UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC R. BRANT, et al.,

Plaintiffs,

v. Case No. 20-C-1049

SCHNEIDER NATIONAL INC., et al.,

Defendants.

DECISION AND ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case involves the thorny question of whether a truck driver is an employee of Schneider National Carriers, Inc. (SNC), within the meaning of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, or an independent contractor to whom the FLSA does not apply. Plaintiff Eric R. Brant signed Owner-Operator Operating Agreements (OOOA) with SNC, specifying that he was an independent contractor. Brant had worked as a truck driver for various other carriers since at least 2007, both as an employee and as an independent contractor. Brant elected to join SNC as an owner-operator after a friend told Brant of the freedom he enjoyed and the profit he was making. In 2018, Brant submitted a credit application and signed a lease for a truck with Schneider Finance, Inc. (SFI), that required a $1,000 security deposit and weekly payments of $843.42. On December 4, 2018, Brant signed an OOOA with SNC under which Brant was able to choose when he would work and which loads he would pick up and deliver from Schneider's online portal. Under the OOOA, Brant would receive 65% percent of the revenue that SNC received for each load he delivered, plus incentives. From this amount, Brant was to pay his operating expenses, including fuel, maintenance, and lease payments.

Though initially pleased with his arrangement, Brant significantly decreased his driving beginning in March of 2019 due to his father's health problems and other family obligations. As a result, the revenue he was earning decreased substantially. In June 2019, Brant decided to drive for a different company where he believed he would make more money. Shortly thereafter, however, Brant developed blood clots that prevented him from driving and he eventually lost his medical authorization to drive a commercial motor vehicle.

On July 10, 2020, Brant filed this lawsuit against Defendants SNC (collectively, with Schneider National Bulk Carriers, Inc. (SNBC), added later, "Schneider"), SFI, and Schneider National, Inc. (SNI), their parent company, together with 10 unknown defendants, claiming that SNC had misclassified him as an independent contractor and violated the FLSA by making unlawful deductions from his wages and failing to pay him his federal minimum wage. Brant also alleged violations of the Truth in Leasing Act (TILA), 49 U.S.C. § 14704, and the Wisconsin minimum wage law (WMWL), Wis. Stat. § 104.02. Brant asserted his FLSA claim on behalf of himself and as an FLSA collective action under 29 U.S.C. § 216(b) and sought Rule 23 class action certification of his TILA and state law claims. Fed. R. Civ. P. 23.

On January 19, 2021, the court granted Defendants' Rule 12(b)(6) motion to dismiss the complaint. Adopting the analysis of the court in *Derolf v. Risinger Brothers Transfer, Inc.*, 259 F. Supp. 3d 876 (C.D. Ill. 2017), the court concluded that the rights Brant had to control his business under the OOOA, his opportunity for profit and loss, and the various other factors used to determine the parties' relationship indicated that Brant was an independent contractor and not an employee. Dkt. No. 58. The dismissal was without prejudice, and Brant filed an amended complaint, but the court again granted Defendants' motion to dismiss for essentially the same reasons and entered a final judgment. Dkt. Nos. 83–84.

Brant appealed, and the Seventh Circuit reversed and remanded the case for further proceedings. Dkt. No. 89; *Brant v. Schneider Nat'l, Inc.*, 43 F.4th 656 (7th Cir. 2022). On September 22, 2022, Brant, as sole named Plaintiff, filed a motion for conditional certification of a collective under the FLSA. Dkt. No. 104. While that motion was pending, the court granted Brant leave to file a second amended complaint. Dkt. No. 133. On May 1, 2023, Brant did so, adding Thomas Campbell and Brian Minor, two other truck drivers who also entered OOOAs with Schneider, as named plaintiffs. Dkt. No. 134. The court thereafter denied Brant's motion for conditional certification of an FLSA collective action under 29 U.S.C. § 216(b), leaving the three Plaintiffs named in the second amended complaint as the sole claimants. *See* Dkt. No. 137. By stipulation of the parties, SNBC was added as a defendant on February 26, 2024, and the following month, Plaintiffs withdrew their TILA claims. Dkt. Nos. 163 & 165. With discovery complete, the case is now before the court on Defendants' motion for summary judgment on Plaintiffs' FLSA and WMWL claims. Defendants contend that they are entitled to summary judgment dismissing those claims because the undisputed facts of the case establish as a matter of law that all three plaintiffs were independent contractors within the meaning of both the FLSA and the WMWL. As for the WMWL, Defendants also contend that it has no application to Plaintiffs as they neither reside in the State, nor performed significant work here.

ADDITIONAL BACKGROUND

Schneider is a federally authorized interstate motor carrier that relies on thousands of semi-trailer trucks to transport freight across the country for its customers. Schneider utilizes two classes of drivers to move freight. First, Schneider hires "company drivers" and designates them as employees. The other class of drivers Schneider hires are what it calls "owner-operators," and Schneider designates them as independent contractors. Owner-operators provide their own trucks,

whether leased or purchased, and choose when they drive and what loads they will carry. Recognizing that purchasing a truck requires significant capital investment, Schneider created a program where drivers could lease Schneider's trucks and use those trucks to drive for Schneider under contract. Under the program, owner-operators enter into two agreements: (1) a lease agreement for a truck with SFI and (2) an OOOA with SNC or SNBC to define the terms of hauling freight for Schneider.

Painting in broad strokes, under the lease, SFI agreed to lease an owner-operator a truck valued at over $140,000. *See* Dkt. No. 71-4 at 11. In exchange, the owner-operator would make periodic rent payments to SFI. *See id.* Owner-operators did not have to pay an initial security deposit at signing, and their first payment was deferred by about a month. *See id.* At the end of the lease period, owner-operators would have the opportunity to purchase the truck from SFI. *Id.* at 3. After or concurrent to signing a lease, owner-operators entered into an OOOA with Schneider. The OOOA provided, again painting in broad strokes, that owner-operators would be paid a settlement on a per trip basis. Dkt. No. 71-3 at 61. Some owner-operators were paid a percentage of the gross revenue generated from the trip, less any deductions; other owner-operators were paid a fixed rate, or "all-in-rate," less any deductions. Deductions that were taken from a driver's settlements included among other things: fuel, road, and mileage taxes; insurance payments; toll charges; fuel purchases made through Schneider's discount program; and any lease payments owed to SFI on a Schneider truck. Thus, owner-operators used their revenues from hauling Schneider loads to make their lease rental payments.

Regardless of the payment scheme, owner-operators were not guaranteed any set amount of freight, nor required to haul any freight at all. Dkt. Nos. 204-19 at 18; 71-3 at 1–2. Instead, owner-operators would select their own loads from Schneider's "load board." The load board was

a computer interface that allowed drivers to see the destination, mileage, weight, and revenue of specific loads. Dkt. No. 204-19 at 25. At some point in time, each named Plaintiff entered into a lease and OOOA with Schneider.

Like Brant, Campbell and Minor had previous experience driving truck before signing their OOOAs with Schneider. Campbell had worked as an employee driver at various carriers since 2014. In September 2016, Campbell was hired by SNBC as an employee driver but eventually elected to join SNBC's owner-operator program to earn more money and work his way to owning his own truck. Campbell signed a truck lease with SFI on February 16, 2018, and signed an OOOA on March 27, 2018. Like Brant, Campbell was initially able to generate a profit as an owner-operator. Over a ten-month period, his total net pay after deductions was roughly $50,584. Things changed in 2019, when his truck was in need of repairs. SFI allowed him to skip payments when his truck was in the shop and agreed to add the past due payments to the end of the lease. Campbell eventually stopped making payments on the lease and SFI repossessed the truck due to his default. He then bought his own truck and began driving as an independent owner-operator for a different carrier, L&B Transport, using his truck. He currently drives an L&B Transport company truck as an employee because his own truck broke down, but he plans to go back to working as an independent owner-operator when his truck is repaired.

Minor likewise had previous experience driving a truck. He spent five years as a company driver for Schneider before signing a truck lease with SFI on June 5, 2017, and an OOOA with SNC on March 29, 2018, by which time he had formed his own business entity—Maurice B. Trucking, LLC. And like Brant and Campbell, Minor initially experienced success. In 2018, his first full year as an owner-operator, his total net pay after deductions was roughly $77,540, well above the $40,000 to $45,000 he earned as an SNC company driver. He started out strong in 2019

as well, on a pace to generate over $100,000 for the year, until he clipped a parked car for his third accident within a span of thirteen months. This led SNC to terminate his OOOA. He then returned his truck to SFI, obtained his own operating authority, and began operating as a DOT-approved carrier through his entity, Minor Carriers. His company, which engages a second driver who Minor classifies as an independent contractor, currently contracts with Schneider to transport brokered loads.

Like Brant, Campbell and Minor claim that, notwithstanding the OOOAs under which they agreed to work as independent contractors, Schneider wrongfully classified them as independent contractors when, as a matter of economic reality, they were employees of Schneider. As a result of this misclassification, Plaintiffs contend that they were paid less than the minimum wages required under federal and state law for employees. In addition to declaratory and injunctive relief, Plaintiffs seek statutory, compensatory, and liquidated damages, as well as actual costs and attorneys' fees.

LEGAL STANDARD

Summary judgment is appropriate when the movant shows there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* In deciding a motion for summary judgment, the court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845

F.3d 807, 812 (7th Cir. 2017)). This means that the court must refrain from making credibility determinations. *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp.*, 477 U.S. at 322).

ANALYSIS

A. The FLSA and the Economic Reality Test

The FLSA covers only employees, not independent contractors. For this reason, a clear definition of the terms "employee" and "employer" would seem an essential component of the Act. After all, how can a business owner comply with the FLSA if he or she does not know whether it applies? Surprisingly, the FLSA does not contain a clear definition of the term employee. The FLSA provides unhelpful and circular definitions of the terms employee and employer. The term "employer," under the FLSA, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 203(d). The term "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). As far back as 1947, the Supreme Court noted that the FLSA has "no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food*

Corp. v. McComb, 331 U.S. 722, 728 (1947). Unfortunately, since then, neither Congress, nor any court with the authority to do so, has provided any clarification or refinement that solves or even helps to address such problems. Instead, lower courts and the parties involved in disputes over the applicability of the Act are told they must consider "all of the circumstances of the work activity" to determine "the economic reality of the nature of the working relationship." *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987).

The Seventh Circuit applies "the six-factor test set out in *Lauritzen* to determine whether economic reality indicates a worker is an employee." *Brant*, 43 F.4th at 665 (citing *Simpkins v. DuPage Housing Auth.*, 893 F.3d 962, 964 (7th Cir. 2018); *Lauritzen*, 835 F.2d at 1534–35). Those factors are:

> 1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanency and duration of the working relationship;
>
> 6) the extent to which the service rendered is an integral part of the alleged employer's business.

Id. (quoting *Lauritzen*, 835 F.2d at 1535). "No single factor is necessarily controlling," however, and "the ultimate conclusion on employee status is made by examining the totality of the circumstances." *Id.* (citing *Simpkins*, 893 F.3d at 964). The court is also to consider throughout its review of these factors the degree to which the alleged employee is dependent on the alleged

employer, with greater dependence weighing in favor of an employer-employee relationship, making dependence, in effect, a seventh factor. *Lauritzen*, 835 F.2d at 1538.

A rule requiring consideration of all of the circumstances surrounding a series of factors with no single factor controlling, however, does not lend itself to resolving a case on summary judgment. As Judge Easterbrook observed in *Lauritzen*, "[a] legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision." 835 F.3d at 1539 (Easterbrook, J., concurring). And the price of that avoidance, except in obvious cases, is committing the resolution of such a case to the finders of fact. *Id.* at 1542 ("If we are to have multiple factors, we also should have a trial. A fact-bound approach calling for the balancing of incommensurables, an approach in which no ascertainable legal rule determines a unique outcome, is one in which the trier of fact plays the principal part.").

It is clear from the Seventh Circuit's opinion reversing this court's decision granting Defendants' motion to dismiss that this is not an obvious case. The court acknowledged that "Brant could not be deemed an employee" if it looked only to the face of his contracts with Schneider. *Brant*, 43 F.4th at 665. But "the terms of a contract," the court noted, even contracts such as those in this case which carefully delineate the rights and responsibilities of the parties, "do not control the employer-employee issue under the Act. We look instead to the 'economic reality of the working relationship' to determine who is an employee covered by the FLSA." *Id.* (quoting *Simpkins*, 893 F.3d at 964). And the economic reality, it appears, is to be determined not so much by the terms of the contract, but rather by the degree to which a truck driver is able to exercise the rights given by the contract and the success the truck driver is able to achieve, even if his failure to exercise those rights and achieve success is due to circumstances personal to himself.

Based on Brant's allegations, the Court of Appeals found that the first, second, third, and sixth factors weighed in favor of finding Brant was an employee of Schneider. *Id.* at 668, 670–72. The court also found that the fifth factor weighed in favor of an employer-employee relationship, "though weakly," and the fourth factor was "neutral" but leaned in favor of finding an employer-employee relationship. *Id.* at 671–72. As such, the court concluded that Brant alleged a legally viable claim under the FLSA. *Id.* at 680. Though the Seventh Circuit's decision pertained only to Brant, Plaintiffs make substantially the same allegations in their second amended complaint as to Campbell and Minor as well. *Compare* Dkt. No. 63, *with* Dkt. No. 134.

Defendants argue that the Seventh Circuit's opinion reversing this court's decision granting their motion to dismiss is not suggestive of the result on summary judgment since at the motion to dismiss stage "Plaintiffs' allegations 'receive[d] the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" Dkt. No. 195 at 8 (emphasis omitted) (quoting *Brant*, 43 F.4th at 664). They note that the case has now proceeded to the summary judgment stage with an evidentiary record that controls over mere allegations. Defendants contend that Plaintiffs' opposition to summary judgment rests in large part on their own pre-discovery declarations which are contradicted by the evidentiary record, including their own deposition testimony, and should be therefore disregarded. *Id.*

Conflicting statements, however, whether set forth in declarations or in response to questions at depositions, are for the factfinder to resolve, not the court on a motion for summary judgment. While it is true that much of Plaintiffs' evidence is inconsistent with the terms of their OOOAs and their deposition testimony, the evidence, as a whole, is mixed and yields no definitive and conclusive finding as to the seven *Lauritzen* factors. This is not surprising. As Judge Easterbrook explained in his concurring opinion in *Lauritzen*, each of the seven factors that are

used to determine whether the relationship in one of employment has some aspects that are found in employment relationships and some that are more commonly associated with independent contractors. 835 F.2d at 1540–42. They are all "of uncertain import in theory and cut both ways in practice." *Id.* at 1542.

For example, the first factor is the alleged employer's control over the way the alleged employee performs his work. In considering Schneider's purported control over the way Brant performed his work, the Seventh Circuit considered five subfactors: conduct, monitoring, hiring helpers, supply equipment, and routes and schedules. *Brant*, 43 F.4th at 666–68. The evidence shows that Schneider exercised complete control over advertising, billing, and negotiation with customers over the terms of shipment contracts, but Plaintiffs decided which contracts to accept. Schneider exercised some control over the manner in which Plaintiffs performed the contracts they accepted to the extent that it required drivers to comply with its operational standards and policies, and follow the customers' special instructions for delivery and parking. Schneider also monitored and collected data including speed, hard breaking incidents, collisions, critical driving events, hours of service, engine operational data, and other telematics data. Dkt. No. 196 ¶ 3. Monitoring may not be the same as controlling, but under the law of the case, it is suggestive of control. As for hiring additional help, Brant testified that the economic reality made it impossible for him to exercise that right, but it is unclear whether that was due to his personal circumstances or the structure of the arrangement. The fact that Plaintiffs owed substantial lease payments to SFI in order to retain possession of the truck, which was then leased to Schneider, also gives Schneider substantial control over the driver's conduct. Finally, routes and schedules, according to Plaintiffs, were largely dictated by pick-up and delivery schedules and access to fuel stops where it was possible to purchase fuel on Schneider's credit. Still, under the terms of their OOOAs, Plaintiffs

could drive for other companies or purchase fuel on their own. The parties offer sharp disputes over the amount of control Schneider had over Plaintiffs' work, but it is unclear in any event how much control is needed to find in favor of Plaintiffs on this factor.

These same kinds of disputes over the evidence exist as to each of the other *Lauritzen* factors. Even if the record before the court permitted a clear determination as to several of the factors, with no rule to determine which or how many are dispositive of an independent contractor versus employment relationship, the court would still be unable to determine the issue as a matter of law. The problem pointed out by Judge Easterbrook in his *Lauritzen* concurrence almost forty years ago remains: there is no legal rule to determine the outcome. 835 F.2d at 1542; *see also* Tammy McCutchen & Alex MacDonald, *The War on Independent Work: Why Some Regulators Want to Abolish Independent Contracting, Why They Keep Failing, & Why We Should Declare Peace*, 24 FED. SOC'Y REV. 165, 190 (2023) ("Six factors, seven factors, ten factors, sixteen factors, twenty factors, more. Under this opaque, complex, and chaotic morass, how can any normal human have any idea who is an employee and who is an independent contractor?").

Given this state of the law, the court is unable to determine whether Plaintiffs are or are not independent contractors as a matter of law. The case must therefore go to trial with all the additional time and expense that will require. Moreover, at the conclusion of the trial, the trier of fact, here, a jury of lay persons, will have to determine, from all of the surrounding circumstances, and based upon a set of jury instructions as opaque, complex, and confusing as the multi-factor economic reality test they will attempt to apply, whether Plaintiffs are Schneider's employees or independent contractors. Only then will the parties have an answer in this case, though that answer will provide little, if any, guidance to what the answer may be in the next case brought by another "owner-operator."

It is a serious failure of law and our legal system that businesses such as Schneider, aided by experienced and learned legal counsel, cannot know whether a contract it wishes to offer to thousands of truck drivers can, in effect, at least for some truck drivers, create a contract for employment, thereby subjecting it to liability under the FLSA. It is even worse that, having entered into such a contract with thousands of drivers, and now facing a lawsuit on that very issue, neither Schneider nor the drivers with whom it has contracted, can learn the answer to that question without first expending years of litigation, untold thousands of dollars in legal fees, and perhaps multiple trips to the Court of Appeals. As Judge Easterbrook urged almost forty years ago, "We can, and should, do away with ambulatory balancing in cases of this sort. Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become." 835 F.2d at 1545 (Easterbrook, J., concurring). More importantly, the longer we keep them in the dark, the more unjust it is to the parties who have a right to know what the law is so that they can comply with it and avoid lawsuits that waste time and resources of both the parties and the courts.

B. Wisconsin Minimum Wage Claim

Plaintiffs also allege Schneider violated the WMWL, Wis. Stat. § 104.02. In support of its motion seeking summary judgment on this claim, Defendants first argue that application of the WMWL to Plaintiffs would be impermissible extraterritorial exercise of Wisconsin law. Defendants note that Plaintiffs were not based in Wisconsin, nor did they perform significant work in the State. Brant was based in Ohio and never delivered to or drove through Wisconsin. Dkt. No. 204-19 at 10. Campbell lived in Texas and drove truck in Wisconsin on a handful of occasions, including three times to deliver shipments. *Id.* at 11. And Minor lived in Georgia and completed work for Schneider in Wisconsin twice. *Id.* at 13–14. Plaintiffs have not proffered specific

evidence, Defendants argue, from which a jury could find that either Campbell's or Minor's work in Wisconsin resulted in them "not [being] paid the Wisconsin minimum wage during at least one workweek." *Brant*, 43 F.4th at 673. It thus follows, Defendants contend, that the WMWL does not apply.

Plaintiffs note in response that the WMWL does not contain any clear geographical boundaries. By its plain terms, it requires any employer to pay any employee at least the statutorily required minimum wage. The statute does not say where the employee must reside or perform the work required by the employer. Given the language of the statute, requiring a Wisconsin corporation to comply with Wisconsin law does not seem unreasonable.

In support of their argument that the State law applies, Plaintiffs cite *Wendt v. Trifecta Sols. LLC*, No. 23-CV-1415-JPS, 2024 WL 3201159, at *7 (E.D. Wis. June 27, 2024), in which the court concluded that the WMWL could be applied to a worker who performed work in Illinois. Importantly, *Wendt* was decided on a motion for a default judgment, both the employee and the employer were Wisconsin residents, and the employee had performed substantial work in Wisconsin. *Id.* Ultimately, the court awarded damages under Illinois' minimum wage law, which the court concluded was also applicable, because it offered a greater recovery. Thus, *Wendt* is distinguishable from this case on several grounds.

Nevertheless, if Wisconsin's minimum wage law does not apply in this case, it would be difficult to determine what state's law would apply. Plaintiffs performed their work duties across the entire country, and they were constantly picking up, driving through, and delivering shipments in different states. It would be patently absurd to require compliance with each state's law in which Plaintiffs performed any amount of work. Schneider is headquartered in Wisconsin and has many

employees there. Moreover, the OOOA the parties all signed contains a choice of law provision, which reads in pertinent part:

> This Agreement, any documents and instruments relating hereto, and/or the relationship created thereby will be governed by, and will be construed and enforced in accordance with, the substantive laws of the State of Wisconsin, without regard to principles of conflicts of laws as applied to contracts entered into and to be performed entirely within that state by its residents (the "State Laws") and any applicable federal laws . . . .

Dkt. No. 182-1 at 196.

The general rule in Wisconsin is that parties to a contract may agree that the law of a particular jurisdiction will control their contractual relationship. *Bush v. Nat'l Sch. Studios, Inc.*, 139 Wis. 2d 635, 642, 407 N.W.2d 883, 886 (1987). But even aside from the choice of law provision of the contract, it would appear that Wisconsin law would apply under traditional choice-of-law principles. "In contractual disputes, Wisconsin courts apply the 'grouping of contacts' rule, that is, that contract rights must be determined by the law of the jurisdiction with which the contract has its most significant relationship." *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, ¶ 26, 251 Wis. 2d 561, 577, 641 N.W.2d 662, 670–71 (internal citations and brackets omitted) (quoting another source). Given the nature of the work at issue, Wisconsin is the state with the most significant relationship to the contract. The same result follows even if Plaintiffs' Wisconsin minimum wage claims are viewed as tort claims. The most significant relationship with any such tort is with the State of Wisconsin.

Defendants also argue that application of the Wisconsin minimum wage statute to out-of-state workers would violate the dormant Commerce Clause. But this argument was rejected by the Seventh Circuit in *Hirst v. Skywest, Inc.*, 910 F.3d 961, 966–67 (7th Cir. 2018). Under the dormant Commerce Clause, a court invalidates a state law only where there is a clear showing of discrimination against interstate commerce, "either expressly or in practical effect." *Id.* at 967

(quoting *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017)). Moreover, the dormant Commerce Clause has no application to "state and local laws expressly authorized by Congress." *Id.* Because the FLSA expressly authorizes state and local laws establishing minimum wages, application of Wisconsin's minimum wage law is not improper under the dormant Commerce Clause. *Id.*

Finally, Defendants argue, just as they do under the FLSA, that Plaintiffs are independent contractors and not employees, and therefore the WMWL does not apply. The WMWL requires that "[e]very wage paid . . . by any employer to any employee . . . shall not be less than the applicable minimum wage . . . ." Wis. Stat. § 104.02. Unfortunately, the WMWL provides as little clarity as the FMLA for determining whether a worker is an employee or an independent contractor. The WMWL defines the term "employee" as "every individual who is in receipt of or is entitled to any compensation for labor performed for any employer." Wis. Stat. § 104.01(2)(a). The term "employer" is defined to include "every person, firm or corporation, agent, manager, representative, contractor, subcontractor or principal, or other person having control or direction of any person employed at any labor or responsible directly or indirectly for the wages of another." Wis. Stat. § 104.01(3)(a).

The Court of Appeals noted in *Brant* that "Wisconsin courts do not appear to have addressed squarely the boundary between employee and independent contractor for minimum wage purposes." 43 F.4th at 673. Construing the pertinent statutes as it believed the Wisconsin Supreme Court would, the court observed that "[t]he mention of control in the definition of 'employer' in Wisconsin's minimum wage law is significant, though it is not the exclusive method of showing employer status." *Id.* at 674. The court then concluded: "Based on the text of § 104.01(3)(a) and the consistent focus on control shown across various areas of Wisconsin

employment law, allegations giving rise to a plausible inference of control over a person employed at labor are enough to plead that a person or business is an employer under Wisconsin's minimum wage law." *Id.* For the same reasons that it found Brant's allegations of the nature and degree of Schneider's control sufficient to suggest an employer-employee relationship under the FLSA, the court concluded that they were sufficient to state a claim under the WMWL. *Id.*

With the same question before the court now on Defendants' motion for summary judgment, the court reaches the same conclusion as it arrived at under the FLSA. Given the conflicting evidence before the court and the lack of clarity as to the nature and degree of control needed under Wisconsin law to create an employer-employee relationship, summary judgment is likewise unavailable on the same issue here. On this record, the court cannot conclude as a matter of law that Plaintiffs are not employees under the WMWL.

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment on Plaintiffs' FLSA and WMWL claims (Dkt. No. 180) is **DENIED**. Pursuant to the stipulation of the parties, Plaintiffs' unjust enrichment claims also remain, but their TILA claims are withdrawn. Dkt. No. 165. The Clerk is directed to set this matter on the court's calendar for a telephone conference to discuss further proceedings.

SO ORDERED at Green Bay, Wisconsin this 21st day of February, 2025.

William C. Griesbach
United States District Judge