No. 20-1529

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE SCALIA, SECRETARY OF LABOR,

Plaintiff-Appellee,

v.

TIMBERLINE SOUTH LLC; JIM PAYNE,

Defendants-Appellants.

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

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases--Continued:

Page

Statutes:

Other Authorities:

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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 the district court's orders, including the April 10, 2020 Opinion & Order on Remand, R.68, PGID 4569, pursuant to 28 U.S.C. 1291 (final decisions of district courts).[1] Defendants filed a timely Notice of Appeal from that Order on June 5, 2020. R.70, PGID 4581; *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court properly granted summary judgment regarding the amount of back wages due for unpaid overtime work in accordance with the framework set forth in *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946), where Timberline South LLC ("Timberline") failed to document any commute time or bona fide meal break time in its payroll records of hours worked, where the Secretary relied on Timberline's own payroll records to establish as a just and reasonable inference the amount of uncompensated overtime hours worked and

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[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 "PGID ___" (ECF page number).

back pay due, and where Timberline failed to establish a genuine issue of material fact by coming forward with either "evidence of the precise amount" of non-compensable commuting time and/or bona fide meal breaks which were allegedly taken or other evidence to negate the reasonableness of the Secretary's estimates of the amount of uncompensated overtime work for each of Timberline's 50 employees who performed uncompensated overtime work.

2. Whether the district court properly concluded that Defendant's other allegations of errors in the Secretary's back pay calculations were either unsupported or insufficient to create a genuine issue of material fact, where the Secretary's calculations relied on Timberline's own payroll journals and therefore any errors in the Secretary's calculations were due to Timberline's own mistakes.

STATEMENT OF THE CASE

A. Factual Background

1. Defendant Timberline is a logging company in the state of Michigan, and is managed by Defendant Jim Payne, who directs all of its operations. *Secretary of Labor v. Timberline South LLC* (*"Timberline I"*), 925 F.3d 838, 841 (6th Cir. 2019). During the relevant period, Timberline operated two to four worksites, at each of which it employed approximately four equipment operators who used heavy equipment to cut down trees, cut the raw timber into lengths, and transport the timber to a central landing site. *Id*. It also employed six to eight truck drivers,

who loaded the timber at the landing sites and transported it to lumber mills within the State for processing into paper and other products. *Id*.

2. The Wage and Hour Division of the Department of Labor ("DOL") initially investigated Timberline's payment practices during the two-year period of August 25, 2013 through August 20, 2015, which was later extended through March 20, 2017. *Id*. 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). *Timberline I,* 925 F.3d at 842. Timberline's payroll records showed that many employees worked 50 to 60 hours a week. *See, e.g.*, R.25-7 (timecards showing 65.75 and 54.5 weekly hours), PGID 2715, 2716.

The company paid most of its equipment operators and truck drivers on an hourly basis and recorded their hours of work. R.33, Order Granting Pl.'s Mot. for Summ. J. in Part, PGID 3632, 3635-36; R.43, Order Directing Additional Briefing and Setting Status Conference, PGID 4181 & n.1.[2] However, it paid certain other

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[2] For the period from August 25, 2013 through August 20, 2015, Timberline recorded hourly employees' weekly hours of work, in addition to their gross weekly wages and their hourly rate. R.43, PGID 4181-82 (citing R.18-10, PGID 414). For the period from August 21, 2015 through March 20, 2017, Timberline's payroll journals recorded only their gross weekly wages and their hourly rate, but not their weekly hours of work. R.43, PGID 4182 (citing R.18-11, PGID 1653).

workers a day, cord, piece, or load rate, and paid others "a combination of hourly rates as well as day, cord, piece, and/or load rates" at various times during the relevant period. R.33, PGID 3635, 3661.[3] It admitted that it did not record the hours worked or regular hourly rates for most non-hourly employees or the combination-rate employees when they were being paid non-hourly rates, R.33, PGID 3636, 3661, but recorded only their day or piece rates and their gross weekly wages. R.43, PGID 4185-86. Defendants admitted that Timberline made no effort to record, track, or total working hours for the non-hourly employees or the combination-rate employees for those periods, or to identify whether these employees worked over 40 hours a week. R.18-4 (Payne Tr.), PGID 229-30. They also admitted that it did not pay any of these employees (i.e., hourly, non-hourly, or combination-rate employees) for overtime at one and one-half times their regular hourly rate during the relevant period. R.33, PGID 3635-36, 3656, 3661.

3. Timberline required its hourly workers to record their daily and weekly "hours worked" each week on timecards, R.25-4 (Payne Tr.), PGID 2684, which Timberline then input into its computerized payroll journals. R.25-3 (Klein Tr.),

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[3] Thus, for purposes of calculating the back pay owed, there were three groups of employees: (1) employees paid solely an hourly rate during the relevant period; (2) employees paid solely a non-hourly rate (i.e., a piece rate, cord or load rate (which are types of piece rates), or a day rate); and (3) employees paid some combination of an hourly rate for some weeks and a piece and/or day rate for other weeks.

PGID 2684. These records typically recorded only the hourly employees' start and stop times each day, with no indication of any time spent commuting between the employee's home and work or of any lunch or other meal breaks, and likewise no indication that any such time was included in the hours of work. *Id*. at PGID 2665, 2667, 2669; R.25-4 (Payne Tr.), PGID 2676-77, 2684. Timberline kept no records of any employee's time spent commuting between the employee's home and work. Likewise, Timberline kept no records indicating if and when any employee took a meal break or the duration of any such meal break. Defendant Jim Payne admitted that the employees did not record ordinary commuting time or meal breaks on their timecards: "they don't keep track of it. It's just the hours they work." R.25-4 (Payne Tr.), PGID 2685. Though Timberline admitted that it required employees to work eight to ten hours a day, R.18-4, PGID 225, 226 (Payne Tr.), Jim Payne conceded that he does not know how long employees spent on the worksite each day, how long they spent eating lunch, or even whether employees took lunch breaks each day, R.25-4, PGID 2676-77, 2684, 2685, 2689, 2696; R.18-4, PGID 232. He also conceded that Timberline made no effort to separate commuting time from work-related travel time in its records, for example travel to or from fueling stations or between the shop and various worksites. R.25-4 (Payne Tr.), PGID

2673-74, 2683, 2696.[4] Thus, Timberline has no records indicating that commute or meal time was included in its payroll journals as hours of work.

4. For their part, numerous hourly employees testified that the hours they recorded on their timecards were accurate, and that they recorded hours only for work performed at the worksites and not for time spent commuting or eating. *See, e.g.,* R.18-16, PGID 1715-16 (Eddy Decl.), 1722-23 (Jacobs Decl.), 1728 (Straight Decl.); R.25-6, PGID 2711 (Palmer Decl.). For example, equipment operator Philip Eddy stated that he worked 45 to 50 hours per week, but "was not paid for the time [he] spent commuting between home and the worksites and [he] did not

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[4] Timberline's timecards instructed employees to record "drive time to the job FROM THE SHOP;" but nothing on the cards instructed employees to record or include any home-to-work commute time. R.25-7, PGID 2715 (emphasis in original). Jim Payne himself described so-called "drive-to-work" time as including fueling up, picking up tools and equipment at the shop, driving from the shop to the worksite, and driving back to the shop, R.25-4, PGID 2683, none of which is actual home-to-work commuting. There is evidence in the record that Timberline sometimes required employees to perform work during their commute between their homes and the shop. Jim Payne admitted that Timberline's equipment operators typically had to drive their personal trucks to a designated fuel station at least once a day on the way to or from their worksites, where they were required to fill up a one-hundred gallon fuel tank every day to power their forestry equipment, and then had to "stop by the shop and pick up some oil or hoses and drive to their job." *Id.* at PGID 2672-74; *see also* PGID 2695, 2698, 2700. Employees "get fuel at least once a day. That's usually over a half hour process in itself." *Id*. at 2702. Jim Payne also admitted that he did not know when or how often any particular employee stopped for fuel or at Timberline's shop to pick up or drop off equipment between work and home, and did not know how long employees actually spent working on any particular worksite, other than what the records showed. *Id.* at PGID 2686-89, 2696-2702.

record that time on [his] timecards." R.18-16, PGID 1715-16; *see also* PGID 1719 (Hamilton Decl.) (truck driver Hamilton typically worked at least 50 hours per week, with the work time he recorded starting when he arrived at Timberline's shop at the beginning of the day and ending when he left the shop at the end of the day), 1728 (equipment operator Straight typically worked and recorded 50-60 hours per week on the worksite, not including commuting time); R.25-6, PGID 2712 (truck driver Palmer typically worked 50-60 hours per week, with the work time he recorded starting when he arrived at Timberline's shop at the beginning of the day and ending when he left the shop at the end of the day).

The record also contains no evidence of any employee regularly taking 30-minute meal breaks, if they took lunch breaks at all; most of the time, they ate lunch while working. *See, e.g.*, R.18-16, PGID 1728 (Straight) ("I ate my lunch while I worked on my machine. It took me about 5 to 10 minutes to eat my lunch. All the guys on the site basically did the same thing and ate while working. We did not take a half-hour to eat."), 1731-32 (Fletcher) ("I never took off to eat lunch because I typically did not have time to do so. I pretty much ate while I drove to and from the mills. . . . I understood that as far as Jim Payne was concerned, truck drivers could eat and drive. . . . There was no designated time to eat lunch.."), 1719-20 (Hamilton) ("The majority of the time I ate lunch in my truck while driving."), 1723 (Jacobs) ("I generally ate in the cab of my truck while I was

driving to and from the mill," which was a six-hour round trip); *see also id.* at PGID 1725-26 (Sanborn), 1716 (Eddy); R.25-6, PGID 2713 (Palmer).

5. Timberline submitted five identical affidavits from five other employees, each of whom stated that "On most days I drove about one hour to the jobsite, and one hour home, and took a half-hour lunch when I could fit it in. When I reported time, I included my drive time and lunch time in total hours." R.41-12, Affidavit of William Axford, PGID 4167; *see also id.*, identical Affidavits signed by Gary Payne, David Keyser, Dan Kitchen, and Mark Ogden, PGID 4168-4171. Jim Payne admitted, however, that the time each worker actually spent commuting would vary widely, depending on where the worker lived, the location of their worksite (which could change daily or weekly), and on whether they had to stop and fill up their bulk fuel tanks on the way to the worksite. R.25-4, PGID 2683, 2685-87, 2698; *see also* PGID 2697-2702 (for example, employee Kitchen recorded 40 minutes of "drive time," but Jim Payne did not know whether that was one way or both ways, or whether it included driving to the fuel station or time spent filling fuel tanks).

B. The Secretary's Back Pay Calculations

1. Wage and Hour Investigator Jeffrey Wrona calculated unpaid overtime hours and back pay differently for each of the three groups—hourly workers, non-hourly workers, and the combination-rate workers. R.33, PGID 3635; R.43, PGID

4181. For the hourly workers, of whom there were 43, Wrona calculated each of these 43 employees' uncompensated overtime hours and back pay due by relying primarily on two sets of Timberline's payroll journals, as corroborated by employee interviews. "Computing overtime for these employees [was] a simple case of arithmetic based upon Defendants' own records." *Timberline I*, 925 F.3d at 851-52 (quoting R.38, PGID 3725-26). To calculate unpaid overtime due for the first two-year period, Wrona simply multiplied each employee's recorded hours worked over 40 in each workweek by one-half of the employee's hourly rate to calculate overtime back wages due to that employee. R.43, PGID 4182. For the period of time covered by the second payroll journal, which did not contain weekly hours worked, Wrona had to take the additional step of first determining the weekly hours worked by dividing each employee's weekly gross wages by that employee's hourly rate, then calculating the unpaid overtime by multiplying any hours over 40 in each workweek by one-half of that employee's hourly rate. *Id.*

2. Timberline admitted that it failed to keep adequate records of the hours worked by the three non-hourly and four combination-rate employees' hours worked R.33, PGID 3635, 3661; R.43, PGID 4185-4186. As a result, for these seven employees, Wrona had to estimate or "reconstruct" their weekly hours to calculate unpaid overtime due to each employee, based on the available payroll journals. R.33, PGID 3635; R.43, PGID 4181.

For the three "non-hourly" employees (truck driver Gayle Baur and equipment operators Don Crawford and Shawn Hintz), Timberline recorded only their weekly gross wages; it had no records of their weekly hours worked for any portion of the relevant period. R.33, PGID 3635-36; R.43, PGID 4185; R.46, Order Granting Summ. J. as to Damages, PGID 4397. Therefore, Wrona relied on similarly-situated employees to estimate these three non-hourly employees' weekly hours worked. Timberline's payroll journals showed that, within the group of 43 hourly employees, equipment operators averaged 48 hours of work per week during the relevant period and truck drivers averaged 55 hours. *See Timberline I,* 925 F.3d at 851-52 (summarizing evidence); R.18-10 (payroll journal for 2013-2015); R.18-11 (Excerpt of payroll journal for 2015-2017); R.43, PGID 4184-85; R.44-3, PGID 4215-17; R.46, PGID 4397 (payroll journals showed that truck drivers averaged 55 work hours per week, while equipment operators averaged 48 hours weekly). Wrona applied the average hours worked by these similarly situated employees to the three non-hourly employees.[5]

For the four "combination-rate" employees (William Axford, Tom Freeman, Jeremy Kremien, and Gary Payne), Timberline admitted that it kept only partial

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[5] For Baur and Hintz, Wrona had initially relied on employee interviews to estimate weekly hours worked. R.18-17, PGID 1739; R.38-9, PGID 3934-35. Later, as directed by the court, he revised those estimates to rely instead on payroll records for similarly situated workers. R.44-2, PGID 4209; R.44-3, PGID 4216.

records; it had records of their weekly hours worked for the portion of the relevant period when it paid them an hourly rate, but it did not have such records for periods when it paid them a piece, cord, load, or day rate. R.43, PGID 4185-86. For these employees Wrona explained that he created an "individualized estimated average" of weekly hours worked for each employee by relying on payroll journals, to the extent they existed. R.44-2, PGID 4209; *see also* R.38-9, PGID 3937-39; R.18-17, PGID 1739. For example, Wrona determined that combination-rate employee Gary Payne's partial payroll records showed that he averaged 66.5 hours a week when he was being paid by the hour. Wrona used this individualized average to calculate his weekly hours and unpaid overtime hours for the weeks after Timberline changed his compensation to non-hourly and stopped recording his hours. R.43, PGID 4186-87.[6]

Thus, as summarized by this Court, the Secretary explained that he estimated overtime hours "for the remaining seven employees without complete hours-worked records by: "(1) averaging the number of hours similarly situated

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[6] Wrona initially included Crawford as a combination-rate employee and estimated his weekly hours worked using this method. Wrona later explained that, although Defendants represented Crawford to be an hourly or a "combination-rate" employee, he was neither—he was actually a non-hourly employee because he was paid a day rate for the entire relevant period, with the number of days erroneously reported as hours worked. Therefore, Wrona ultimately revised Crawford's estimated average weekly hours to rely on the average number of hours worked by similarly situated equipment operators (48 hours). R.44-3, PGID 4216.

employees worked per week or (2) averaging the number of hours individual employees worked each workweek based upon time records previously kept for each employee prior to Defendants changing the employee compensation to nonhourly and ceas[ing] keeping the required records." *Timberline I,* 925 F.3d at 852 (quoting R.38, PGID 3726); *see also* R.43, PGID 4185-86.

Once Wrona estimated each of these seven employee's weekly hours worked as accurately as possible, he calculated their regular hourly rate of pay using the same method as for the 43 hourly workers: he divided each employee's gross weekly wages by the hours worked by each person for each week of the four-year back pay period. R.18-17, PGID 1738-39; R.38-9, PGID 3934. To calculate the overtime back wages due to each employee, he then multiplied the hours over 40 by one-half the regular hourly rate for that employee. R.18-17, PGID 1738-39; R.38-9, PGID 3935-38. Additionally, Wrona revised, clarified and updated his calculations and computation methodology for certain workers several times, ultimately reducing his estimated total of unpaid overtime back wages from $468,595 to $445,533.49. *Timberline I,* 925 F.3d at 852; R.46, PGID 4400.

C. Procedural History

1. The Secretary originally commenced this lawsuit in April 2016, 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. R.1, Compl.; 29 U.S.C. 216(c), 217.

2. After discovery was complete, the Secretary moved to amend the pleadings to include additional employees to whom Timberline owed back wages and to add FLSA violations which had occurred during 2016 and 2017. R.16, Mot. for Leave to Amend Compl., PGID 59. Both parties filed cross-motions for summary judgment. R.18, Pl.'s Mot. for Summ. J., PGID 130; R.19, Defs.' Mot. for Summ. J., PGID 2038. The Secretary's motion sought summary judgment on both coverage and liability, as well as damages owed to 50 employees for unpaid overtime for August 25, 2013 through March 17, 2017.

3. On October 6, 2017, the district court issued an order granting the Secretary's motion to amend the pleadings, granting in part the Secretary's motion for summary judgment as to coverage and liability, and denying Defendants' motion. R.33. The court concluded, in relevant part, that Timberline had violated the FLSA's overtime and recordkeeping requirements and that any commute or meal time included in the records of hours worked were made compensable by an exception to the Portal-to-Portal Act. *Id.* But the court denied the Secretary's motion for $468,595 in damages and ordered supplemental briefing by the parties on the amounts of back pay due. *Id.* at PGID 3665-66; *see also Timberline I,* 925 F.3d at 851.

4. After both parties responded to the court's order and the Secretary revised and updated his estimates of unpaid overtime hours worked, the court, on May 2, 2018, directed additional briefing to address specific questions regarding the Secretary's revised estimates of unpaid overtime hours worked. R.42, PGID 4172; R.43, PGID 4181.

5. Both parties again responded, and the Secretary again revised and updated his estimates of unpaid overtime hours worked, and also explained and clarified the sources upon which he relied for his estimation of hours worked. *See, e.g.,* R.44, Sec'y's Second Supp. Br. in Support of Damages Computations, PGID 4191; R.44-2, Wrona Supp. Decl., PGID 4205 (reducing the total estimated overtime due to $456,684.73); R.44-3, Wrona Supp. Decl., PGID 4212; R.44-8, Updated Summary of Back Wages (further reducing the estimated overtime damages to $445,533.49); *see also Timberline I,* 925 F.3d at 852.

6. On June 5, 2018, the court issued a final summary judgment decision in favor of the Secretary, but reduced the amount calculated by Wrona, awarding $439,437.42 in back pay damages and an equal amount in liquidated damages. R.46, PGID 4400.

7. Defendants appealed to this Court, which affirmed on coverage, liability, and liquidated damages. *Timberline I,* 925 F.3d at 857-58. However, the Court concluded that the district court had erred on the issue of including any "ordinary

commute" or "bona fide meal time" in compensable hours worked, and remanded for further fact-finding on the issue of whether such time had improperly been included in the Secretary's calculations of overtime worked. *Id.* at 855.

8. On remand, the district court considered the evidence proffered by Defendants relating to commuting time and bona fide lunch breaks, and again concluded that the Secretary had made a reasonable estimate of total hours worked based on Defendants' payroll records, and that Defendants had failed to carry their burden to negate or rebut the reasonableness of those calculations. Therefore, the court again concluded that the correct amount of unpaid overtime owed was $439,437.42, plus an equal amount in liquidated damages. R.68, PGID 4578.

D. Court Decisions

1. *District Court's Order Granting Summary Judgment on Coverage, Liability, Liquidated Damages, and Injunctive Relief*

After holding in its October 6, 2017 summary judgment order that Defendant Timberline was a covered enterprise under the FLSA and that Timberline's employees were not exempt from overtime under either the motor carrier, forestry, or agricultural exemption, the court concluded that Timberline had admitted to failing to record overtime hours worked, failing to compute or record regular hourly rates, paying straight time for all hours worked, and failing to pay overtime at the required rate. R.33, PGID 3656 (citing Payne Tr. at 168-70, 280), 3661. The court thus concluded that Defendants had violated the overtime and

recordkeeping provisions of the FLSA, and that both Defendants were liable to their employees for unpaid overtime. *Id.* at PGID 3657.

The 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 Defendants had come forward with evidence of the precise amount of work performed or with other evidence to rebut the Secretary's evidence. R.33, PGID 3657 (quoting *Mt. Clemens*, 328 U.S. at 687. The court questioned certain back pay calculations made by Investigator Wrona, observing that it was unclear how each worker was paid (hourly or 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 PGID 3659-64. However, the court also concluded that Defendants' "rough estimates" were insufficient to meet its burden under *Mt. Clemens* to rebut or negate the Secretary's calculations. *Id.* at PGID 3661.

As a result, it ordered both sides to address seven separate questions regarding the amounts of back pay due to the hourly workers, and specifically instructed the Secretary to revise his back wage calculations, to the extent possible, "with reference to the hours and rates contained in the [Defendants'] Payroll Journal." *Id.* at PGID 3660-61. It also requested that the parties address nine specific aspects regarding the amounts due to the non-hourly and combination-rate

employees. Specifically, the court noted that some employees had submitted declarations to the court estimating their hours, while others had been interviewed but the interviews were not part of the record, and that the source of the data for others was unclear. *Id.* at PGID 3662-63. The court ordered the Secretary to identify and explain the sources of his data and calculations for each of the seven non-hourly and combination-rate workers, and to rely on available payroll data, including payroll journals, timecards, employee declarations or depositions, to the extent possible. *Id.* at PGID 3665-66.

Although Defendants contended that some of the timecards and payroll journals allegedly included time which was spent commuting between a worker's home and the shop or the worksite or allegedly spent on non-compensable bona fide meal breaks, the court refused to permit Defendants to offset any such time, holding that the hours were compensable under an exception set forth in the Portal-to-Portal Act because Timberline admitted that it had agreed to pay for that time. *Id*. at PGID 3658 (citing the Portal Act, 29 U.S.C. 254(a), (b)). Defendants did not offer any records or other evidence showing how much time they believed that any worker spent on such non-compensable activities or that such time was included in Timberline's records of hours worked.

2. *District Court's Order in Response to Supplemental Briefing and Requesting Additional Briefing*

On May 2, 2018, the district court responded to the parties' supplemental briefing on damages. R.43. It acknowledged the Secretary's explanation of the methods and data sources used to calculate damages for each worker, and his clarification that the calculations for the hourly employees relied solely on Timberline's payroll journals. *Id.* at PGID 4181. The court approved of the Secretary's revised methodology used to estimate weekly hours worked for the non-hourly workers, which recalculated the weekly estimated averages using payroll data for similarly situated workers, rather than employee interviews. *Id.* at PGID 4185. Similarly, given the fact that Timberline failed to record the hours worked for the seven non-hourly and combination-rate employees, the court endorsed 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. *Id.* at PGID 4187. As the court explained in regard to Gary Payne, who, as a combination-rate employee, was paid on an hourly and a non-hourly basis in different workweeks, "[o]nce 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." *Id.* at PGID 4188.

The court also rejected Defendants' efforts to critique the Secretary's methodology "by cherry picking particular workweeks with unusually high gross wages or unusually low gross wages," concluding that "Defendants' argument is unpersuasive, because it is essentially an attack on the statistical concept of an average." *Id*. at PGID 4187-88. In approving the Secretary's revised methodology for the non-hourly and combination-rate employees, the court noted that "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 *[Mt. Clemens]*." R.43, PGID 4188 (internal citation omitted).

The court further rejected Defendants' criticism that numerous errors in the data underlying the estimated damages undermined the entire set of calculations (as shown in a chart which purported to show discrepancies between the estimated damages and timecards for eight specific workweeks, R.41, PGID 4114). The court concluded that Defendants "overlook[] the fact" that the Secretary's computations were based entirely on Timberline's own payroll journals that Timberline had provided to the Secretary, not on the timecards. "Defendants have not identified a discrepancy between the payroll journals and the Plaintiff's

computation sheets[,]" and therefore any discrepancies in Timberline's data were its own fault and could not be blamed on the Secretary. R.43, PGID 4184.[7]

However, the court did agree with Defendants that the Secretary's estimated damages appeared to contain overlapping workweeks for the month of August 2015, and that some factual questions remained regarding the source of the Secretary's estimated hours for Baur, Hintz and Crawford,[8] the three non-hourly workers. R.43, PGID 4184-86. As a result, the court ordered the Secretary to revise his calculations a third time to address these issues. R.43, PGID 4189.

3. *District Court's Order Granting Summary Judgment as to Damages*

On June 5, 2018, after the Secretary again revised his calculations, the district court awarded summary judgment on damages, reducing the employees' award for unpaid overtime to $439,437.42 and an equal amount in liquidated damages. R.46, PGID 4400. It 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 seven non-hourly and combination-rate

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[7] The court specifically noted that that "Defendant's payroll journal reflects 51.25 hours for Gary Nadell for the workweek ending August 7, 2015," and that "in some cases the hours from the employee timecards would have resulted in overtime liability higher than Plaintiff's calculation reflects." R.43, PGID 4184.

[8] As previously noted, Defendants represented that Crawford had been paid by the hour; but the Secretary eventually learned that he was actually paid a day rate and that no hourly records existed for him. *Id.* at PGID 4184-86.

employees as a matter of just and reasonable inference as required by *Mt. Clemens*. *Id*.

The court noted that the Secretary had revised and updated his estimate to resolve and/or explain each of the issues raised by Defendants, had corrected the overlapping workweek issue, and had updated and reduced his estimated weekly hours worked based on additional data from the second set of payroll journals. R.46, PGID 4396-98. Specifically, the court acknowledged that the Secretary had reduced the amount owed to Randy Newberry by $20.63 to remove any duplication, reduced the estimated weekly hours to 55 hours for Baur (a non-hourly truck driver) and 48 hours for Hintz and Crawford (non-hourly equipment operators), and updated the estimates for Crawford based on the records available, all as directed by the court. *Id.,* PGID 4396 (Newberry), 4397-98 (Baur, Hintz, Crawford).[9] The court noted that certain overlapping dates cited in 2016 for Mike Lube appeared due to an apparent typographical error but gave Defendants "the benefit of the doubt" by further reducing the amount due him by $6,060. R.46, PGID 4397-98. The court also reduced the total award by $36.07, to account for

[9] In his revised Declaration, Wrona explained why he reduced his initial estimates of weekly hours worked for both truck drivers and equipment operators, identified the "similarly situated employees" for each worker, and explained the basis for his revised estimates for Crawford. R.44-3, PGID 4215-18.

an alleged miscalculation in the reductions for Newberry, Baur, Crawford, and Hintz. *Id.* at PGID 4399.

The district court again rejected Defendants' argument that the Secretary should have revised his calculations to reflect timecards which Defendants had not provided in discovery and which differed from the two sets of payroll journals it had previously provided and on which the Secretary had relied. As the court explained, "[i]t is unclear when, if at all, these documents were produced to the Plaintiff, nor is it apparent where these documents can be found in the evidentiary record (other than the attachment to Defendants' current supplemental brief)." R.46, PGID 4398-99. The court further explained that even if Timberline had provided the documents previously, "Plaintiff is still not at fault for relying on the data produced by Defendants which Defendants represented to be accurate. Defendants cannot now contend that those records were inaccurate, and Plaintiff should have instead relied on other (accurate) data that covered the same time periods in question." *Id.* After deducting the amounts noted above from the revised total, the district court held that the Secretary had proved overtime wages due to the hourly employees by a preponderance of the evidence, and had proved the overtime wages due to non-hourly and combination rate employees as a matter of just and reasonable inference as required by *Mt. Clemens,* and awarded

$439,437.42 in back pay, with an equal amount in liquidated damages. *Id*. at PGID 4400.

4. *This Court's Decision Affirming and Remanding in Part*

Timberline appealed and this Court issued an amended decision on May 29, 2019 affirming the district court's decision on three of the four issues presented on appeal. *Timberline I,* 925 F.3d 838. The Court affirmed that Timberline was a covered enterprise under the FLSA, that the employees at issue were not exempt from the FLSA's overtime compensation requirement, and that liquidated damages were appropriate. *Id.* at 845-49, 851, 857.

However, this Court remanded for reconsideration of the amount of back wages due. It concluded that the Portal-to-Portal Act did not require that ordinary commute time and bona fide meal time be considered "hours worked" under the FLSA when the employer had a "custom or practice" of having agreed to pay for such time. *Id.* at 852-55 (citing regulations). The Court explained that because of the district court's erroneous contrary conclusion, neither the court nor the Secretary had determined or calculated the amount of commute or meal break time that may have been included in the records. *Id.* at 855. This, the Court concluded, "was error." *Id.* "*Any ordinary commute and bona fide meal time that can be established must not be included in determining how many hours of overtime each employee worked*[.]" *Id.* (emphasis added). The court made clear, however, that

"Defendants may not use the amounts paid for those otherwise non-compensable work periods as an offset against the amounts owed." *Id.*

The Court noted that the Secretary had argued that "even if Defendants' employees' travel time and lunch breaks were included in the recorded hours, Defendants did not meet their burden to negate the reasonableness of the Secretary's damages computations[.]" *Id*. at 855, n.12. The Secretary had further argued that "Defendants did not establish that the travel time did not constitute work time or that their employees received bona fide meal breaks." Without opining on these arguments, the Court left them for resolution on remand. *Id.*[10]

5. *District Court's Opinion and Order on Remand*

On April 10, 2020, after directing both parties to submit briefs in response to this Court's decision, the district court issued an opinion and order. R.68. It noted that Defendants had not offered any new evidence on remand, but sought to reopen discovery in an effort to determine the amount of commuting and meal time that was improperly included in its own payroll records and therefore in the Secretary's estimated overtime hours. R.68, PGID 4575. The district court refused, finding

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[10] This Court also noted with approval the district court's observations that Defendants "were essentially attacking 'the statistical concept of an average,'" 925 F.3d at 852 (citing R.43, PGID 4188), and stated that "the district court was correct in rejecting Defendants' argument that 'industry aggregate data' should be used to determine unpaid overtime rather than Defendants' payroll records." *Id.* at 855.

that additional discovery was "extremely unlikely to produce any new testimony that Defendants have not already provided." *Id.* The court then reviewed the record evidence, noting that liability was previously established and that it was undisputed that Timberline did not keep complete and accurate payroll records. *Id.* at PGID 4575. As a result, the court again concluded that the burden-shifting *Mt. Clemens* standard was applicable. *Id.* at PGID 4574-75 (citing *Mt. Clemens*, 328 U.S. at 687-88).

Applying the *Mt. Clemens* standard, the court expressly held that the Secretary "made a reasonable estimation of total hours worked[.]" *Id.* at PGID 4578. It noted Wrona's explanation that he had relied on Timberline's payroll journals to determine the number of hours worked by the 43 hourly employees and his methodology for estimating hours worked by the seven non-hourly and combination-rate employees. *Id.* at PGID 4575-76 (quoting R.38, PGID 3726). It also recounted his extensive efforts to correct, update, and revise his estimates in response to questions raised by Defendants and by the court, and in response to supplemental discovery obtained during the earlier rounds of summary judgment briefing, and concluded that his final estimated damages remained reasonable. *Id*.

The court then turned to the question of whether Defendants had met their burden under *Mt. Clemens* to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to

be drawn from the Secretary's evidence. *Id.* at PGID 4577-78. It noted that "after three rounds of briefing, Defendants have been unable to provide evidence regarding the amount of time their employees spent commuting or eating meals." *Id.* at PGID 4577. The court concluded that "*[i]t is impossible to remove any potential meal or commute time from the Secretary's calculations because Defendants have repeatedly been unable to provide more detailed records establishing the time taken for meals or commuting*." *Id.* (emphasis added). It pointed out that the only evidence that Timberline provided was affidavits from five employees out of 50 in which they stated that they commuted two hours daily and took a 30-minute lunch break when possible. *Id.* The court reasoned that "*[t]his is simply inadequate to demonstrate how much time each employee spent on those activities in order to exclude that time from the calculation*." *Id.* (emphasis added). Thus, the court concluded, "the Secretary's calculations for overtime are sufficient *because Defendants cannot provide evidence to rebut the Secretary's calculations.*" *Id.* (emphasis added).

Noting this Court's comment that it was leaving to the district court the issue of whether Timberline had met its *Mt. Clemens* burden to negate the reasonableness of the Secretary's estimates or proffer evidence to rebut the Secretary's evidence, the court expressly held that "Plaintiff made a reasonable estimation of total hours worked and Defendants failed to meet their burden to

negate the reasonableness of Plaintiff's calculations," since Defendants did not prove that any time spent eating meals or commuting was improperly included, or the amounts of any such time. *Id.* at PGID 4578. Therefore, the court once again awarded $439,437.42 for unpaid overtime damages, with an equal amount in liquidated damages. *Id.*

SUMMARY OF ARGUMENT

Because Defendants admitted that they failed to keep adequate records of hours worked or to pay for overtime as required, and liability has already been established, the *Mt. Clemens* burden-shifting framework for estimating hours worked and calculating back pay applied to this case. The district court correctly concluded that the Secretary presented evidence to support a "just and reasonable inference" of unpaid overtime hours worked and to calculate back pay owed. Specifically, the Secretary relied on Timberline's own payroll records to determine the number of overtime hours that employees worked. Nothing in those records indicated that the recorded hours of work included commute time or bona fide meal break time, let alone any discernable amount of such time.

Although Defendants kept, and produced during discovery, payroll records purporting to show "hours worked" for the 43 hourly employees and partial records of "hours worked" for the four combination-rate employees, and although Defendants represented that those records were accurate, they now claim that those

records were inaccurate, and that some unspecified amount of the hours reflected in their payroll records were not actually "worked," but instead were spent commuting between work and home or in taking bona fide meal breaks. The district court properly rejected Defendants' argument and concluded that Defendants failed to raise a genuine issue of material fact by either presenting evidence of the precise amount of work performed or negating the reasonableness of the Secretary's estimates, as required by *Mt. Clemens*. Specifically, Defendants failed to establish any precise amounts of non-compensable commuting time or bona fide meal break time that were improperly included in their payroll records and should therefore be deducted from the back pay award. The sole items that Defendants relied upon were five identical employee affidavits, which offered only vague, conclusory allegations and which the court correctly held were insufficient to meet Defendants' burden under *Mt. Clemens*. Thus, Defendants failed to demonstrate that any precise amounts of excludable commute and meal break time could be established in accordance with this Court's directive in *Timberline I*.

The district court also properly rejected Timberline's effort to attack the accuracy of the Secretary's back pay calculations because Timberline's attack rested on challenging the accuracy of its own payroll journals. The court correctly concluded that the Secretary was entitled to rely on those documents, which Defendants had represented to be accurate. Defendants' chart purporting to show

minor discrepancies and allegations of errors in transcribing particular workweeks did not demonstrate any genuine dispute of material fact which would require a trial on the issue of damages. As the district court repeatedly explained, any errors in the Secretary's calculations that Defendants now rely on to attack those calculations are Timberline's own fault. Moreover, the Defendants' chart, as reproduced in their brief to this Court, cites to an outdated set of the Secretary's calculations and to weeks that do not exist.

Additionally, the district court carefully and systematically addressed each objection made by Defendants, and repeatedly ordered the Secretary to correct perceived accounting errors and to rely on actual payroll records and averages of similarly situated workers, resulting in three reductions of the estimated damages due, and the court itself deducting any disputed amounts and considering all the record evidence before making the final award. Defendants fail to recognize that liability has already been established and affirmed by this Court, and that they bore the burden of proffering evidence to support a "more reasonable calculation" of the amount of uncompensated overtime hours worked than the amounts shown in their own payroll records. In light of Timberline's failure to meet its burden of proof, the court was therefore well within its authority to award damages to the employees based on the Secretary's reasonable estimates and Timberline's own payroll data, even though the result be only approximate.

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. *Timberline I,* 925 F.3d at 843; *Dole v. Elliott Travel & Tours, Inc*., 942 F.2d 962, 965 (6th Cir. 1991). Summary judgment is proper "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." *Viet v. Le*, 951 F.3d 818, 822 (6th Cir. 2020) (quoting Fed. R. Civ. P. 56(a)). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "This language compels summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. A nonmoving party has not made that sort of showing if the record taken as a whole could not lead a rational trier of fact to find in the party's favor." *Viet*, 951 F.3d at 822 (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT PROPERLY AWARDED UNPAID OVERTIME WAGES DUE BASED ON THE *MT. CLEMENS* FRAMEWORK AND CORRECTLY DETERMINED THAT THERE WAS NO MATERIAL DISPUTE REGARDING THE AMOUNT OF THOSE WAGES.

On remand, the only issue before the district court was whether any amount of "ordinary commute and bona fide meal time … can be

established[.]" *Timberline I*, 925 F.3d at 855. If such time could be established, this Court instructed the district court to deduct those hours from the hours worked used in the Secretary's calculations. *Id.* The Court also directed the district court to consider whether, "even if Defendants' employees' travel time and lunch breaks were included in the recorded hours," Defendants met their burden either to negate the reasonableness of the Secretary's back wage computations or to establish that the commute time did not constitute work time or that their employees in fact received bona fide meal breaks. *Id*. at 855, n.12.

The district court did not err on remand in awarding back pay of $439,437.42 after reviewing the evidence in the record and applying the *Mt. Clemens* burden-shifting framework. The court properly concluded that the Secretary had established the back pay amount as a matter of just and reasonable inference under *Mt. Clemens* and that Defendants failed to rebut or negate the Secretary's estimated calculations.

Under *Mt. Clemens*, where a FLSA plaintiff has already proved liability and the employer's records are inaccurate or inadequate, the plaintiff "does not need to prove every minute of uncompensated work. Rather, she can estimate her damages, shifting the burden to the employer." *O'Brien v. Ed Donnelly Enters., Inc*., 575 F.3d 567, 602-03 (6th Cir. 2009). Specifically, once a

plaintiff proves that he performed "work for which he was not properly compensated," as the Secretary has done in this case for the 50 employees at issue, the plaintiff need only produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," at which point the burden 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." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (*quoting Mt. Clemens*, 328 U.S. at 687-88). If the employer fails to meet this burden, the court may award damages to the employee "even though the result be only approximate." *Id.* at 688.

Thus, the plaintiff's estimates need not be "perfectly accurate or precise," but must only be reasonable in light of the evidence available. *See, e.g., Timberline I,* 925 F.3d at 956 *(quoting Acosta v. Off Duty Police Servs., Inc.,* 915 F.3d 1050, 1065 (6th Cir. 2019) ("The reasonableness of the DOL's proposed calculation depends in part on the availability of other, more reasonable alternatives to that proposal"); *Monroe v. FTS USA, LLC,* 860 F.3d 389, 404 (6th Cir. 2017) (endorsing an "estimated damages approach" based on average hours worked under the "relaxed" *Mt. Clemens* standard, but remanding for recalculation based on accurate hourly rate), *cert. denied*, 138 S.

Ct. 980 (2018); *Acosta v. Min & Kim,* 919 F.3d 361, 366 (6th Cir. 2019) (affirming Secretary's "inexact" back pay calculations under *Mt. Clemen*s, where calculations could not be exact "in view of the plentiful holes in [employer's] records," but are "reasonable estimates based on what evidence we do have"); *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").

The burden-shifting regime under *Mt. Clemens* is intended to avoid a situation where, as here, the employer seeks to benefit by "failing to keep proper records in conformity with his statutory duty," *Mt. Clemens*, 328 U.S. at 687, then asserts that no damages should be awarded because the evidence is not sufficiently accurate. Such an outcome would unfairly penalize employees and result in a windfall for the employer. Instead, "[t]he 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.

A. Due to Timberline's Failure to Keep Accurate and Reliable Records that Tracked Actual Overtime Hours Worked, the District Court Properly Accepted the Secretary's "Just And Reasonable Inference" of Hours Worked Based on the Available Evidence.

1. On remand, the district court correctly held that the *Mt. Clemens* burden-shifting standard applied. R.68. Timberline admittedly failed to keep accurate

employment records as required by the FLSA and its implementing regulations, with the predictable result that the Secretary had "no way to establish the time [that employees] spent doing uncompensated work" other than to rely on those inadequate and inaccurate records. *Tyson Foods*, 136 S. Ct. at 1047; R.68, PGID 4575. Thus, the district court appropriately relied on the *Mt. Clemens* burden-shifting framework in this case. R.68, PGID 4574-78.

2. The district court properly reaffirmed its prior conclusion that the Secretary had met his initial burden "to show the amount and extent of [uncompensated overtime] work as a matter of just and reasonable inference," by making "a reasonable estimation of hours worked," as required by *Mt. Clemens*. R.68, PGID 4578; *see also id.* at PGID 4570 (quoting R.46) ("Plaintiff's data and calculations were reasonable."). This Court's decision in *Timberline I* required that "Defendants' payroll records" be used, where available, to determine the amount of back pay owed, and rejected Defendant's proposal to rely on industry averages instead. *Timberline I,* 925 F.3d at 855-56.

This is exactly what the Secretary did. As this Court already recognized, the Secretary "presented voluminous data showing how he arrived at the calculated unpaid overtime," *id.* at 852, including contemporaneous timecards and payroll journals showing that at least 47 of the 50 workers (the 43 hourly employees plus the four combination-rate employees) reported on their timecards their hours of

work and were working well over 40 hours a week, as well as affidavits from numerous employees confirming that their timecards reflected the hours they actually worked. *See, e.g.,* R.18-10 & 18-11 (payroll journals); R.18-16, PGID 1715-16 (Eddy), 1719 (Hamilton), 1728 (Straight); R.25-6, PGID 2711 (Palmer). The timecards and payroll journals show that many employees often worked 50 to 60 hours a week. *See, e.g.*, R.25-7 (timecards showing 65.75 and 54.5 weekly hours), PGID 2715, 2716; R.43, PGID 4185; R.44-3, PGID 4215-17; R.46, PGID 4397 (payroll journals showed that truck drivers worked 55 hours per week on average, while equipment operators averaged 48 hours weekly). Jim Payne himself admitted that he required employees to work a minimum of eight to ten hours a day, R.18-4, PGID 225, 226, and that the timecards reflected "hours worked." R.18-4, PGID 232; R.25-4, PGID 2684, 2685.

3. Notably, Jim Payne also admitted that Timberline's records did not show that commute time was included in the hours worked or the actual amounts of time any employee spent commuting. As he explained, "they don't keep track of it. It's just the hours they work…. everything is together. It's one hourly thing at the end of the week." R.25-4 (Payne Tr.), PGID 2685; *see also id.* at PGID 2673-74, 2683, 2696 (explaining that workers' hours also included daily travel time to or from fueling stations and between the shop and various worksites). Timberline made no effort to separate any "commute time" allegedly included in the record of hours

worked from work-related travel time between the shop and various worksites. R.18-4, PGID 229-30. Jim Payne likewise admitted that the timecards did not show whether or if employees took any lunch breaks or the length of any such break. R.25-4, PGID 2676-77, 2684-85, 2689, 2696. Timberline's office manager admitted that Timberline did not record any commuting time or alleged lunch breaks, but typically recorded only the employees' start and stop times each day. R.25-3 (Klein Tr.), PGID 2665, 2667, 2669. Not only did the records not indicate that commute and/or meal time was included in the hours worked, Jim Payne also conceded that he had no personal knowledge of how long employees commuted each day or whether employees even took meal breaks each day. *Id*. at PGID 2676-77.

4. Defendants assert that the Secretary "made absolutely no attempt to estimate commute and meal time in this case" and there was no evidence in the record that the Secretary's interviews with employees addressed commute or meal periods. Defs.' Br. 11, 21. This both inverts the burdens under *Mt. Clemens* and is inaccurate. Defendants' argument upturns the burdens under *Mt. Clemens* because the Secretary relied on Timberline's own payroll records of hours worked to calculate overtime hours worked. While Timberline did not have complete records of hours worked for all employees due to Timberline's inadequate recordkeeping, it did have records of hours worked for the 43 hourly employees and partial

records for the four combination-rate employees. The Secretary used those records to calculate the hours of overtime the 43 hourly employees worked and used those records to estimate the hours for the seven non-hourly and combination-rate employees for whom Timberline did not keep complete records. Because nothing in those records indicated that they included non-compensatory time and because Timberline represented them as accurate, it was not the Secretary's burden to establish the amount of non-compensatory time that should be excluded from the recorded hours of work. *See, e.g.*, *Off Duty Police Servs.*, 915 F.3d at 1065 (discussing shifting burdens and noting that the burden falls upon the employer for any imprecision in the amount of back wages resulting from the employer's failure to keep adequate records); *Monroe,* 860 F.3d at 399, 407 (explaining that after employees have proven liability and met their "relaxed burden for establishing the extent of uncompensated work," such as by using an estimated-average approach, the burden then shifts to the employer to prove the precise amount of work performed or otherwise rebut the reasonably inferred damages amount; "[i]f defendants fail to carry this burden, the court may award the reasonably inferred, though perhaps approximate, damages.").

Defendants' argument is also inaccurate. In fact, the Secretary obtained and submitted declarations from at least seven equipment operators and truck drivers, each of whom testified that they recorded only time spent working on their

timecards, not time spent commuting to or from the job. For example, equipment operator Eddy stated that he worked 45 to 50 hours per week, but "was not paid for the time [he] spent commuting between home and the worksites and [he] did not record that time on [his] timecards," while equipment operator Straight typically worked 50 to 60 hours per week on Timberline's worksites, as recorded on his timecards, not including commuting time). R.18-16, PGID 1715-16 (Eddy), 1728 (Straight). Several truck drivers also stated that they typically worked at least 50 hours per week, and that they treated their start time as when they arrived at Timberline's shop at the beginning of the day and stop time as when they left at the shop at the end of the day, as recorded on their timecards. *Id.* at 1719 (Hamilton); R.25-6, PGID 2712 (Palmer).[11]

The Secretary also presented evidence showing that employees did not regularly take 30-minute bona fide meal breaks, if they took lunch breaks at all; most of the time, they ate lunch while working. For example, Straight explained that "I ate my lunch while I worked on my machine. It took me about 5 to 10 minute to eat my lunch. All the guys on the site basically did the same thing and

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[11] The timecards themselves instructed workers to record only "drive time to the job FROM THE SHOP," R.25-7, PGID 2715 (emphasis in original), not "ordinary commute time" to and from the worker's home which Defendants now claim was improperly included. Defs.' Br. 7-8.

ate while working. We did not take a half-hour to eat." *Id.* at PGID 1728; s*ee also id.* at PGID 1731-32 (Fletcher) ("I never took off to eat lunch because I typically did not have time to do so. I pretty much ate while I drove to and from the mills. . . . I understood that as far as Jim Payne was concerned, truck drivers could eat and drive. . . . There was no designated time to eat lunch.), 1719-20 (Hamilton) ("The majority of the time I ate lunch in my truck while driving."), 1723 (Jacobs) (same), 1725-26 (Sanborn) (same), 1716 (Eddy); R.25-6, PGID 2713 (Palmer).[12]

Thus, the district court correctly concluded that, by relying on Timberline's own payroll records, and relying on similarly situated employees' payroll records for the three non-hourly employees, supplemented with employee declarations, the Secretary produced sufficient evidence to show the amount and extent of the employees' uncompensated overtime work as a matter of just and reasonable inference, as permitted by *Mt. Clemens,* 328 U.S. at 687-88, and *Tyson Foods,* 136 S. Ct. at 1047. Defendants' contention, Defs.' Br. 19, that the court misapplied the

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[12] Lunch breaks are only considered "bona fide" and non-compensable when the employee is "completely relieved from duty for the purposes of eating regular meals," ordinarily for at least 30 minutes; shorter breaks must be included in compensable "hours worked." 29 C.F.R. 785.18; 29 C.F.R. 785.19; *see also Jones-Turner v. Yellow Enter. Sys., LLC*, 597 F. App'x. 293, 297 (6th Cir. 2015) (*citing Reich v. S. New England Telecomms. Corp*., 121 F.3d 58, 65 (2d Cir. 1997) (employees who were required to eat in their trucks or to drive or perform other duties while eating must be paid for that time).

Mt. Clemens standard and that the Secretary bore the burden of both showing compensable work time and excluding alleged non-compensable time has no merit.

B. Defendants Failed To Meet Their Burden to Establish a Genuine Issue of Material Fact by Either Producing Evidence of the "Precise Amount" of "Ordinary Commute Time or Bona Fide Meal Time" to Be Deducted, or Negating the Secretary's Reasonable Calculations of Overtime Hours Worked Based on Timberline's Own Payroll Records.

1. Having properly concluded that the Secretary met his burden under *Mt. Clemens* to show the amount of uncompensated overtime work, the burden shifted to Defendants to come forward with evidence "to prove the precise amount of work performed or otherwise rebut the reasonably inferred damages amount." *Monroe*, 860 F.3d at 407 (*citing Mt. Clemens*, 328 U.S. at 687-88). The district court correctly concluded that "Defendants failed to meet their burden to negate the reasonableness of [the Secretary's] calculations." R.68, PGID 4578.

2. Defendants contend that it is "uncontested" that each of the 50 employees at issue improperly included daily non-compensable commuting time and daily bona fide lunch time in their timecards. Defs.' Br. 11. The record does not support Defendants' contention. They have presented no contemporaneous payroll records to support their assertions, nor have they made any effort to quantify which of the thousands of work hours in the Secretary's computations should be deducted from those individualized back pay estimates, which covered approximately 10,000 workweeks (4 years of back pay for each of 50 workers).

Indeed, Timberline's own admissions contradict its claim that the timecards included non-compensable hours which could or should be deducted. As noted above, Jim Payne admitted that Defendants' timecards and payroll journals indicated "hours worked." R.25-4 (Payne Tr.), PGID 2684; *see also* id. at PGID 2685 (admitting that Timberline did not keep track of commuting time or bona fide meal breaks, and that most employees did not record any such time: "they don't keep track of it. It's just the hours they work."), 2676-77, 2689, 2696 (admitting that he did not know how long employees spent on any worksite, or whether they took meal breaks every day, or for how long). Moreover, Defendants did not dispute that their own payroll records supported the Secretary's determination that truck drivers performed an average of 55 hours a week of compensable work and that equipment operators performed an average of 48 hours a week of compensable work. *See, e.g.*, R.46, PGID 4397 (noting that the payroll records showed that truck drivers averaged 55 hours a week, while equipment operators averaged 48 hours a week, and that Defendants did not dispute this calculation).

3. Defendants now assert, Defs.' Br. 7, that they rebutted the Secretary's estimates and created a genuine issue of material fact on this issue by submitting identical affidavits from five employees stating that "*On most days I* drove about one hour to the jobsite, and one hour home, and took a half-hour lunch *when I could fit it in*. When *I* reported time, *I* included my drive time and lunch time in

total hours." R.41-12, Affidavit of William Axford, PGID 4167 (emphasis added); *see also id*. at PGID 4168-4171. However, the district court correctly rejected these affidavits as insufficient to negate or rebut the very detailed payroll evidence submitted by the Secretary. R.68, PGID 4577. They relate to only five out of the 50 employees. And they do not purport to be representative of the remaining 45 employees who performed uncompensated overtime work for which they are owed back wages. Each of the five employees stated only what he individually did; none purported to offer evidence about what other employees did.

Moreover, these affidavits contain no evidence of "the precise amount of" non-compensable time to be deducted for any workweek as required by *Mt. Clemens*; they provide only vague generalizations about what those five individuals did on "most days" and "when [they] could fit it in." *Id*. Even for those five employees, Defendants failed to identify the specific non-compensable hours which they believe should be deducted from the Secretary's computations.[13] This Court directed the district court on remand to exclude from the hours worked calculations any ordinary commute time and bona fide meal breaks "that can be

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[13] For the other 45 employees, Defendants failed to present any evidence at all, much less "establish" which specific hours recorded by the hourly employees the Defendants now seek to deduct as non-compensable from the Secretary's computations. As shown below, this lack of specificity is fatal to their claims on appeal.

established[.]" *Timberline I*, 925 F.3d at 855. Following that directive and reviewing all the evidence before it, the district court correctly shifted the burden to Defendants and concluded that Defendants failed to "establish" "the amount of ordinary commute time and meal time that was included in Defendants' records," as this Court required them to do. Thus, they failed to satisfy their burden under *Mt. Clemens* and thereby avoid summary judgment on damages because they did not present "evidence of the precise amount of work" they claim was not performed or otherwise negate the Secretary's reasonable calculations.

4. Caselaw supports the court's conclusion that Timberline's affidavits were simply "inadequate to demonstrate how much time each employee spent on [non-compensable] activities in order to exclude that time from the calculation." R.68, PGID 4577. In *Pythagoras General Contracting Corp. v. United States Department of Labor*, a district court concluded that an employer's general statements were legally insufficient to rebut the Secretary's just and reasonable inference under *Mt. Clemens*, where the employer failed to present "individualized documentation of who performed the work or the nature and amount of the work allegedly performed," did not account for hours with "precision," and did not "fully account for the work hours in question." 926 F. Supp. 2d 490, 498 (S.D.N.Y. 2013); *see also Min & Kim,* 919 F.3d at 365-66 (affirming damages award under *Mt. Clemens* where investigator used partial payroll records to

calculate overtime pay and employers failed to produce evidence to rebut the Secretary's calculations); *Solis v. Min Fang Yang*, 345 F. App'x 35, 38 (6th Cir. 2009) (affirming back wage award under *Mt. Clemens* where employer "could not produce contemporary records" to dispute the Secretary's estimates*)*; *Bueno v. Mattner*, 633 F. Supp. 1446, 1454-55 (W.D. Mich. 1986), *aff'd,* 829 F.2d 1380 (6th Cir. 1987) (affirming back wage award under *Mt. Clemens* where employer offered only estimations and assumptions to rebut reasonable inferences of work time).

And as a more general principle, a party in an FLSA overtime case must present more than "bare assertion[s]" and "conclusory estimates" to create a genuine dispute of material fact about the number of hours worked in an average workweek. *Viet*, 951 F.3d at 825.[14] In *Viet*, as here, this Court rejected the employee's inconsistent, vague, and conclusory allegations about his work schedule, such as "Whenever … I have time," "Almost every day," or "Sometimes…", as insufficient to withstand summary judgment because such "conclusory estimates about an employee's average workweek … provide no details which would allow a jury to determine [how much overtime was worked] in any specific week." *Id.* Instead, in order to withstand summary judgment, a party

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[14] *Viet* was also decided on summary judgment, although it involved evidence of liability rather than damages; this Court held that "a plaintiff may not rely on conclusory evidence to proceed past the summary-judgment stage." *Id.* at 823 (citations and quotations omitted).

"must identify specific facts, as opposed to general allegations," "detail[] the specific hours that the employee typically worked," and must "'coherently describe[ ]' their day-to-day work schedules or the time it takes to complete their duties so that a rational jury could find that they worked more than 40 hours in the weeks claimed." *Id*., 951 F.3d at 826; *see also Carmody v. Kan. City Bd. of Police Comm'rs,* 713 F.3d 401, 407 (8th Cir. 2013) (vague and general evidence not enough to survive summary judgment; specific evidence of dates and hours was required); *Turner v. The Saloon, Ltd.,* 595 F.3d 679, 690-91 (7th Cir. 2010) (mere assertions insufficient to create a jury issue); *Blodgett v. FAF, Inc.*, 446 F. Supp.3d 320, 329 (E.D. Tenn. 2020) (prior contradictory statements about how many hours were worked are insufficient to survive a motion for summary judgment; party must demonstrate work schedules in sufficient detail for a rational jury to return a verdict in that party's favor).

5. As this Court noted in its prior opinion, "'[t]he reasonableness of the DOL's proposed calculation depends in part on the availability of other, more reasonable alternatives to that proposal.'" *Timberline I*, 925 F.3d at 855-56 (quoting *Off Duty Police Servs.*, 915 F.3d at 1065). Here, Defendants have not offered "a more reasonable alternative" to the Secretary's calculations. Therefore, this Court's conclusion in *Off Duty Police Services* is equally applicable here: "Although the calculation adopted by the district court may be imprecise, it is the

best method available in light of [the employer's] failure to maintain accurate and complete records." 915 F.3d at 1065; *Monroe*, 860 F.3d at 412 (affirming estimated back pay award based on time sheets and payroll records, where company's records were inaccurate, because "an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize employees for an employer's failure to keep adequate records."). Here, as in *Monroe* and *Off Duty Police Services*, although the calculation adopted by the district court may be imprecise, it is the best method available in light of Defendants' failure to maintain accurate and complete records.

In sum, the court correctly held that Defendants failed to carry their burden to rebut the Secretary's reasonable calculations, and that this failure made it "impossible to remove any potential meal or commute time from the Secretary's calculations because Defendants have repeatedly been unable to provide more detailed records establishing the time taken for meals or commuting." R.68, PGID 4577. Defendants' failure to present sufficient evidence that each of their 50 employees recorded non-compensable commuting or bona fide lunch breaks as "hours worked", or the amount of such time that each worker allegedly recorded during each of the workweeks at issue, or even an "average" workweek, meant that no commuting or meal time could be "established," and therefore no such time could be deducted. As a result, even though the result be only approximate the

court properly concluded that $439,437.42 was the amount of back pay due to the Secretary.[15]

II. DEFENDANTS' ALLEGATION OF ERRORS IN THE SECRETARY'S CALCULATIONS IS WITHOUT MERIT BECAUSE THE DISTRICT COURT CORRECTLY HELD THAT ANY ERRORS WERE DUE TO INACCURACIES IN TIMBERLINE'S OWN RECORDS.

1. The Secretary's back pay calculations, which relied on Timberline's own payroll data, were reasonable, and any errors were due to Timberline's own records. As the district court correctly concluded, "Plaintiff is not at fault for any error in Defendants' payroll journals," R.43, PGID 4184, and cannot be blamed "for relying on the data produced by Defendants which Defendants represented to be accurate," R.46, PGID 4399. In attempting to attack the reasonableness of the Secretary's calculations, Defendants contend that those calculations lack credibility

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[15] Defendants also suggest that the district court erred in not reopening discovery after this Court remanded. Defs. Br. 2. They do not, however, present any specific argument on this issue. In any event, the Secretary notes that this Court reviews a a district court's decisions regarding discovery matters under an abuse of discretion standard. *See Dortch v. Fowler*, 588 F.3d 396, 400 (6th Cir. 2009). A party "should have access to information necessary to establish her claim, but … may not be permitted to 'go fishing'; the trial court retains discretion" to limit discovery *Anwar v. Dow Chemical Company*, 876 F.3d 841, 854 (6th Cir. 2017). To overcome summary judgment, a party must show "how further discovery would rebut the movant's showing of the absence of a genuine issue of material fact." *Himes v. United States*, 645 F.3d 771, 783 (6th Cir. 2011). Here, Defendants had ample time to conduct discovery in 2016 and 2017, prior to the first grant of summary judgment, and have failed to show that further discovery would reveal any new information or that the court abused its discretion by declining to reopen the record.

and contain basic calculation errors, which they maintain create disputed issues of material fact. Defs.' Br. 26-28. This argument is without merit.

2. Defendants offer a chart which purports to show that "the investigator … misread payroll journals, or failed to recreate them accurately in his damage assessment, and failed to review time cards." Def's Br. 28. Defendants presented, and the district court rejected, two versions of this same chart. Their first chart purported to show errors in specific workweeks by comparing the estimated damages with time cards, while their second version of the chart added references to a purported "payroll journal" which differs from the payroll journals as produced in discovery. R.43, PGID 4183-84; R.46, PGID 4398-99. In rejecting both charts, the court noted that Defendants "overlook[ed] the fact" that the Secretary's computations were based entirely on Timberline's own payroll journals that Timberline had produced in discovery and represented as accurate. R.43, PGID 4184; *see also* R.46, PGID 4398. In the first rejection, the court explained that "it appear[ed] that Defendants may have incorrectly incorporated the information from the employee timecards into the payroll journals in some cases." R.43, PGID 4184. Thus, the court reasoned, any discrepancies in that data were Defendants' own fault, not the Secretary's. *Id.*

In rejecting the second chart, the court again explained that the Secretary was not at fault for relying on Timberline's data produced in discovery. R.46,

PGID 4398-99. The court further noted that "[i]t is unclear when, if at all, these [new payroll journal] documents were produced to the Plaintiff, nor is it apparent where these documents can be found in the evidentiary record (other than the attachment to Defendants' current supplemental brief)." *Id*. Thus, the court concluded, "Defendants cannot now contend that [their] records were inaccurate, and Plaintiff should have instead relied on other (accurate) data that covered the same time periods in question." *Id*.

In their arguments to this Court, Defendants' asserted factual errors are inconsistent with the actual evidence in this case. The Secretary's final computations of weekly hours worked by the seven hourly employees identified in the chart that Defendants reproduced in their brief, Defs. Br. 27, are identical to the weekly totals for these individuals recorded in Defendants' payroll journals, as outlined below. *Compare* R.44-4, Secretary's Revised Computations, *with* R.18-10, Payroll Journal:

Employee	Wk Ending	Pl.'s Revised Hours, R.44-4	Payroll Journal, R.18-10
Barton Briley	8/7/2015	**48** [PGID 4297]	**48** [PGID 1414]
Barton Briley	7/3/2015	**50** [PGID 4297]	**50** [PGID 1451]
Pat Cobb	7/31/2015	**67.5** [PGID 4292]	**67.5** [PGID 1421]
Ron Jacobs	7/24/2015	**48** [PGID 4270]	**48** [PGID 1431]
Mike Lube	8/7/2015	**0** [PGID 4249]	**20.5** [PGID 1418]
Ed Welsh	7/3/2015	**48.5** [PGID 4223]	**48.5** [PGID 1457]
Gary Nadell	8/7/2015	**51.25** [PGID 4248; PGID 4184]	**51.25 [**PGID 1418]

Newberry	8/14/2015	**53.75** [PGID 4223]	**53.75** [PGID 1411]

As this version of the chart demonstrates, the Secretary did not "misread" the evidence; Wrona's amended damages calculations do, in fact, match the actual payroll journal entries for each of the weeks in question for each employee cited. Indeed, for Gary Nadell, the court specifically found that "Defendant's payroll journal reflects 51.25 hours … for [that] workweek," not 42.75 hours as Defendants inaccurately claim. R.43, PGID 4184 (citing R.18-10, PGID 1418).[16] Furthermore, Defendants' chart, Defs. Br. 27, relies on documents which apparently do not appear in the record anywhere, and cites to an outdated version of the Secretary's calculations that had adopted the inconsistent dates shown in Timberline's two sets of payroll journals. R.44-3, PGID 4213-14. As explained by the court, each workweek in the final revised back pay award was adjusted and corrected to correspond to Timberline's payroll journal as set forth in the record at R.18-10. R.43, PGID 4697-98.

3. Even if there were minor errors in the Secretary's calculations, "the employer cannot be heard to complain that the damages lack the exactness and

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[16] For Lube, although the payroll journals indicated that he actually worked fewer hours the week at issue than Defendants claim in their inaccurate chart, the difference is immaterial, because the parties agreed that he did not work over 40 hours that week and therefore no overtime liability was due for that week. R.43, PGID 4184.

precision of measurement that would be possible had it kept [accurate] records in accordance with the requirements of [the FLSA]." *Monroe*, 860 F.3d at 404 (*quoting Mt. Clemens*, 328 U.S. at 687-88). This Court has often affirmed the award of damages based on "rough estimates" and estimated averages where a company's records were inaccurate or incomplete. *See, e.g., Monroe*, 860 F.3d at 411-12 (affirming back pay award based on time sheets, payroll records, and estimated averages, where "to the extent that the DOL's calculation provides only a rough estimate of the back wages owed to [employees], that imprecision is a result of [the employer's] failure to keep accurate and complete records."); *Cole Enters.*, 62 F.3d at 781 (affirming back pay award based on Secretary's calculations, employment records and interview statements, even though not "precisely accurate"); *see also Timberline I*, 925 F.3d at 856 (quoting *Off Duty Police Servs*., 915 F.3d at 1065 ("The reasonableness of the DOL's proposed calculation depends in part on the availability of other, more reasonable alternatives to that proposal. . . . Although the calculation adopted by the district court may be imprecise, it is the best method available in light of [employer's] failure to maintain accurate and complete records.").

Defendants attack the Secretary's calculations because the Secretary revised and updated his calculations three times, as directed by the district court. However, rather than undermining the back wage award, this illustrates how the

district court endeavored to ensure that the estimated damages award was reasonable and as accurate as possible (given that Timberline's records were incomplete). It carefully and systematically addressed each objection made by Defendants and deducted any disputed amounts before making the final award. R.46, PGID 4396-97, 4399. It repeatedly ordered the Secretary to correct alleged accounting errors, resulting in two supplemental briefs and four Declarations by Investigator Wrona, each of which reduced the estimated amounts due. Even then, the court carefully considered the accuracy of the Secretary's calculations and, giving Timberline the "benefit of the doubt" by deducting certain disputed amounts, adjusted the final back wage award downward.

Defendants have failed to identify specific evidence on which a jury could determine how much overtime was actually worked by each employee in each workweek or to offer a "more reasonable alternative" to the Secretary's estimates of the unpaid overtime at issue. As a result, the district court's reliance on the allegedly inaccurate payroll records (and the Secretary's estimates based on those records) may be "rough," but it is the best method available in light of Defendants' failure to maintain accurate and complete records. f. Instead of coming forward with "evidence of the precise amount of work [not] performed, or with evidence to negat[e] the reasonableness of the inference to be drawn" as required by *Mt. Clemen*s, 328 U.S. at 687, Defendants instead seek to profit from their wrongdoing

and unfairly penalize their employees. The court correctly rejected their efforts, since "[t]he 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. This court should affirm the adjusted back pay award of $439,437.42 as based on the best method available in light of the employer's failure to maintain accurate and complete records, even though the result be only approximate.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's back pay damages award and its award of an equal amount in liquidated damages.

Respectfully submitted,

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

R.1, Complaint, PGID 1-6 (April 29, 2016)

R.16, Motion for Leave to Amend Complaint, PGID 59 (April 17, 2017)

R.18, Pl.'s Motion for Summary Judgment, PGID 130 (April 19, 2017)

R.18-4, Excerpts from Jim Payne and R.30(b)(6) Designee Deposition Transcript (Feb. 27, 2017), attached as Ex. C to Brief in Support of Pl.'s Mot. for Summ. J., PGID 183

R.18-10, 2013-2015 Payroll Journal, attached as Ex. H to Pl.'s Brief in Support of Pl.'s Mot. for Summ. J., PGID 414 (filed April 19, 2017)

R.18-11, 2015-2017 Payroll Journal Extracts attached as Ex. J to Pl.'s Brief in Support of Pl.'s Mot. for Summ. J., PGID 1653 (filed April 19, 2017)

R.18-16, Employee Declarations, attached as Ex. O to Pl.'s Brief in Support of Pl.'s Motion for Summ. J., PGID 1714 (filed April 19, 2017)

R.18-17, Declaration of WHI Wrona, attached as Ex. O to Pl.'s Brief in Support of Mot. for Summ. J., PGID 183-281 (April 18, 2017)

R.19, Defs.' Motion for Summary Judgment, PGID 2038 (April 20, 2017)

R.25-3, Excerpts from Cheryl Klein Deposition Transcript, attached as Ex. B to Pl.'s Brief in Opp. to Defs.' Mot. for Summ. J., PGID 2662 (March 1, 2017)

R.25-4, Excerpts from Jim Payne and 30(b)(6) Designee Deposition Transcript, attached as Ex. C to Sec'y of Labor's Br. in Response to Defs.' Mot. for Summ. J., PGID 2670 (Feb. 27, 2017)

R.25-6, Declaration of Edwin Palmer, attached as Ex. E to Sec'y of Labor's Br. in Resp. to Defs.' Mot. for Summ. J., PGID 2711 (May 3, 2017)

R.25-7, Time Card Extracts (Part 1), attached as Ex. F1 to Sec'y of Labor's Br. in Resp. to Defs.' Mot. for Summ. J., PGID 2715 (filed May 11, 2017)

R.33, Order Granting Pl.'s Motion for Summary Judgment in Part, PGID 3632 (Oct. 6, 2017)

R.38, Pl.'s Supplemental Brief, PGID 3722 (Nov. 6, 2017)

R.38-9, Wrona Supplemental Declaration, attached as Ex. 8 to Pl.'s Supp. Br., PGID 3933 (Nov. 6, 2017)

R.41, Defs.' Brief Regarding Damages, PGID 4086 (filed Nov. 20, 2017)

R.41-12, Employee Affidavits attached as Ex. K to Defs.' Br. Regarding Damages, PGID 4124 (filed Nov. 20, 2017)

R.42, Order Denying Defs.' Motion for Reconsideration, PGID 4172 (Feb. 14, 2018)

R.43, Order Directing Additional Briefing and Setting Status Conference, PGID 4181 (May 2, 2018)

R.44, Pl.'s Second Supplemental Brief in Support of Damages Computations, PGID 4191 (May 17, 2018)

R.44-2, Declaration of Wage and Hour Investigator Jeffrey Wrona, attached as Ex. A to Pl's Second Supp. Br., PGID 4205 (May 8, 2018)

R.44-3, Supplemental Declaration of Wage and Hour Investigator Jeffrey Wrona, attached as Ex. B to Pl.'s Second Supp. Br., PGID 4212 (May 17, 2018)

R.44-4, Revised Transcription and Computation Sheet for Hourly Employees, attached as Ex. C to Pl.'s Second Supp. Br., PGID 4220 (May 17, 2018)

R.44-8, Updated Summary of Back Wages, attached as Ex. G to Pl.'s Second Supp. Br., PGID 4354 (May 17, 2018)

R.46, Order Granting Summary Judgment as to Damages, PGID 4396 (June 5, 2018)

R.68, Opinion and Order On Remand, PGID 4569 (April 10, 2020)

R.70, Notice of Appeal, PGID 4581 (June 5, 2020)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,877 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 using Microsoft Word 2016 in a proportionally spaced typeface, 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.

/s/Sarah J. Starrett
SARAH J. STARRETT

Dated: September 23, 2020