AMERICAN ARBITRATION ASSOCIATION

In re Mass Arbitration Against A-1 Quality Logistical Solutions, LLC; William Foster III; Richard Mursinna; et al.

INTRODUCTION

For over a decade A-1 and its owners have blatantly ignored their obligations under the Fair Labor Standards Act and state wage and hour laws by misclassifying their warehouse workers as independent contractors and refusing to pay them the premium overtime rate for all hours worked over 40 in a workweek. As a result, Respondents A-1 Quality Logistical Solutions, LLC (A-1); William Foster; Richard Mursinna; and a number of A-1's contracting companies have cheated hundreds, if not thousands, of employees out of hard-earned overtime wages.

Respondents employ Claimants as order selectors and lumpers to work in their customers' warehouses across the country. Order selectors pick pallets of products (such as food), encase them with saran wrap, and move them to a designated spot in the warehouse for another worker to place on a truck for distribution or delivery. Lumpers load and unload pallets of products from the trucks. Respondents scheduled and required Claimants to work more than 40 hours each week, paid them on 1099s, illegally deducted business expenses from their wages, and failed to pay them premium overtime wages for all hours worked over 40 in a workweek.

Under the FLSA, arbitrators evaluate whether companies misclassified workers using the economic reality test. That test is generally composed of six factors, and asks whether the workers are economically dependent on the company. Here, Respondents' warehouse workers are employees because they are economically dependent on Respondents, and all six factors

support employee status. Respondents control the warehouse workers' schedules and assign their work, and have authority to hire, fire, and discipline them. The work does not require special skill, and the warehouse workers do not run their own businesses and do not invest in the business. They are employees, not independent contractors. Below, Claimants provide the procedural history of this litigation, an overview of the facts, and a legal analysis of some of the claims relevant to the FLSA analysis. There are numerous issues that the parties will need to resolve at the hearing, and those include:

- whether A-1 employed Claimants;
- whether the additional Respondents, including the owners of the closely held companies, are joint employers and/or individually liable;
- whether Claimants worked more than 40 hours in a week;
- whether Respondents accurately recorded the hours Claimants worked;
- whether Respondents paid Claimants premium overtime wages at the rate of time and one-half for all hours worked over 40 in a workweek;
- the extent of Claimants' overtime damages;
- whether Claimants are due mandatory liquidated damages under 29 U.S.C. § 216(b);
- if Respondents assert a good faith defense, whether that defense can overcome the high bar even when A-1 litigated similar issues in *Foster et al., v. A-1 Quality Labor Services, LLC and William J. Foster III*, 1:11 Civ. 3342-JEC, (N.D. Ga. April 1, 2014);
- if applicable, whether Respondents willfully violated the FLSA;
- whether Respondents are responsible for any damages under state wage and hour laws; and
- if Claimants prevail, the amount of attorneys' fees and costs Claimants are entitled to recover.

PROCEDURAL HISTORY

This case started in early 2023 when 20 warehouse workers filed their claims with the AAA. However, shortly after filing the demands, but before Respondents answered, Claimants filed a complaint in the U.S. District Court for the Southern District of Ohio. Because the U.S. Supreme Court's holding in *S.W. Airlines Co. v. Saxon,* 596 U.S. 450, 461 (2022) exempted airline luggage handlers from the Federal Arbitration Act's residual clause under § 1, the warehouse workers here challenged the enforceability of the arbitration clause and sought to bring their claims on a collective and class basis in federal court. Thus, the AAA stayed the proceedings.

In federal court, the warehouse workers asserted the same wage and hour allegations as in arbitration. They brought FLSA claims as a collective action, and Rule 23 class action claims under various wage and hour laws (N.Y. Lab. Law § 190 *et seq.*; Mo. Rev. Stat. § 290.505; Colo. Rev. Stat. §§ 8-4-101, *et seq.*, 7 CCR 1103-1). More than 130 warehouse workers from across the country filed a consent to sue in the case. After waiting approximately 15 months, and over the warehouse workers' objections, the District Court compelled the workers to arbitration. Dkt. 83.

As a result of the District Court's order, the original litigants restarted their arbitrations, and additional warehouse workers began filing new arbitration demands. The AAA invoked the mass arbitration process. The parties participated in settlement negotiations with an experienced mediator — retired U.S. Magistrate Judge F. Bradford Stillman — but those negotiations were unsuccessful. To date, over 100 warehouse workers seek to recover their unpaid overtime wages.

FACTS

A. Respondents Employed Their Warehouse Workers

Respondent A-1 Quality Logistical Solutions, LLC is a Cincinnati, Ohio based company that provides low-cost labor to its warehouse customers.[1] Respondent William Foster III is A-1's founder and owner, and his business partner, Respondent Richard Mursinna, is the registered agent.[2]

Respondents Foster and Mursinna implemented a plan to create separate companies to contract with the warehouse workers to provide the labor for A-1's customers.[3] At the start of each year, Respondent Mursinna creates a new company that contracts with A-1's warehouse workers for that year. Then, at the end of the year, Respondents shut the company down and create a new company that contracts with the warehouse workers for the following year.[4] Attached as Exhibit 7 is an incomplete list of Respondent's Mursinna's companies, along with the dates that they existed. Respondents East Logistics, LLC; Eastern Labor, LLC; and Empire Labor Services, LLC are three such companies.

A-1 Quality Logistical Solutions, LLC and the contracting companies work in unison and their operations are interrelated.[5] They share the same business address and management

[1] Ex. 1, Amended Compl. ¶ 42.
[2] *Id.* at ¶ 19.
[3] *Id.* at ¶¶ 21, 24. The companies include East Logistics, LLC; Eastern Labor, LLC; Empire Labor Services, LLC; AtPac Services LLC. Regardless of the company, the same corporate representative signs the contract. *See* Declaration of Elijah Gaiter ("Gaiter Decl.") at ¶ 5 (Ex. 1); Declaration of Corey London ("London Decl.") at ¶ 5 (Ex. 1); Exhibit 4, Independent Contractor Agreements.
[4] Amended Compl at ¶ 24.
[5] .*Id.* at ¶ 38.

personnel.[6] A-1 pays for the warehouse workers' travel and lodging.[7] A-1's personnel communicate with the warehouse workers through emails connected to A-1 Quality Logistical Solutions, LLC. [8] A-1 places ads for warehouse jobs that identify both A-1 Quality Logistical Solutions, LLC and the contracting company as the employer.[9] Various documents, including time records and shift summaries, list A-1 as the warehouse workers' employer.[10]

A-1, through its contracting companies, hires warehouse workers, including Claimants, to work in A-1's customers' warehouses across the country.[11] They work in Arizona, California, Colorado, Georgia, Michigan, Missouri, Maryland, New York, Wisconsin, and other states.[12] A-1's customers include companies such as Kroger, Aldi, Frito-Lay, and PFG.[13]

Respondents classify their warehouse workers as independent contractors.[14] Each warehouse worker must sign an independent contractor agreement.[15] The same contract is used each year, and each contract contains substantially the same terms. The only difference between the contracts is the name of the contracting company, which changes yearly.

Warehouse workers, including lumpers and order selectors, perform the same essential job duties. Their job is to process Respondents' customers' products for shipment to retail stores. Lumpers load and unload merchandise from assigned trucks, break down the pallets, and create

---

[6] *Id.* at ¶¶ 37-39.
[7] Ex. 3, Declaration of Tevin Patton ("Patton Decl.") at ¶ 19; Ex. 4, Declaration of Bishmee Rouse ("Rouse Decl.") at ¶ 21.
[8] Ex. 2, Declaration of Corey Lodon ("London Decl.") ¶ 6.
[9] *See* Exhibits 5, A-1 website; Ex. 6, A-1 Job Postings.
[10] London Decl. ¶ 6; ; Rouse Decl. ¶ 6 (Ex. 1).
[11] Amended Compl. ¶ 42.
[12] *Id.* at ¶ 44; London Decl. ¶ 3; Patton Decl. ¶ 3; Rouse Decl. ¶ 3.
[13] Amended Compl. ¶ 42; Patton Decl. ¶ 14.
[14] Amended Compl. at ¶¶ 1, 15; London Decl. ¶ 5; Patton Decl. ¶ 4; Rouse Decl. ¶ 5.
[15] Ex. 5;London Decl. ¶ 5 (Ex. 1); Patton Decl. ¶ 4; Rouse Decl. ¶ 5.

new pallets of product for A-1's customers' employees to place on the warehouse shelves.[16] Order selectors move, locate, stack and count merchandise, and also locate product for customers, remove it from warehouse shelves, place it on pallets, wrap and place it at designated locations for lumpers to place on trucks.[17] Regardless of whether the products arrive at the warehouse or are shipped from the warehouse, the products travel across state lines.[18]

Respondents and their customers provide warehouse workers with all the tools necessary to perform their work, including pallet jacks, saran wrap, and headsets.[19] Respondents develop the customers, work sites, and business infrastructure to perform the work. The warehouse workers do not invest in tools to perform their work or otherwise invest in the business.[20]

Respondents exercise and maintain control over warehouse workers' work.[21] Respondents employ a manager to supervise their warehouse workers, dictate the warehouse workers' schedules, and assign the work performed throughout the day.[22] Respondents decide whether to hire or fire warehouse workers.[23] Respondents set the human resources policies applicable to warehouse workers.[24] Respondents track the number of cases the warehouse workers pick and move during their workday.[25] Respondents' supervisors closely monitor the warehouse workers to ensure the warehouse workers perform their jobs in accordance with their

[16] Amended Compl. at ¶¶ 57, 59.
[17] *Id.* at ¶ 60.
[18] London Decl. ¶ 27; Patton Decl. ¶ 6; Rouse Decl. ¶ 8.
[19] London Decl. ¶ 9; Patton Decl. ¶ 8; Rouse Decl. ¶ 10.
[20] London Decl. ¶ 10; Patton Decl. ¶ 9; Rouse Decl. ¶ 11.
[21] London Decl. ¶¶ 14-16; Patton Decl. ¶¶ 12-15; Rouse Decl. ¶¶ 14-17
[22] London Decl. ¶¶ 16, 20; Patton Decl. ¶¶ 15, 18; Rouse Decl. ¶¶ 17, 20.
[23] London Decl. ¶ 13; Patton Decl. ¶ 12; Rouse Decl. ¶ 14.
[24] London Decl. ¶ 14; Patton Decl. ¶ 13; Rouse Decl. ¶ 15.
[25] London Decl. ¶ 19; Patton Decl. ¶ 17; Rouse Decl. ¶ 19.

own and their the customers' requirements.[26] If the warehouse workers fail to do so, the supervisors often counsel them and require them to correct any mistakes. The supervisors also monitor the warehouse workers to ensure that they are efficiently and quickly performing their jobs. If they are too slow, the supervisors may take any corrective action, which could include termination.[27] Respondents' warehouse workers cannot and do not hire others to perform the work Respondents assign to them.[28]

B. Respondents Fail To Pay Warehouse Workers an Overtime Premium

Respondents regularly schedule warehouse workers to work more than 40 hours in a workweek, and the warehouse workers regularly do so, irrespective of state or location.[29] The warehouse workers often work six or seven days a week in shifts of up to 12 hours or even longer.[30] These long hours result in Respondents' warehouse workers working 60 or more hours a week.[31] Although Claimants work long hours, Respondents fail to accurately track and record the hours worked.

Respondents have a uniform policy and practice not to pay warehouse workers the time-and-one-half overtime premium for all hours worked over 40 as required by the FLSA.[32] Respondents pay many order selectors on production basis — meaning it pays them for each case processed.[33] It pays them $0.13 or $0.16 per case. Workers are usually paid $0.16 per case, but if they miss a day of work, they are paid $0.13 per case for the entire week.

---

[26] Camel Decl. ¶ 14; Conyers Decl. ¶ 15; Gaiter Decl. ¶ 15; Gholsby Decl. ¶ 15; London Decl. ¶ 14; Patton Decl. ¶ 13; Rouse Decl. ¶ 15.
[27] London Decl. ¶ 13-14.
[28] London Decl. ¶ 12; Patton Decl. ¶ 11; Rouse Decl. ¶ 13.
[29] London Decl. ¶ 21; Patton Decl. ¶ 20; Rouse Decl. ¶ 22.
[30] London Decl. ¶ 24; Patton Decl. ¶ 22; Rouse Decl. ¶ 21.
[31] Rouse Decl. ¶ 25.
[32] London Decl. ¶ 25; Patton Decl. ¶ 23; Rouse Decl. ¶ 26.
[33] London Decl. ¶ 22; Patton Decl. ¶ 21; Rouse Decl. ¶ 25;

Respondents pay lumpers and some order selectors on an hourly basis.[34] While it may pay for some overtime hours, at time and one-half the hourly rate, it does not pay for all hours worked. Hourly workers report working substantially more hours than those they were paid for. Further, Respondents have a policy and practice to deduct $6 per day worked for general liability insurance from both hourly and production workers.[35]

Even though warehouse workers previously sued A-1 and Mr. Foster for misclassifying them as independent contractors, Respondents continue to classify warehouse workers as independent contractors, require warehouse workers to work more than 40 hours per week, charge them for business expenses, and fail to pay time-and-one-half overtime premium pay for all hours worked over 40 in a workweek. *See* Exhibit 7, Complaint and Order of Final Confirmation of Proposed Settlement in *Foster et al., v. A-1 Quality Labor Services, LLC and William J. Foster III*, 1:11 Civ. 3342-JEC, Dkt Nos. 1, 90 (N.D. Ga. April 1, 2014)). In 2014, A-1 and Respondent Foster settled the FLSA lawsuit on behalf of warehouse workers classified as independent contractors, and paid $400,000 to the workers and their attorneys. Despite knowing that their practices violated the law, Respondents chose to continue their illegal wage and hour practices.

ARGUMENT

I. The FLSA Has a Broad Remedial Purpose

In 1938, Congress enacted the FLSA to "eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202 (a–b). To protect against excessive hours of work, the

[34] Patton Decl. ¶ 21.
[35] London Decl. ¶ 23; Rouse Decl. ¶ 24.

FLSA requires that employers pay employees for hours more than 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The FLSA was designed "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (quotation marks omitted). In passing the FLSA, Congress intended to address long working hours that "are detrimental to the maintenance of the minimum standard of living necessary for health deficiency and general well-being of workers." *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981). And the "broad remedial goal of the statute should be enforced to the full extent of its terms." *Hoffman–La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

II. Respondents Illegally Classified Claimants as Independent Contractors

Under the FLSA, an entity "employs" an individual if it "suffers or permits" the individual to work. 29 U.S.C. § 203(g). The FLSA's definition of is "strikingly broad" and "stretches the meaning of employee to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 112 (1992) (internal quotations omitted).

To carry out the FLSA's remedial purpose and evaluate whether a worker classified as an independent contractor should be afforded employee protections under the FLSA, the Arbitrator applies the "economic realities" test. The fundamental question is whether as a matter of economic reality the worker is economically dependent on the company or whether the worker is in business for themselves. *See, Acosta v. Off Duty Police Servs.,* 915 F.3d 1050, 1055 (6th Cir. 2019); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 145 (6th Cir. 1977) (citations omitted). To

make that assessment, the Arbitrator analyzes and balances the following six factors: (1) the permanency of the relationship between the parties; (2) the degree of skill required for the rendering of the services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon their skill; (5) the degree of the alleged employer's right to control the manner in which the work is performed; and (6) whether the service rendered is an integral part of the alleged employer's business. *Keller*, 781 F.3d at 807. The Sixth Circuit has also considered whether the business "had authority to hire or fire the plaintiff" and "whether the defendant-company maintains the plaintiff's employment records." *Id.* (quoting *Ellington v. City of E. Cleveland*, 689 F.3d 549 at 555 (6th Cir. 2012).

Here, Claimants are economically dependent on Respondents, not in business for themselves, and all six factors support a finding that Claimants are employees under the FLSA.

1. The Permanency of Claimants' Relationships with Respondents Supports Employee Status

The U.S. Department of Labor explains that this factor weighs in favor of employee status "when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers." 29 C.F.R § 795.110(b)(3)[36]; *Gilbo v. Agment, LLC*, 831 Fed. Appx. 772, 776 (6th Cir. 2020) (unpublished) ("employees usually work for only one employer and such relationship is continuous and indefinite in duration."); *Keller*, 781 F.3d at 807-808 (same, and noting that "even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship."). Further, renewal of a contract, at-will work, a non-

[36] The entire section states "This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily *indicate* independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative."

compete agreement, and even the type of work such as seasonal work support a finding of employee status. *Roeder v. Directv, Inc.*, 2017 WL 151401 at *23 (N.D. IA. Jan. 13, 2017) (where "there is nothing to suggest that [the plaintiff] did not treat his employment as anything other than permanent" this factor weighs in favor of employee status); *Brant v. Schneider National, Inc.*, 43 F.4th 656, 671-672 (7th Cir. 2022) (renewal of contract indicates employee status); *Alexander*, 765 F.3d 981, 996 (9th Cir. 2014) (automatic renewal for successive one-year terms on satisfactory performance weighs in favor of employee status); *Narayan v. EGL, Inc.*, 616 F.3d 895, 903 (9th Cir. 2010) (same); *Doe v. Swift Trans. Co., Inc.*, 2017 WL 67521 at *5 (D. AZ Jan. 6, 2017) (same). Further, working exclusively for a company favors employee status. *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 784 (E.D. Mich. 2021) (finding the seasonal employment and inability to work for another employer favored employee status for seasonal workers); *Miller v. SBK Delivery, LLC*, 2:21 Civ. 4744, 2024 WL 917601, at *3 (S.D. Ohio Mar. 4, 2024) (driver who worked exclusively for a company for seven months favors employee status). If the company imposes a non-compete clause, that too favors employee status. *Lacy v. Marketplace Acquisitions, LLC*, 21 Civ. 12312, 2023 WL 4831400, at *7 (E.D. Mich. July 27, 2023) ("A noncompete clause of an independent contractor agreement weighs in favor of viewing an alleged independent contractor as an employee."). And employment at will, as opposed to a fixed term, favors employee status. *Su v. Halo Homecare Services, LLC*, 1:20 Civ. 744, 2023 WL 4286494, at *6 (S.D. Ohio June 30, 2023) (employment at will, rather than a fixed employment period, supports employee status).

Here, Claimants work exclusively for Respondents. While Respondents require their workers to sign a contract with a new company each year, the work is at-will. Further,

Respondents incorporate a non-complete clause within the agreement, which imposes significant limitations on order selectors and lumpers:

> ***The term "non-compete" as used herein shall mean that the contractor shall not own, manage, operate, consult, or to be an employee or independent contractor in a business substantially similar to or competitive with the present business of Company or such other business activity in which Company may substantially engage during the term of contract agreement***

Ex. 8, East Logistics Agreement. And the type of work and the work locations remain consistent and continuous. Thus, this factor weighs in favor of employee status. 29 C.F.R § 795.110(b)(3).

2. Warehouse Workers' Degree of Skill Supports Employee Status

This factor does not focus on skill in the abstract, but on the "skill and initiative required in performing the job." *Walsh v. Alpha & Omega, Inc.,* 39 F.4th 1078, 1082 (8th Cir. 2022); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011). The skill factor looks to whether a worker's profits increased because of the "'initiative, judgment[,] or foresight of the typical independent contractor,' or whether their work 'was more like piecework.'" *Keller*, 781 F.3d at 809; *see also Guerra v. Teixeira*, 2019 WL 330871, *8 (D. Md. Jan. 25, 2019) (unskilled work weighs in favor of employment status). Further, although to a certain extent every worker has and uses some relevant skills to perform their job, the skill factor considers where a worker obtained their skills (for example, via formal education, an apprenticeship, or via the employer themselves.) *Keller*, 781 F.3d at 809; *see also Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 784 (E.D. Mich. 2021) (employee status favored for workers whose duties were to choose and transport plants from a greenhouse to a shipping department, "where they ticketed plants with shipping code labels and packed them for shipping around the country," did not require specialized skills or advanced training); *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 308 (4th Cir. 2006) (noting that even though personal security agents requires "special skill," the inquiry

does not end there, because "the agents' tasks were, for the most part, carefully scripted by the [defendant]").

Here, the job did not require, and Claimants do not possess, special skill to perform the routine warehouse work. The job — the repetitive movement of pallets of products — does not require a special degree, certificate, or any other special skill. This is confirmed by Respondents' job postings, which do not require previous experience for lumpers, pallet jack experience for order selectors, and only requires a worker to be 18 (or older), and be able to lift up to 50 lbs. *See Keller*, 781 F.3d at 809 (skill factor supported employee status where defendant selected cable technicians on the basis of availability and location, not because they were particularly skillful). Moreover, the Claimants received minimal training, if any. *See Gilbo,* 831 Fed. Appx. At 776 (parties conceded that skill factor indicated employee status where exotic dancers did not possess special skill and employer provided no training to dancer). The Claimants' work did not require any particular exercise of initiative or judgment, or specialized skill, but was more akin to piecework, as they were often paid a set amount for each case they moved. Thus, this factor favors employee status.

3. Compared to Respondents' Substantial Investment, Claimants' Investment Was Nominal at Most and Thus Supports Employee Status

Under this factor:

> the 'investment' which must be considered as a factor is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.

Dole v. Snell, 875 F.2d 802, 810 (10th Cir. 1989) ("The relative investment of the [cake] decorators in their own tools compared with the investment of the [defendants] simply does not qualify as an investment in this business"); *see* 29 C.F.R. § 795.110(b)(2) ("[T]he focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer ((even if on a smaller scale)) to suggest that the worker is

operating independently, which would indicate independent contractor status"). Respondents invest in their entire business operation with no input or investment by the workers. Respondents' investment includes the contracts with the distribution centers (including negotiation regarding the contracts), personnel to negotiate the contracts, labor to provide the work, equipment (through its contracts) to move the products, travel and lodging costs, and the operational infrastructure to support service contracts with larger companies. In comparison, the warehouse workers' investment is virtually nonexistent: they do not invest in the business and do not purchase any specialized equipment; the tools they use on the job are provided by Respondents or Respondents' customers. *See Gilbo*, 831 Fed.Appx. at 776-77; *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 785 (E.D. Mi. Jan. 12, 2021) (agricultural company's investment dwarfed that of workers, and thus employee status favored); *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1256 (N.D. Fla. 2014) (factor favored seasonal worker who only provided van to transport crew members, but employer provided seed, fertilize, chemicals to produce the crops, and all materials and equipment to perform the work).

The warehouse workers did not invest in Respondents' business at all, thus this factor favors employee status.

4. The Opportunity for Profit or Loss, Depending on Managerial Skill, Factor Favors Employee Status

This factor looks to "whether the worker or the alleged employer controlled the major determinants of the amount of profit which the [worker] could make." *Roeder,* 2017 WL 151401 at *17 (quoting *Eberline v. Media Net LLC,* 636 Fed. Appx. 225, 228 (5th Cir. 2016)). *See also* 29 C.F.R. § 795.110(b)(1); *Acosta v. Off Duty Police Servs.,* 915 F.3d 1050, 1059 (6th Cir. 2019) (Courts evaluate this factor by asking if workers "could exercise or hone their managerial skill to increase their pay."). While workers, if paid on a production basis, may make more money the

more efficient they are, that does not necessarily support independent contractor status. For example, in ruling that a factory worker paid on a piecework basis was an employee, the U.S. Supreme Court explained "[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). Further, when the work is time oriented and not project oriented, this factor favors employee status. *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 308 (4th Cir. 2006) (security work that was time oriented and not project oriented favored a finding of employee status); *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1255–56 (N.D. Fla. 2014) (factor favored employee status for worker paid on piece-rate for harvesting work and hourly basis for other work, because employer made decisions concerning worker's income and it was not based on workers "entrepreneurial skills."); *Luna v. Del Monte Fresh Produce*, 1:06 Civ. 2000, 2008 WL 754452 at *8 (N.D. Ga. Mar. 19, 2008) (contractor determined to be employee in part because "[g]iven the limited nature of her investment, [the contractor's] opportunity for loss was practically nonexistent."); *Lacy v. Marketplace Acquisitions, LLC*, 2023 WL 4831400, at *9 (E.D. MI July 27, 2023) (if the employer controls the overall amount of work or commission, it limits the worker's opportunity for profit or loss based on skill, suggesting employee status); *Olden v. Quality Care & Advocacy Grp., Inc.*, 2021 WL 4176243, at *4 (S.D. GA Sept. 14, 2021) (registered nurse's ability to be more proficient is unrelated to the ability to earn or lose profit based on managerial skill, and thus, employee status was favored).

Here, Respondents' workers' income is not based on their managerial or entrepreneurial skill. Instead, it is based on the pay rates Respondents set, the hours Respondents permit

Claimants to work, and how fast Claimants can move Respondents' customers' products within the warehouse. Further, Claimants cannot hire other workers to perform the job or scale any alleged business. Thus, this factor favors employee status.

5. Respondents' Right to Control the Manner in which Work Is Performed Favors Employee Status

This factor considers the degree of control the employer may exercise over the workers. *Acosta v. Off Duty Police Services*, 915 F.3d 1050, 1060 (6th Cir. 2019). "To guide this evaluation, [the court] ask[s] whether the company 'retains the right to dictate the manner' of the worker's performance." *Id.* (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984). However, "'[t]he absence of need to control should not be confused with the absence of right to control,' and the actual exercise of control 'requires only such supervision as the nature of the work requires.' " *Id.* at 1061 (alteration in original) (quoting *Peno Trucking, Inc. v. Comm'r of Internal Revenue*, 296 F. App'x 449, 456 (6th Cir. 2008)). Employee status is favored when the company directly supervises the workers, trains the worker on their job duties, assigns the work, and dictates start and stop times. *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 786 (E.D. Mich. 2021) (company maintained a "constant physical presence throughout every shift,"); *Lacy v. Marketplace Acquisitions, LLC*, 21 Civ. 12312, 2023 WL 4831400, at *9 (E.D.MI July 27, 2023) (factor favored employee status for real estate who was scheduled to work, company controlled days/hours required to work in office or from home, required to attend meeting, and how to do job, and was closely supervised, and controlled workload).

Respondents retain and exercise the right to control when Claimants work, including start and stop times and the manner in which Claimants perform their work. Respondents constantly supervise Claimants and subject them to discipline, up to and including termination. Respondents

require Claimants to work more than 40 hours a week . Thus, this factor supports employee status.

6. Claimants Are an Integral Part of Respondents' Business

Workers who perform a job that is an integral part of the enterprise in which they work are more likely to be employees than independent contractors. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (boners are integral part of company's meat packing operation). "The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship." *Roeder*, 2017 WL 151401, at *23 (quoting *Keller v. Miri Microsystems, LLC*, 781 F.3d 799, 815 (6th Cir. 2015); 29 C.F.R. §795.110(b)(5) ("This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business."); *See Hall v. DIRECTV*, 846 F.3d 757, 775 (4th Cir. 2017) (holding that "Plaintiffs' work was integral to DIRECTV's business—absent Plaintiffs' work installing and repairing DIRECTV satellite systems, DIRECTV would be unable to convey its product to consumers"); *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 309 (4th Cir. 2006) (security guards were an integral part of the security guard business).

Here, Respondents' business is to provide warehouse labor to their customers. Claimants are the laborers that Respondents provide to their customers. Thus, this factor supports employee status.

Because all of the factors weigh in favor of employee status, and because Claimants are economically dependent on Respondents, Claimants are employees under the FLSA.[37]

[37] The employee test under the FLSA is arguably the same for all corporate entities. *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 783 (E.D. MI, Jan. 12, 2021) ("Of these approaches, the *Bonnette* factors are the most consistent with the FLSA's expansive

C. William Foster and Richard Mursinna Are Liable Under the FLSA

Generally, a corporate officer with operational control of a business is an employer under the FLSA, and is thus jointly and severally liable. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991). The FLSA extends "'employer' liability to individuals who are chief corporate officers of the business, have a significant ownership interest in the business, control significant aspects of the business's day-today functions, and determine employee salaries and make hiring decisions." *Diaz v. Longcore*, 751 Fed. Appx. 755, 758-759, *citing U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995); *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965-66 (6th Cir. 1991). As the Sixth Circuit has noted, the party only needs "operational control of significant aspects of the corporation's day to day functions" to be considered an employer. *Dole,* 942 F.2d at 966, quoting *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983). Here, Respondents Foster and Mursinnaa are jointly and severally liable. Foster owns A-1, Mursinna is the registered agent, and Mursinna is the principal owner of the companies that contract with the warehouse workers. They make hiring and compensation decisions, including whether to classify A-1's warehouse workers as independent contractors. Together, and individually, they control all aspects of A-1's business. The companies operate for their profit. *Dole*, 942 F.2d at 966 (finding the owner liable because he was the "top man" and the "corporation functioned for his profit."). Thus, they are jointly and severally liable for the FLSA violations.

---

definition of 'employer' because they contemplate factors beyond the purported joint employer's level of control. However, 'the FLSA does not distinguish between employers and joint employers. Any factor that is relevant to whether an entity is an employer is also relevant to whether the entity is a joint employer.' *Scalia*, 2020 U.S. Dist. LEXIS 163498, 2020 WL 5370871, at *29. Because the Sixth Circuit has articulated a test for evaluating the economic reality of direct employment relationships under the FLSA, *Acosta*, 915 F.3d at 1055, the Court will apply this test to evaluate whether Four Star was Plaintiffs' joint employer.")

D. Respondents Owe Claimants Overtime Wages

The FLSA requires employers to pay non-exempt employees time and one-half the regular rate for all hours worked over 40 in a workweek. 29 U.S.C. § 215. Here, no exemption applies to Claimants. While Claimants regularly work more than 40 hours in a workweek, Respondents fail to pay them premium overtime wages are the rate of time and one-half the regular rate. Thus, Claimants are due overtime pay for the overtime hours over 40 worked each workweek.[38]

Respondents may claim that they paid their piece rate workers overtime by paying them an extra $.03 cents per piece — but that is factually incorrect. Although respondents paid piece rate workers either $0.13 or $0.16 per piece each week, the difference in pay does not correspond with whether the worker worked more than 40 hours. Instead, workers were paid the lower rate if they missed any scheduled day of work, and only paid the higher rate if they had perfect attendance. But even workers who missed one day out of a six or seven day schedule regularly worked more than 40 hours in a workweek.

Moreover, even if Respondents did pay their workers $.03 more per piece when they worked more than 40 hours per week, this is not a valid method of calculating overtime under the FLSA. Under the FLSA, overtime for piece rate workers is generally calculated as follows:

> When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources. […] This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For overtime work the pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week.

[38] FLSA claims must be brought within two years, unless the violation is willful in which case the claims must be brought within three years. 29 U.S.C. § 255.

29 C.F.R. § 778.111(a). But Respondents did not follow this methodology. Thus, Claimants are entitled to additional compensation at a rate of one-half their regular rate for all hours worked over 40 in a workweek.

The FLSA allows for an alternative method of calculating overtime for piece rate workers, but Respondents' purported overtime scheme also does not comply with this method. Piece rate workers can be paid overtime at a piece rate, but only "pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work" where an employee is paid "at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours." 29 U.S.C. § 207(g); 29 C.F.R. § 778.418. Respondents' alleged overtime scheme does not comply with the law in two ways. First, there was no agreement or understanding that Claimants would be paid overtime on a piece rate basis. Second, Respondents did not pay a piece rate of 1.5 times the regular piece rate, or at least $0.195, when Claimants worked over 40 hours in a week. Respondents have therefore failed to pay the FLSA required overtime premium under either permissible method.

Although Respondents sometimes paid hourly workers at a rate of time and one-half for hours worked over 40 in a workweek, the hourly workers worked substantially more hours than Respondents paid them for. Respondents thus owe overtime wages to both hourly and production workers. In addition, Respondents deducted business expenses from Claimants' wages for each day worked. As stated in Respondents' "Liability Insurance Program," Respondents state "$6.00 per day will be automatically deducted from your submitted invoices. This is a set cost and will not fluctuate based on the amount of services provided each day." Ex. 2. These are not costs that Respondents are permitted to shift to employees, and they must be reimbursed for overtime

wages to be fully paid. 29 C.F.R. § 531.35 (wages must be paid free and clear of employer's business expenses).[39]

Respondents thus owe Claimants $6.00 for each day worked, and the additional overtime premium for all overtime hours worked.

E. Claimants Are Due Mandatory FLSA Liquidated Damages

The FLSA provides that "[a]ny employer who violates the [overtime provisions] of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Awarding liquidated damages is consistent with the underlying remedial purpose of the FLSA. *McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 245 (4th Cir. 2016) ("If an employer were instead liable for only unpaid wages and overtime pay, it might roll the dice by underpaying employees, reasoning all the while it would be no worse off even if the employees eventually prevailed in court.").

Accordingly, when a Court finds an employer violated the FLSA's overtime provisions, awarding liquidated damages is the "norm." *U.S. v. Edwards*, 995 F.3d 342, 346 (4th Cir. 2021) (internal citation omitted). The employer bears a "substantial burden" to avoid liquidated damages, which "requires 'proof that [the employer's] failure to obey the statute was both in

[39] The regulation states: "Whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c)."

good faith and predicated upon such reasonable grounds that it would be unfair to impose upon [it] more than a compensatory verdict.'" *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 840 (6th Cir. 2002) (quoting *McClanahan v. Mathews*, 440 F.2d 320, 322 (6th Cir. 1971))." *Hendricks v. Total Quality Logistics, LLC*, 694 F. Supp. 3d 1005, 1038 (S.D. OH Sept. 26, 2023). Indeed, "'the burden is a difficult one, with double damages being the norm and single damages the exception.'" *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941 (8th Cir. 2008) (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir.1999)). Here, Respondents have knowingly engaged in an illegal scheme to avoid the FLSA's mandates. Indeed, they were placed on notice at the latest in 2011 when workers sued A-1 and Respondent Foster for misclassifying them as independent contractors and failing to pay overtime wages. And there is no basis to classify their workers as independent contractors and deny them FLSA overtime wages. Thus, Respondents owe Claimants mandatory FLSA liquidated damages.

F. The Warehouse Workers' Claims Are Not Arbitrable

For all of the reasons stated in Plaintiffs' opposition to Respondents' motion to compel arbitration, as well as subsequent filings, Claimants' claims are not arbitrable because the FAA's exception applies. Thus, Claimants object to proceeding in arbitration.

G. State Law Claims

Claimants worked in various states across the country, and they bring their applicable claims under state law as well. They include:

Arizona:

California: Respondents failed to pay premium overtime wages in violation of applicable California overtime laws, Cal. Lab. Code § 510 and Cal. Lab. Code § 1194.2.

***Colorado*:** Respondents failed to pay premium overtime wages in violation of the Colorado Wage Claim Act and Colorado Overtime and Minimum Pay Standards Order. Colorado Rev. Stat §§ 8-4-101, *et seq*., 7 CCR 1103-1.

***Connecticut*:** Respondents failed to pay premium overtime wages in violation of Conn. Gen. Stat. Ann. § 31-71b-c (West); Conn. Gen. Stat. Ann. § 31-72; Conn. Gen. Stat. Ann. § 52-596.

Illinois: Respondents failed to pay premium overtime wages in violation of 735 Ill. Comp. Stat. Ann. 5/13-205; 820 Ill. Comp. Stat. Ann. 115/3; 820 Ill. Comp. Stat. Ann. 115/5; 820 Ill. Comp. Stat. Ann. 115/14

Maryland: Respondents failed to pay premium overtime wages in violation of Md. Code Ann., Lab. & Empl. § 3-502; Md. Code Ann., Lab. & Empl. § 3-505; Md. Code Ann., Lab. & Empl. § 3-507.2; Md. Code Ann., Cts. & Jud. Proc. § 5-101.

Missouri: Respondents failed to pay overtime wages in violation of Mo. Rev. Stat. § 290.505.

***New York*:** a) Respondents failed to pay overtime wages in violation of New York Labor Law Articles 6 and 19 and their implementing regulations, including, but not limited to, 12 N.Y.C.R.R. Part 142; b) Respondents failed to provide wage statements that reflected the actual regular hours and the rate paid for such hours, and by failing to account for and pay for all overtime hours worked, as required by New York Labor Law § 195(3); and c) In violation of New York Labor Law § 195(1)(a), Respondents failed to provide notice at the time of hiring in writing in English and in the language identified by the employee as

the primary language of such employee. For all employees who are not exempt from overtime, the notice must state the regular rate of pay and the overtime rate of pay. Each time the employer provides such notice to an employee, the employer shall obtain from the employee a signed and dated written acknowledgement, in English and in the primary language of the employee, of receipt of such notice, which the employer shall preserve and maintain for six (6) years. As a result, Claimants have suffered concrete harm, including but not limited to having been unaware of the actual overtime wages owed to them based on the number of hours they worked over forty in a week

***Pennsylvania*:** Respondents failed to pay premium overtime wages in violation of 43 Pa. Stat. Ann. § 260.3; 43 Pa. Stat. Ann. § 260.5; 43 Pa. Stat. Ann. § 260.9a; 43 Pa. Stat. Ann. § 260.10.

***Virginia*:** Respondents failed to pay overtime wages in violation of Virginia state classification law, Va. Code § 40.1-28.7:7, Va. Code Ann. § 40.1-2, and Va. Code Ann. § 40.1-29.3.

***Wisconsin*:** Respondents failed to pay premium overtime wages in violation of Wis. Stat. Ann. § 109.03; Wis. Stat. Ann. § 109.11.

RELIEF REQUESTED

Based on the summary facts alleged above, Respondents failed to classify Claimants as employees and pay Claimants overtime wages as required by any applicable state wage and hour law, and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and its implementing regulations. Respondents' failure to pay Claimants the required overtime wages caused Claimants to lose

wages and interest on those wages. Claimants seek to recover back wages, liquidated (double), interest, and costs and fees in bringing these claims.

Claimants request that the Arbitrator enter an Order:

1. Declaring that Respondents violated the Fair Labor Standards Act, and applicable state law;
2. Granting judgment to Claimants for claims of unpaid overtime wages as secured by the FLSA, and an equal amount in liquidated damages;
3. If applicable, granting Claimants damages under relevant state law; and
4. Awarding Claimants the costs of suit, and reasonable attorneys' fees.

/s/ Matt Dunn
Matt Dunn
Getman, Sweeney & Dunn, PLLC
260 Fair Street
Kingston, NY 12401
(845) 255-9370
Attorneys for Claimants