No. 21-2122

In the
United States Court of Appeals
for the Seventh Circuit

ERIC R. BRANT, et al.,

Plaintiffs-Appellants,

v.

SCHNEIDER NATIONAL, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 1:20-cv-01049-WCG.
The Honorable **William C. Griesbach**, Judge Presiding.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

MICHAEL J.D. SWEENEY
GETMAN, SWEENEY & DUNN, PLLC
260 Fair Street
Kingston, New York 12401
(845) 255-9370

JENNIFER KROLL
SUSAN MARTIN
MICHAEL M. LICATA
MARTIN & BONNETT, P.L.L.C.
4747 North 32nd Street, Suite 185
Phoenix, Arizona 85018
(602) 240-6900
smartin@martinbonnett.com

EDWARD TUDDENHAM
23 Rue du Laos
75015 Paris, France
+33 06 84 79 8930

Counsel for Plaintiffs-Appellants
(Full list of all appellants on inside cover)

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INTRODUCTION

Appellee Schneider's Brief misunderstands the nature of the issues on appeal as well as the standard of review. Schneider acts as if it were filing a bench memo after trial, asking the Court to weigh the parties' competing evidence and render a ruling on the merits. That is clear from the way Schneider rephrases the first issue on appeal to read: "Whether Brant was an independent contractor where he had substantial authority to manage the manner in which he performed under the Operating Agreement including the ability to hire employees to transport freight and select what freight he would transport." Brief of Defendants-Appellees (Appellees' Response Br.), Dkt. 29 at 2.[1] Whether Plaintiff was an independent contractor is decidedly not the issue on an appeal from a 12(b)(6) dismissal. At this stage of the litigation, the issue before the Court focuses on the complaint and asks whether the allegations of the complaint, taken as true, plausibly allege claims for relief -- i.e. whether Plaintiff has alleged facts from which a jury could plausibly find that, as a matter of economic reality, Plaintiff was an employee entitled to minimum wage, that Plaintiff's Operating Agreement was unconscionable, permitting a claim for unjust enrichment, and that Plaintiff has plausibly alleged TILA violations. The question on appeal is not whether Plaintiff *is* an employee or whether the Agreement *is* unconscionable or whether Schneider violated

[1] Citations to the record on appeal use the following abbreviations: "A" for the attached appendix, "SA" for the separate appendix, "Doc." for the docket entry number in the District Court, and "Dkt." for the docket entry number in the Seventh Circuit.

TILA -- those are questions for another day, after discovery and a trial. Schneider repeats this error in its discussion of the "standard of review" where it fails even to mention the fundamental principle, applicable when evaluating any motion to dismiss, that the plaintiff's well-pleaded allegations are to be taken as true. *Compare* Appellees' Response Br. at 12-14 *with Rujawitz v. Martin*, 561 F.3d 685, 688 (7th Cir. 2009) (in evaluating a motion to dismiss the district court should accept as true all well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor). Schneider's refusal to acknowledge the appropriate inquiry and its invitation to this Court to weigh the relative strength of Plaintiff's case versus Defendants' merits arguments based on no record whatsoever beyond the complaint and the Operating Agreement is fundamentally flawed and should be summarily rejected.

I. PLAINTIFF PLAUSIBLY ALLEGED HE WAS AN EMPLOYEE ENTITLED TO MINIMUM WAGE

Plaintiff's opening brief argued that the First Amended Complaint (FAC)[2] alleged sufficient facts from which a reasonable jury could plausibly conclude that Plaintiff was an employee of Schneider entitled to receive at least the FLSA and Wisconsin minimum wage. Schneider does not address the adequacy of Plaintiff's allegations or even mention the word "plausible" in its discussion of this claim. Instead, it asks this Court to weigh Plaintiff's allegations against the terms of the Operating

[2] The First Amended Complaint (FAC) can be found at Doc. 63 and at SA4-43. Citations to the FAC use the following abbreviations: FAC at SA4-43.

Agreement and find that the Operating Agreement grants Plaintiff sufficient independence to establish his status as an independent contractor regardless of the allegations in the FAC. But in making that argument Schneider ignores the fundamental principle that contracts, "however skillfully devised" do not control who is an employee for purposes of the FLSA. *U.S. v. Silk*, 331 U.S. 704, 715 (1947). "'[E]conomic reality' rather than contractual form is . . . dispositive." *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1544-1545 (7th Cir. 1987) (Easterbrook, J., concurring). Unlike its position in the district court, Schneider's appeal brief no longer disputes the truth of that legal principal, it simply ignores it. It has to because if it did address it, it would have to concede that the Operating Agreement is not relevant at this stage, at least to the extent the FAC alleges that the economic reality was different from the Agreement terms. The sole question on appeal is whether Plaintiff has alleged facts which, taken as true and with all reasonable inferences made in Plaintiff's favor, would allow a reasonable jury to conclude that Plaintiff was dependent upon Schneider and therefore an employee for purposes of the FLSA and Wisconsin law.

A few examples will suffice to illustrate the error in Schneider's approach: Schneider argues that the provision in the Operating Agreement giving Plaintiff the right to hire drivers and other employees "weighs heavily in favor of the conclusion that he exercised control over the manner of performing his work." Appellees' Response Br. at 16. But the FAC clearly alleges that this right to hire others offered

Drivers no economic benefit: Schneider still controlled all the available loads (Drivers could not work for anyone else, FAC at SA19-20 ¶¶ 87-90), so that hiring an employee would simply add to a Driver's overhead with no guarantee of additional work. FAC at SA22-23 ¶ 100. That was why Plaintiff and other Drivers did not bother hiring anyone else and, instead, drove their own trucks. *Id.* Indeed the Plaintiff's putative class is defined to include only individuals who drove their leased truck themselves. FAC at SA9-10 ¶ 33. These allegations, that Drivers derived no economic benefit from the right to hire others and did not do so, must be accepted as true. As a result, the contractual right to hire others on which Schneider places so much weight, loses all significance in analyzing the sufficiency of the complaint. *See Usery v. Pilgrim Equip.*, 527 F.2d 1306,1312 (5th Cir. 1976) ("the controlling economic realities are reflected by the way one actually acts" not the way one could have acted); *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1047 (5th Cir. 1987) ("it is not what plaintiffs *could* have done that counts, but, as a matter of economic reality, what they actually *do* that is dispositive"). Even if it were relevant, it does not establish independence. *Villalpando v. Exel Direct Inc.*, No. 12-CV-04137-JCS, 2015 WL 5179486, at *48 (N.D. Cal. Sept. 3, 2015) (finding right to hire drivers and take on additional routes did not indicate independent status and citing cases).

Schneider also notes that the Operating Agreement contained the self-serving recitation that Plaintiff had the right to "determine the manner, means and methods of performance" of his services as well as the right to choose his routes and control his

equipment. Appellees' Response Br. at 15. But Schneider again refuses to acknowledge that the FAC alleges in considerable detail that those "rights" were illusory and afforded him no meaningful ability to act independently. *Compare* Appellees' Response Br. at 15-16 *with* FAC at SA22, 23, 26 ¶¶ 99, 101, 116.[3]

Next Schneider takes issue with the significance of its right to terminate Drivers at-will, noting that an at-will termination provision can sometimes be consistent with independent status. Appellees' Response Br. at 17. That may be true, but it misses the point. At this stage, what matters is that the FAC alleges that the right to terminate Drivers at-will gave Schneider a powerful tool for controlling Driver performance and that a jury could reasonably find that to be the case, particularly since the right to terminate also meant that Schneider could put a Driver in default of his or her lease at-will, allowing Schneider to accelerate all lease payments and repossess the truck. FAC at SA21, 30-33 ¶¶ 115, 153(i), 154(d). The threat of such draconian consequences could easily be viewed as a way to exercise control over Drivers. *See Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (at-will termination provision is "strong evidence of an employment relationship."); *Doe v. Swift Transp. Co., Inc.*, No. 2:10-CV-00899 JWS, 2017 WL 67521, at *8 (D. Ariz. Jan. 6, 2017) (company's ability to put

[3] Like the Operating Agreement's recitation that Plaintiff was an "independent contractor," the recitation that he could control the "manner, means and methods" of his work was just boilerplate. It is the economic reality of the relationship that controls, not self-serving contractual language inserted by the company seeking to evade its FLSA responsibilities.

a driver in default of his lease through the at-will termination provision gave the company "full control over the terms of the relationship").

Schneider argues that some of Plaintiff's other allegations regarding control - that he had to follow Schneider's rules and procedures governing the manner in which he drove, that Schneider monitored his driving behavior, and that it expected him to comply with customer requirements, including pick-up and delivery times, FAC at SA17, 19, 26-27 ¶¶ 66-68, 82-84,122-128, represented only "a limited framework of rules and oversight" that was "consistent" with independent contractor status. Appellees' Response Br. at 18. Schneider is free to argue that rather dubious characterization at trial. For present purposes, it is sufficient that a reasonable jury could take the opposite view and find such detailed controls over the manner in which Drivers were required to operate to be an indication of employee status, particularly since those were the same controls Schneider exercised over its employee company drivers. FAC at SA19, 26-27, 38 ¶¶ 66-68, 120, 122-129, 182-84. *See Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1299369, at *2-3 (D. Ariz. Mar. 23, 2015) (training of drivers in company policies, use of computer system to monitor deliveries from pick up to delivery, right to discipline drivers for delivery errors all indicate employer control); *Swift Transp. Co., Inc.*, 2017 WL 67521, at *5, 8-9 (requirement that drivers comply with company policies and have a computer communication device in their truck indicate employee status).

As for the second *Lauritzen* factor, Schneider claims that Plaintiff had the ability to make a profit because the Operating Agreement gave him the ability to accept or decline loads, set his work schedule, and choose his routes. It is not at all evident how exercising those minor prerogatives translates into making a profit and Schneider never explains. Regardless, the allegations of the FAC make clear that (1) the ability to turn down a load or decide when to work did not enable Drivers to exercise economic independence and (2) despite the Operating Agreement provisions to the contrary, Schneider could, and did, compel Plaintiff to work and take specific unprofitable loads. FAC at SA21-22 ¶¶ 93-95, 97-98. The FAC also makes clear that, because Plaintiff could not work for other carriers, FAC at SA19-20 ¶¶ 87-90, turning down loads offered by Schneider, or taking time off, even when possible, provided Plaintiff no opportunity for profit; it only meant loss of income, just as any employee loses income when he declines offered overtime or takes unpaid time off. FAC at SA21-22 ¶ 97. For present purposes, a jury could reasonably conclude from the FAC allegations that Schneider exercised total control over all work assigned to Plaintiff and over the price to be paid for those assignments, that Plaintiff was totally dependent on Schneider for his livelihood and precluded from making a profit as an independent business.[4] *See Collinge*, 2015 WL

[4] The cases Schneider cites to support its position are easily distinguishable. In both *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 147 (2d Cir. 2017) and *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998), the plaintiff had the ability to work for other entities. In that situation, a worker might be able to use the

1299369, at *4-5 (explaining that "the drivers' opportunity for profit or loss depends more upon the jobs to which IntelliQuick assigns them than on their own judgment and industry."); *Davis v. Colonial Freight Sys., Inc.*, 2017 WL 11572196, at *5 (E.D. Tenn. Nov. 22, 2017) (inability to work for others and inability to negotiate rates indicates driver had "minimal opportunity to affect his own profitability"). In short, a jury could find that the second *Lauritzen* factor weighs in favor of employee status.

Schneider next argues that Plaintiff's "investment" in his leased truck indicates independent status. But given the FAC allegations that Schneider provided the truck with no credit check, no money down, and allowed it to be paid off in weekly installments deducted from Plaintiff's earnings, earnings that Schneider controlled, FAC at SA23-24 ¶ 102, a jury could well conclude that Plaintiff had no real investment in his truck and that the whole leasing arrangement was a fiction created by Schneider to give the appearance of independent investment with none of the substance. *See* Brief of Plaintiffs-Appellants (Appellants' Opening Br.), Dkt. 24 at 25 (citing cases). Indeed, the leasing arrangement created by Schneider is not too different from the company store of old where workers were allowed easy credit subject to deduction from their earnings, a superficially attractive arrangement that quickly led to debt servitude, both then and in the present case.

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ability to turn down loads and take time off to accept more advantageous loads from other entities. The FAC alleges that Plaintiff had no such ability.

Schneider argues that Plaintiff's ability to drive a truck indicates that the skill factor weighs in favor of independent status. But the ability to drive a truck was the same skill that Schneider's company drivers possessed and it in no way distinguishes Plaintiff from those employee drivers. FAC at SA24 ¶ 103. And, like its employee drivers, Schneider did not hire Plaintiff for any skill other than his ability to drive. FAC at SA24 ¶ 105. It did not inquire about his finances or experience operating an independent business, and it structured its relationship with Drivers in such a way that they did not have to have any ability to operate independently--Schneider took care of all aspects of their "business" for them. FAC at SA16, 24 ¶¶ 64, 104-105. A jury could reasonably conclude from these allegations that the skill factor also weighs in favor of employee status. *See Kiri v. Microsystems, LLC*, 781 F.3d 799, 809-810 (6th Cir. 2015) (where plaintiff was licensed installer, but defendant did not select plaintiff for any other special skills he brought to the job beyond the license, weight to be given this factor presented a jury question).

Schneider asserts that the one-year term recited in the Operating Agreement indicates independent status. Here again, Schneider is willfully refusing to consider the allegations of the FAC. The FAC makes clear that Schneider not only treated the contract as renewable on satisfactory performance but made use of a number of strategies to force Drivers to extend their employment indefinitely. FAC at SA24-26 ¶¶ 107-115. A jury could readily conclude from these allegations, if supported at trial, that,

as a matter of economic reality, Drivers were hired for an indefinite period, indicating employee status. The fact that the contracts did not have automatic renewal clauses is of no import where, as here, the complaint alleges that, as a matter of economic reality, Schneider intended an indefinite relationship and acted to ensure that that would be the case.

Inasmuch as Schneider concedes that the final *Lauritzen* factor -- that Plaintiff's work was integral to its business -- indicates employee status, it is evident that a reasonable jury could find, based on the facts alleged in the FAC, that all six of the *Lauritzen* factors show Plaintiff's economic dependence on Schneider and weigh in favor of employee status. That is more than sufficient to allege an entitlement to unpaid minimum wages under the FLSA and Wisconsin law for purposes of Fed. R. Civ. P. 12(b)(6).

II. PLAINTIFF PLAUSIBLY ALLEGED THAT THE OPERATING AGREEMENT WAS UNCONSCIONABLE

Although Schneider does not dispute that an unjust enrichment claim will lie where a contract is void or voidable, it argues that the FAC fails to plausibly allege the Operating Agreement was procedurally and substantively unconscionable. Its arguments are unpersuasive to say the least.

Schneider does not dispute that a finding of procedural unconscionability could be supported by the FAC's allegations that: (i) the Operating Agreement was a contract of adhesion totaling more than 100 single-spaced fine print pages, (ii) that there was a

vast disparity in bargaining power between Schneider and the Drivers who generally had little education beyond high school and lacked business experience, and (iii) that Schneider did not adequately explain the terms of the Agreement or give Drivers reasonable time to review it. FAC at SA30-31 ¶ 153. Instead, it argues that those facts are contradicted by the allegation, toward the end of the FAC, that Schneider would routinely send Drivers a renewal Agreement to sign, FAC at SA24 ¶ 108, which, Schneider asserts, would, at least, have given Drivers time to review it. But there is no contradiction. Having the right to review a renewal contract does not make the circumstances surrounding the signing of the original contract any less procedurally unconscionable. Moreover, the FAC makes clear that at the time a Driver received a renewal contract he or she was already indebted to Schneider as a result of his or her truck lease (which extended beyond the expiration of the Agreement thereby requiring a Driver to sign the renewal to avoid default on the Lease), as well as debt owed on advances made by Schneider. FAC at SA25, 31 ¶¶ 110-114, 153(i). Those circumstances increased the procedural unconscionability associated with renewal contracts by making it that much harder for Drivers to freely choose whether to enter into the renewal Agreement. FAC at SA25, 31 ¶¶ 111-114, 153(i).

Schneider also implicitly concedes that the contract provisions that Plaintiff alleges were substantively unfair, FAC at SA31-33 ¶ 154, would support a finding of substantive unconscionability if Plaintiff were, in fact, an employee. Schneider's only

argument is that Plaintiff was properly classified as an independent contractor and, therefore, the unfair provisions cited by Plaintiff must be viewed as normal burdens of independent contractor status. Appellees' Response Br. at 34 ("Since almost all of his allegations of substantive unconscionability merely allege that Schneider treated him as an independent contractor rather than as an employee, Brant has failed to allege a plausible claim of substantive unconscionability."). But, as noted above, Plaintiff *has* plausibly alleged that he was an employee and that the Operating Agreement misclassified him. His claim that the Agreement imposes obligations that are unconscionable in an employment agreement, including, *inter alia,* imposing all operating expenses on the Drivers, must be evaluated on the assumption that the FAC's allegations of employee status are true. Defendants do not argue that Plaintiff's allegations fail to rise to the level of substantive unconscionability in an employment agreement. Accordingly, the Court should find that, at the pleading stage, the Operating Agreement poses no bar to the unjust enrichment claim.

That said, there are also allegations of substantive unconscionability that would support voiding the Operating Agreement even if Plaintiff were not an employee. These include the provision imposing attorney's fees on Drivers who pursue FLSA claims, (thereby chilling the exercise of protected FLSA rights and imposing the threat of unlawful anticipatory retaliation against workers who attempt to pursue FLSA claims). *See Doe 1 v. Swift Transp. Co., Inc.*, 2017 WL 735376, at *4-5 (D. Ariz. Feb. 24, 2017)

(finding contract provision making truck drivers liable for Swift's attorneys' fees if they unsuccessfully pursue an FLSA claim against Swift to be unlawful and coercive and ordering corrective notice to be sent to the putative class of truck drivers who signed independent contractor agreements). Similarly, the fact that the Operating Agreement imposed no obligation on Schneider to provide loads to Drivers while simultaneously (1) binding Drivers to work exclusively for Schneider, and (2) making it difficult for Drivers to terminate the Agreement by virtue of their lease debt to Schneider is "commercially unreasonable" and far "outside the limits of what is reasonable or acceptable" even with respect to an independent contractor. *Wisconsin Auto Title Loans, Inc. v. Jones*, 290 Wis. 2d 514, 536 (2006). Those provisions essentially force Drivers into a form of indentured servitude and are unconscionable. For all these reasons, Schneider's argument that Plaintiff has failed to allege facts that would support voiding the Operating Agreement as unconscionable is without merit and the dismissal of that claim should be reversed.

III. PLAINTIFF PLAUSIBLY ALLEGED TILA VIOLATIONS

Plaintiff plausibly alleged damages resulting from Schneider's TILA violations. Schneider does not contest that Plaintiff alleged that he was underpaid and overcharged in connection with undisclosed charges that were required to be disclosed under TILA, including $1,200 in unspecified chargebacks that Schneider refused to substantiate to Plaintiff as well as the imposition of an allegedly discretionary security deposit upon

termination of Plaintiff's operating agreement that Plaintiff was unable to pay, resulting in the loss of his truck. FAC at SA34 ¶¶ 157-60. Schneider's argument that in order to allege a plausible TILA violation Plaintiff must somehow more precisely identify and quantify the financial harm flowing from the withheld information, applies a higher standard than is appropriate at the pleading stage and as shown in Plaintiff's Opening Brief, is contrary to the statute and has been rejected by numerous courts. Appellants' Opening Br. at 46-48. Like the lower court, Schneider fails to cite a single authority in support of its strained, narrow reading of the statute and regulations.

Plaintiff also met his burden to plead that the terms of Schneider's operating agreement did not meet TILA requirements. Schneider does not contest Plaintiff's claims that its Operating Agreement and Lease failed to specify that it would give the Plaintiff, "before or at the time of settlement, a copy of the rated freight bill, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would appear on a rated freight bill" as required by 49 C.F.R. § 376.12(g). Instead, it argues that its offer to provide "reasonable detail" for its calculations at the time of settlement is a sufficient substitute for what the TILA requires. Appellee's Response Br. at 40. At this stage there is no record of the "reasonable detail" Schneider claims it provided nor what information it provided Plaintiff regarding the $1,200 in chargebacks. As in *Stampley v. Altom Transport, Inc.*, 958

F.3d 580 (7th Cir. 2020), a decision on the sufficiency of the information is appropriate at summary judgment, not on a motion to dismiss.

Plaintiff also plausibly alleged that Schneider's disclosure of chargebacks did not comply with the TILA regulations. Schneider's position that his allegations fail because he cannot say why Schneider took the chargeback Plaintiff cited as an example, is an attempt to turn the statute upside down. It was Schneider's duty to set forth in detail all allowable chargebacks and provide copies of documents necessary to determine the validity of the charge. Schneider does not claim it complied -- only that Plaintiff somehow fails to identify with specificity how the cited withdrawal from his account was improper. But Plaintiff did seek to determine the basis for the charge and Schneider refused to provide it. FAC at SA34-35 ¶ 160.

Finally, Plaintiff has alleged that Schneider's operating agreement and lease did not disclose all required escrow funds. Schneider's argument that the Lease did not "require" Plaintiff to pay the additional security deposit it demanded is spurious. Schneider's Lease required the additional funds in the most important way—if a Driver did not pay it, Schneider could put him into default and seize the truck. Doc. 71-4 at 8, ¶ 19L. In fact, that is precisely what Plaintiff alleges happened to him. FAC at SA35 ¶¶ 161-62. The fact that Schneider could choose not to require the payment does not change its obligation under the TILA to specify the amount of the escrow obligation in in the lease.

CONCLUSION

For all the foregoing reasons, this Court should find that the First Amended Complaint plausibly asserts claims for violations of the FLSA, Wisconsin minimum wage, Wisconsin unjust enrichment, and TILA, reverse the judgment below, and remand for further proceedings.

Respectfully submitted December 9, 2021.

/s/ Michael J.D. Sweeney

GETMAN, SWEENEY & DUNN, PLLC
Michael J.D. Sweeney
Meagan M. Rafferty
260 Fair Street
Kingston, NY 12401
(845) 255-9370
msweeney@getmansweeney.com
mrafferty@getmansweeney.com

MARTIN & BONNETT, P.L.L.C.
Susan Martin
Michael M. Licata
4747 N. 32nd Street, Suite 185
Phoenix, Arizona 85018
(602) 240-6900
smartin@martinbonnett.com
mlicata@martinbonnett.com

Edward Tuddenham
42 Ave. Bosquet
75007 Paris, France
+33.6.84.79.89.30
etudden@prismnet.com

CERTIFICATE OF COMPLIANCE

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Dated: December 9, 2021

/s/ Michael J.D. Sweeney
Michael J.D. Sweeney
One of the Attorneys for the Plaintiffs- Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, the Appellants' Reply Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael J.D. Sweeney
Michael J.D. Sweeney