IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

FREDRICK BLODGETT, d/b/a BIG FS LLC, on behalf of themselves and all others similarly situated,	
Plaintiffs,	**Civil Action No. 2:18-cv-00015**
v.	
FAF, INC., d/b/a FORWARD AIR TRANSPORTATION SERVICES, INC., and DOES 1-25	
Defendant.	

PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

PLEASE TAKE NOTICE THAT, for the reasons set forth in the Memorandum of Law in Support of Plaintiff's Motion for Conditional Certification, associated filings, and the exhibits attached thereto, Plaintiff respectfully requests the Court enter an order:

(1) Conditionally certifying the proposed Collective pursuant to 29 U.S.C. § 216(b);

(2) Ordering Defendant FAF, Inc. to produce a computer-readable list of the names, last known mailing addresses, last known telephone numbers, last known email addresses, and dates of work for all Collective Members, and the Social Security numbers of those Collective Members whose notices are returned undeliverable;

(3) Ordering other such relief as the Court deems just and proper.

Respectfully Submitted,

Dated: October 26, 2018

Gary E. Mason (admitted *pro hac vice*)
Danielle L. Perry (admitted *pro hac vice*)
WHITFIELD BRYSON & MASON, LLP
5101 Wisconsin Ave NW, Ste. 305
Washington, D.C. 20016
Tel: 202-429-2290
Fax: 202-429-2294
Email: gmason@wbmllp.com
Email: dperry@wbmllp.com

Gregory F. Coleman (TN BPR No. 014092)
Lisa A. White (TN BPR No. 026658)
Mark E. Silvey (TN BPR No. 13415)
GREG COLEMAN LAW PC
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
Tel.: 965-247-0080
Fax: 865-522-0049
Email: greg@gregcolemanlaw.com
Email: lisa@gregcolemanlaw.com
Email: mark@gregcolemanlaw.com

CERTIFICATE OF SERVICE

On October 26, 2018, I served the foregoing documents described as: PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION on interested parties through ECF's document filing system.

Danielle L. Perry

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

FREDRICK BLODGETT, d/b/a BIG FS LLC, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **FAF, INC., d/b/a FORWARD AIR TRANSPORTATION SERVICES, INC., and DOES 1-25** **Defendant.**	**Civil Action No. 2:18-cv-00015**

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

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I. INTRODUCTION

Large trucking companies have for many years used the "lease-operator" business model to shift their enormous costs onto the backs of individual drivers. They sell the model hard, with claims drivers can "be their own boss" and "make as much money as they want." What trucking companies do not disclose is that the "freedom" drivers are handed with the "independent contractor" classification is a farce. In fact, lease-operator drivers remain as economically dependent on the company as employees. The differences are that the so-called "independent contractors" bear the burden—and risks—of many of the company's business responsibilities, including paying the expenses of truck leases, fuel, insurance, and licensing. Meanwhile, the company maintains exclusive control over the trucks, loads, pricing, and fees. Subsequently, for all their hard work—their weeks-long and even months-long stints on the road and away from their homes—lease-operator drivers are too often paid less than the minimum wage permitted by the Fair Labor Standards Act ("FLSA").[1]

Plaintiff Fredrick Blodgett ("Plaintiff"), with support from opt-ins Lucious Coleman and Robert Lucas, submit this brief seeking conditional certification on behalf of all individual persons and/or entities who leased a truck to provide driving services for Defendant FAF, Inc. ("FAF") (hereafter referred to as "lease-operators"). Conditional certification is the first step in obtaining justice for lease operators' misclassification and FAF's failure to pay the minimum wage.

The burden for FLSA conditional certification "is not heavy." *E.g.*, *White v. MPW Indus. Servs.*, 236 F.R.D. 363, 367 (E.D. Tenn. 2006); discussed *infra,* Sections III.A and III.B. Plaintiff readily satisfies the bar set in the Sixth Circuit for conditional certification, and

[1] *See generally,* Declaration of Danielle L. Perry, ¶ 9, Ex. 8, Steve Viscelli, Expert Report on the Similarities of FAF Lease Operators and their Relationship to FAF.

Defendant's other lease operators should be promptly notified of their right to participate in this lawsuit.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

A. Procedural History and Discovery

Plaintiff filed the present action in February 2018, alleging he and Defendant's other lease-operators were misclassified as "independent contractors" and compensated with less than the minimum wage required by the FLSA. *See generally*, Complaint, Dkt. 1; First Amended Complaint, Dkt. 17. In May, in accordance with Federal Rule of Civil Procedure 26(f) and this Court's Scheduling Order, the parties conferred and agreed that discovery in this matter would proceed in phases. The first, or "Pre-Conditional Certification" discovery phase included fact discovery related to issues of certification. *See* Report of Rule 26(f) Planning Meeting, Dkt. 24. Merits discovery is reserved for Phase Two, to proceed only after the Court conditionally certifies the class. *Id.* While the dates on this schedule were pushed back in part to account for difficulties in scheduling the deposition of Defendant's 30(b)(6) designee, the phasing of the agreement remained unaltered. *See* Joint Proposed Modifications to Discovery Plan, Dkt. 24.

Thus far, the parties have each propounded and responded to initial requests for production and interrogatories. Declaration of Danielle L. Perry ("Perry Decl.") ¶ 2. Defendant has deposed Plaintiff, and Plaintiff has deposed Defendant's 30(b)(6) designee on various topics. Perry Decl. ¶¶ 4, 5. Production is ongoing and the parties continue to meet and confer regarding supplemental responses to interrogatories and outstanding production of documents. Perry Decl. ¶ 2.

B. Defendant's Corporate Structure

Defendant FAF is a motor carrier company and wholly owned subsidiary of Forward Air Corporation ("Forward Air"). Perry Decl. ¶ 5, Ex. C, Deposition of Tim Parker ("Parker Depo."), 50:10-12. Forward Air is a publicly-traded holding company whose primary purpose is to provide transportation of goods from place to place. Parker Depo., 47:6-18. In addition to FAF, Forward Air's other subsidiaries include Forward Air Inc., TQI Holdings, TQI, Central States, and Forward Air Solutions. Parker Depo., 50:13-25, 58:23-59:8. More recently, the subsidiary "Forward Air Technology Logistics Services" was created to help manage the significant overlap between Forward Air subsidiaries and to increase inter-subsidiary efficiencies. Parker Depo., 52:14-19, 75:22-76:1. FAF loads are brokered by its sister companies Forward Air, Inc. and Forward Air Technology Logistics Services. Parker Depo., 31:11-18, 51:23-52:4. While the majority of loads dispatched to FAF drivers are, from the viewpoint of drivers, "truckload services" transported between Forward Air, Inc. terminals, FAF lease-operators are also used to carry loads to and from other locations for FAF's other sister companies and/or to balance the Forward Air system. Parker Depo., 56:5-57:15.

From a lease-operator's standpoint, there are few differences between the loads they carry. Perry Decl., ¶ 4, Ex. B, Deposition of Fredrick Blodgett ("Blodgett Depo."), 34:7-20, 35:3-7; Perry Decl., ¶ 3, Ex. A, Declaration of Fredrick Blodgett ("Blodgett Decl."), ¶ 5; Perry Decl., ¶ 7, Ex. E, Declaration of Lucious Coleman ("Coleman Decl."), ¶ 5; Perry Decl., ¶ 8, Ex. F, Declaration of Robert Lucas ("Lucas Decl."), ¶ 5. Lease-operators' job duties involve providing truck driving services and equipment to Forward Air companies. Blodgett Depo., 120:8-18. Essentially, dispatchers provide drivers with loads to transport from "Point A" to

"Point B" within specified time frames. Blodgett Decl. ¶ 5; Coleman Decl. ¶ 5; Lucas Decl., ¶ 5; Blodgett Depo., 317:11-18.

While load types and locations may differ, the primary difference between loads for drivers is whether a load is "drop and hook" (meaning the trailer is dropped off/hooked up to the truck), or "live load" (meaning the trailer is manually loaded and unloaded at given locations). *See* Blodgett Depo., 34:7-20. While this difference may cause a driver to spend additional time dropping off or picking up a load, it will not change how he or she spends the majority of his or her working hours—transporting the load at the direction of and to the specifications provided by Forward Air. *See* Blodgett Depo., 34:7-20; 35:3-7. Lease-operators are usually not even informed what type of load they are being assigned prior to confirming their ability to accept the assignment, or for what Forward Air subsidiary they will be driving. Blodgett Decl., ¶ 6; Coleman Decl., ¶ 6; Lucas Decl., ¶ 6.

C. The Lease-Operator Business Model

The lease-operator model utilized by FAF is a common labor management system used by motor carriers. Perry Decl. ¶ 9, Ex. G, Steve Viscelli, *Expert Report on the Similarities of FAF Lease Operators and Their Relationship to FAF* ("Viscelli Report"), at 13. By this model, major trucking companies are able to shift costs and risks of doing business onto the lease-operators, whom they classify as independent contractors. *Id.* at 17. At the same time, carriers like FAF maintain disproportionate control over the drivers to guarantee their business needs are met:

> While contractors are promised and nominally retain the right to control the use of their truck, carriers can easily get them to behave like employees because ***they control all immediately available work.***

Id. at 16, (emphasis added); *see also* Blodgett Depo., 24:7-13. In fact, if carriers like FAF allowed their lease-operators to retain significant control in decision making processes (as true independent contractors do), FAF's operational goals and profitability would likely suffer substantial negative impacts. *Id.* at 8.

Accordingly, FAF and similar carriers actively manage their lease-operators as if they are employees. *Id.* The few options or decisions left to the lease-operators are minor, and likely to have only a marginal impact on lease-operators' net earnings and economic independence. *Id.* Carriers, including FAF, hold unilateral control over dispatch of loads—and thereby control their lease-operator's income. *Id.* at 8, 16, 22. FAF, for example, offers lease-operators only one load option at a time, pressures lease-operators to take the offered loads, and punishes lease-operators with wait time or bad future loads when they exercise their "right" to turn down offered loads. Coleman Decl., ¶¶ 8-9; Lucas Decl., ¶¶ 8-9; *see also* Blodgett Decl., ¶¶ 8-9.[2] Moreover, FAF lease-operators understand that they are not permitted to drive their trucks for companies or brokers outside the Forward Air family without first terminating their relationship with FAF. Blodgett Decl. ¶ 10; Coleman Decl. ¶ 10; Lucas Decl. ¶ 10.[3]

> Many truck drivers become lease-operators because they believe they will have more control and make more money than they would as employees. As is the case across the industry, neither of these promises are likely to be realized by lease-operators. Giving drivers meaningful control over the things that really matter (i.e. load selection,

[2] Although Defendant's 30(b)(6) designee testified that FAF independent contractors are provided with a choice of loads, and that evidence of choices provided could be found in communications with drivers via the Omnitrac system (*see* Parker Depo., 217:1-9), FAF has only produced documented evidence of such options being presented on six occasions that each occurred *after* the filing of the complaint in this matter, between April 2018 and the present.

[3] Though Defendant's 30(b)(6) designee testified that FAF independent contractors have the "availability per the ICOA" to haul loads for other carriers when they are not driving for FAF, he could only speak to one specific example of an FAF independent contractor ever hauling loads for another carrier—an example that occurred 10-20 years ago. Parker Depo., 138:8-140:3. The designee could not provide any other examples of FAF independent contractors hauling loads for other carriers, could not provide any estimate of how many independent contractors had hauled loads for other carriers while with FAF, and could not identify any person at FAF who would have such knowledge. Parker Depo., 140:4-140:15.

negotiation of load prices) is simply not feasible given the way that firms like FAF do business.

Viscelli Report at 18-19.

D. Defendant's Uniform Treatment of and Control over Lease-Operators

Consistent with the lease-operator model widely utilized throughout the trucking industry, FAF utilizes standard form agreements and various policies, practices, and procedures to establish the basis of its employment relationship with its "independent contractor" lease-operators. *See* Parker Depo., Exs. C5-C15.

At the start of their employment, FAF Inc.'s lease-operators are all required to attend multiple-day orientations where they review Independent Contractor Operating Agreements ("ICOAs"), and are given presentations on various FAF policies, practices, and procedures that they are expected to follow. Parker Depo., 148:6-9, 148:14-24, 149:4-7, 151:9-23, 153:14-155:8; Blodgett Depo., 314:14-315:5, 315:13-17. Orientation presentations do not vary based on the region in which a lease-operator will be driving. Parker Depo., 153:8-13.

ICOAs set forth terms and conditions governing the relationship between FAF and putative members of this collective action. *See generally,* Parker Depo., Exs. C5-C15. While various versions of ICOAs have been operative during the covered period, the central terms dictating the control that FAF maintains over each individual lease-operator have not materially changed.[4] They are, in fact, almost indistinguishable. *See* Parker Depo., Exs. C5-C15. All

[4]Defendant has produced just two versions of the ICOAs operative prior to Plaintiff's filing of his Complaint in this matter, dated April 2015 and October 2017. Defendant has produced an additional nine versions of ICOAs revised since the filing of this matter, one dated June 2018, and seven dated August 2018. *See* Parker Depo., Exs. C5-15.

ICOAs produced by Defendant, including that signed by Plaintiff Fredrick Blodgett,[5] include near identical (if not identical) provisions regarding:

- FAF Policies and Procedures: Under the ICOAs, all lease-operators are required to follow FAF's "Policies and Procedures."[6] Parker Depo., Exs. C5 and C6 at p. 8, C7-C15 at p. 5.
- Operating Expenses: Under the ICOAs, all lease-operators are required to cover costs and expenses, including lease payments, fuel, licenses, permits, cab cards, taxes, plates, lubricants, tires, parts and equipment. Parker Depo., Exs. C5 and C6 at pp. 9-12, C7-C15 at pp. 5-7.
- Communications Equipment: Under the ICOAs, all lease-operators are required to have and maintain both a wireless telephone and onboard communications technology compatible with FAF's systems that allow Forward Air dispatchers to monitor truck movement and driving hours. Parker Depo., Exs. C5 and C6 at p. 12, C7-C15 at pp. 7-8.
- Termination: Under the ICOAs, all lease-operators can be terminated immediately for a litany of reasons including the independent contractor's failure to adhere to customer requirements, federal, state, local authorities, and FAF policies and

[5] Mr. Blodgett signed the ICOA Revised April 2015 on two occasions, once in his own name, and again after he was required to create a business entity under which to operate. *See* Blodgett Depo., 97:21-99:20, 112:15-113:21, 113:22-114:19, Exs. B4, B5, B7.

[6] ICOAs dated prior to June 2018 describe the term "Policies and Procedures" as referring to documents including the *FAF Contractor Manual*, the Rand McNally Milemaker mileage guide, the Federal Motor Carrier Safety Regulations, Applicable Law, FMCSA's Compliance, Safety, Accountability ("CSA") Measurement System and related CSA materials. Parker Depo., Ex. C5 at p. 8 (FAF001897), Ex. C6 at p. 8 (FAF001839). Although no document titled *FAF Contractor Manual* as referenced by the ICOAs has been produced, FAF did produce a document titled *FAF, Inc. Drivers' Manual*, that appears to apply to independent contractors. Parker Depo., 226:12-227:23; Parker Depo., Ex. C17. The parties are continuing to meet and confer regarding document production. Perry Decl. ¶ 3. ICOAs dated June 2018 and August 2018 also refer to "Carrier's Policies and Procedures," which are comprised of applicable driver qualification standards, a Drug-and-Alcohol policy, and manual(s) for contractors and their drivers. Parker Depo., Exs, C7-C15 at p. 5, section 9.9 (FAF001482, 1521, 1560, 1599, 1638, 1677, 1716, 1755, and 1794).

procedures. Lease-operators can also be terminated with 30-days' notice for any other reason. Parker Depo., Exs. C5 and C6 at pp. 1-2, C7-C15 at p. 1.

- Escrow Accounts: Under the ICOAs, all lease-operators are required to maintain escrow accounts, put in place and held by FAF, to ensure compliance with the ICOAs. Parker Depo., Exs. C5 and C6 at p. 7, C7-C15 at p. 4.
- Insurance: Under the ICOAs, all lease-operators are required to provide particular insurance including non-trucking liability insurance, and workers compensation/occupational accident insurance. Parker Depo., Exs. C5 and C6 pp. 3-7, C7-C15 pp. 2-4. While FAF allows its lease-operators to seek insurance coverage outside that facilitated by FAF, it requires lease-operators to obtain insurance from companies of "at least A.M. Best "A" rated or of equivalent (or better) financial strength in the commercially reasonable judgment of [FAF]." *Id.*
- Driver Requirements: Under the ICOAs all lease-operator drivers are required to meet minimum driver qualifications. Parker Depo., Exs. C5 and C6 at p. 8, C7-C15 at p. 4.
- Compensation: Under the ICOAs all lease-operators are compensated primarily with mileage based compensation. Parker Depo., Exs. C5 and C6 at p. 1 and Appendix B, C7-C15 at p. 2 and Appendix B.[7] Although after the filing of this matter FAF changed its compensation schedule with an increase in pay per loaded mile and named particular routes subject to a flat rate, the primary compensation terms still appear to be based on mileage. Parker Depo., Exs. C5 and C6 at p. 1

[7] For compensation terms in each ICOA, see specifically:
-ICOAs Rev. April 2015 and Rev. March 2017, see p. 2 at ¶ 3, and Appendix B.
-ICOAs Rev. June 2018 and Rev. August 2018, see p. 1 at ¶ 3.2, and Appendix B.

and Appendix B, C7-C15 at p. 2 and Appendix B *see also* Parker Depo., 198:9-15.

Other policies, practices, and procedures reviewed with all lease-operators at orientation include topics as: deductions made for use of required communications systems; deductions made for mandatory escrow funds; required pre and post trip inspections; FAF, Inc.'s Passing Policy; FAF's U-Turn Policy; FAF's Speed Limit Policy; required compliance with the DOT and Federal Motor Carrier Safety Regulations; required insurance; roadside reporting requirements; and value-driven driving techniques. Parker Depo., 154:3-155:20, 159:21-160:12, 160:17-161:11, 161:12-16, 161:17-162:1, 162:2-16, 162:17-21; 162:22-163:2, 163:3-10, 163:24-164:14; 164:15-165:3, 164:17-22, 170:25-173:25, 174:6-25, 175:18.

Even after orientation, all lease-operators are constantly reminded that they must be compliant with both DOT regulations and FAF's own policies, practices and procedures. Blodgett Decl., ¶ 4; Coleman Decl., ¶ 4; Lucas Decl., ¶ 4. Though classified by FAF as "independent," the lease-operators are subject to constant monitoring—via GPS, safety scorecards, grading tools and Compliance, Safety, and Accountability programs. Parker Depo., 99:3-9, 223:21-226:5, 251:1-19, 246:19-249:15, Exs. C16, C18, C20; Blodgett Decl., ¶ 11; Coleman Decl., ¶ 11; Lucas Decl., ¶ 11. The purpose of this monitoring appears to be two-fold. First, it allows FAF to operate more efficiently in transporting loads and servicing customers. *See generally,* Viscelli Report. Second, monitoring helps to ensure that FAF's record is not affected by any negative marks earned by drivers. Parker Depo., 224:16-225:.

FAF subjects its drivers, including lease-operators, to consequences if they fail to comply with FAF's policies, practices and procedures. For example, FAF pays a third-party to provide scorecards for its drivers to monitor their performance. Parker Depo., 247:25-248:20, Ex. C18.

Poor performance leads to consequences, including required additional training, loss of provided loads, or even termination. Parker Depo., 102:4-104:4, 248:21-249:3, 249:4-15, Exs. C19, C22; Blodgett Depo., 316:10-25. Moreover, FAF dispatchers use a grading tool to evaluate driver performance with regard to completed loads. Parker Depo., 251:1-254:7, Ex. C20. Dispatchers then use a "value hierarchy" based on criteria such as the grading tool scores and historical performance, driver experience, and equipment reliability to determine which of its drivers are offered future loads. Parker Depo., 102:4-104:4.

E. Defendant's Uniform Pay Practices

As per the ICOAs, FAF provides mileage based compensation for all of its lease-operators. *See* Blodgett Depo., 315:25-316:9, Parker Depo., Exs. C5 and C6 at p. 1 and Appendix B, C7-C15 at p. 2 and Appendix B. Such compensation is meant to cover all activities done or undertaken in furtherance of the lease-operators' job duties, including non-driving activities. *See* Blodgett Depo., 123:2-9; Parker Depo., Exs. C5 and C6 at p. 1 and C7-C15 at p. 2.

Plaintiff testified to the fact that during his time with FAF he never considered himself completely off-duty unless he was back at home and no longer carrying a load. Blodgett Depo., 322:2-17. FAF considers its lease-operators responsible for the safety and security of both the freight they haul as well as for the truck and trailer. Parker Depo., 258:19-25. Despite the 24/7 on-duty nature of their jobs, Plaintiff and other lease operators never agreed not to be paid for meals or sleep times when they were working for FAF. *See* Blodgett Decl., ¶ 12; Coleman Decl. ¶ 12; Lucas Decl. ¶ 12; *see also* ICOAs at Parker Depo., Exs. C5-C15.

Particular rates applicable to drivers can be found in appendices to the ICOAs, as well as by reviewing weekly settlements distributed to all lease-operators. Parker Depo., 189:2-8; *see also* Parker Depo. 198:16-199:10. These weekly settlements also evidence any additional

payments made to lease-operators and deductions made for items such as lease payments, fuel, insurance, licenses. Parker Depo., 194:11-195:12, 240:25-241:11; Blodgett Decl. ¶ 3, Coleman Decl., ¶ 3; Lucas Decl. ¶ 3.

These common pay policies caused lease-operators to be paid less than $7.25 per hour for hours worked. *See* Blodgett Depo., 308:16-20; Perry Decl., ¶ 6, Ex,. D, *in conjunction with* First Amended Complaint, Dkt. 17 at ¶¶ 82-88. FAF has no policy or practice for ensuring lease operators are compensated at least the hourly minimum wage required under the FLSA:

> Q: Do you know of any term in any of the ICOAs that guarantees drivers classified as independent contractors at least the minimum wage under the FLSA? [objection omitted]
> A: No.
> ...
> Q: Does FAF, Inc. have any policy in place to ensure that drivers classified as independent contractors are paid a least the minimum wage under the FLSA? [objection omitted]
> A: No.
> ...
> Q: Does FAF, Inc. have any policy, practice or procedure to check as to whether drivers classified as independent contractors are paid at least $7.25 per hour?
> A: No.

Parker Depo., 199:11-17, 199:18-25; *see also* 201:13-18, 201:19-202, 202:4-8.

III. LEGAL STANDARD

A. Conditional Certification Under the FLSA

Under the FLSA, employees can sue on their own behalf and on behalf of "similarly situated" persons. 29 U.S.C. 216(b).[8] The purpose of conditionally certifying a collective under the FLSA is to provide notice to potential plaintiffs and to present them with an opportunity to opt in to the suit. *Bacon v. Subway Sandwiches & Salads* LLC, 2015 US Dist. LEXIS 19572 (E.D. Tenn. 2015), *citing Lindbergh v. UHS of Lakeside*, 761 F. Supp. 2d 752, 757-58 (W.D.

[8] Plaintiff alleges that he and FAF's other lease-operators were misclassified as "independent contractors," are in fact employees, and are thus owed the minimum wage under the FLSA. *See generally* Complaint, Dkt. 1, First Amended Complaint, Dkt. 17.

Tenn. 2011). To participate in FLSA collective actions, plaintiffs must provide written consent to join the action. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). Courts have discretion at conditional certification to determine whether "similarly situated" persons may be notified of the action and permitted to "opt-in" to the collective. *Id.*

Congress passed the FLSA with broad remedial intent to address unfair method[s] of competition in commerce that cause labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015) (internal quotations omitted); 29 U.S.C. § 202(a). "The provisions of the statute are 'remedial and humanitarian in purpose,' and 'must not be interpreted or applied in a narrow, grudging manner.'" *Monroe v. FTS ISA, LLC*, 860 F. 3d 389, 397 (6th Cir. 2017) (*quoting Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002)).

B. The "Similarly Situated" Standard Applicable to Conditional Certification

The weight of available authority suggests a two-step analysis is appropriate in FLSA cases. *White v. MPW Indus. Servs.*, 236 F.R.D. 363 (E.D. Tenn. 2006). At the initial stage of conditional certification, to demonstrate notice should be provided to potential class members, plaintiffs must make only a "modest factual showing" that the named Plaintiff and putative opt-ins were victims of a common policy or plan that violated the law. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d at 547 (*citing Morisky v. Public Serv. Elec. & Gas Co.,* 111 F. Supp. 2d 493, 497 (D. N.J. 2000)). A plaintiff need only show "his position is similar, not identical, to the positions held by the putative class members." *Pritchard v. Dent Wizard Int'l Corp.*, 210 F.R.D. 591, 595 (Aug. 2002).

The standard at this notice stage is "fairly lenient," and "typically results in 'conditional certification' of a representative class[.]" *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d at 547 (*citing Morisky,* 111 F. Supp. 2d at 497). The Sixth Circuit has found that plaintiffs can be deemed similarly situated where their "claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct[.]" *Monroe*, 860 F.3d at 398 (emphasis added) (*quoting O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F. 3d 567, 584-85 (6th Cir. 2009)); *see also Bacon v. Subway Sandwiches & Salads* LLC, 2015 US Dist. LEXIS 19572 (E.D. Tenn. 2015).

IV. ARGUMENT

Plaintiff has met the Sixth Circuit's standard for conditional certification by demonstrating that he and Defendant's other lease-operators are unified by their theory of Defendant's misclassification of its lease-operator drivers as independent contractors. They are similarly situated in that they have received the same training, are subject to the same policies, practices, and procedures, are scheduled in the same manner, and their compensation is calculated in the same way. When examined on the merits after conditional certification and completion of discovery, the operation of these business practices will demonstrate that the collective members were misclassified by Defendant as independent contractors, that they are actually employees, and that each driver is owed back wages to increase their hourly compensation to at least the minimum wage required under the FLSA.

Although it is not necessary at this point in time to address issues of damages, Plaintiff has demonstrated evidence supporting his prima facie allegation that he was compensated at less than the minimum wage. *See* Perry Decl., ¶ 6, Ex. D, *in conjunction with* First Amended Complaint, Dkt. 17. He has also set forth sufficient facts to demonstrate that all putative

collective members were subject to a substantially similar compensation policies which result in a denial of minimum wages under the FLSA.

A. Plaintiff's Collective Should be Conditionally Certified Because Lease-Operators Are Uniformly Misclassified by Defendant.

Sixth Circuit courts have found that the determination of whether an employee has been misclassified as an independent contractor is a question of his or her "economic reality." *Davis v. Colonial Freight Sys.*, 2017 U.S. Dist. LEXIS 221275, *9-10 (E.D. Tenn. 2017) (*citing Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015)). Although courts will examine factors, including (1) the permanency of the relationship between the parties; (2) the degree of skill required for rendering the services; (3) the worker's investment; (4) the worker's opportunity for profit or loss, depending on his or her skill; (5) the degree of the alleged employer's right to control the manner in which work is performed; and (6) whether the service rendered is an integral part of the alleged employer's business, **the central question of the "economic realities" test is whether, and to what extent, the worker is economically dependent upon the business for which he is laboring.** *Id., quoting Donovan v. Brandel,* 736 F.2d 1114, n.5 (6th Cir. 1984) (emphasis added).

The economic realities test is subject to common proof across the alleged collective, and as such, conditional certification should be granted. FAF's ICOAs alone, which contain near identical provisions for all lease-operators across the entire covered period, demonstrate that Plaintiff and members of the putative collective were similarly situated as to each of the prongs of the economic realities test. The ICOA clauses on termination demonstrate Plaintiff and the other lease-operators were similarly situated with regards to the permanency of their relationship with FAF. ICOA Clauses on settlement sheets, deductions, and costs required to be covered by lease-purchasers show the investments made by all lease-operators were similar. ICOA clauses

regarding driver qualifications demonstrate the degree of skill required to render services for FAF. The ICOAs also describe Plaintiff and the other lease-operators' responsibility to abide by FAF policies and procedures, demonstrating FAF's right to control the manner in which their work is performed.

Additional evidence supports the initial showing made by the ICOAs and demonstrates that lease operators were similarly situated as to all of the remaining prongs of the "economic realities" test. Testimony of FAF's Rule 30(b)(6) designee demonstrates that all lease-operators, who all carry loads for Defendant's customers, render a service integral to the very nature of FAF's business of transporting customer freight. Viscelli's Expert Report and Declarations of Plaintiff and Opt-ins lend further support to Plaintiff's argument that not only were all lease-operators similar in their economic dependence on Defendant, but that such reliance is a common and typical issue within both FAF and the trucking industry at large.

Courts regularly grant conditional certification of cases in which a plaintiff alleges he or she was misclassified as an independent contractor and owed wages under the FLSA. *See Huddleston v. John Christner Trucking, LLC*, 2018 U.S. Dist. LEXIS 73149 (N.D. Okla. 2018) (conditionally certifying a collective of lease-operators allegedly misclassified as independent contractors); *Williams v. King Bee Delivery, LLC*, 2017 U.S. Dist. LEXIS 36195 (E.D. Ky. 2017) (conditionally certifying a group of delivery drivers allegedly misclassified as independent contractors); *Scovil v. FedEx Ground Package Sys., Inc.*, 811 F. Supp. 2d 516 (D. Me. 2011) (granting conditional certification of drivers alleging they were misclassified as independent contractors); *Scheidler v. Safeway Rd. Servs.*, 2014 U.S. Dist. LEXIS 52442 (S.D. Tex. 2014) (conditionally certifying a class of tow truck drivers alleging they were misclassified as independent contractors and owed wages under the FLSA); *Curtis v. Scholarship Storage, Inc.*,

2015 U.S. Dist. LEXIS 33242, (D. Me. 2015) (granting conditional certification to shuttle drivers allegedly misclassified as independent contractors, subject to the same unlawful payroll deductions); *Carter v. XPO Last Mile, Inc.*, 2016 U.S. Dist. LEXIS 137176 (N.D. Cal. 2016) (granting conditional certification of a class of delivery drivers allegedly misclassified as independent contractors); *Grady v. Alpine Auto Recovery LLC*, 2015 U.S. Dist. LEXIS 81989 (D. Colo. 2015) (granting conditional certification to a group of tow truck drivers allegedly misclassified as independent contractors). This court should grant certification of the similar collective alleged in this matter.

B. Plaintiff's Collective Should be Conditionally Certified Because Defendant's Business Model and Practices Cause Putative Collective Members to Be Compensated at less than the Minimum Wage.

The U.S. Supreme Court has made clear that "when *allegedly* unlawful conduct affects multiple employees, the FLSA does not 'relieve employers of the burden of multiparty actions,' but instead allows plaintiffs to pool their resources by litigating factually similar claims at once." *Burdine v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 79807 (E.D. Tenn. 2011) (emphasis in original) (*quoting Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 170-173 (1989)). Here, Plaintiff has alleged FAF's control over mileage rates, control over the loads, strict requirements to adhere to its own policies, and its common policy and practice of shifting operating expenses to its individual lease-operators cause its lease-operator drivers to be paid less than the required minimum wage under the FLSA. As such, under *Hoffman* and consistent with *Burdine v. Covidien, Inc., supra,* Plaintiff and other lease-operators should be permitted to pool their resources and litigate their factually similar claims together.

Plaintiff has shown FAF provides mileage-based compensation for its lease-operators that is expected to cover all activities done or undertaken in furtherance of their job duties. The

common compensation schemes are laid out in ICOAs prior to FAF hiring lease-operators and are evidenced by all lease-operators' weekly settlements statements throughout the course of their employment relationship with FAF. The ICOAs, settlement statements, and lease-operator declarations demonstrate FAF's policy and practice of compensating all lease-operators with a common compensation plan. The ICOAs, settlement statements, and lease-operator declarations also demonstrate FAF's policy and practice of making similar deductions from all lease-operator's settlements for operating expenses such as lease payments, fuel, insurance, licenses. While exact payments and deductions will certainly have some variation week by week, the analysis applied to all lease-operator wages will be identical and involve common proof.

Similarly, and as discussed at length above, FAF's defense to Plaintiff's FLSA claims—that lease-operators were properly classified as independent contractors—is *also* subject to common proof.

V. CONCLUSION

For all the aforementioned reasons, this Court should grant Plaintiff's Motion for Conditional Certification and allow notice to be provided to putative members of the collective.

Respectfully Submitted,

Dated: October 29, 2018

Gary E. Mason (admitted *pro hac vice*)
Danielle L. Perry (admitted *pro hac vice*)
WHITFIELD BRYSON & MASON, LLP
5101 Wisconsin Ave NW, Ste. 305
Washington, D.C. 20016
Tel: 202-429-2290
Fax: 202-429-2294
Email: gmason@wbmllp.com
Email: dperry@wbmllp.com

Gregory F. Coleman (TN BPR No. 014092)
Lisa A. White (TN BPR No. 026658)
Mark E. Silvey (TN BPR No. 13415)
GREG COLEMAN LAW PC
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
Tel.: 965-247-0080
Fax: 865-522-0049
Email: greg@gregcolemanlaw.com
Email: lisa@gregcolemanlaw.com
Email: mark@gregcolemanlaw.com

CERTIFICATE OF SERVICE

On October 26, 2018, I served the foregoing documents described as: MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION on interested parties through ECF's document filing system.

Danielle L. Perry