IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al. Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	Civil Action No. 1:17-cv-01371 (APM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE DECLARATION OF MARC BENDICK, JR., Ph.D.

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INTRODUCTION

Defendant Medical Transportation Management, Inc. (MTM) operated a network of transportation services to provide D.C. residents, among other things, non-emergency medical transportation (NEMT) under contracts with the District of Columbia. MTM provided these services through its subcontracted transportation service providers (TSPs or subcontractors). Rather than paying the drivers jointly employed by MTM and the subcontractors for every hour worked, MTM chose to reimburse its subcontractors for each trip performed. But across the board, drivers reported that they were not paid legally mandated wages for their work under MTM.

Because of its common policies and practices towards the drivers, Plaintiffs have sought class certification of their D.C. wage law claims against MTM. To aid in showing that the claims against MTM are common across the putative class, Plaintiffs have repeatedly sought access to MTM trip data that would allow for calculations of, among other things, the number of trips performed, the distances traveled, and the hours spent providing transportation services. MTM repeatedly refused to produce such data, either in whole or as part of a representative sample. After approximately a year of class-certification discovery and repeated refusals by MTM to produce these records, Plaintiffs pursued an alternative path to obtain such information. Specifically, Plaintiffs retained Marc Bendick, Jr., Ph.D.—an accomplished labor economist with decades of experience in the field—to determine whether a methodology could be applied to the class as a whole as to whether MTM's reimbursement rates allow for the payment of legally required wages.

In light of the time constraints and the bifurcation between class certification and merits discovery, Plaintiffs worked with Dr. Bendick to develop a process that would provide Dr. Bendick with the information necessary to opine on whether such a methodology could be developed for application to the class a whole. As part of that process, Dr. Bendick approved of a convenience

sample of drivers to participate in a driver survey, and Dr. Bendick worked with Plaintiffs' counsel to develop a semi-structured interview process to collect relevant information from the convenience sample of drivers. Dr. Bendick then developed a methodology that could be applied to the class for determining the maximum feasible wage MTM's reimbursement rates would enable subcontractors to pay the drivers, and Dr. Bendick applied his methodology based on the best available data, all of which is contained within his expert report that Plaintiffs provided in support of their motion for class certification.

After denying access to the underlying data, MTM now seeks to strike Dr. Bendick's report, primarily based on the alleged errors in the data collection process largely necessitated by the lack of data provided to Plaintiffs. MTM's challenges center around the values Dr. Bendick used when applying his methodology, rather than the methodology itself. At class certification, Plaintiffs need not prove their case, and Plaintiffs do not rely on Dr. Bendick's report to show that MTM is, in fact, liable to the class. Rather, Dr. Bendick's report is further support for Plaintiffs' contention that class certification is appropriate because common questions of liability *can be answered* for the class as a whole. Viewed in the proper context, many of MTM's complaints are inapposite to the issue before the Court. In any event, Dr. Bendick's report rests on reliable facts and scientifically sound methods. Because his report is both reliable and relevant, there is no basis to strike it.

BACKGROUND

On July 13, 2017, plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin filed this action, on behalf of themselves and others similarly situated, against MTM, bringing claims under the Fair Labor Standards Act (FLSA), the D.C. Minimum Wage Act, the D.C. Living Wage Act, and the D.C. Wage Payment and Collection Law, as well as breach of contract claims as third-party

beneficiaries. *See* Compl. (Doc. 1). As relevant here, Plaintiffs alleged that their claims "ar[ose] out of MTM's systemic, company-wide failure to pay Plaintiffs and hundreds of similarly situated drivers the minimum wages, living wages, and overtime wages" they were legally entitled to. *Id.* ¶ 2. MTM moved to dismiss the claims, and the Court largely denied MTM's motion, granting it only with respect to Plaintiffs' breach of contract claims. *See* March 5, 2018 Mem. Op. & Order (Doc. 21). The Court conditionally certified Plaintiffs' FLSA claims as a collective action, July 17, 2018 Order (Doc. 48), and authorized a Notice to be issued to all putative members of the collective action, Collective Action Notice (Doc. 73). As a result, approximately 152 drivers filed consent forms to join the FLSA collective action.

MTM then used its own sampling methodology to select among those 152 drivers for class certification discovery and objected to sampling processes Plaintiffs proposed to obtain records of the putative class members trips. The Court adopted a bifurcated discovery process for Plaintiffs' D.C. wage claims, under which the parties would first proceed to class-certification discovery, culminating in Plaintiffs' motion for class certification, and then continue with merits discovery after class certification. Joint Rule 26(f) Plan ¶ 13(a) (Doc. 28); April 27, 2018 Order 2 (Doc. 29). As part of class-certification discovery, MTM sought discovery of 56 opt-in plaintiffs, in addition to the three Named Plaintiffs. Initially, MTM sought discovery of 5 early opt-in plaintiffs, *see* Plaintiffs' Notice of Consent Filing (Doc. 25), and Plaintiffs requested that, instead, discovery of opt-in plaintiffs be suspended until the close of the opt-in period "to allow for representative sampling" of the class. Plaintiffs' Notice 1 (Doc. 80). During a telephonic status conference with the Court, the Court determined that MTM would be permitted to take discovery of the 5 early opt-in plaintiffs but "go[ing] beyond that" would seem to "reach[] a number that certainly would call for sampling." Oct. 18, 2018 Hr'g Tr. 26:1–12 (Doc. 102). Thus, the Court explained that, for

any further discovery of opt-in plaintiffs, the parties should have "a discussion about sampling, the number that would be appropriate and the types of discovery that would be appropriate to take from those individuals." *Id.* at 26:14–18.

Thereafter, in January 2019, MTM selected 51 opt-in plaintiffs to respond to discovery. In justifying to the Court its selection of these additional opt-in plaintiffs, MTM explained that it "looked at all of the transportation providers that were implicated" and sent discovery requests to one driver from every transportation provider. Jan. 30, 2019 Hr'g Tr. 16:8–19 (Doc. 149). MTM stated it was "trying to get the information … as to commonality and other issues" relevant to class certification. *Id.* at 18:12–14; *see also id.* at 17:24–18:2 (counsel for MTM explaining such information was relevant to "crucial elements of the class certification"). MTM further asserted that its selection of drivers was "a good sample and a targeted sample." *Id.* at 19:7–8. Following further conferrals amongst counsel regarding the scope of such discovery, Plaintiffs agreed to provide discovery responses for the "good" and "targeted" sample MTM had identified. *See* Feb. 8, 2019 Joint Status Report (Doc. 109); Mar. 22, 2019 Hr'g Tr. 4:11–14, 19–23 (Doc. 150).

Throughout class-certification discovery, Plaintiffs sought production of—and were not provided—MTM's assignment sheets and trip logs for the class period.[1] Oct. 26, 2018 Pls. Letter (Doc. 82); Apr. 8, 2019 Pls. Letter. Plaintiffs proposed a variety of sampling methods for these records, but MTM nevertheless refused to provide them. Apr. 8, 2019 Pls. Letter 4. Combined with MTM's failure to maintain any payroll records for the drivers—providing only records for a handful of drivers from six subcontractors obtained through third-party discovery—Plaintiffs

[1] As Plaintiffs previously explained, "assignment sheets" are records reflecting trip assignments by MTM to its subcontractors, and "trip logs" are records completed by individual drivers after performing individual trips for MTM, which are eventually transmitted to MTM by the subcontractors for payment under MTM's reimbursement rates. Oct. 18, 2018 Hr'g Tr. 8:14–9:4 (Doc. 102); Apr. 8, 2019 Pls. Letter 2 n.2 (Doc. 118); Apr. 12, 2019 Def. Letter 1–2 (Doc. 120).

largely lacked access to documentary evidence concerning the hours worked by and wages paid to the drivers.

After MTM's second refusal to provide access to trip logs and assignment sheets, Plaintiffs agreed in a status conference on April 25, 2019, to postpone seeking the assignment sheets and trip logs until merits discovery, unless MTM made it apparent during the class certification briefing that such records were necessary for class certification. Accordingly, one week later, on May 3, 2019, Plaintiffs engaged Marc Bendick, Ph.D., to conduct an economic analysis as to whether a methodology could be developed for measuring on a class-wide basis the ability of subcontractors to pay legally mandated wages to drivers working for MTM based on MTM's reimbursement rates for that work. Specifically, Dr. Bendick was asked to "apply economic/employment/business analysis to three questions" for Plaintiffs:

a. Given the level of payments TSPs received from MTM, what wages rate could TSPs have paid their drivers while remaining financially viable?

b. How do those financially-feasible driver wage rates compare to legally-mandated minimum hourly wage rates that plaintiffs allege apply in this case?

c. To what extent can the same analyses be applied to address the questions for all drivers in the proposed plaintiff class?

Declaration of Marc Bendick, Jr., Ph.D. (Bendick Report) ¶ 8 (Doc. 130-66). To aid in the development of this methodology and a preliminary application of the methodology, Dr. Bendick created a "Driver Data Chart" identifying categories of data concerning the driver's hours and wages that would be relevant to his methodology. Groveunder Decl. ¶ 2 (Doc. 130-67). To complete the Driver Data Chart, Dr. Bendick and Plaintiffs' counsel together developed a semi-structured interview process for collecting the data, including by drafting a script for the interviews. Reply Decl. of Marc Bendick, Jr., Ph.D. ¶ 19 (attached as Ex. A); Bendick Dep. Tr.

102:5–11, 104:5–20 (attached as Ex. B). Further, given that MTM had previously identified a "good" and "targeted" sample of drivers for class-certification discovery, Plaintiffs' counsel collected information for the Driver Data Chart from a convenience sample of drivers consisting primarily of those drivers identified by MTM for class-certification discovery, which Dr. Bendick approved as an appropriate sample. Bendick Reply Decl. ¶ 10; Bendick Report ¶ 5 n.1; Groveunder Decl. ¶ 4.

After receiving the completed Driver Data Chart, Dr. Bendick developed a methodology to calculate the maximum feasible wage that could be paid by the subcontractors from MTM's reimbursement rates and concluded that "the wage circumstances of all drivers within the proposed class can reasonably be understood and measured using one analytical approach." Bendick Report ¶¶ 9(h), 54. Dr. Bendick supported this determination by using the data from both the Driver Data Chart and other sources of information to apply the underlying sub-analyses to the convenience sample of drivers. *Id.* ¶¶ 9(a)–(g), 11–53. Dr. Bendick concluded his report by noting that "[i]f this litigation proceeds to subsequent stages, further discovery may provide additional and/or refined data," including either "a larger sample of drivers" or "in place of information for the average driver often examined in this declaration, wage rates for individual drivers might be computed based on their individual dates of employment, payroll records, hour records, or trip logs." *Id.* ¶ 54. "However, the elements of the computations and the computational procedures would directly parallel those demonstrated in" the Bendick Report. *Id.*

On July 26, 2019, Plaintiffs filed their Motion for Class Certification (Doc. 134). Plaintiffs offered the Bendick Report as partial support for their arguments that questions of law or fact are common to the proposed class under Rule 23(a)(2), i.e., commonality, and that common questions predominate under Rule 23(b)(3), i.e., predominance. Specifically, Plaintiffs relied on the Bendick

Report in contending that "[e]vidence common to the class will show that MTM's methods of paying the subcontractors failed to ensure that drivers were paid" the applicable legally mandated wages because Dr. Bendick developed a methodology to "estimate the maximum hourly rate a subcontractor can pay its drivers while remaining financially viable" and such analysis could be performed "to determine the maximum feasible rate for all subcontractors." Pls. Class Certification Mem. 38–40. Plaintiffs additionally relied on the Bendick Report in explaining that the main questions for trial—whether MTM is a joint employer of the class and whether MTM's rate system failed to ensure that the drivers were paid for all compensable time—could be answered "through common representative proof, including MTM's policy documents, testimony from MTM's representative, and expert economic analysis of MTM's universal D.C. rate scheme," such that common questions predominate. *Id.* at 43–44. Importantly, Plaintiffs noted that, consistent with Dr. Bendick's conclusion that a single analysis can be applied, if MTM produces reliable records during liability discovery, "Dr. Bendick could perform the same analysis using those records to determine liability." *Id.* at 40; *see* Bendick Report ¶¶ 54–55. Moreover, Plaintiffs explained that Dr. Bendick's methodology would be utilized at the "first stage trial" (liability) as follows: "[P]laintiffs will collect data using statistical sampling methods that can be analyzed using [the Bendick Report's] model to show that MTM's compensation system is insufficient to ensure that the drivers are paid the legally required wages." Pls. Class Certification Mem. 48.

On January 3, 2020, MTM filed its Opposition to Plaintiffs' Motion for Class Certification (Doc. 142-2). Additionally, that same day, MTM filed a Motion to Strike the Bendick Report (Doc. 143), arguing that the Bendick Report fails to meet the standard for admissibility of an expert report set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702, Def. Mem. 5–6 (Doc. 143-1).

LEGAL STANDARD

The D.C. Circuit has not yet articulated the proper standard for evaluating a motion to strike an expert report at the class-certification stage. Some circuits have held that, where an expert report is "critical to class certification," the district court must determine its admissibility and, accordingly, conduct a full analysis under the standard set forth in *Daubert*. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010). Others, recognizing that class certification necessarily precedes liability determinations, have held that proponents of expert testimony need not prove the admissibility of an expert report under *Daubert* at class certification and, instead, have explained that any *Daubert* challenges to the expert report should affect only the weight given to the expert report by the district court. *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018); *see In re Zurn Pex Plumbing Prods. Liability Litig.*, 644 F.3d 604, 611–14 (8th Cir. 2011) (rejecting need for "full and conclusive *Daubert* review" at class certification and instead requiring only a "tailored *Daubert* analysis").

Whether the Court applies a full *Daubert* analysis or a tailored *Daubert* analysis, the Court reviews whether the proffered expert testimony is both reliable and relevant in a "limited 'gatekeeper' role." *Ambrosini v. Labarraque*, 101 F.3d 129, 133. 134–35 (D.C. Cir. 1996). In evaluating the reliability of expert testimony, the Court "focus[es] on 'principles and methodology, not on the conclusions they generate,'" and must require "a grounding in the methods and procedures of science, rather than subjective belief or unsupported speculation." *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1127 (D.C. Cir. 2001) (quoting *Daubert*, 509 U.S. at 595). As to the reliability of data derived from a survey, alleged "technical and methodological deficiencies in a survey generally go to the weight of the evidence, not the admissibility, unless the deficiencies are

so substantial as to render the survey unreliable." *United States v. H & R Block, Inc.*, 831 F. Supp. 2d 27, 32 (D.D.C. 2011).

ARGUMENT

Dr. Bendick's report meets all requirements for admissibility under Federal Rule of Evidence 702. Therefore, it should not be struck under *Daubert* or the tailored standard applicable to class certification. *See Sali*, 909 F.3d at 1005–06; *see Zurn Pex Plumbing*, 644 F.3d at 612–14. Because *Daubert*'s applicability at class certification is limited to determining the weight afforded an expert report and not its admissibility, *Sali*, 909 F.3d at 1006, MTM's motion to strike should be denied on that basis alone. Moreover, because the Bendick Report is reliable and relevant for class certification, it should not be struck under any application of the *Daubert* standard.

Dr. Bendick is well qualified in the field of labor economics and, thus, more than satisfies the standard for being accepted as an expert in that field. Additionally, MTM's three challenges to the reliability of the Bendick Report under *Daubert* lack merit, primarily because MTM misconstrues the import of the Bendick Report as being the outcome of the analyses (Dr. Bendick's application of his methodology to the data currently available) as opposed to the purpose for which it was offered: to show that a reliable and sound analysis can be applied on a class-wide basis at the liability stage. First, the Driver Data Chart is reliable for the purpose of supporting Dr. Bendick's development of his analysis. Second, Dr. Bendick's calculations of subcontractor expenses are similarly reliable and based on reasonable assumptions flowing from available information for purposes of developing his analysis. Third, Dr. Bendick's analysis is scientifically sound and based on accepted methodologies, as are the underlying computations applied to the available information in the Bendick Report. Finally, the Bendick Report is plainly relevant to issues of commonality and predominance at class certification.

I. Dr. Bendick is well qualified as an expert in labor economics and related survey design and implementation.

Federal Rule of Evidence 702 provides that a person may be "qualified as an expert by knowledge, skill, experience, training, or education." To meet this standard, "[f]ormal education ordinarily suffices, and a person who holds a graduate degree typically qualifies as an expert in his or her field." *Khairkhwa v. Obama,* 793 F. Supp. 2d 1, 11 (D.D.C. 2011). Ultimately, "[t]he degree of 'knowledge skill, experience, training, or education' required to qualify an expert witness is only that necessary to insure that the witness's testimony 'assist' the trier of fact" *Id.* (internal quotation marks omitted).

MTM has not challenged Dr. Bendick's qualification as an expert, and there can be no question that Dr. Bendick meets this standard. As explained in his Report, Dr. Bendick "earned a Ph.D. in economics from the University of Wisconsin and ha[s] engaged in the practice of economics, specializing in employment, business analysis, and related issues, for more than 35 years." Bendick Report ¶ 1. He has additionally authored 140 scholarly publications and participated in 217 legal cases, being accepted as an expert in 40 federal district courts and 11 state courts or other tribunals. *Id.* ¶ 1–2; *see also* Bendick Report Attachment A (Resume of Dr. Bendick); Bendick Report Attachment B (Dr. Bendick Cases and Projects in Litigation Support). His work has included "analyz[ing] the revenues, operating costs, and financial viability of many hundreds of business firms, ranging from very large multinational corporations to 'self-employment' firms with a single owner-employee," and also specifically includes "analyses of firms employing drivers," such as "taxi, delivery, and bus companies." Bendick Report ¶ 3. Moreover, Dr. Bendick has extensive experience "designing, running, and analyzing numerous surveys" in this field. Bendick Reply Decl. ¶ 19 & n.25; *see also* Bendick Dep. Tr. 10:21–11:8 (explaining Dr. Bendick regularly serves as a "referee" for scholarly research journals, which

requires evaluating the scientific validity of surveys). Accordingly, Dr. Bendick is qualified as an expert in labor economics, including related survey design and implementation, under FRE 702.

II. The Bendick Report satisfies *Daubert.*

> Under Federal Rule of Evidence 702, a qualified expert may provide testimony if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

As the D.C. Circuit has explained, the current requirements of FRE 702 were added "to reflect the *Daubert* line of cases, outlining general standards that the trial must use to assess the reliability and relevance of testimony." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 892 (D.C. Cir. 2010). Thus, the focus of a court's inquiry under FRE 702 is whether the testimony is "reliable" and "relevant." *Heller v. District of Columbia*, 801 F.3d 264, 294 (D.C. Cir. 2015).

A. The Bendick Report is reliable.

The Court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)). Moreover, at class certification, whether *Daubert* is applied to determine admissibility or to evaluate the weight given to an expert report, the reliability inquiry is limited to whether the expert report is reliable for purposes of satisfying Rule 23's prerequisites for class certification. *See Blood Reagents*, 783 F.3d at 188 n.8; *Am. Honda*, 600 F.3d at 816 (holding court must "resolve any challenge to the reliability of information provided by an

expert if that information is relevant to establishing any of the Rule 23 requirements for class certification"). Here, as explained above, Plaintiffs have relied on the Bendick Report as part of their support for both commonality and predominance. Accordingly, the relevant determination is the Bendick Report's reliability as it pertains to those two issues.

Understood in the proper context, then, many of MTM's challenges to the Bendick Report are improper as they concern whether the initial application of Dr. Bendick's methodology reliably answers the question of whether MTM, in fact, failed to ensure the drivers were paid legally required wages—a merits determination—rather than whether Dr. Bendick's methodology reliably shows that question *can be answered* with proof common to the class—a class-certification determination. For example, MTM repeatedly quibbles with certain inputs into Dr. Bendick's methodology, such as one inconsistency between data in the Driver Data Chart and a declaration and the calculation of start times. Def. Mem. 15–16, 18–20. Although framed as challenges to the "reliability of the Driver Data Chart," *id.* at 16, 20, such challenges are more accurately viewed as challenging the reliability of the Driver Data Chart *for proving liability to the class*, which neither Plaintiffs nor Dr. Bendick have done. Instead, Dr. Bendick relied on the Driver Data Chart to develop an analysis that *could be* applied on a class-wide basis at the liability stage. As Plaintiffs and Dr. Bendick have noted, if additional or more accurate information becomes available during merits discovery, that data can be input into Dr. Bendick's methodology. Pls. Class Certification Mem. 40; Bendick Report ¶¶ 5, 55 & n.1. Thus, MTM's contentions that the Bendick Report is unreliable are incorrect.

1. The Driver Data Chart is reliable.

MTM's scattershot argument appears to challenge both the reliability of the methods used collect data for the Driver Data Chart—i.e., the use of semi-structured interviews to collect information from a convenience sample—and the reliability of the data itself. Def. Mem. 6–26.

i. The use of semi-structured interviews to collect data from a convenience sample was appropriate.

As explained in Dr. Bendick's report, both convenience samples and semi-structured interviews are "widely accepted for scholarly research in business, economics, and the social sciences." Bendick Report at ¶ 5 n.1. Dr. Bendick has further detailed the substantial support behind using both of these methods in this case in his declaration provided in support of this opposition. *See* Bendick Reply Decl. ¶¶ 4–23.

a. As to using a convenience sample, "[i]n business, economic, and social science research and analysis, a range of survey sampling techniques—including both random sampling and non-random sampling including convenience sampling—are recognized as acceptable professional scientific practices for both scholarly and applied work." *Id.* ¶ 6 & n.9. As Dr. Bendick explains, "standard professional practices call for implementing sampling procedures which are feasible and appropriate given the circumstances of the survey and generalizing the findings to a broader population … to the extent that the former group is likely to be representative of the broader population." *Id.* ¶ 7. Here, a convenience sample was feasible and appropriate, *id.* ¶¶ 8–12, and MTM is wrong when it states that "the survey group is wholly unrepresentative of the proposed class," Def. Mem. 9. Although using a randomly selected sample of drivers from a known universe may provide a sample "known to be representative," Bendick Dep. Tr. 91:17–18, there are other indicators of representativeness that were present in the convenience sample utilized, *id.* at 93:9–12. For example, the sample "covers more than half of the known subcontractors," includes

"nearly four dozen drivers," "the distribution of the drivers is across a range of subcontractors rather than concentrated in one or a very small number of subcontractors," and MTM itself played a role in the selection of these drivers for discovery. *Id.* at 93:20–94:9; Bendick Reply Decl. ¶ 11. Contrary to the assertions of MTM and Dr. Holt, the convenience sample used in this case provides a sufficient basis for drawing inferences as to the class. Thus, the convenience sample was a reliable data set for Dr. Bendick to conclude that "[n]o employment circumstances for any driver, and no behavior for any TSP, required handling outside the scope of [the Bendick Report's] analysis." Bendick Report ¶ 54.

Further, the method by which the drivers were selected for inclusion in the convenience sample does not undermine the reliability of the convenience sample. First, MTM repeatedly misleadingly asserts that "Plaintiffs' counsel unilaterally selected the individuals who would be interviewed and incorporated into the Driver Data Chart." Def. Mem. 3, 23; *see also id.* at 8. But the vast majority of the drivers included in the sample were those selected *by MTM* for class-certification discovery. *See* January 30, 2019 Hr'g Tr. Indeed, in justifying its selection of 51 opt-in plaintiffs to respond to class-certification discovery requests, MTM explicitly stated that such selection was "a good sample and a targeted sample" that bore on "commonality and other issues" relevant to class certification. *Id.* at 18:12–14, 19:7–8. Second, MTM and Dr. Holt are wrong to suggest that because the drivers in the convenience sample opted in to the FLSA collective action, their self-interest bias renders the Driver Data Chart unreliable. That objection would apply to every plaintiff in wage cases in which the employer fails to maintain adequate payroll records and the employees are forced to rely on their own recollection in determining hours worked and wages paid. But the Supreme Court has long rejected challenges to worker recollection in such circumstances, explaining an employer "cannot be heard to complain" about the lack of

documentary evidence where it failed to keep payroll records required by law. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). In such circumstances, the employees are entitled to a "just and reasonable inference" as to "the amount and extent of" the work performed. *Id.* at 687.

Finally, the involvement of Plaintiffs' counsel in identifying the convenience sample does not render the sample biased or unreliable for class certification purposes. As an initial matter, because the vast majority of participants were selected *by MTM* for class certification discovery, MTM's objection on this point applies to, at best, seven of the forty-four drivers whose data was included in the Driver Data Chart. *See* Groveunder Decl. ¶ 5. Further, Dr. Bendick—an expert on survey design and implementation in the field of labor economics—"approved the sampling procedure implemented by Plaintiffs' Counsel because, in the circumstances in which drivers were to be surveyed, that procedure was feasible and appropriate." Bendick Reply Decl. ¶ 12. Additionally, the case law relied upon by MTM for this point, Def. Mem. 7–8, largely lacks any discussion of the selection of the sample of respondents. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 196–97 (N.D. Cal. 2004) (explaining the survey participants were "randomly selected"); *Sirko v. Int'l Bus. Machines Corp.*, No. CV 13-03192 DMG (SSx), 2014 WL 4452699, at *2, *4 (C.D. Cal. Sept. 3, 2014) (explaining survey was sent to putative class members, without explanation as to any selection method); *Pittsburgh Press Club v. United States*, 579 F.2d 751, 756–57 & n.8 (3d Cir. 1978) (explaining survey was sent to all relevant persons, except for those that the plaintiff lacked an address for). Although the court in *Yapp v. Union Pacific Railroad Co.* mentioned that "[c]ounsel for Defendant selected the interviewees" for the survey at issue in that case, the court's discussion was plainly more concerned with the fact that the experts had disclaimed any interest in assuring the reliability of the survey whatsoever and explicitly "decline[d] to adopt a rigid bar

against the participation of counsel" in the development of an expert study. 301 F. Supp. 2d 1030, 1036–37 (E.D. Mo. 2004). Plaintiffs address below these cases as they concern the design and implementation of the interviews, *see infra* pp. 19–20, but they provide little support for MTM's attack on the selection of drivers for the convenience sample in this case.

As already explained, for the liability-stage trial, "[P]laintiffs will collect data using statistical sampling methods that can be analyzed using [the Bendick Report's] model to show that MTM's compensation system is insufficient to ensure that the drivers are paid the legally required wages." Pls. Class Certification Mem. 48. But for purposes of class certification, i.e., establishing that a methodology exists for analyzing on a class-wide basis how MTM's rate-payment system fails to provide sufficient funds for subcontractors to pay legally required wages, the convenience sample utilized here was reliable.

b. As for the use of semi-structured interviews, "[i]n business, economic, and social science research and analysis, a range of survey techniques—structured, semi-structured, and unstructured—are recognized as acceptable professional scientific practices for both scholarly and applied work." Bendick Reply Decl. ¶ 15 & n.18. As Dr. Bendick explains, "standard professional scientific practices call for implementing survey procedures that are feasible and appropriate to the data being collected, the interviewees, and other circumstances." *Id.* ¶ 16. Dr. Bendick concluded a number of factors indicated that semi-structured interviewing should be utilized, including "the drivers' likely unfamiliarity/discomfort with structured interviews"; "variation among the TSPs in the terminology for driver duties, schedules, and pay arrangements"; and the "passage of time since the events being asked about." *Id.* Indeed, where, as here, the persons that are relevant to the survey are less sophisticated and not "tightly focused on the subject of the interview"—meaning

the subject is not "their every day bread and butter in the present period"—the use of semi-structured interviewing is a "particularly … standard technique." Bendick Dep. Tr. 100:11–17.

To fit its narrative that the interviews "did not apply a consistent methodology," MTM misrepresents Mr. Groveunder's testimony about the interview process as "lack[ing] uniformity in the manner in which the drivers were asked questions." Def. Mem. 9–10. As Dr. Bendick explained, semi-structured interviewing covers the same topics in every interview but is designed to be "more interactive" by providing the questioner with a script which he may "work[] around … to maximize the amount of understanding between the questioner and the questionee." Bendick Dep. Tr. 99:11–22; *see also* Bendick Reply Decl. ¶ 17. A semi-structured interview is, thus, intended to provide multiple avenues through which the questioner can obtain accurate information:

> For example … the interviewee may give a response that doesn't seem to be a sensible response to the question asked so the interviewer may ask[] the question in a different way. Or the interviewee may in the course of the interview … make a side comment which leads the interviewer to go back and change an answer that was previously given.

Id. at 99:22–100:8. In other words, a semi-structured interview "starts with the script, and ends with a standardized data reporting form but in between there may be some back and forth, some resequencing of questions, some going back to questions to maximize the communication between interviewer and the interviewee and maximize the accuracy of the information obtained." *Id.* at 104:6–13.

Rather than reflecting "inconsistencies" or a "lack of uniformity," Def. Mem. 9–10, Mr. Groveunder's testimony establishes that there was a consistent methodology applied: semi-structured interviewing. For example, the full first passage quoted in part by MTM demonstrates this clearly:

Q. So you're interviewing the driver, and … you go through your questions, someone who is providing information. Okay. You go through your questions on exhibit 4; is that correct?
A. Yes.

Q. Did you ask them—for example, on Exhibit 4, let's take question 9 on page 3, which is Groveunder 5, are these the words that you would have used in the interview?
A. Sometimes.

Q. But not always?
A. I didn't repeat those words word for word every time.

Q. What words would you use when you didn't use these?
A. Words that would solicit information to get information for Dr. Bendick's chart.

Q. I understand that. But that was not my question. Are you saying that you wouldn't—and I'm using number 9 as an example, which are specific questions. You're telling us that you didn't always ask those specific questions to the drivers; is that correct? Is that what you're telling us?
A. Yes.

Q. So can you remember in some other way in which you asked for that same information that's in exhibit—that's in number 9?
A. I don't remember specifically what I said to every driver.

Q. So you didn't ask the questions in the exact same way to each driver?
A. No.

Groveunder Dep. Tr. 88:9–89:20 (attached as Ex. C). Further, while MTM complains that "Plaintiffs' counsel added additional topics of questioning such that some, but not all drivers, were asked about certain subject matter," Def. Mem. 10, the only additional topic identified in the cited deposition passage was multiload trips, *see* Groveunder Dep. Tr. 191:3–19; Groveunder Dep. Ex. 23 (June 25, 2019 Email from Stacy Cammarano to Seth Groveunder) (attached as Ex. D), which was not included in the Driver Data Chart, *see* Driver Data Chart (Doc. 143-3); Bendick Report ¶ 17 (noting that multiload rates applied to only 15.5% of rate tables). MTM has no explanation

for why the inclusion of this question in some interviews undermines the reliability of the interviewing process, particularly since Dr. Bendick did not rely on that data.

Moreover, the fact that not all drivers were able to "provide answers to each of the questions asked," Def. Mem. 10, does not render the interviewing process unreliable. The only example MTM points to are gaps in the Driver Data Chart related to "Scheduled Breaks." *Id.* But comparison of the Driver Data Chart to Mr. Groveunder's declaration provides a straightforward explanation for several of the drivers: They were the four persons who responded to interrogatory responses but whom Mr. Groveunder could not reach before completing the Driver Data Chart and, thus, had information entered based solely on their interrogatory responses, which did not specifically discuss scheduled breaks. Groveunder Decl. ¶ 4. As to the remaining four (of forty-six) drivers, as any lawyer will instruct a client prior to giving testimony, if the truthful answer to the question is "I don't know," then the client should give that answer. Had Mr. Groveunder instructed the interviewees to simply guess if they did not know the answer to a question, MTM would have undoubtedly challenged the Driver Data Chart on that basis.

Finally, the involvement of Plaintiffs' counsel in the semi-structured interviews, particularly Mr. Groveunder, did not render those interviews unreliable. First, Dr. Bendick was involved throughout the survey design and administration process: He worked with Plaintiffs' counsel to develop the script and questions for the interviews, Bendick Reply Decl. ¶ 19; Bendick Dep. Tr. 102:5–11, 104:5–20; designed the Driver Data Chart, Groveunder Decl. ¶ 2; and was generally "ultimately responsible for the design, conduct, and analysis of the driver survey," Bendick Reply Decl. ¶ 19. These facts distinguish the instant case from those cited by MTM, *see* Def. Mem. 7–8, where the *combination* of the involvement of counsel and other flaws indicated an unreliable information-collection process. In *Sirko*, the plaintiffs explicitly did not conduct their

survey in collaboration with or under the oversight of an expert, instead relying solely on their attorney to develop and apply the survey who "disavow[ed] … any expert qualifications." 2014 WL 4452699, at *4. In *Dukes*, the survey instrument also was apparently developed without any expert involvement and was "biased on its face." 222 F.R.D. at 197. In *Yapp*, as noted above, the experts disavowed any quality control over the survey conducted. 301 F. Supp. 2d at 1036–37. And in *Pittsburgh Press*, although the poll was developed with an "expert," the court noted such expert "had never before taken a poll." 579 F.2d at 759. Moreover, *Pittsburgh Press* concerned the reliability of poll data that had been presented as representative proof for liability at trial. *Id.* at 754–55. Here, Plaintiffs do not rely on the Bendick Report to prove that drivers were underpaid, only as support for showing that an analysis can be done on a class-wide basis.

Second, Mr. Groveunder was qualified to conduct the interviews. Mr. Groveunder previously worked for the Securities and Exchange Commission (SEC) for over a year, where he interviewed potential whistleblowers "[a]lmost every day," Groveunder Dep. Tr. 244:10–17, and he additionally received training from the SEC on conducting interviews, *id.* at 244:18–245:6. Moreover, as Dr. Bendick explained, "it's well within standard professional practice to use as data collection interviewers people who don't have formal training in survey research methods" because that is "the expertise that [Dr. Bendick] bring[s] to bear on the subject." Bendick Dep. Tr. 117:21–118:4. As to semi-structured interviews specifically, "there's much less use of professional interviewers and more use of people who have some background on what the issues are, some understanding of the questions" to facilitate the "conversational back and forth … to maximize the accuracy of information." *Id.* at 119:7–120:10; Bendick Reply Decl. ¶ 18 & n.24. As an attorney himself previously trained by the SEC to interview potential whistleblowers and employed and trained by Plaintiffs' counsel on the wage law issues in this case, Groveunder Dep. Tr. 10:19–

11:11, 32:17–33:3, 33:10–12, 40:9–20, 236:19–22, 244:18–245:6; Groveunder Decl. ¶¶ 1–3, Mr. Groveunder was well-positioned to conduct the semi-structured interviews in this case.

In developing the process to be followed for Dr. Bendick's trial analysis, Dr. Bendick could perform the same analysis using independent assistants to conduct any necessary interviews.[2] At class certification, Plaintiffs' counsel were faced with a lack of documentary evidence from MTM showing the hours worked by and wages paid to the drivers. To expediently move the case forward after several discovery delays, Plaintiffs' counsel utilized an interviewing system that permitted them to accomplish multiple tasks simultaneously, i.e., interviewing their clients for purposes of both the Driver Data Chart and to gather additional information relevant to class certification. Moreover, the interview process and questions related to the Driver Data Chart were developed in consultation with and under the oversight of Dr. Bendick, who is qualified as an expert in such information collection processes. *See supra* pp. 10–11. Accordingly, the involvement of counsel in the semi-structured interviews does not undermine their reliability for providing data that Dr. Bendick utilized to develop an analysis to be applied on a class-wide basis at trial.

ii. The data collected from semi-structured interviews of and sworn statements by the drivers is reliable.

In addition to challenging the use of a convenience sample and semi-structured interviewing, MTM raises a handful of additional challenges to the data in the Driver Data Chart. Again, nearly all of these arguments challenge the data input into Dr. Bendick's analysis rather than the soundness of the analysis itself. None are persuasive or provide a sufficient basis to reject the Bendick Report.

[2] Again, were MTM to make documentary evidence available that could substitute for some of this information, further interviews may be unnecessary or significantly limited in any trial-stage analysis.

First, MTM challenges both that some data was drawn from interrogatory responses rather than interviews and that Mr. Groveunder assumed the accuracy of the interrogatory responses during his interviews. Def. Mem. 10–13; 23. But as the Court is well aware, responses to interrogatories must be answered under oath and signed by the respondent, Fed. R. Civ. P. 33(b)(3), (5), and such sworn testimony is specifically denoted as sufficient to support a factual position at summary judgment, Fed. R. Civ. P. 56(c)(1)(A), which undisputedly must be based on admissible evidence, *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007). Because the goal of the semi-structured interviews was to obtain accurate and reliable information for the Driver Data Chart, it is simply unremarkable that Plaintiffs would rely on data already provided in sworn testimony. The thrust of MTM's contrary argument is that because *some* drivers provided information in their interviews that was inconsistent with prior interrogatory responses—requiring Plaintiffs to reconcile the information and, if necessary, provide supplemental interrogatory responses—*all* drivers' interrogatory responses are inherently unreliable. Def. Mem. 11–13. Unsurprisingly, MTM cites no authority for this proposition nor is there any sound basis for this logical leap.

Second, that one data point of one driver in the Driver Data Chart is inconsistent with that driver's declaration is hardly "indicative of the overall lack of reliability of the Driver Data Chart." Def. Mem. 15–16. As an initial matter, such a "minor flaw" plainly would not render the Bendick Report inadmissible, *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002), nor has MTM provided any basis to extrapolate this inconsistency to the entirety of the Driver Data Chart. Moreover, as Dr. Bendick explains, "[w]henever questions on the same topic are asked at different points in time in different formats, it is not surprising that differing answers are occasionally recorded," but "revising one or a small number of answers by one or a small number of survey respondents almost never makes a substantial difference in the overall conclusions drawn

from a survey-based analysis." Bendick Reply Decl. ¶ 21. Finally, any individual data points for drivers contained within the Driver Data Chart could be easily be corrected prior to any use of the analysis at trial, and any such changes would not undermine the validity of Dr. Bendick's methodology.

Third, MTM complains that, because some drivers performed work under non-MTM contracts, Dr. Bendick's failure to exclude that work undermines his analysis. Def. Mem. 17–18. MTM's argument contains an implicit legal assertion that should not be accepted as true. As the Fourth Circuit explained, "the hours an individual works for *each joint employer* must be aggregated to determine whether and to what extent the individual must be paid overtime" under the applicable wage laws. *Salinas v. Commercial Interiors*, 848 F.3d 125, 134 & n.5 (4th Cir. 2017). MTM cannot, therefore, absolve itself of responsibility for the hours worked by its employees under other contracts. But even accepting MTM's assumption, its point would only further establish that the source of any underpayment of legally mandated wages would be MTM's rate system: At trial, if Dr. Bendick's analysis included all hours worked by the drivers, applied MTM's rates for all trips, and determined such rates did not feasibly provide sufficient revenue to pay legally mandated wages, MTM's argument would be that *other transportation providers* would pay sufficiently high rates to the subcontractors to subsidize the inadequate MTM rates. Not only would that bolster Plaintiffs' case, but as Dr. Bendick explained, a rational TSP would not subsidize its MTM work with other contracts and would, instead, focus on only those better paying contracts. Bendick Dep. Tr. 273:12–277:9; Bendick Reply Decl. ¶¶ 31–33. Absent evidence of any "special circumstance" indicating that such subsidization both exists and would be "compatible with [the subcontractors'] financial viability in the long run," Dr. Bendick appropriately "estimate[d] a maximum feasible wage for drivers providing services to MTM by considering

revenues provided by MTM alone." Bendick Reply Decl. ¶ 34. Moreover, precisely what hours are input into Dr. Bendick's calculation do not affect the underlying validity of his analysis.

Fourth, MTM argues that the Driver Data Chart is "completely unreliable" as to the hours worked by the drivers represented in it because of an alleged ambiguity in the drivers' start times for their workdays. Def. Mem. 18–20. Specifically, MTM contends that because Mr. Groveunder was unable to recall whether he specifically asked if a driver's "Start Time" was connected to their "First Principal Activity," it's unclear whether the listed start time references "the time [the drivers] left home to go to work or the time that they actually started working." *Id.* at 19. As an initial matter, MTM's argument again contains an implicit legal assertion that should not be accepted as true, specifically that compensable time for D.C. wage law claims begins with the first principal activity. As Plaintiffs have previously explained, the "principal activity" limitation derives from the Portal-to-Portal Act, a federal law that specifically curtailed compensable time under the FLSA to exclude:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary or postliminary to said principal activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). But D.C. law, though modeled after the FLSA, does not incorporate the Portal-to-Portal Act limitations on compensable work and statutorily provides that references to interpretations of the Portal-to-Portal Act "shall have no force and effect" in determining the meaning of compensable work time under D.C. law. *Dinkel v. MedStar Health, Inc.*, No. 11-998(CKK), 2015 WL 5168006, at *4–5 (D.D.C. Sept. 1, 2015) (quoting D.C. Code § 32-1002(10)). In any event, the purported ambiguity MTM points to is unlikely to exist given that Mr.

Groveunder, in the context of asking for start times, also asked for the driver's first principal activity, i.e. "[t]he first thing the driver did for work in the morning." Groveunder Dep. Tr. 125:12–15. Thus, it is reasonable to assume the drivers would logically connect the two, rather than provide a "start time" for something other than "the first thing the driver did for work in the morning."

Fifth, MTM asserts that Dr. Bendick "arbitrarily modified" certain data in making his underlying calculations. Def. Mem. 20–22. Specifically, MTM argues (1) Dr. Bendick lacked an adequate basis to translate certain descriptive entries, such as "60+ hours," to numerical entries that could be used in his calculations, such as "65 hours"; (2) Dr. Bendick's translation of one such entry was inconsistent with a declaration; and (3) Dr. Bendick should not have used the midpoint of ranges provided by the drivers for certain data points. *Id.* As Dr. Bendick explains, these adjustments were reasonable because "to report summary figures such as averages, totals, or ranges, it is necessary to have all answers to a question in a consistent numerical format." Bendick Reply Decl. ¶ 26. Accordingly, Dr. Bendick "instructed Mr. Groveunder to record each driver's responses in whatever format the driver chose to report them," leaving to Dr. Bendick "the translation of the responses into a numerically-analyzable common format." *Id.* ¶ 27. "Following standard professional scientific practice," Dr. Bendick "created and documented consistent rules for this translation," and "[t]his process of standardizing the format of survey responses is a routine practice in analyzing survey data and is consistent with standard professional scientific research." *Id.* ¶¶ 27–28 & nn.31 & 32 (footnote omitted). Moreover, these disagreements plainly have nothing to do with the validity of Dr. Bendick's methodology, only with the way in which he interpreted data to be plugged into that analysis. Such disagreements do not bear on whether the analysis is sound.

Sixth, MTM contends that Dr. Bendick could not rely on the Driver Data Chart because he failed to independently verify the data himself. Def. Mem. 25–26. That argument would prevent an expert from ever relying on data provided to him rather than directly collected by him, which is belied by both common sense and the law. *See, e.g.*, *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002) ("An expert witness is permitted to use assistants in formulating his expert opinion …."); *see also* Bendick Reply Decl. ¶ 22 n.27 (explaining "no standard professional scientific practices" required Dr. Bendick to "speak directly with Mr. Groveunder or any of the surveyed drivers"). Moreover, although a small amount of records were available at the time of Dr. Bendick's report—trip logs and assignment sheets drivers had by happenstance retained and payroll information for a small number of drivers from six subcontractors—those records were too limited to provide reliable evidence of typical work weeks and wages. Bendick Reply Decl. ¶ 16 n.20. After being denied access to both comprehensive data and a representative sample of such data, the best comprehensive evidence available to Plaintiffs were the drivers' recollections.

MTM and Dr. Holt also contend that there was a particular need for Dr. Bendick himself to verify the data collected here because the underlying survey allegedly "fails to meet established minimum standards for scientific inquiry in the area of statistical sampling and statistical inference." Def. Mem. 26 (citing Holt Decl. ¶¶ 4, 21–32). These objections largely deal with the propriety of using a convenience sample and semi-structured interviewing, which, as explained, are soundly supported by social science literature in these circumstances. *See supra* pp. 13–21. But Dr. Holt also states that Dr. Bendick's report lacks certain "typical" statistical calculations, such as standard deviations, confidence intervals, and margins of error. Holt Decl. ¶ 31. As Dr. Bendick explains, though, "[a] major principle of statistical analysis is that it is appropriate and important

to report statistical calculations *to the extent that they are relevant to answering the questions being addressed in the analysis*" and, thus, "should not … be automatically or universally reported as mere 'window dressing.'" Bendick Reply Decl. ¶ 36 (emphasis added).

Further, neither Dr. Holt nor MTM explain why these additional statistical computations would be relevant, much less actually perform these calculations to demonstrate their relevance. *Id.* ¶ 38. But MTM cannot rely on "mere conjectures or assertions" to challenge Dr. Bendick's statistical analysis and must, instead, introduce its own evidence explaining why these additional calculations would undermine the applicability of Dr. Bendick's methodology. *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 43 (D.D.C. 2007) (quoting *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)); *see Bazemore v. Friday*, 478 U.S. 385, 403 n.14 (1986) (rejecting defendant's argument that plaintiffs' statistical analysis concerning an inference of discrimination was unsound because certain factors were omitted, finding that defendant "made no attempt … to demonstrate that when these factors were properly organized and accounted for there was no significant [racial] disparity"); *Palmer*, 815 F.2d at 101 n.13 ("[D]efendants generally must introduce evidence to support their attack on plaintiffs' statistics. Mere conjectures and assertions usually will not suffice."). MTM's failure to do so is fatal to its argument.

Lastly, MTM argues that Plaintiffs' counsel skewed the Driver Data Chart by selectively "shap[ing] the data provided to Dr. Bendick in a manner favorable to Plaintiffs' claims in this action." Def. Mem. 22. MTM is wrong. Although it implies that Mr. Groveunder only asked additional questions to "those drivers who reported wages higher than those that would have been anticipated based on Dr. Bendick's calculations," *id.*, the first email it relies upon flatly contradicts that statement. In a May 28, 2019, email between Ms. Cammarano and Mr. Groveunder, Ms. Cammarano instructs Mr. Groveunder that he should "think critically about how the info we get

fits into our case and push back *if it doesn't make sense*." MTM Ex. 8 (emphasis added) (Doc. 143-9). Ms. Cammarano is thus explaining that rather than simply accept illogical answers—as would seem to be necessary under MTM's preferred mode of interviewing drivers—Mr. Groveunder should, consistent with the strictures of semi-structured interviews, ask clarifying questions and gather additional information to explain nonsensical answers. Bendick Reply Decl. ¶¶ 14 & 17. Indeed, the very example Ms. Cammarano discusses in that email belies MTM's point as she points out that "7–8 one way trips at 35 minutes should not take 12 hours," meaning that the driver's initial report of performing 7–8 one-way trips in a day and also working a 12-hour day appeared inconsistent. MTM Ex. 8. Had Plaintiffs' counsel simply wanted to inflate hours worked, there would have been no reason to "push back" on this information.

Similarly, MTM incorrectly asserts that the selection of additional drivers for inclusion in the convenience sample—beyond the vast majority that were selected by MTM for class-certification discovery—was an attempt to skew the data, Def. Mem. 24, and its error is illustrated by the very examples MTM points to. Specifically, MTM notes that Ronald Jackson reported pay from MBI Transportation at rates of $13.95 to $14.20 per hour, and that Mr. Kyle reported pay from another subcontractor at $15.50 per hour plus an overtime premium. *Id.* MTM neglects to mention that (1) Mr. Kyle also reported working for two other subcontractors, one of which paid him an effective hourly wage of no more than $5.68 per hour for a year and the other of which paid him an effective hourly wage of no more than $7.27 per hour for two years, MTM Ex. 10 at 4–5 (Doc. 143-10); and (2) Mr. Jackson reported working at another TSP that paid him between $6.15 and $11.08 per hour for over a year, MTM Ex. 13 at 4 (Doc. 143-13). Thus, inclusion of these drivers would not have been uniformly (or even overall) unfavorable to Plaintiffs, as MTM suggests. And although MTM points to two inconsistencies between the Driver Data Chart and

Mr. Groveunder's notes as evidence of selective data entry, Def. Mem. 24–25, Mr. Groveunder explained at his deposition that, when he received additional information he "would always update the driver data chart" but "would *not* always update my notes," Groveunder Dep. Tr. 244:3–5 (emphasis added). But even if additional drivers are included—or certain inputs for particular drivers are changed—none would affect the validity of Dr. Bendick's development of an analysis to be applied on a class-wide basis. Accordingly, because Plaintiffs do not rely on the *outcome* of the calculations at this stage to prove liability, these objections are misplaced.

2. Dr. Bendick's calculations of subcontractor expenses are reliable.

Similar to MTM's challenges to the reliability of the Driver Data Chart, MTM's complaints about the TSP expenses focus on whether the correct values were input into the Dr. Bendick's analysis, not the validity of the analysis itself. Specifically, MTM challenges the value assigned to the average Zone 1 trip length, the use of expenses from only one TSP to determine certain values, and a purported assumption about the number of hours worked by the average driver. Def. Mem. 26–32. None affect whether Dr. Bendick's analysis can be applied on a class-wide basis.

First, MTM attempts to have it both ways by simultaneously denying access to its trip logs and assignment sheets to Plaintiffs and faulting Plaintiffs for not calculating the average length of a Zone 1 trip based on "data as to the actual average mileage driven by a driver on any given NEMT trip." Def. Mem. 27. This data is indisputably in MTM's sole possession, and after repeatedly seeking and being denied access to this data, Plaintiffs were required to rely on Dr. Bendick's expertise in developing a reasonable estimate of this distance to create his analysis. Moreover, although MTM argues Plaintiffs could have asked the drivers about the length of their trips, *id.* at 27–28, common sense would dictate that, unless a driver were paid per mile driven—and none have reported that they were—there would be no reason for her to know or recall how

many miles any particular trip was. MTM further seeks to support its position by relying on the Declaration of Christina Gunseor, who states MTM's "records reveal that the average NEMT trip length … is actually 4.56 miles." *Id.* at 28 (citing Gunseor Decl. ¶ 5). Again, MTM still has not provided access to any such data or records, providing no basis to confirm the accuracy of her calculation or the basis for her assertion.[3] But even if the underlying data and records show that a different average length should be used for Zone 1 (or any zone) trips, that will simply change the value input into Dr. Bendick's analysis. Thus, it is not a proper basis to reject the reliability of the analysis itself.

Second, Dr. Bendick reasonably assumed that subcontractors would incur certain typical business expenses—such as rent, general liability insurance, utilities, and mandatory fringe benefits—and used the reported expenses of one subcontractor as one source for his calculations of these expenses. Bendick Report ¶¶ 30–31. As Dr. Bendick explained, his determination of the categories of expenses were based on some reported expenses of one subcontractor, MTM-subcontractor agreements, and "standard business accounting and small business rules of thumb." Bendick Report ¶ 31 & nn.20–22 (citing Peter Brewer et al., *Introduction to Managerial Accounting* (8th ed. 2019) and Anthony Ng, *Bookkeeping and Accounting Essentials for Small Business Owners* (2018) as sources of "[s]tandard accounting practices"). Indeed, MTM does not seriously dispute that subcontractors have such expenses, only that the expenses of one TSP are not "representative of all of the approximately 80" subcontractors, as well as adjustments Dr. Bendick made to account for other expenses. Def. Mem. at 29–31. Again, as Dr. Bendick explains, the expenses of one subcontractor "were used *after considering their reasonableness* against

[3] As Dr. Bendick notes, Ms. Gunseor provides no explanation of the methodology she used to arrive at this number. Bendick Reply Decl. ¶ 46; *see* Gunseor Decl.¶ 5.

standard business cost accounting practices and small business rules of thumb." Bendick Reply Decl. ¶ 53 & n.51 (emphasis added). MTM's objections further only demonstrate the shortcomings of MTM's motion: If additional information or documents regarding these expenses become available, Dr. Bendick can modify the values accounted for by his analysis, but the precise values do not undermine the applicability of his methodology to the class. *Id.* ¶ 54.

Third, MTM argues that Dr. Bendick irrationally assumed that "the average workweek" for a driver is 62 hours—and thereby incorporating overtime pay requirements—rather than assuming the subcontractors would simply hire additional workers so that total hours did not exceed 40 hours per week. Def. Mem. 31–32. Dr. Bendick's assumption is hardly irrational—it was based on the actual average workweek of the drivers in the convenience sample, which MTM acknowledges. *Id.* at 32. Moreover, "scholarly research in employment economics and practical experience in human resource management identify many reasons that employers rationally incur large amounts of overtime rather than hiring additional employees," and Dr. Bendick provides several examples of such reasons. Bendick Reply Decl. ¶ 30 & n.33. MTM nevertheless maintains that, because his goal was to determine the maximum feasible wage rate that subcontractors could pay and remain financially viable, Dr. Bendick should have ignored the best available data on worker hours and adopted a contrary assumption based on cost minimization. *Id.* Importantly, this objection has nothing to do with the validity of the analysis itself; it only addresses what value is used for the average workweek of a driver. Even so, Dr. Bendick's analysis of the convenience sample—as would any future analysis—utilized the most accurate information available to determine what labor costs the subcontractors, in fact, assumed during the class period, not the costs a future, hypothetical subcontractor would assume.

3. Dr. Bendick's analysis is based on an accepted methodology.

Perhaps the only portion of MTM's motion to strike that addresses the relevant question—whether the analysis developed by Dr. Bendick rests on a recognized methodology—is its most unsupported argument. *See* Def. Mem. 33–38. The three points raised by MTM fail to show that Dr. Bendick's analysis is unreliable.

First, MTM states that Dr. Bendick has not shown that the analysis he developed for this case "has been countenanced by any court." Def. Mem. 33. But that is not the applicable standard. As MTM itself acknowledges, the question is whether "Dr. Bendick's methodology 'rests on a reliable foundation and is relevant to the task at hand.'" *Id.* (quoting *Kumho Tire*, 526 U.S. at 141 (quoting *Daubert*, 509 U.S. at 597)). Here, Dr. Bendick's methodology is neither novel nor based upon flawed assumptions. As Dr. Bendick explains, his analysis "involved estimating the costs of TSP operations and comparing those costs to revenues earned from these operations," and such analysis "is a routine, widespread activity in the field of cost accounting (sometime referred to as managerial accounting)." Bendick Reply Decl. ¶ 66; *see also id.* ¶ 68 (explaining "multitudes of these analyses are conducted every day by business firms in the course of their normal business operations"). Further, Dr. Bendick has personally "presented an analysis of an employer's maximum feasible wage rate" in another case, as well as "conducted similar cost accounting-based analyses in multiple published scholarly research projects" and "performed similar analyses in multiple consulting assignments." *Id.* ¶ 67 & nn.62 & 63. Additionally, as explained above, the Driver Data Chart is reliable for purposes of allowing Dr. Bendick to develop this analysis. *See supra* pp. 13–29. Moreover, virtually every "assumption" that MTM identifies flows directly from either its failure to maintain adequate payroll records or its refusal to provide access to its assignment sheets and trip logs. *See* Def. Mem. 33–34. As explained above, Dr. Bendick's

assumptions were based on the best available data; should additional data become available through merits discovery, such information would be relied upon by Dr. Bendick for his trial analysis.

Second, minor variations in the rates paid by MTM to its subcontractors do not undermine the reliability of Dr. Bendick's analysis. As explained the Bendick Report, Dr. Bendick utilized an average of all available rates for the various subcontractors in calculating the applicable reimbursement rates. Bendick Report ¶ 12. For the variation between the reimbursement rates "to preclude calculation of a single maximum feasible wage rate, the variation would have to be unrelated to different contract dates, large enough to make a substantial difference, and systematically related to different types of TSPs." Bendick Reply Decl. ¶ 60 n.57. In the absence of any evidence that such circumstances are present—as to the reimbursement rates or other variations between the subcontractors—Dr. Bendick concluded his methodology could provide a single maximum feasible wage rate for the class as a whole. *Id.* ¶¶ 56–60. Thus, that some subcontractors may have received slightly greater compensation than the average used by Dr. Bendick is, at best, a damages question.

Third, the fact that some drivers reported being paid wages that exceed the maximum feasible wage Dr. Bendick's analysis generated based on the available information at class certification does not show the analysis is unreliable. As the Bendick Report explained, approximately 70% of both the drivers and the subcontractors in the convenience sample reported wages falling below the maximum feasible wage calculated. Bendick Report ¶ 9(e). Moreover, over a third of the subcontractors with wages reported above the maximum feasible wage calculated were no longer in the non-emergency medical transportation business. *Id.* ¶¶ 9(e), 35. As Dr. Bendick explained, both the high number of consistent wage rates and the significant

number of higher-paying businesses that went out of business support the credibility of the maximum feasible wage rate determined as to the convenience sample. *Id.* ¶¶ 34, 35. Further, because the calculation of the maximum feasible wage rate applies to the total workforce of each subcontractor, there may be some a few drivers that are paid slightly above that rate—concurrent with drivers who are paid below that rate. Bendick Reply Decl. ¶ 62. MTM may, of course, have some individualized defenses as to drivers that worked at subcontractors who report being paid at the legally mandated wage rates.[4] *See also id.* ¶ 63 (explaining individual wage rates may be necessary at the "damages stage of litigation" to determine "how much backpay is owed"). But Dr. Bendick's analysis is, for the above reasons, a reliable method for determining liability on a class-wide basis.

B. The Bendick Report is relevant.

Under the second prong of *Daubert*, the Court considers the relevance of the expert report and "must determine whether the proffered expert testimony 'is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Ambrosini*, 101 F.3d at 134 (quoting *Daubert*, 509 U.S. at 591). Thus, the question is whether the expert's testimony "'fits' an issue in the case." *Id.*

Here, MTM has not challenged the relevance of the Bendick Report, nor is there a basis to question its relevance. This case involves wage claims against MTM as a joint employer, based on its failure to pay legally mandated wages for all hours worked. In support of their motion for class certification, Plaintiffs have provided substantial documentary evidence establishing that MTM

[4] At least as to the convenience sample, between 91.2% and 100% of the drivers reported being paid less than the D.C. minimum wage, and 100% of drivers reported being paid less than the D.C. Living Wage and the applicable Service Contract Act wage, Bendick Report ¶ 9(g), suggesting that, even if the maximum feasible wage is higher, it will unlikely approach these legally-mandated rates.

behaved in common ways towards the entire putative class, included by setting policies that failed to compensate drivers for all hours worked. *See* Pls. Class Certification Mem. Additionally, Plaintiffs provided the Bendick Report, which provides a methodology that can be applied to the class a whole in answering the common question of whether the reimbursement rates paid by MTM failed to sufficient funds to the subcontractors to enable them to, in turn, pay legally mandated wages to the drivers for all hours worked. As such, the Bendick Report is plainly relevant to the case, and specifically to whether class certification should be granted.

CONCLUSION

For the foregoing reasons, MTM's motion to strike should be denied.

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Respectfully submitted,

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