IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

HARRY SWALES, COREY LILLY, KYLE SHETTLES, and JOHN MCGEE on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **KLLM TRANSPORT SERVICES, LLC, and DOES 1-25** **Defendants.**	**Civil Action No.: 3:17-cv-490 CWR-LRA** **FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

Harry Swales, Corey Lilly, Kyle Shettles, and John McGee ("Plaintiffs"), on behalf of themselves and those similarly situated, by and through their undersigned attorneys, hereby make the following allegations against Defendant KLLM Transport Services, LLC, and Does 1 through 25 (collectively "KLLM" or "Defendant") concerning its acts and status upon actual knowledge and concerning all other matters upon information, belief, and the investigation of their counsel:

NATURE OF ACTION

1. Defendant KLLM Transport Services, LLC has engaged in a pattern and practice of taking advantage of its truck drivers by misclassifying them as independent contractors and improperly shifting the costs of doing business to these truck drivers, while completely controlling the means and manner by which the truck drivers perform their job duties. Plaintiffs bring this action under the Fair Labor Standards Act, 28 U.S.C. §§ 201, *et seq.*, (the "FLSA") on behalf of all persons in the United States who entered into Independent Contractor Agreements

and Tractor Lease/Purchase Agreements with KLLM (collectively, the "Agreements") at any time during the period from three years prior to filing of the complaint to the present (the "Class").

2. Defendant has, at all times relevant herein, misclassified Plaintiffs and similarly situated individuals nationwide as independent contractors, and refused and failed to pay them at least the minimum wage for all hours worked. Specifically, Defendant has intentionally required that Plaintiffs and similarly situated individuals cover the costs of operating Defendant's business, (including but not limited to the costs of fuel and truck maintenance), willfully reducing the wages of Plaintiffs and those similarly situated to a rate below the federally mandated minimum wage.

JURISDICTION AND VENUE

3. This Court has jurisdiction over Plaintiffs' FLSA claims pursuant to 28 U.S.C. § 1331 because this civil action arises under federal law of the United States, 29 U.S.C. § 201 *et seq.*

4. This Court may properly maintain personal jurisdiction over Defendant because Defendant's contacts with this state and this judicial district are sufficient for the exercise of jurisdiction over Defendant to comply with traditional norms of fair play and substantial justice.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendant is domiciled in this District.

PARTIES

6. Named Plaintiff Kyle Shettles is an adult individual residing at 4927 Cairo Loop, Ecru, Mississippi 38841.

7. Named Plaintiff Corey Lilly is an adult individual residing at 206 Atyla St., Longview, Texas 75604.

8. Named Plaintiff Harry Swales is an adult individual residing at 6 Spectrum Drive, Newark, Delaware 19713.

9. Named Plaintiff John McGee is an adult individual residing at 875 Homer, Memphis, Tennessee 38122.

10. Defendant KLLM Transport Services, LLC is a limited liability company formed in the State of Texas with its principal place of business at 135 Riverview Drive, Jackson, MS 39218. Defendant KLLM Transport Services, LLC provides over-the-road carrier services throughout the United States.

11. Defendants Does 1 through 25 are presently unknown persons and/or entities who had control over the wages, hours, and payroll of Plaintiffs and similarly situated individuals.

12. At all times relevant herein, KLLM and Does 1 through 25 acted by and through their agents and employees, each of whom acted in the course and scope of their employment.

FLSA COLLECTIVE ACTION ALLEGATIONS

13. Plaintiffs bring this lawsuit pursuant to 29 U.S.C. § 216(b) as a collective action on behalf of the Class, as defined above.

14. Plaintiffs desire to pursue their FLSA claims on behalf of any individuals who opt in to this action pursuant to 29 U.S.C. § 216(b).

15. Plaintiffs and the Class are "similarly situated" as that term is used in 29 U.S.C. § 216(b), because, *inter alia*, all such individuals worked pursuant to the terms of the Agreements entered with KLLM and as a result of the terms of the Agreements, together with common business policies and practices, were not always paid minimum wage. Resolution of this action

requires inquiry into common facts, including, *inter alia*, Defendants' common compensation practices and common practices used to manage Plaintiffs and members of the Class.

16. Specifically, KLLM failed to pay the members of the Class the minimum wage in violation of the FLSA and the regulations promulgated thereunder.

17. During the relevant time period, Defendant has employed Plaintiffs and members of the Class as "Contractors" and misclassified them as independent contractors.

18. During all times relevant herein, Plaintiffs and members of the Class were subjected to a compensation system which often paid them less than minimum wage in violation of the FLSA.

19. Plaintiffs and members of the Class are similarly situated. During the relevant time period, they have held similar job titles ("Contractor"); have performed similar job duties and procedures; have been paid under similar contractual pay provisions; and are all subject to Defendant's policies and practices as described herein.

20. Plaintiffs and members of the Class are estimated to number in the hundreds, if not thousands. KLLM has entered into Independent Contractor Agreements and Tractor Lease/Purchase Agreements with thousands of persons who thereafter worked for KLLM as Contractors.

21. Contractors work for KLLM pursuant to the substantially similar provisions of the Independent Contractor Agreements and the Lease/Purchase Agreements. As such, the contractual relationship with KLLM, the job duties, and compensation arrangements of individual Contractors were all essentially the same.

22. The Independent Contractor Agreements all included provisions:

a. requiring the Contractor to maintain detailed service records;

b. providing the calculation of compensation;

c. identifying expenses for which the Contractor agrees to pay, including fuel; fuel taxes; base plates and licenses; maintenance of all equipment; operating expenses; tools; compatible on-board computer and tracing technology; property damage to carrier's trailer equipment; and fines for overweight shipments;

d. specifying the terms of payment;

e. identifying chargeback options; and

f. mandating the Contractor's insurance obligation, including an option for the Contractor to agree to authorize KLLM to obtain coverage (at the Contractor's expense) on behalf of the Contractor.

23. The Lease/Purchase Agreements all included an option to purchase the truck and provisions requiring the Contractor to, among other things:

a. Establish a maintenance escrow account;

b. Pay any and all costs of operating the truck, such as wages, payroll taxes or assessments, employee benefits, lubricants, antifreeze and expendables, fuel costs, fuel taxes;

c. Deliver the truck to a location designated by Defendant for inspection at least quarterly; and

d. Pay for insurance, including workman's compensation insurance, bobtail insurance, and physical damage or collision insurance.

24. The similarly situated employees are known to Defendant, are readily identifiable, and can be located through Defendant's records. Defendant employs hundreds of drivers throughout the United States who work for it and are compensated pursuant to the Agreements.

These similarly situated employees may be readily notified of this action through direct U.S. mail and/or other means, and allowed to opt into it pursuant to U.S.C. § 216(b), for the purpose of collectively adjudicating their claims for minimum wage, liquidated damages, and attorneys' fees and costs under the FLSA.

25. Therefore, Plaintiffs should be permitted to bring this action as a collective action on behalf of themselves and all other individuals similarly situated pursuant to the "opt-in" provisions of the FLSA.

FACTUAL ALLEGATIONS

A. KLLM Misclassifies Plaintiffs and other Class Members as Independent Contractors as a Matter of Course.

26. During the relevant time period, Defendant engaged in a policy and practice of employing truck drivers and misclassifying them as independent contractors when they were in fact Defendant's employees under federal law.

27. KLLM utilizes the lease-operator management model for over-the-road truckload carriers. That labor management model is fundamentally incompatible with the exercise of meaningful control by Contractors in choosing the work they do.

28. KLLM retains and exercises the ability to control work performed by its Contractors.

29. KLLM actively manages its Contractors as if they were employees, regularly monitoring their activity in real time.

30. Contractors do not and cannot independently perform most of the essential tasks required to provide trucking services to customers. In other words, Contractors could not move freight without KLLM. They do not find loads, engage with customers, negotiate prices for their

services, provide meaningful capital investments, or do a wide range of other kinds of work that is required for participation in the business of trucking.

31. The decisions made by Contractors, other than the decision about how many days to stay on the road at a time, have only a marginal impact on their earnings. The decisions available to Contractors about how to perform their work do not differ in any meaningful way from the decisions available to employees.

32. KLLM determines all the important terms of employment, including carrying out all interactions to solicit freight and price services with customers, whether to pay rates per mile or by percentage load, what fuel charges will be based on, and the pay for unloading trailers.

33. KLLM controls all meaningful aspects of the trucking business including interactions to solicit freight, price services with customers, and set customer flow and rates, effectively eliminating ability to function as independent economic entities.

34. Contractors do not in actuality run their own trucking businesses. These workers do little more than pick up freight with a truck at a particular location and drive it to another location within a specified time period, at KLLM's direction.

1. The Lease/Purchase Agreements Bind Contractors to Their Employment with KLLM.

35. Because Contractors are not, in fact, independent owner-operators, they do not actually own their own truck and trailer. Contractors must thus obtain "their" trucks from Defendant. Contractors typically sign the Lease/Purchase Agreement at or around the same time that they sign the Independent Contractor Agreement.

36. Contractors enter into substantially uniform lease agreements with Defendant whereby a Contractor makes large regular payments in return for the use of one of Defendant's trucks. Defendant automatically deducts these lease payments from Contractors' wages.

37. These leases typically extend for periods of four to six years. During the term of the lease, Contractors gain no equity in the trucks: if a Contractor stops working for KLLM before the term of the lease is completed, the Contractor receives nothing in return for the lease payments already made.

38. The Lease Agreements automatically terminate upon a Contractor's termination of employment with Defendant. Contractors are not allowed to take the truck with them and continue making lease payments after leaving KLLM.

39. Until a Contactor reaches the end of the lease term and/or completes all payments towards purchase of the truck, the Contactor is driving Defendant's equipment. The Lease Agreements effectively restrict Contractors to hauling freight only for KLLM.

2. Defendant Unilaterally Controls Payment of Contractors.

40. Contractors are compensated based on a number of factors unilaterally determined by Defendant, including but not limited to the distance a load must be hauled and the size and/or weight of the cargo.

41. Defendant does not permit Contractors to carry loads for independent companies that are/were not assigned by and/or through Defendant, even on days that Contractors have no assigned work from Defendant.

42. Defendant controls the loads that Contractors get and Contractors may only accept loads that have been assigned to them by Defendant.

43. Defendant requires Contractors to have and maintain particular onboard communications and tracing technology.

44. The onboard communications and tracing technology enables Defendant to locate and track the trucks Contractors drive at all times, and to better control the schedules and loads of Contractors.

45. Defendant assigns loads to Contractors through its communications and dispatch system.

46. Contractors have little to no ability to refuse assigned loads.

47. On information and belief, when a Contractor refuses a particular load assigned to it, Defendant may require that the Contractor sit and wait days for another load, substantially decreasing the amount of money the Contractor is able to earn and endangering the Contractor's ability to meet his/her lease payment obligations.

48. Because Contractors are not permitted to accept loads or jobs from anyone other than Defendant, they have no meaningful opportunity to increase their business outside of what is offered by Defendant.

49. Although Contractors are required by law to hold commercial driving licenses, they are not required to have special skills uncommon to the over-the-road trucking industry.

50. Contractors perform the same or substantially similar job duties as are performed by company drivers employed directly by Defendant.

51. Because Defendant controls the rates paid and the available loads, Contractors can do little to increase their profits other than attempt to improve their efficiency within the bounds of the Motor Carrier Act.

3. Defendant's Contractors are Properly Classified as Employees.

52. As described in the above allegations, Defendant controls and directs Contractors in the performance of their job duties, and Contractors are economically dependent on Defendant.

53. Contractors, including Plaintiffs and members of the Class, are properly classified as "employees," as that term is used and defined in the FLSA and the regulations promulgated thereunder.

B. KLLM Fails to Pay its Contractors Minimum Wages for All Hours Worked.

54. Defendant's pay structure regularly causes Contractors to make less than the minimum wage as set forth by Section 206 of the FLSA, 29 U.S.C. § 206.

55. Defendant has a policy and practice of making regular deductions from the paychecks of Contractors for items including but not limited to: lease payments, communications system rentals, insurance payments, and for an escrow account set aside to cover maintenance of the truck.

56. Defendant does not reimburse Contractors for necessary and reasonable business expenses including but not limited to costs of fuel, lubricants, antifreeze, licenses, and insurance.

57. Defendant also does not pay Contractors for all required compensable time, such as time waiting for trucks to be loaded or unloaded, time spent performing administrative tasks like filling out paperwork, time sleeping while on the road, or rest time required by Department of Transportation regulations.

58. Defendant's pay structure, including both deductions made and its failure to reimburse for all necessary and reasonable business expenses, regularly causes Contractors to make wages amounting to less than the federal minimum wage of $7.25 per hour for all hours worked during a workweek.

C. KLLM Misclassified Plaintiffs as Independent Contractors.

59. As alleged above, as a Contractor, each of the named Plaintiffs was utterly economically dependent on KLLM and was an "independent contractor" in name only.

60. Plaintiff Kyle Shettles worked for Defendant as a Contractor from approximately October 2015 to January 2017, and was misclassified by Defendant as an independent contractor.

61. Shettles did not own his own truck and trailer before becoming a Contractor with KLLM, and signed the Lease/Purchase Agreement and the Independent Contractor Agreement on or about the same date.

62. Shettles did not interact with customers, solicit loads, price his services with customers, nor did he independently determine the customers for whom he would drive loads.

63. Shettles did not drive any loads that were not assigned to him by KLLM, nor did he feel that he could freely refuse to carry a load assigned to him by KLLM.

64. Plaintiff Harry Swales worked for Defendant as a Contractor from approximately July 2013 to July 2015, and was misclassified by Defendant as an independent contractor.

65. Swales did not own his own truck and trailer before becoming a Contractor with KLLM, and signed the Lease/Purchase Agreement and the Independent Contractor Agreement on or about the same date.

66. Swales did not interact with customers, solicit loads, price his services with customers, nor did he independently determine the customers for whom he would drive loads.

67. Swales did not drive any loads that were not assigned to him by KLLM, nor did he feel that he could freely refuse to carry a load assigned to him by KLLM.

68. Plaintiff Corey Lilly worked for Defendant as a Contractor from approximately March 2016 to November 2016, and was misclassified by Defendant as an independent contractor.

69. Lilly did not own his own truck and trailer before becoming a Contractor with KLLM, and signed the Lease/Purchase Agreement and the Independent Contractor Agreement on or about the same date.

70. Lilly did not interact with customers, solicit loads, price his services with customers, nor did he independently determine the customers for whom he would drive loads.

71. Lilly did not drive any loads that were not assigned to him by KLLM, nor did he feel that he could freely refuse to carry a load assigned to him by KLLM.

72. Plaintiff John McGee worked for Defendant as a Contractor from approximately October 2015 to November 2016, and was misclassified by Defendant as an independent contractor.

73. McGee did not own his own truck and trailer before becoming a Contractor with KLLM, and signed the Lease/Purchase Agreement and the Independent Contractor Agreement on or about the same date.

74. McGee did not interact with customers, solicit loads, price his services with customers, nor did he independently determine the customers for whom he would drive loads.

75. McGee did not drive any loads that were not assigned to him by KLLM, nor did he feel that he could freely refuse to carry a load assigned to him by KLLM.

D. KLLM Failed to Pay Plaintiffs Minimum Wages for All Hours Worked.

76. During the term of Plaintiff Shettles' employment with KLLM, KLLM charged various deductions from Shettles' compensation, including regular charges for truck lease payments, communications system rentals, maintenance, liability insurance for physical damage, and fuel. As a result of these substantial deductions, Shettles was often paid less than minimum wage.

77. For example, for the period starting January 5, 2017 and ending on January 12, 2017, Shettles drove two trips for a total of 2,568 miles. He was paid a total of $2,911.64 for these trips. He also received a Christmas bonus of $400.00 and miscellaneous credits totaling an additional $17.00. His total pay for this period was therefore $3,328.64.

78. During that same time period, the charges imposed on Shettles amounted to a total of $3,210.92, all of which were deducted directly from his wages. These charges included but were not limited to: $282.48 deducted for a maintenance fund; $66.65 deducted for truck insurance; $19.00 deducted for use of the required satellite communication and tracking system; $515.83 deducted for a lease payment; and $1,638.75 deducted for fuel.

79. Consequently, Shettles' net pay for this time period was $117.72. Assuming an average rate of speed of 40 mph,[1] Shettles drove his truck no less than 64.2 hours, meaning he was paid $1.83 per hour, significantly below the federal minimum wage of $7.25 per hour.

80. Plaintiffs' expert estimates that drivers spend an average of 9 hours on administrative tasks per week when driving the average number of weekly miles. If these hours are added to 64.2, the total hours worked by Shettles for this settlement period would be 73.2 hours, reducing his hourly wage to $1.61. As these estimates do not include sleep time, which is compensable pursuant to FLSA regulations, they are conservative and understate the hours worked as defined by the FLSA regulations.[2]

81. During the term of Plaintiff Swales' employment, KLLM charged various weekly deductions from Swales' compensation, including regular charges for truck lease payments,

[1] The accepted average speed of truck drivers for all time spent driving—including all time spent behind the wheel of a truck with the motor running, including time moving on the highway as well as slow driving time off the highway, backing and parking time in truck stops, and time waiting in line to enter yards or truck stops, or waiting at lights or for parking spaces—is 40 mph.

[2] Pursuant to Department of Labor Field Operations Handbook Section 31b09 and 29 C.F.R. § 785.22, a work day for truck drivers is 24 hours, less bona fide meal times, unless the driver and the employer have agreed to exclude sleep time.

communications systems rentals, maintenance, liability insurance for physical damage, and fuel. As a result of those substantial weekly deductions, Swales was often paid less than the minimum wage.

82. On information and belief, Swales drove an average of approximately 2,700 miles per week during his employment with KLLM. Swales was compensated at 91 cents per mile for trips over 500 miles long, and was compensated approximately $1.25 per mile for trips shorter than 500 miles, making for an average rate of approximately $1.08 per mile, and approximate weekly compensation of $2,900.00.

83. KLLM made substantial deductions to Swales' weekly compensation. All such deductions are evidenced by his weekly settlement sheets, which are, upon information and belief, in the sole possession, custody, and control of KLLM.

84. On information and belief, these weekly charges included but were not limited to deductions for: the truck maintenance fund; use of the required satellite communication and tracking system; truck insurance; the weekly lease payment; and the cost of fuel.

85. On information and belief, and taking into account the above deductions, Swales' net pay regularly reached around $400.00 per week. Some weeks, Swales' net pay was even less, ranging from approximately $100.00 to $200.00. Assuming an average speed of 40 mph, Swales drove his truck for 67.5 hours, meaning on an average week he was paid approximately $5.93 per hour, significantly below the federal minimum wage of $7.25 per hour.

86. Plaintiffs' expert estimates that drivers spend an average of 9 hours on administrative tasks per week when driving the average number of weekly miles. If these hours are added to 67.5, the average total hours worked by Swales during a settlement period would be 76.5 hours, reducing his hourly wage to $5.23. As these estimates do not include sleep time,

which is compensable pursuant to FLSA regulations, they are conservative and understate the hours worked as defined by the FLSA regulations.

87. During the term of Plaintiff Lilly's employment, KLLM charged various weekly deductions from Lilly's compensation, including regular charges for truck lease payments, communications systems rentals, maintenance, liability insurance for physical damage, and fuel. As a result of those substantial weekly deductions, Lilly was often paid less than the minimum wage.

88. For example, Lilly estimates that he typically drove approximately 2,800 miles per week during his employment with KLLM. Lilly was compensated at approximately 90 cents per mile, making for an average compensation of approximately $2,520.00 per week.

89. KLLM made substantial deductions to Lilly's weekly compensation. All such deductions were evidenced by his weekly settlement sheets, which are, upon information and belief, in the sole possession, custody, and control of KLLM.

90. On information and belief, these weekly charges included but were not limited to deductions for: the truck's maintenance fund; use of the required satellite communication and tracking system; truck and bobtail insurance; the weekly lease payment; and the cost of fuel.

91. On information and belief, and taking into account the above deductions, Lilly's net pay regularly reached around $435.00 per week. Some weeks, Lilly's net pay was even less. Assuming an average speed of 40 mph, Lilly drove his truck for 70 hours, meaning on an average week he was paid approximately $6.21 per hour, significantly below the federal minimum wage of $7.25 per hour.

92. Plaintiffs' expert estimates that drivers spend an average of 9 hours on administrative tasks per week when driving the average number of weekly miles. If these hours

are added to 70, the average total hours worked by Lilly during a settlement period would be 79 hours, reducing his hourly wage to $5.51. As these estimates do not include sleep time, which is compensable pursuant to FLSA regulations, they are conservative and understate the hours worked as defined by the FLSA regulations.

93. During the term of Plaintiff McGee's employment, KLLM charged various weekly deductions from McGee's compensation, including regular charges for truck lease payments, communications systems rentals, maintenance, liability insurance for physical damage, and fuel. As a result of those substantial weekly deductions, McGee was often paid less than the minimum wage.

94. For example, McGee estimates that he drove an average of approximately 2,800 miles per week during his employment with KLLM. McGee was usually compensated at approximately 90 cents per mile, making for an average weekly compensation of $2,520.00 per week.

95. KLLM made substantial deductions to McGee's weekly compensation. All such deductions are evidenced by his weekly settlement sheets, which are, upon information and belief, in the sole possession, custody, and control of KLLM.

96. On information and belief, these weekly charges included but were not limited to deductions for: the truck's maintenance fund; use of the required satellite communication and tracking system; truck and bobtail insurance; the weekly lease payment; and the cost of fuel.

97. On information and belief, and taking into account the above deductions, McGee's net pay regularly reached around $450.00 per week. Some weeks, McGee's net pay was even less: on about 4 to 5 occasions he actually ended the work week owing KLLM money. Assuming an average speed of 40 mph, McGee drove his truck for 70 hours, meaning on an

average week he was paid approximately $6.43 per hour, significantly below the federal minimum wage of $7.25 per hour.

98. Plaintiffs' expert estimates that drivers spend an average of 9 hours on administrative tasks per week when driving the average number of weekly miles. If these hours are added to 70, the average total hours worked by McGee during a settlement period would be 79 hours, reducing his hourly wage to $5.70. As these estimates do not include sleep time, which is compensable pursuant to FLSA regulations, they are conservative and understate the hours worked as defined by the FLSA regulations.

COUNT I

Violation of the Fair Labor Standards Act ("FLSA")

Failure to Pay Minimum Wages

99. Each of the preceding paragraphs is incorporated by reference as though fully set forth herein.

100. At all times relevant herein, Defendant was and continues to be an "employer" of Plaintiffs and members of the Class within the meaning of the FLSA.

101. At all times relevant herein, Plaintiffs and members of the Class were/are "employees" within the meaning of the FLSA.

102. At all times relevant herein, Defendant, as well as Plaintiffs and members of the Class, have been engaged in "commerce" within the meaning of the FLSA, 29 U.S.C. § 203.

103. Section 206 of the FLSA requires employers to minimally compensate employees such as Plaintiffs and members of the Class at the federal minimum wage: $7.25 per hour for all hours worked.

104. Defendant has violated and continues to violate the FLSA by willfully failing to

compensate Plaintiffs and members of the Class at least the federal minimum wage.

105. As a result of Defendant's company-wide policy and practice of not paying Plaintiffs and members of the Class at least the federally mandated minimum wage for all hours worked, Plaintiffs and members of the Class have been harmed.

JURY DEMAND

106. Plaintiff hereby demands a trial by jury in the above captioned matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and members of the Class, respectfully seeks the following relief:

a. Judgment against Defendant;

b. All unpaid minimum wages;

c. Liquidated damages;

d. Litigation costs, expenses, and attorneys' fees; and

e. Such other and further relief as this Court deems just and proper.

[signature page follows]

Respectfully Submitted,

Dated: August 18, 2017

/s/ Danielle L. Perry
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**pro hac vice* admission anticipated

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2017, I caused an electronic copy of the above and foregoing *First Amended Complaint and Demand for Jury Trial* to be served on all interested parties by filing it with the Court's Electronic Case Filing System.

/s/ Danielle L. Perry
Danielle L. Perry