipment which had been manufactured out of state as an integral part of its business operations, the court concluded that it was a covered enterprise. *Id.* at 3652.

2. The district court also concluded that Timberline's employees were not exempt from overtime under the forestry exemption, 29 U.S.C. 213(b)(28), the agricultural exemption, 29 U.S.C. 213(b)(12), the administrative exemption set out in 29 U.S.C. 213(a)(1), or the motor carrier exemption set forth in 29 U.S.C. 213(b)(1). *Id.* at 3652-3654. It determined that the forestry exemption was inapplicable because it is limited to small foresters with fewer than eight employees engaged in felling operations, and Timberline admittedly employs more than eight such employees. *Id.* at 3652-53 (citing 29 U.S.C. 213(b)(28); 29 C.F.R. 788.13). The district court concluded that the agricultural exemption was inapplicable because forestry and lumbering are only considered "agriculture" when performed by a farmer or on a farm in connection with farming operations, and it is undisputed that Timberline is not a farm. *Id.* at 3653 (citing 29 U.S.C. 213(b)(12); 29 U.S.C. 203(f)). The court further concluded that the administrative exemption did not apply since Timberline's only office employee is paid on an hourly basis instead of a salary basis as required by 29 C.F.R. 541.200. *Id.* at 3653-54.

Finally, in regard to the exemption claimed by Timberline relevant to this appeal, the district court rejected Timberline's contention that its truck drivers were exempt from the overtime requirements of the FLSA under the motor carrier exemption, 29 U.S.C. 213(b)(1). It explained that the exemption applies only to employees with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 31502, a part of the Motor Carrier Act ("MCA"), and only to employees of motor carriers who transport passengers or goods in interstate commerce and actually travel interstate. The court concluded that the exemption did not apply to Timberline's truck drivers because they do not cross state lines, and because Timberline's intrastate transportation of raw timber did not form part of a "practical continuity of movement" into interstate commerce. *Id.* at 3654-56. Finally, it held that the scope of the MCA exemption is much narrower than the test for determining coverage under the "handling clause," because the exemption requires each individual driver to personally cross state lines, while the coverage clause is enterprise-wide. *Id.* at 3656.

3. The court next addressed the issue of Timberline's liability for overtime pay generally. It noted that section 207(a)(1) of the FLSA provides that all non-exempt employees are entitled to overtime pay for all hours worked over 40 in any workweek, at the rate of at least one and one-half times their regular hourly rate,

while section 211(a) requires employers to keep records of hours worked and wages paid and 29 C.F.R. 516.2(a) requires employers to record the regular hourly pay rate for each workweek subject to overtime. R.33, Page ID#3656. The court found that Timberline had admitted to failing to record overtime hours worked for most employees, failing to compute or record regular hourly rates, paying straight time for all hours worked, and failing to pay overtime at the required rate. *Id.* at 3656-57 (citing Payne Dep. at 168-70, 280). The court thus concluded that Defendants had violated the overtime and recordkeeping provisions of the FLSA. *Id.* at 3657.

4. The district court then considered whether the Secretary had established the amount and extent of unpaid overtime hours for all workers "'as a matter of just and reasonable inference,'" and whether the employer had come forward with evidence of the precise amount of work performed or with other evidence to rebut the Secretary's evidence. R.33, Page ID# 3657 (quoting *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946)). The court questioned certain back pay calculations made by Investigator Wrona, and observed that it was unclear which employees were paid on an hourly basis, which were non-hourly, how much was due to each group, and whether Wrona based his calculations on payroll journal records or on employee interviews. *Id.* at 3659-64. Although it found that the employer had failed to meet its burden to negate those calculations, it nonetheless

ordered supplemental briefing addressing seven separate questions relating to back pay due to the hourly employees, specifically instructing the Secretary to make back wage calculations, to the extent possible, "with reference to the hours and rates contained in the [Defendants'] Payroll Journal". *Id.* at 3660-61.

The court found that some employees were paid based on other criteria including day rates, cord rates, piece rates, load rates, hourly rates, or various combinations of rates. It noted that Timberline also admitted to failing to maintain records of hours worked or regular rates paid to most of these workers, and had failed to negate the Secretary's calculations for these employees as well. However, the court again questioned the reliability and sources of the Secretary's back pay calculations, and ordered supplemental briefing addressing nine separate questions for the non-hourly workers with instructions to rely on available data where it existed. R.33, Page ID#33 3661-66.

The court also rejected two specific arguments made by Defendants as to the amount of back pay due. It refused to permit Defendants to offset time which workers allegedly spent driving to or from work, or on meal breaks, which would normally be non-compensable under the Portal-to-Portal Act, 29 U.S.C. 254(a). It held instead that Defendants had established a "custom or practice" of paying for

such time, and that the time was therefore compensable under an exception set forth in the Portal Act. *Id.* at 3658 (citing 29 U.S.C. 254(b)).[9]

5. The district court proceeded to consider whether Defendants should be held liable for liquidated damages. *Id.* at 3667-70. It noted that under the FLSA, employers "shall be liable for liquidated damages in an amount equal to the unpaid overtime compensation," but that the court may deny or reduce such damages where the employer meets the "substantial burden of establishing this affirmative defense," which necessarily includes a showing both of its subjective good faith belief that its act or omission was compliant with the FLSA and its objectively reasonable basis for that belief. R.33, Page ID# 3667 (citing 29 U.S.C. 216(b) & 260; *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991); *Elwell v. Univ. Hosps. Home Care Servs*., 276 F.3d 832, 840 (6th Cir. 2002)).

The district court concluded that "Defendant's single inquiry to Timberline's accountant falls well short of meeting this standard. Mr. Rooyakker's advice was at most an opinion [regarding] the general applicability of the agricultural exemption to Timberline's operations." R.33, Page ID# 3668. The court noted

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[9] The court did acknowledge Defendants' argument that its gross pay may have included reimbursements for fuel, mobile phones, or other items, and allowed Defendants to object to any such amounts which might be included in Wrona's revised calculations. *Id.* at 3661-62. However, no such objections appear in the record. There is also no record evidence of how many hours were actually spent driving, commuting, or on meal breaks.

that Payne had admitted that he did not actually believe that his truck drivers were agricultural employees, that he made no effort to follow up with Rooyakker, and that he performed no individual analysis of any employee's duties; thus, the court concluded that Payne could not have reasonably relied on Rooyakker's opinion to conclude that all his employees were exempt, including truck drivers and office employees. *Id.* at 3668-69 (citing Payne deposition).

The district court also concluded that Payne had not established his subjective, good faith belief that his truck drivers fell within the motor carrier exemption "at the time he developed Timberline's compensation structure." R.33, Page ID# 3669. Although Payne claimed that he had reviewed parts of a DOL Fact Sheet on the motor carrier exemption, he could not recall when he did so, and the Fact Sheet itself explained that it only applied to employees engaged in interstate commerce, i.e., "across state or international lines." *Id.* (quoting DOL Fact Sheet 19).[10] The court further rejected Timberline's contention that it should be excused from liquidated damages because it paid its employees above "industry norms," concluding that Defendants had not met their statutory burden of proof on

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[10] The court acknowledged that "it may be objectively reasonable for a covered employer to believe that its drivers are covered by the Motor Carrier Exemption" because it is a covered enterprise, but concluded that Payne did not prove that he made a good faith and reasonable effort to determine whether the motor carrier exemption applied "*at the time he developed Timberline's compensation structure*." R.33, Page ID# 3669 (emphasis in original).

this issue because the amount of compensation paid "does not affect the analysis." *Id.* at 3670.

6. Finally, the court granted the Secretary's motion to amend his complaint to add additional employees and violations identified during discovery, including supplemental discovery. It also granted his motion to enjoin future violations of the Act, based on Defendant's admitted refusals to correct its violations during the litigation and bring its pay structure and recordkeeping into compliance with the FLSA. R.33, Page ID# 3671-73.[11]

2. *Order Denying Defendants' Motion for Reconsideration*

The district court issued a second order on February 14, 2018, refusing to reconsider its decision on the issue of liquidated damages. R.42. Defendants contended that Payne had made more than "a single inquiry" to Rooyakker, and had spoken to him on a couple of occasions, but the court found that the number of discussions was immaterial, citing Rooyakker's testimony that he only advised Payne regarding the agricultural exemption in a single meeting with Payne in February 2011. *Id.* at 4175 (citing to Rooyakker Dep. at 61-62).

[11] The court also denied the Secretary's motion to strike evidence relating to Timberline Logging's DOT number as moot, explaining that the new evidence did not affect the motor carrier exemption analysis. R.33, Page ID# 3673-74.

The court reiterated its earlier holding that Defendants had not proven that they had a subjective good faith belief that all their employees were covered by the agricultural exemption, since Payne admitted that he did not actually believe that his truck drivers or office workers were agricultural employees, and Rooyakker admitted he had never reviewed employee's job duties with Payne, did not recall discussing which employees might be exempt, and did not discuss any other exemptions with Payne. R.42, ID Page# 4176-77 (citing to Payne Dep. at 306, Rooyakker Dep. at 45).[12] The court also refused to reconsider its earlier holding that Timberline's alleged belief was objectively reasonable. It agreed that Timberline was not required to consult an attorney, but held that employers may not rely on any advice unless that advice is fully informed, is based on all the facts, is reasonable, and is strictly adhered to. *Id.* at 4178. The court concluded that Rooyakker's general advice met none of these criteria -- he was not fully informed on all employees' duties, and did not offer any opinion on whether truck drivers or office employees fell within the agricultural exemption (the only exemption he commented on); his advice was not based on all the facts and was unreasonable, since Timberline is clearly not engaged in agriculture; and he did not advise Payne not to pay overtime to particular employees but left the decision to "'Jim Payne

[12] Payne did not contend that he had sought or relied on advice regarding the motor carrier exemption or any other exemption. See R.33 at 3637.

and his personnel.'" *Id.* at 4178-79 (quoting Rooyakker Dep. at 80). Therefore, the district court again held that Payne's alleged reliance on his accountant's advice was unjustified, and that Defendants had failed to meet their "substantial burden" as is required to avoid liquidated damages. *Id.*

3. *Order Directing Additional Briefing and Setting Status Conference*

The district court issued a third order on May 2, 2018, responding to the parties' supplemental briefing on damages. R.43. The court acknowledged the Secretary's revised and updated calculations, including his explanations for the methods and data sources used to calculate damages, and the Secretary's correction of its earlier estimates to reflect his reliance on updated payroll data rather than employee interviews for the hourly employees. *Id.* at 4181. The district court rejected Defendants' criticism of the Secretary's computations, finding that they were based entirely on data provided by Defendants, and that "Plaintiff is not at fault for any error in Defendants' payroll journals." *Id.* at 4184. Similarly, given the fact that Timberline failed to record the actual hours worked for certain employees (and/or failed to record a portion of the actual hours worked for other employees), the court upheld the Secretary's use of individualized average hours worked for that group, and rejected Timberline's suggestion that "industry aggregated data" should be used instead. As the court explained in regard to Gary

Payne, who was paid on both an hourly and a non-hourly basis in different workweeks,

> Once Defendants stopped recording [the worker's] hours, exact figures were no longer available and it was reasonable to assume, as Plaintiff did, that Mr. [Gary] Payne continued working approximately the same number of hours each week. Defendants offer no reason to question that assumption, nor do they offer a more realistic method to estimate the hours worked. Plaintiff's methodology reaches the most accurate result possible given the data available, and satisfies the "just and reasonable inference standard" set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1945).

*Id.* at 4188. The district court stated that Defendants' argument regarding the Secretary's reconstruction of the weekly hours worked for Payne and other employees "is essentially an attack on the statistical concept of an average." *Id.*

Finally, the court ordered the Secretary to provide further briefing on three remaining issues: correcting overlapping workweeks for the month of August 2015, explaining the basis for its estimates of weekly hours worked by similarly situated drivers and equipment operators, and explaining how it calculated back pay for Crawford, a non-hourly employee for whom Defendants claim that there were existing hourly records. *Id.* at 4189.[13]

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[13] The district court also ordered the Secretary to provide a Declaration signed by Wrona (to substitute for his original Declaration which had been signed by someone on his behalf), which the Secretary did. R.46 at 4396.

4. *Order Granting Summary Judgment as to Damages*

On June 5, 2018, the district court issued a final summary judgment order, awarding the employees $439,437.42 in back pay, with an equal amount in liquidated damages. R.46 at 4400. It found that the Secretary had resolved and explained each of the issues raised by Defendants, and acknowledged that the Secretary had reduced the amount owed to Newberry by $20.63 to account for the sole overlapping workweek. *Id.* at 4396.[14]

The court acknowledged that the Secretary had updated and reduced its estimated weekly hours worked to 55 hours for Baur (a truck driver) and 48 hours per week for Crawford and Hinz (equipment operators) based on updated data from the second payroll journal that was applicable to these non-hourly employees. R.46, Page ID# 4397.[15] It also acknowledged the Secretary's updated estimates for Crawford, along with Wrona's explanation of how they were calculated. R.46, Page ID# 4398.[16] It resolved Defendants' objection to the amounts calculated for

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[14] *See also* R.44-3 (explaining source of overlapping dates and reason for reduction of $20.63 for Newberry).

[15] In his revised Declaration, Wrona identified the "similarly situated employees" that he relied on and reduced his initial estimates of weekly hours worked for both truck drivers and equipment operators. *Compare* R.43 at 4185; R.44-3 at 4215-17.

[16] Wrona had initially calculated $780.15 to be due to Crawford based on what appeared to be an hourly rate listed in the payroll journal; after it became clear that Defendants had not recorded either his hourly rate or his hours worked, but had

Mike Lube, finding that the overlapping dates were due to an apparent typographical error, and gave Defendants "the benefit of the doubt" by further reducing the amount sought by $6,060. R.46 at 4397-98. The court also reduced the total award by $36.07, to account for an alleged miscalculation in the reductions for Newberry, Baur, Crawford, and Hinz. *Id.* at 4399.

The district court rejected Defendants' continued questioning of the accuracy of the Secretary's calculations, observing that "Plaintiff relied on Defendants' payroll journal in performing their calculations …., was not at fault for using data from Defendants' payroll journals.… [and cannot be blamed] for relying on the data produced by Defendants which Defendants represented to be accurate." R.46 at 4398-99. It thus concluded that the Secretary had proved overtime wages due to the 43 hourly employees by a preponderance of the evidence, and had proved overtime wages due to the non-hourly and combination-rate employees as a matter of just and reasonable inference as required by *Mt. Clemens*, 328 U.S. 680, an inference that was not refuted. Having deducted the $6096.07 noted above from the revised total of $445,533.49 sought by the

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erroneously listed a "day rate" under "hours," Wrona recalculated the amount due him as $2,037.26 based on average hours worked by other equipment operators. *See* R.44-3 at 4217-18.

Secretary, the district court awarded $439,437.42 in back pay, with an equal amount in liquidated damages. *Id*. at 4400.

## SUMMARY OF ARGUMENT

1. The district court correctly concluded that Defendant Timberline is a covered enterprise under the FLSA, since its employees "handle" and use logging and harvesting equipment that has previously traveled in interstate commerce in the course of performing their jobs. Such equipment qualifies as "materials," not "goods" as Timberline would have it, and is not subject to the "ultimate consumer goods" exception. Congress, in amending the FLSA in 1974, explicitly included the handling of materials under enterprise coverage, and the legislative history and case law clearly instruct that the kind of equipment necessary for Timberline's employees to perform their job duties falls within the definition of materials.

2. The district court also correctly concluded that Defendants' truck drivers were not exempt from the FLSA's overtime provisions under the Motor Carrier Act exemption, because the individual truck drivers transport timber solely within the state of Michigan. Furthermore, Timberline is not a "motor carrier" that provides motor vehicle transportation across state lines for compensation or a "motor private carrier" that transports property or goods in interstate commerce. Thus, neither the company nor the drivers are personally engaged in interstate commerce as required for DOT jurisdiction under the MCA. The fact that

Timberline's trucks have DOT registration numbers and that its drivers maintain Commercial Drivers Licenses does nothing to alter this conclusion. Actual involvement in interstate commerce is a requirement for the motor carrier exemption to apply, and by Timberline's own admission its truck drivers do not cross Michigan state lines while transporting the timber.

3. The district court correctly awarded damages in the form of back pay for overtime hours worked that were not paid at the proper rate because Defendants admitted that they failed to keep adequate records of hours worked or to pay for overtime as required. For the 43 hourly workers who were paid straight time, the Secretary established back pay due by a preponderance of the evidence, by calculating unpaid overtime hours based on Defendants' own payroll records (specifically, their payroll journals) and multiplying overtime hours by .5 to compute the back pay due. The district court properly rejected Timberline's effort to challenge the accuracy of its own payroll journals, and correctly concluded that the Secretary was entitled to rely on those documents, which Defendants had provided and represented to be accurate. For the other seven workers, who were paid at various non-hourly rates (either for part or for all of the relevant period) and for whom Defendants failed to keep required records, the Secretary reconstructed weekly hours worked and hourly rates where necessary and computed unpaid overtime hours in accordance with the "just and reasonable inference" standard of

*Mt. Clemens*, 328 U.S. 680. Defendants failed to negate that evidence or rebut those inferences as required to avoid liability. Thus, the court correctly awarded damages, as adjusted, based either on Defendant's own payroll records for the hourly workers, or on "just and reasonable inferences" of hours worked for the seven non-hourly workers for whom Timberline failed to keep adequate payroll records.

The district court also properly refused to offset alleged travel time or meal breaks from the recorded hours worked, finding that Timberline had established a custom or practice of paying for such time by including the time as "hours worked" on its payroll records, which made the time compensable under the Portal Act, 29 U.S.C. 254(b). In addition, Timberline failed to present any specific evidence to negate this finding or to show what hours were actually non-compensable.

The district court ensured that the damages award was reasonable and fair, and as accurate as possible (given that records were incomplete), by carefully and systematically addressing each objection made by Defendants and by deducting any disputed amounts before making the final award. Significantly, the Secretary filed two supplemental briefs, based in part on two additional Declarations by Investigator Wrona, in which he responded to the district court's detailed instructions regarding the calculation of damages. Specifically, the Secretary

responded to 19 separate requests made by the district court (and a 20th request for a signed Declaration from Wrona), often aimed at requiring the Secretary to rely on the actual records of Defendants to the extent that there were such records, which the Secretary assiduously did. In other words, it cannot be said that the district court just accepted the damage calculations of the Secretary without independently considering the accuracy of those calculations, or that the Secretary himself did not perform multiple recalculations with the goal of getting those damages right.

4. Finally, the district court did not abuse its discretion by awarding liquidated damages as required by law, since Defendants failed to prove both that they acted based on a subjective good faith belief that they did not have to pay overtime, and that their alleged belief was objectively reasonable. Payne admitted that he knew that his truck drivers and office workers were not agricultural employees (the only exemption even remotely raised with Defendants' accountant), and he made no efforts whatsoever to review any of the employees' job duties with his accountant for purposes of ascertaining the applicability of the agricultural exemption, let alone the motor carrier exemption, to any of his employees. Because Defendants failed to carry their burden of showing both good faith and objective reasonableness, this Court should affirm the district court's

award of liquidated damages, which is the norm and must be provided absent a showing that both prongs were met.

## STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, viewing all inferences in the light most favorable to the nonmoving party. *See Smith v. Perkins Bd. of Educ*., 708 F.3d 821, 825 (6th Cir. 2013); *Walton v. Ford Motor Co*., 424 F.3d 481, 485 (6th Cir. 2005). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

This Court reviews the district court's decision to award liquidated damages for abuse of discretion. *See, e.g., Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 840 (6th Cir. 2002).

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DETERMINED THAT TIMBERLINE IS A COVERED ENTERPRISE UNDER THE FLSA BECAUSE ITS EMPLOYEES HANDLE MATERIALS WHICH HAVE MOVED IN INTERSTATE COMMERCE

Timberline's contention that it is not covered by the FLSA should be summarily rejected. "It is well established that local business activities fall within

the FLSA when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce." *Brock v. Hamad*, 867 F.2d 804, 808 (4th Cir. 1989). Since 1974, "satisfying the handling clause [has been] an independent basis for bringing an enterprise under FLSA coverage." *Polycarpe*, 616 F.3d at 1221; *see, e.g., Dole v. Odd Fellows Home Endowment Bd.*, 912 F.2d 689, 695 (4th Cir. 1990) (residential home was covered enterprise where employees used goods and materials that had traveled in interstate commerce); *Donovan v. Pointon*, 717 F.2d 1320, 1322-23 (10th Cir. 1983) (real estate developer was covered enterprise where its employees handled construction machinery, including earth movers, bulldozers, scrapers, tractors, and chain saws, which had moved in interstate commerce); *Marshall v. Brunner*, 668 F.2d 748, 751-52 (3d Cir. 1982) (garbage collection business was covered enterprise where it used trucks, truck bodies, and other materials manufactured out of state).[17]

In light of this well-established precedent, the district court held that Timberline qualifies under the FLSA's enterprise coverage provision because its

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[17] As explained in *Polycarpe*, the coverage provisions of the FLSA have been expanded several times, most recently in 1974, and now, as is significant for purposes of resolving the issue in this case, cover enterprises over a certain dollar threshold which have employees "handling, selling, or otherwise working on goods or materials that have been moved in commerce by any person." 29 U.S.C. 203(s)(1)(A); *see* 616 F.3d at 1220-27 (explaining legislative history of 29 U.S.C. 203(s)(1)(A)).

employees "handled" or otherwise worked on "materials that have been moved in or produced for commerce by any person," namely logging and harvesting equipment manufactured outside Michigan, a fact that is not disputed. R.33, Page ID# 3648 (citing 29 U.S.C. 203(s)(1)(A)(i)). Timberline, however, contends that it is exempt because (1) the only "goods or materials" its employees handle are the cut timber, which it does not sell in interstate commerce; (2) its logging equipment does not qualify as "materials" as defined in *Polycarpe*; (3) even though the logging equipment it uses has been moved in commerce, its employees do not place such equipment "in commerce" themselves because they use it only in Michigan, and (4) its harvesting equipment should be considered "goods," and it is the "ultimate consumer" of the equipment. Br. 11-18. It is wrong on every point.

The district court correctly concluded that while the timber which Timberline produces falls within the definition of "goods" in 29 U.S.C. 203(i) (defining "goods" to include "products [and] commodities"), its logging and harvesting equipment qualifies as "materials." R.33 at 3648-49 (citing *Polycarpe*, 616 F.3d at 1226). The district court essentially followed the *Polycarpe* definition of "materials" as "tools or other articles necessary for doing or making something" that "have a significant connection with the employer's commercial activity," which the Eleventh Circuit concluded was consistent with the text (with reference to dictionary definitions of "materials") and the legislative history of the 1974

amendments. *See Polycarpe*, 616 F.3d at 1224-26.[18] This interpretation is reasonable and consistent with other case law. Indeed, both before and after *Polycarpe*, courts have recognized that tools and equipment fall within the definition of "materials" when they are necessary for employees to perform their jobs. *See, e.g., Polycarpe*, 616 F.3d at 1225, 1228 (cooking equipment is a "material" when used by a restaurant; remanding to district court to determine whether lawnmowers, trucks, and other items were "materials" when used in landscaping business); *Polycarpe v. E & S Landscaping Serv., Inc*., 821 F. Supp. 2d 1302, 1307 (S.D. Fla. 2011) ("*Polycarpe II*") (deciding on remand that trucks used in landscaping business were "materials," not goods); *see also Marshall*, 668 F.2d 751-52 (trucks and truck bodies were "materials" when used in local garbage collection business); *Burman v. Everkept, Inc.*, No. 1:15-cv-596, 2017 WL 1150664, at *8 (W.D. Mich. 2017) (vehicles and components such as tires and batteries were "materials" as used in garbage collection business); *Bautista Hernandez v. Tadala's Nursery, Inc.*, 34 F. Supp. 3d 1229, 1240 (S.D. Fla. 2014) (trucks used in local nursery business were "materials," not goods); *Centeno v. I &*

[18] The *Polycarpe* court explained that it relied on the Senate Report accompanying the 1974 amendments, which included "'goods consumed in the employer's business, as, e.g., the soap used by a laundry ....'" as an example of the "materials" which Congress sought to include in the expanded handling clause. 616 F.3d at 1224 (quoting S. Rep. No 93-690, 93rd Cong., 2nd Sess. at 17 (1974)).

*C Earthmovers Corp.*, 970 F. Supp. 2d 1280, 1296 (S.D. Fla. 2013) (excavators, loaders, and bulldozers used in construction business were "materials").[19] The same principles apply here. The district court correctly held that Timberline's logging and harvesting equipment qualifies as "materials," since it is used by Timberline's employees to cut down trees and transport the harvested timber, which are integral parts of their jobs.

There also is no merit to Defendants' contention that they are exempt because they use their logging equipment only within the state of Michigan, and do not place their logging equipment into commerce themselves. "Under the 'handling materials' clause of enterprise coverage, it is immaterial that the [vehicles] are purchased and/or used in Michigan." *Burman*, 2017 WL 1150664, at *9. "The fact that [defendant] may have himself acquired the goods and materials ... from sources within the state … is irrelevant …. The critical issue is whether the goods or materials handled by [defendant] and his employees had moved in interstate commerce" at some point prior to being purchased. *Donovan*, 717 F.2d

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[19] *Polycarpe* cautions that each item must be considered in context, so that plates being sold by a department store are defined as "goods," while plates being used by a catering company to serve food are "materials." *Polycarpe*, 616 F.3d at 1225-1226. Similarly, a truck or lawnmower might be considered "goods" when being sold by an equipment dealer, but "materials" when they are being used to perform essential functions of a business, such as landscaping, trash collection, or timber harvesting.

at 1322-1323. If the equipment was manufactured out of state and therefore moved in interstate commerce prior to purchase, and is then used by employees to perform their work, the enterprise is covered. *Marshall*, 668 F.2d at 751 (coverage established where trucks and truck bodies were manufactured out of state before use); *Polycarpe II*, 821 F. Supp. 2d at 1307 (coverage established where trucks were manufactured outside state before use in local landscaping business); *Solis v. Intern. Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 747-48 (N.D. Ill. 2011) (coverage established where employees used vehicles and other out-of-state materials to do their jobs); *Archie v. Grand Cent. P'ship, Inc*., 997 F. Supp. 504, 530-31 (S.D.N.Y. 1998) (coverage established where city sanitation crews used tools and equipment which had previously moved in interstate commerce to clean streets); *Dole v. Morefield Constr. Co*., 745 F. Supp. 1231, 1232-33 (E.D. Mich. 1990) ("interstate character" of heavy equipment, including bulldozer and trencher, is sufficient for enterprise coverage, even though items were acquired intrastate and were used solely within Michigan). In fact, Congress specifically intended the 1974 amendments to extend coverage to all businesses whose employees handle items which have moved in interstate commerce, as explained in *Dunlop v. Industrial America Corp*., 516 F.2d 498 (5th Cir. 1975). Thus, since 1974, "the use of a computer made in California, a pen made in Florida, or a lawn mower made in Illinois" does indeed result in FLSA coverage, despite Timberline's

protestations to the contrary, if those items are "handled" or otherwise worked on or used by the employees in Michigan to perform their jobs. Br. 16.[20]

Finally, as noted above, Defendants contend that their logging and harvesting equipment qualifies only as "goods," and that they "consume" those goods, so as to fall within the "ultimate consumer exception." Br. 17-18. They are wrong on both counts. As explained in *Polycarpe,* Congress expressly defined "goods" as "items sold by a business," including "wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof";[21] furthermore, as noted above, each item must be considered in context, so that plates being sold by a department store are "goods," while plates being used by a catering company to serve food are "materials." *Polycarpe,* 616 F.3d at 1225-1226. This distinction is well established, as is the principle that the

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[20] The cases cited by Defendants are irrelevant to this analysis, either because they focus on individual employee coverage rather than enterprise coverage, or because they predate the 1974 amendments. *See Thorne v. All Restoration Servs., Inc.,* 448 F.3d 1264, 1265-66 (11th Cir. 2006) (individual coverage); *Houchin v. Thompson*, 438 F.2d 927 (6th Cir. 1970) (same); *Wirtz v. Wohl Shoe Co*., 382 F.2d 848, 850 (5th Cir. 1967) (same).

[21] "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U.S.C. 203(i).

ultimate consumer exception does not apply to "materials." *See, e.g., Asalde v. First Class Parking Sys. LLC,* 898 F.3d 1136, 1141-44 (11th Cir. 2018) (jury could find that tickets used by valet car parkers were "materials," which would not be subject to the "ultimate consumer" exception); *Polycarpe,* 616 F.3d at 1222 ("ultimate consumer" exception does not apply to "materials"); *Exime v. E.W. Ventures, Inc.*, 591 F. Supp. 2d 1364, 1372 (S.D. Fla. 2008) (dry cleaning equipment was "materials," not subject to "ultimate consumer" exception); *Dole v. Bishop*, 740 F. Supp. 1221, 1225 (S.D. Miss. 1990) ("ultimate consumer" exception was effectively rendered obsolete by 1974 amendments); *Marshall v. Davis*, 526 F. Supp. 325, 328 (M.D. Tenn. 1981) (plumbing, heating, and air conditioning equipment used by apartment complex owner were "materials," to which ultimate consumer exemption did not apply). Here, Timberline is in the business of selling timber, not logging equipment; it uses the equipment to produce the timber, just as the catering company uses the plates to serve food. On these facts, the district court correctly concluded that Timberline's logging equipment must be considered "materials," not goods, to which the "ultimate consumer" exception does not apply. The district court also correctly concluded that Timberline does not "consume" its equipment under any definition of the word: instead, its employees handle or use that equipment to perform their timber harvesting jobs, just as the landscaping employees in *Polycarpe II* used their

lawnmowers and the garbagemen in *Marshall* and *Burman* used their trucks to perform their particular jobs. *See, e.g.*, *Polycarpe II*, 821 F. Supp. 2d at 1307; *Marshall*, 668 F.2d at 751-52; *Burman*, 2017 WL 1150664, at *8. As in those cases, because Timberline's employees handle logging and harvesting equipment which once moved in interstate commerce as an essential component of performing their jobs,[22] and the enterprise meets the statutory threshold, the entire enterprise is covered by the FLSA.

## II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE MOTOR CARRIER ACT EXEMPTION DOES NOT APPLY TO TIMBERLINE'S TRUCK DRIVERS BECAUSE THEY ONLY DRIVE WITHIN THE STATE OF MICHIGAN

The district court correctly concluded that Timberline's truck drivers are not exempt from the FLSA's overtime provisions under the motor carrier exemption at 29 U.S.C. 213(b)(1). The motor carrier exemption provides that the FLSA's overtime provisions do not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49." That

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[22] "It seems to us that an employee who uses an item at work will only sometimes be handling, selling, or otherwise working on the item for the purposes of FLSA coverage: an item's use must have a significant connection to the employer's business purposes." *Polycarpe*, 616 F.3d at 1227. Here, the "significant connection" of the logging equipment to Timberline's business purposes is manifest.

provision, which was enacted as part of the Motor Carrier Act, authorizes the Secretary of Transportation to establish "qualifications and maximum hours of service for employees of … a motor carrier [or a] motor private carrier…." 49 U.S.C. 31502(b)(1), (2). Under Department of Labor regulations, the MCA exemption depends "both on the class to which [the employer] belongs and on the class of work involved in the employee's job." 29 C.F.R. 782.2(a). For an individual employee to fall within the exemption, the employer must show that (1) it is a motor carrier or motor private carrier that provides transportation in interstate commerce, and (2) that the employee's work involves "the safety of operation of motor vehicles … in transportation in interstate or foreign commerce …." 29 C.F.R. 782.2(a)-(b)(2); *see Vaughn v. Watkins Motor Lines, Inc.*, 291 F.3d 900, 904 (6th Cir. 2002).

Here, Timberline cannot meet either criterion. First, nothing in the record shows that it is either a "motor carrier," defined as a "person who provides motor vehicle transportation for compensation," 49 U.S.C. 13102(14), or a "motor private carrier," defined as a person who transports property or goods in interstate commerce, 49 U.S.C. 13102(15). See *also* 49 U.S.C. 31502(a)(1), 13501(1) (Secretary of Transportation's jurisdiction limited to transportation by motor carrier in interstate commerce); 29 C.F.R. 782.2(a) (exemption limited to employees who "[a]re employed by carriers whose transportation of passengers or

property by motor vehicle is subject to [the Secretary of Transportation's] jurisdiction under section 204 of the Motor Carrier Act," and whose "activities ... directly affect[ ] the safety of operation of motor vehicles ... in interstate or foreign commerce within the meaning of the Motor Carrier Act"); *cf. Finn v. Dean Transp.*, 53 F. Supp. 3d 1043, 1053, n.11 (M.D. Tenn. 2014) (employer was motor private carrier where it transported a substantial volume of goods in interstate commerce, amounting to ten percent of sales volume); *Graham v. Town & Country Disposal of W. Mo., Inc.*, 865 F. Supp. 2d 952, 955 (W.D. Mo. 2011) (employer was involved in interstate commerce where its employees routinely crossed state lines to collect trash). As discussed above, the undisputed evidence in this case shows that Timberline's business is conducted solely within the state of Michigan; it does not transport its timber in interstate commerce as required for DOT jurisdiction to attach.

Second, there is no evidence in this case that any individual truck driver actually traveled or transported timber across state lines, as is necessary in order to fall within "the power" or jurisdiction of the Secretary of Transportation. *See, e.g.*, *Mazzarella v. Fast Rig Support, LLC,* 823 F.3d 786, 791-93 (3d Cir. 2016) (truck drivers who transported water to and from hydraulic fracking sites within state were not subject to MCA exemption, because they only drove intra-state); *Johnson v. Hix Wrecker Serv., Inc*., 651 F.3d 658, 661 (7th Cir. 2011) (to establish DOT

jurisdiction, employer must prove that individual tow truck driver either drives in interstate commerce or is subject to being assigned to out-of-state trips at any time); *Baird v. Wagoner Transp. Co.*, 425 F.2d 407, 413 (6th Cir. 1970) (truck drivers who transported oil solely within state of Michigan were not engaged in interstate commerce, where shipper had no "fixed and persisting transportation intent" to ship oil out of state at time of shipment) (citing 29 C.F.R. 782.7(b)(2)); *Goldberg v. Faber Indus., Inc.*, 291 F.2d 232, 234 (7th Cir. 1961) (truck drivers who did not cross state lines were not engaged in interstate commerce). Nor has Timberline shown that its drivers carry the raw timber in a "'practical continuity of movement' across State lines from the point of origin to the point of departure," 29 C.F.R. 782.7(b)(1) (quoting *Walling v. Jacksonville Paper Co*., 317 U.S. 564, 568 (1943)), or in a "continuous stream of interstate travel," *Walters v. Am. Coach Lines of Miami, Inc*., 575 F.3d 1221, 1229 (11th Cir. 2009).

Moreover, as this court explained in *Baird*, the mere possession of a certificate is not enough; the drivers' activities on the ground must actually affect the safety of interstate commerce. *See Baird*, 425 F.2d at 412-13. Similarly, it is not enough that the drivers here may hold a CDL (Commercial Drivers Licenses) and/or have a DOT registration number. "The DOT certificate merely authorizes Defendants to engage in interstate transportation. It provides no information about whether Defendants' drivers actually drove across state lines or otherwise engaged

in interstate commerce." *Mazzarella*, 823 F.3d at 792. The same is true here. Timberline has not met its burden to show that any of its truck drivers actually carried goods in interstate commerce, i.e., across state lines. Instead, the timber grows, i.e., originates, in Michigan, and is delivered and processed within Michigan. Although the timber may eventually be processed into lumber, which may ultimately be placed in commerce by another company (an unknown and unnamed lumber mill), Timberline's drivers do not transport the finished lumber into any other state, as is required for there to be DOT jurisdiction over the drivers. Nor are intrastate deliveries part of any "practical continuity of movement in interstate commerce," since the product is fundamentally transformed before it is sold interstate by someone else. *See, e.g.*, *Mazzarella*, 823 F.3d at 791 (describing "alteration" of product as evidence that drivers are not sufficiently involved in interstate commerce for exception to apply) (citing *Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895, 897 (7th Cir. 2009)). As in those cases, Timberline can point to no evidence showing that either it, its drivers, or its timber ever cross state lines or form any part of a "practical continuity of movement in interstate commerce." Absent such evidence, DOT has no jurisdiction over the company or the drivers, and the MCA exemption does not apply.

## III. THE DISTRICT COURT PROPERLY AWARDED BACK PAY FOR THE HOURLY EMPLOYEES BASED ENTIRELY ON TIMBERLINE'S OWN RECORDS IN THE FORM OF PAYROLL JOURNALS, AND FOR THE NON-HOURLY EMPLOYEES BASED ON THE SECRETARY'S COMPUTATIONS OF HOURS WORKED AS A MATTER OF "JUST AND REASONABLE INFERENCE"

The district court did not err in awarding back pay of $439,437.42 based on Investigator Wrona's revised back pay computations, as finally adjusted by the court. Both the district court and the Secretary (at the behest of the district court) carefully and systematically addressed each of Timberline's objections, relied when at all possible solely on available payroll documents produced by Timberline, especially for the hourly employees, and checked and verified their calculations. Indeed, the district court gave Timberline "the benefit of the doubt" by deducting any disputed amounts before making the final award.

1. Defendants contend that the district court's award of back pay damages lacks credibility and contains calculation errors, which it maintains are disputed issues of material fact. Br. 24-25. They specifically complain that DOL reduced its overtime damages amount over time from $468,595.08 to $445,533.49; that there was a discrepancy of $36.07 ($9151.31 - $9,115.24) in the amounts sought for Newberry, Baur, Crawford, and Hinz; and that Lube's back pay calculation contained nine overlapping date entries. However, Defendants fail to acknowledge that Investigator Wrona relied entirely on Timberline's own payroll records to the extent possible (especially for the hourly employees), and that the reasons for the

reductions were that Wrona, at the request of the district court, recalculated and reduced his totals after Defendants provided updated payroll journals, which were in turn used to recalculate damages for the hourly employees. As the district court correctly concluded, "Plaintiff is not at fault for any error in Defendants' payroll journals," R.43 at 4184, and cannot be blamed "for relying on the data produced by Defendants which Defendants represented to be accurate," R.46 at 4399.

Wrona also reduced the estimated hours worked by those employees who were paid on a non-hourly basis (Baur, Crawford, and Hinz); recalculated the hours worked by Crawford based on subsequent discovery; and subtracted $20.63 from the claim for Newberry because of an overlapping workweek, as the district court acknowledged. R.46 at 4396-97. Defendants further fail to acknowledge that the court already gave them "the benefit of the doubt" by deducting each of the challenged items from the final award: it reduced the total award by $36.07 to account for an alleged miscalculation for four workers (Newberry, Baur, Crawford, and Hinz) and deducted $6,060 from Lube's award, even though it found that the overlapping dates were due to an apparent typographical error. R.46 at 4397-99. Thus, the final award of $439,437.42 in back pay did not include any of the alleged errors cited by Defendants; any errors were corrected either by the Secretary in his recalculations or by the district court. *Id.* at 4400.

2. To the extent that Timberline kept either no records or incomplete records, the Secretary's calculations as to damages are not required to be "perfectly accurate or precise" in order to establish a "just and reasonable inference" of hours worked. *Monroe v. FTS USA, LLC*, 860 F.3d 389, 404 (6th Cir. 2017) (citing *Mt. Clemens*, 328 U.S. at 687-88), *cert. denied*, 138 S. Ct. 980 (Feb. 20, 2018). In such cases, if the plaintiff "produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," the burden of proof shifts to the employer "to come forward with evidence of the precise amount of work performed, or with evidence to negat[e] the reasonableness of the inference to be drawn …." *Mt. Clemens*, 328 U.S. at 687-88. "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 688; *see Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016); *Monroe*, 860 F.3d at 412 (affirming back pay award based on time sheets and payroll records, where company's records were inaccurate); *Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 472 (6th Cir. 1999) (affirming back pay award based on Secretary's unrebutted, credible evidence); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995) (affirming damages award based on employment records and interview statements, even though not "precisely accurate"). Thus, in the absence of complete and accurate records, "a FLSA plaintiff does not need to prove every

minute of uncompensated work," but may instead "estimate her damages, shifting the burden to the employer. If the employer cannot negate the estimate, then the court may award damages to the employee, even though the result be only approximate." *O'Brien v. Ed Donnelly Enters., Inc*., 575 F.3d 567, 602-03 (6th Cir. 2009) (internal quotation marks omitted). As this court has explained, "the central tenet of *Mt. Clemens* [is that] an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize the employees for an employer's failure to keep adequate records." *Monroe,* 860 F.3d at 412.

Timberline has admitted failing to maintain records of actual hours worked and actual hourly rates for at least seven employees who were paid in whole or in part on a non-hourly basis.[23] Therefore, for Baur, Crawford, Hinz, Axford, Freeman, Krzemien, and Gary Payne, Timberline "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had it kept records in accordance with the requirements of [the Act]." *Mt. Clemen*s, 328 U.S. at 687-88. In other words, Timberline's employees should not suffer because Timberline failed to adhere to the dictates of the FLSA by failing to

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[23] Timberline admitted that it failed to keep records showing hours worked and regular hourly rates for the three "non-hourly" employees, truck driver Baur and equipment operators Crawford and Hinz. R.33 at 3635-36; R.43 at 4185. It also kept only partial records for four employees who were paid various combinations of hourly and non-hourly rates, including Axford, Freeman, Krzemien, and Gary Payne. R.43 at 4185.

keep proper records. Given Timberline's admissions that it did not record all hours worked for these seven employees, the Secretary was only required to provide sufficient evidence upon which the court could draw reasonable inferences. The Secretary did so, and Defendants failed to come forward with "evidence of the precise amount of work performed, or with evidence to negat[e] the reasonableness of the inference to be drawn …." under the shifting burdens of *Mt. Clemens*, 328 U.S. at 687. The court was therefore well within its authority to award damages to the employees, "even though the result be only approximate." *Id.* at 688*; see Monroe*, 860 F.3d at 412; *Cole Enters.*, 62 F.3d at 781.

3. Instead of coming forward with any argument as to why their own payroll records should not be relied upon to determine damages for the hourly employees, or with any evidence to negate the Secretary's just and reasonable inferences necessitated by Timberline's incomplete records for the non-hourly or "combination" employees, Defendants make two specific legal arguments. First, they assert that any hours allegedly spent commuting or on meal breaks should be deducted from the back pay calculations, since an employer is not required to pay for such time under the Portal-to-Portal Act, 29 U.S.C. 254(a). Br. 29-32. As the district court held, however, by including all such time in their payroll records as "hours worked," Defendants established a custom or practice of paying for such time, and the time was therefore compensable under section (b) of the Portal Act.

R.33 at 3658 (citing 29 U.S.C. 254(b)). They cannot now avoid paying for the time by claiming to have recorded it in error, as the court correctly held. R.43 at 4184; R.46 at 4399.

Second, Defendants assert that the court should have awarded back pay for the non-hourly employees based on "industry aggregate data" rather than on its actual payroll data and the Secretary's calculations; however, it provides no case law in support of this novel approach, because there is none. Given the fact that Timberline failed to record the actual hours worked for these employees, the district court properly upheld the Secretary's use of individualized average hours worked by that group, and rejected Timberline's suggestion that "industry aggregated data" should be used instead. As the court explained,

> Defendants offer no reason to question [the Secretary's] assumption [of hours worked], nor do they offer a more realistic method to estimate the hours worked. Plaintiff's methodology reaches the most accurate result possible given the data available, and satisfies the "just and reasonable inference standard" set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1945).

*Id.* at 4188.

4. As a general matter, Timberline appears essentially to be arguing on appeal that, because there were multiple calculations performed by Wage and Hour Investigator Wrona, the credibility of Wrona and the veracity of his computations are suspect. Br. 24-29. Exactly the opposite is true. In response to queries and instructions from the district court -- which were themselves prompted at least in

part by objections to the damages raised by Timberline -- Wrona comprehensively and painstakingly took into account the actual records of Timberline itself, and to the extent he could not do so because Timberline had failed to keep accurate records, he reconstructed the hours worked and wages due as a matter of just and reasonable inference, an inference which Timberline decidedly did not refute. Wrona submitted two additional declarations and the Secretary submitted two supplemental briefs outlining Wrona's recomputations. If there was any doubt whatsoever as to the proper damages owed, the district court gave Timberline the benefit of the doubt, further reducing the total amount of damages. Thus, contrary to Timberline's argument on appeal that the subsequent correction of the initial computation of damages shows a "lack of credibility," Br. 25, it in fact demonstrates that both the district court and the Secretary engaged in rigorous efforts to reach an accurate back wage total for overtime not paid in contravention of the FLSA.

Thus, the district court properly awarded damages based on Defendants' own payroll data to the extent possible, and on a "just and reasonable inference" of overtime hours as calculated by the Secretary where such data was not available, consistent with *Mt. Clemens* and controlling Sixth Circuit precedent.

## IV. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING LIQUIDATED DAMAGES BECAUSE DEFENDANTS FAILED TO SHOW THAT THEY ACTED IN GOOD FAITH AND HAD REASONABLE GROUNDS FOR BELIEVING THAT THE FLSA DID NOT APPLY

Defendants contend that it is "unjust and inequitable" to award statutory liquidated damages to the employees here under 29 U.S.C. 216(b). In so doing, they ignore the law of this Circuit that liquidated damages under the FLSA are compensatory, not punitive, and have been described, absent certain affirmative showings described below, as "mandatory." *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 585 (6th Cir. 2004) (internal quotation marks omitted); *see Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 840 (6th Cir. 2002) (liquidated damages "are compensation, not a penalty or punishment") (internal quotation marks and citations omitted); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991).

District courts do have discretion to decline or reduce such damages where the employer proves that it acted in good faith and had reasonable grounds for believing that its act or omission complied with the FLSA. *See Elwell*, 276 F.3d at 840 (citing 29 U.S.C. 260); *Solis v. Min Fang Yang*, 345 F. App'x 35, 38 (6th Cir. 2009) (same). In order to demonstrate good faith, an employer "must show that [it] took affirmative steps to ascertain the Act's requirements, but nonetheless violated its provisions." *Martin*, 381 F.3d at 584 (internal quotation marks

omitted). If an employer claims to have relied on the advice of an accountant or attorney, the employer must show more than that a general conversation took place; rather, the employer must show in detail what specific advice it received on the particular compliance matter at issue, and how it relied on that specific advice. *See Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993). The employer must also show that its behavior was objectively reasonable. *See, e.g., Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 942 (8th Cir. 2008); *Williams v. Tri-County Growers*, 747 F.2d 121, 128 (3d Cir. 1984) ("The reasonableness requirement imposes an objective standard by which to judge the employer's conduct. Ignorance alone will not exonerate the employer under the objective reasonableness test."). The burden to prove both good faith and objectively reasonable behavior is "substantial," *Martin*, 381 F.3d at 584, and "[i]n the absence of such proof … a district court has no power or discretion to reduce an employer's liability for the equivalent of double unpaid wages," *Elwell*, 276 F.3d at 840 (internal quotation marks omitted).

Here, as the district court correctly concluded, Defendants failed to meet their "substantial" burden of proving both elements. Although Payne claims to have relied in good faith on accountant Rooyakker's advice, which addressed only the general applicability of the agricultural exemption, Payne admitted that he did not actually believe that his truck drivers or office workers were agricultural

employees, that he performed no individual analysis of any employees' duties, and that he never discussed the employees' actual duties with Rooyakker. R.33 at 3668-69 (citing Payne deposition); R.42 at 4178-79 (citing Rooyakker Dep. at 80). Furthermore, Payne did not prove that he had any good faith belief that his truck drivers fell within the interstate motor carrier exemption "at the time he developed Timberline's compensation structure"; to the contrary, he contended strenuously that his business only operated within the state of Michigan. *See, e.g.*, R.33 at 3669; *see also* Br. 12, 16 (Timberline's business is "wholly intrastate"; company is not engaged in interstate commerce).

The district court also correctly concluded that Timberline's failure to pay overtime was not objectively reasonable, regardless of Rooyakker's opinion, since Rooyakker did not advise Payne not to pay overtime but left the decision to "Jim Payne and his personnel," and Payne knew that neither Timberline nor his truck drivers were engaged in agriculture. R.42 at 4178-79 (citing Rooyakker Dep. at 80). In addition, Payne presented no evidence that he ever sought advice from Rooyakker (or anyone else) on whether his truck drivers were covered by the motor carrier exemption or any other exemption. Nor did he show that any alleged reliance on the MCA exemption was objectively reasonable, especially since he repeatedly insisted (and continues to insist) that the company was not engaged in interstate commerce. Given these undisputed facts, the court correctly concluded

that Payne's alleged reliance on his accountant's advice was unjustified, and that Defendants failed to meet the "substantial burden" required to avoid liquidated damages.

As in *Elwell* and *Martin*, Defendants have failed to prove that they acted in good faith when developing their compensation plan, or that they had objectively reasonable grounds for believing that they were in compliance with the FLSA. Thus, the district court did not abuse its discretion in awarding liquidated damages, which are the "norm" when back wages are awarded, *Martin*, 381 F.3d at 584, and this Court should affirm that award in full.

## CONCLUSION

For the reasons stated above, this Court should affirm the district court's decisions in all respects.

Respectfully submitted,

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# ADDENDUM

**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS PURSUANT TO LOCAL RULES 28(b)(1)(A)(i) and 30(g)(1)**

R.1, Complaint, Page ID # 1-6 (Apr. 29, 2016)

R.33, Order Granting Plaintiff's Motion for Summary Judgment in Part, Page ID # 3632-74 (Oct. 6, 2017)

R.38, Plaintiff's Supplemental Brief, Page ID # 3730-39, 3745-46 (Nov. 6, 2017)

R.38-9, Wrona Supplemental Declaration, attached as Exhibit 8 to Plaintiff's Supplemental Brief, Page ID # 3933-38 (Nov. 6, 2017)

R.42, Order Denying Defendants' Motion for Reconsideration, Page ID # 4172, 4175-79 (Feb. 14, 2018)

R.43, Order Directing Additional Briefing and Setting Status Conference, Page ID # 4181-89 (May 2, 2018)

R.44, Plaintiff's Second Supplemental Brief in Support of Damages Computations, Page ID # 4191-94 (May 17, 2018)

R.44-2, Declaration of Wage and Hour Investigator Jeffrey Wrona (May 8, 2018), attached as Exhibit A to Plaintiff's Second Supplemental Brief, Page ID # 4205-11

R.44-3, Supplemental Declaration of Wage and Hour Investigator Jeffrey Wrona, attached as Exhibit B to Plaintiff's Second Supplemental Brief, Page ID # 4212-18 (May 17, 2018)

R.44-8, Updated Summary of Back Wages, attached as Exhibit G to Plaintiff's Second Supplemental Brief, Page ID # 4354-55 (May 17, 2018)

R.46, Order Granting Summary Judgment as to Damages, Page ID # 4396-00 (June 5, 2018)

R.47, Judgment, Exhibit B, Page ID # 4401 (June 5, 2018)

R.48, Notice of Appeal, Page ID # 4402 (July 3, 2018)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system upon all attorneys who have entered an appearance in this case.

Dated: April 7, 2020 /s/Sarah J. Starrett