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 DECERTIFY FLSA COLLECTIVE ACTION

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I. INTRODUCTION

Although factual and legal questions exist that are central and common to the claims of each of the 155 plaintiffs, including the named plaintiffs, who consented to join this collective action, MTM seeks to decertify this collective action and force this Court to preside over the trial of their common claims seriatim. Notwithstanding that these drivers worked for a diverse group of MTM sub-contractors and may have been subject to varying methods of compensation, common features of their employment ensure that they remain "similarly situated" within the meaning of Section 216(b) of the Fair Labor Standards Act, ("FLSA"). 29 U.S.C. § 216(b). Each plaintiff claims, and the evidence shows, that they were jointly employed by MTM and that MTM declined to pay for substantial amounts of activity in which each was engaged that qualifies as compensable work. Admittedly, questions of whether each was paid less than the legally-required wage levels and, if so, the amounts of damages that should be awarded may require trial individually or in small groups of plaintiffs. But, the common questions that must be resolved for all plaintiffs more than justify retention of the collective certification of these claims.

II. FACTUAL BACKGROUND

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin, and similarly situated plaintiffs who have filed consent forms to join this action, (collectively "Plaintiffs") held the same position as non-emergency medical transportation ("NEMT") drivers for subcontractors of Defendant Medical Transportation Management, Inc. ("MTM") driving MTM clients in the District of Columbia to and from medical appointments.[1] Plaintiffs were subject to the same

[1]Pls. Mot. Class Cert. Ex. 7, Excerpts from the 30(b)(6) Dep. of Michelle Moses, Dec. 20, 2018 at 25:17-19, ECF No. 131-8 (hereinafter, "Pls. Ex. 7, Moses I Dep."). Pls. Mot. Class Cert. Ex. 8, Excerpts from the Dep. of Leo Franklin at 24:14-17, 34:16-35:1, ECF No. 130-10; Pls. Mot. Class Cert. Ex. 9, Excerpts from the Dep. of Darnell Frye at 98:11-98:14, ECF No. 130-11;

MTM policies, some of which were set out in MTM's Service Agreements with subcontractors who directly employed the drivers. *See generally* Pls. Mot. Class Cert. Ex. 5, Medical Transportation Services Agreement between MTM and Star Transportation, ECF No. 130-7 (hereinafter "Pls. Ex. 5"); Pls. Mot. Class Cert. Ex. 2, Excerpts from the 30(b)(6) Dep. of

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Pls. Mot. Class Cert. Ex. 10, Excerpts from the Dep. of Isaac Harris at 56:6-9, ECF No. 130-12; Pls. Mot. Class Cert. Ex. 11, Decl. of Leo Franklin at ¶ 2, ECF No. 130-13; Pls. Mot. Class Cert. Ex. 12, Decl. of Darnell Frye at ¶ 2, ECF No. 130-14; Pls. Mot. Class Cert. Ex. 13, Decl. of Isaac Harris at ¶ 2, ECF No. 130-15; Pls. Mot. Class Cert. Ex. 14, Decl. of Carol Adams at ¶¶ 1,2, ECF No. 130-16; Pls. Mot. Class Cert. Ex. 15, Decl. of Lenora Adams at ¶¶ 1,2, ECF No. 130-17; Pls. Mot. Class Cert. Ex. 16, Decl. of Maurice Alexander at ¶¶ 1,2, ECF No. 130-18; Pls. Mot. Class Cert. Ex. 17, Decl. of Michael Banks at ¶¶ 1,2, ECF No. 130-19; Pls. Mot. Class Cert. Ex. 18, Decl. of Michael Branch at ¶¶ 1,2, ECF No. 130-20; Pls. Mot. Class Cert. Ex. 19, Decl. of Ashley Brinkley at ¶¶ 1,2, ECF No. 130-21; Pls. Mot. Class Cert. Ex. 20, Decl. of Anthony Brockington at ¶¶ 1,2, ECF No. 130-22; Pls. Mot. Class Cert. Ex. 21, Decl. of Patricia Byrd at ¶¶ 1,2, ECF No. 130-23; Pls. Mot. Class Cert. Ex. 22, Decl. of Reginald Cox at ¶¶ 1,2, ECF No. 130-24; Pls. Mot. Class Cert. Ex. 23, Decl. of Donnell Dixon at ¶¶ 1,2, ECF No. 130-25; Pls. Mot. Class Cert. Ex. 24, Decl. of Signe Douglas at ¶¶ 1,2, ECF No. 130-26; Pls. Mot. Class Cert. Ex. 25, Decl. of Tina Edwards at ¶¶ 1,2, ECF No. 130-27; Pls. Mot. Class Cert. Ex. 26, Decl. of Daniel Faison at ¶¶ 1,2, ECF No. 130-28; Pls. Mot. Class Cert. Ex. 27, Decl. of Derrick Ford at ¶¶ 1,2, ECF No. 130-29; Pls. Mot. Class Cert. Ex. 28, Decl. of Ramont Gray at ¶¶ 1,2, ECF No. 130-30; Pls. Mot. Class Cert. Ex. 29, Decl. of Angelo Gregory at ¶¶ 1,2, ECF No. 130-31; Pls. Mot. Class Cert. Ex. 30, Decl. of Stanley Haigler at ¶¶ 1,2, ECF No. 130-32; Pls. Mot. Class Cert. Ex. 31, Decl. of Helen Hall at ¶¶ 1,2, ECF No. 130-33; Pls. Mot. Class Cert. Ex. 32, Decl. of Theodore Hammond at ¶¶ 1,2, ECF No. 130-34; Pls. Mot. Class Cert. Ex. 33, Decl. of Maxine Hampton at ¶¶ 1,2, ECF No. 130-35; Pls. Mot. Class Cert. Ex. 34, Decl. of Robert Harper at ¶¶ 1,2, ECF No. 130-36; Pls. Mot. Class Cert. Ex. 35, Decl. of Dante Hinton at ¶¶ 1,2, ECF No. 130-37; Pls. Mot. Class Cert. Ex. 36, Decl. of Valerie Holmes at ¶¶ 1,2, ECF No. 130-38; Pls. Mot. Class Cert. Ex. 37, Decl. of Ronald Jackson at ¶¶ 1,2, ECF No. 130-39; Pls. Mot. Class Cert. Ex. 38, Decl. of Philip Johnson at ¶¶ 1,2, ECF No. 130-40; Pls. Mot. Class Cert. Ex. 39, Decl. of Louis Luck at ¶¶ 1,2, ECF No. 130-41; Pls. Mot. Class Cert. Ex. 40, Decl. of Katrina Means at ¶¶ 1,2, ECF No. 130-42; Pls. Mot. Class Cert. Ex. 41, Decl. of Alvin Miles at ¶¶ 1,2, ECF No. 130-43; Pls. Mot. Class Cert. Ex. 42, Decl. of Joyce Nabinett at ¶¶ 1,2, ECF No. 130-44; Pls. Mot. Class Cert. Ex. 43, Decl. of Christopher Osborne at ¶¶ 1,2, ECF No. 130-45; Pls. Mot. Class Cert. Ex. 44, Decl. of Alonzo Pelham at ¶¶ 1,2, ECF No. 130-46; Pls. Mot. Class Cert. Ex. 45, Decl. of Zanette Perkins at ¶¶ 1,2, ECF No. 130-47; Pls. Mot. Class Cert. Ex. 46, Decl. of Michael Pittman at ¶¶ 1,2, ECF No. 130-48; Pls. Mot. Class Cert. Ex. 47, Decl. of Peggie Scott at ¶¶ 1,2, ECF No. 130-49; Pls. Mot. Class Cert. Ex. 48, Decl. of Debra Sinclair at ¶¶ 1,2, ECF No. 130-50; Pls. Mot. Class Cert. Ex. 49, Decl. of Natasha Smith at ¶¶ 1,2, ECF No. 130-51; Pls. Mot. Class Cert. Ex. 50, Decl. of Cynthia West at ¶¶ 1,2, ECF No. 130-52. Rather than refiling voluminous records as exhibits to this brief, Plaintiffs adopt the same exhibit designations as were used in the Motion for Class Certification, ECF No. 134.

Michelle Moses, Mar. 14, 2019, at 56:14-57:6, ECF No. 131-4 (hereinafter, "Pls. Ex. 2, Moses II Dep."). MTM's policies include the same provisions for all drivers that:

(a) control various terms of their employment, including their hiring and credentialing, training, complaints, and removal;[2]

(b) provide and enforce performance requirements;[3]

(c) require drivers to log certain categories of working time and submit those records to MTM where they are maintained;[4]

(d) require drivers to perform various tasks that are not included in the logs they must maintain, including driving between trips, waiting for clients, and assisting clients with limited mobility;[5]

[2] *See* Mem. Op. & Order 3, ECF No. 176 (summarizing Plaintiffs' evidence that MTM sets the terms and conditions of the drivers' employment).

[3] Pls. Ex. 2, Moses II Dep. 48:10-21 (describing methods by which complaints against drivers may be lodged with MTM and how MTM may respond); Pls. Ex. 5 at MTM 000917–18 (listing rules for drivers); Pls. Ex. 7, Moses I Dep. 108:10-109:4, 110:14-17, 119:2-9, 119:20-120:3 (rules and standards), 112:10-117:20, 135:11-137:20 (confirming that MTM engages in random inspections and on-site visits); Pls. Mot. Class Cert. Ex. 55, Medical Transportation Services Agreement Appendix B, ECF No. 130-57; Pls. Mot. Class Cert. Ex. 56, Driver/Attendant Training Course: Ethics & Professionalism at MTM 000531-35, ECF No. 131-13; Pls. Mot. Class Cert. Ex. 57, Assisting Passengers with Disabilities and Emergency Situation Training Course, ECF No. 131-14 (hereinafter "Pls. Ex. 57"); Pls. Mot. Class Cert. Ex. 58, Sexual Harassment ECF No. 131-15; Pls. Mot. Class Cert. Ex. 60, Corporate Procedure: Field Liaisons, ECF No. 131-16 (hereinafter "Pls. Ex. 60"); Pls. Mot. Class Cert. Ex. 61, Corporate Procedure: Vehicle Surveillance, ECF No. 131-17 (hereinafter "Pls. Ex. 61"); Pls. Mot. Class Cert. Ex. 72, Understanding Cultural Competency, ECF No. 131-22.

[4] *See* Pls. Mot. Class Cert. Ex. 69, Transportation Provider Handbook at MTM 0000835-39, MTM 000841-42, ECF No. 131-19 (hereinafter "Pls. Ex. 69") (training subcontractors on MTM's system for creating trip manifests and requirements for logging completed trips). Pls. Mot. Class Cert. Ex. 70, Trip Manifest, ECF No. 131-20.

[5] *See* Pls. Ex. 5 at MTM 000913-14 (describing the NEMT services), MTM 000932 (describing requirements to wait for clients), MTM 000922 (imposing penalties if a driver is late to pick up a client); Pls. Ex. 2, Moses II Dep. 87:4-89:11 (explaining that a client dropped off at a medical appointment would typically need a return ride and acknowledging that a driver may not be able to perform other trips in between); Pls. Ex. 7, Moses I Dep. 163:8-17 (explaining that if a driver is on time but the passenger is 15 minutes late, the driver is not compensated for the 15 minutes of waiting); Pls. Mot. Class Cert. Ex. 54, Schedule B, Liquidated Damages, ECF No. 131-12 (providing penalties for late pick-ups and drop-offs) (hereinafter "Pls. Ex. 54").

(e) assign to subcontractors trips, which are derived from MTM's direct relationship with the District of Columbia and the private managed care companies;[6]

(f) pay subcontractors a flat-rate payment for the completed trips without regard to the amount of drivers' working time and without regard to the various unlogged categories of work MTM requires.[7]

Although the subcontractors that directly employed Plaintiffs may have paid them different amounts using different methods for their work, *see* Mem. Op. & Order 19, ECF No. 176, Plaintiffs all allege that they were paid less than what was required under the FLSA. Compl. ¶¶ 124–132. Plaintiffs all allege that MTM was their joint employer. *Id*. ¶¶ 25–41. Plaintiffs all allege that MTM's policies, which declined to pay for various categories of compensable time, resulted in effective pay rates less than the federal minimum wage and the overtime rate for all hours worked in excess of forty hours in a work week.

[6] *See, e.g.*, Pls. Ex. 69 at MTM 000834-841 (showing MTM's involvement in scheduling trips); Pls. Ex. 7, Moses I Dep. 148:13-149:4 (describing the process that MTM uses to assign trips), 112:10-12, 113:19-117:20, 135:11-137:20 (confirming that MTM engages in random inspections and on-site visits) 70:7-20, 113:11-18, 119:2-5, 127:5-10 (describing methods by which complaints against drivers may be lodged with MTM and how MTM may respond); Pls. Ex. 2, Moses II Dep. 97:16-98:1 (describing the factors that MTM considers when assigning trip to the subcontractors). See Pls. Mot. Class Cert. Ex. 62 at DHCF000062 n.3, 64-65, ECF No. 130-64 (explaining that MTM was awarded its first contract with the Department of Health when the NEMT program was first privatized in 2007); Pls. Mot. Class Cert. Ex. 4 at MTM 000002, ECF No. 130-6; Pls. Mot. Class Cert. Ex. 3 at MTM 003597, ECF Nos. 131-5–131-7.

[7] Pls. Mot. Class Cert. Ex. 63, Standard D.C. Medicaid Trip Rate, ECF No. 131-18 (hereinafter "Pls. Ex. 63"); Pls. Ex. 2, Moses II Dep. 29:11-16, 75:17-21, (explaining that the rate sheet in Exhibit 63 is the standard rate structure in MTM's NEMT contracts with all of the D.C. subcontractors), 35:2-6, 37:11-16, 73:19-74:16 (acknowledging that the rates do not account for time spent driving between trips, traffic or construction delays, or time spent walking a client to the door or other variations in time spent helping clients); Pls. Ex. 7, Moses I Dep. 50:9-11 (explaining that the locations subject to MTM's "Zone 1" rates encompass all zip codes in D.C. and those in Maryland and Virginia that are inside the Capital Beltway), 163:4-164:3, 165:5-11, 166:3-15 (acknowledging that the rates do not account for time spent driving between trips, time spent waiting for clients, traffic or construction delays, or time spent driving to a locations where the client does not show up).

III. PROCEDURAL HISTORY

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin initiated this action on July 13, 2017. Plaintiffs alleged on behalf of a collective of similarly situated drivers that they were paid effective rates below the federal minimum wage and that they were not paid the required premium rate for all hours worked in excess of forty hours in a work week. *Id.* ¶¶ 124–132. Plaintiffs further alleged on behalf of a collective of similarly situated drivers that MTM was their joint employer and that it knew that they were paid effective hourly rates below that required under the FLSA. *Id.* ¶ 128. Over MTM's opposition, the Court granted conditional certification of their claims under the FLSA on July 17, 2018. Order ECF No. 48. Thereafter, 155 NEMT drivers[8] (in addition to Plaintiffs Harris, Frye, and Franklin) filed consent forms to join the collective action, each alleging minimum wage and overtime claims against MTM under the FLSA.[9]

[8] Three drivers have since withdrawn from the lawsuit. April Lama's Withdrawal as Plaintiff in Collective Action, ECF No. 101 (Jan. 11, 2019); Notice of Withdrawal of Plaintiff Rashad Mathis, ECF No. 124 (May 7, 2019); Notice of Withdrawal of Plaintiff David Summers, ECF No. 125 (May 7, 2019).

[9] Plaintiffs' Notice of Consent Filing, ECF No. 79 (Oct. 10, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 81 (Oct. 22, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 85 (Oct. 30, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 87 (Nov. 6, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 88 (Nov. 9, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 90 (Nov. 19, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 91 (Nov. 26, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 92 (Nov. 29, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 93 (Dec. 5, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 94 (Dec. 17, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 95 (Dec. 18, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 96 (Dec. 19, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 97 (Dec. 19, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 98 (Dec. 27, 2018); Plaintiffs' Notice of Consent Filing, ECF No. 99 (Jan. 3, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 100 (Jan. 9, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 103 (Jan. 25, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 105 (Feb. 4, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 107 (Feb. 6, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 113 (Feb. 28, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 114 (Mar. 11, 2019); Plaintiffs' Notice of Consent Filing, ECF No. 122 (Apr. 23, 2019) (hereinafter "Notices of Consent Filing").

Thereafter, on July 26, 2019, Plaintiffs sought certification of a class of approximately 800 drivers, under Rule 23(b)(3), who advanced essentially the same claims as the 152 drivers, in addition to the three named plaintiffs, who consented to join this collective action. Pls. Mot. Class Cert., ECF No. 134. Although the Court found Plaintiffs had satisfied the requirements of Rule 23(a), differences in subcontractors and methods of compensation among members of the proposed class led the Court to conclude common questions did not predominate and therefore to deny class certification under Rule 23(b)(3). Responding to an opportunity to supplement their request for certification on alternative grounds, Plaintiffs sought certification, under Rule 23(c)(4), of four issues of law and fact that will be resolved with evidence common to the proposed class. All members of the certified collective action would be members of the class certified pursuant to Rule 23(c)(4). For many of the same reasons that the Court should grant certification of an issue class pursuant to Rule 23(c)(4), Defendant's motion to decertify the collective action should be denied.

IV. LEGAL STANDARD

The FLSA allows a plaintiff to bring unpaid minimum wage and overtime claims on behalf of herself and "other employees similarly situated." 29 U.S.C. § 216(b). This collective action procedure, which is not subject to the procedural requirements of Rule 23, requires only that the members of the collective consent to join the proposed collective, and that the plaintiffs are similarly situated. *Galloway v. Chugach Gov't Servs., Inc.*, 263 F. Supp. 3d 151, 154 (D.D.C. 2017) (Moss, J.) ("Whereas Rule 23 judgments often bind all absent class members, see Fed. R. Civ. P. 23(c)(3), the only persons bound by a collective action are those who file 'consent in writing to become ... a party,' § 216(b). Rule 23's procedural safeguards—including

the numerosity, commonality, and typicality requirements—are therefore inapposite.").[10] Neither the Supreme Court nor the D.C. Circuit has defined "similarly situated." *Id*. at 155. However, the Supreme Court has analyzed the FLSA's "similarly situated" requirement as adopted by the Age Discrimination in Employment Act (the "ADEA"), explaining that Congress intended collective actions to allow plaintiffs to vindicate rights through the pooling of resources and that the "judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Building on *Hoffmann-La Roche*, the recent trend adopted by the Second and Ninth Circuits interprets the similarly situated requirement to allow collective treatment of Plaintiffs' claims where common issues of law or fact are material, i.e. legally significant, to the disposition of the FLSA claims. *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 516 (2d Cir. 2020) ("[I]f named plaintiffs and party plaintiffs share legal or factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment.'") *pet. for cert. filed* (Aug. 28, 2020)(No. 20-257); *Campbell*, 903 F.3d at 1112–17 (rejecting the "ad hoc" approach to decertification because it risks improperly inserting Rule 23(b)(3) predominance and superiority requirements and is insufficient to further the FLSA's goal of providing a mechanism for pooling of resources to vindicate workers' rights). *See also O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584–85 (6th Cir. 2009) *abrogated on other*

[10] A minority of district courts and the Seventh Circuit have at times required plaintiffs to meet some of the Rule 23 requirements in the FLSA context, but "no circuit court has adopted the minority approach in toto." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1111 (9th Cir. 2018) (collecting cases); *Cf. Roussell v. Brinker Int'l, Inc.*, 441 F. App'x 222, 226 (5th Cir. 2011) ("We have declined to choose between two standards, one involving a multi-factor "similarly situated" test, and the other akin to the standard for Rule 23 class actions.").

grounds (plaintiffs were similarly situated where they alleged common ways that the defendant violated the FLSA even though "proof of a violation as to one particular plaintiff d[id] not prove that the defendant violated any other plaintiff's rights under the FLSA").

Other circuits follow an "ad hoc" approach that considers factors related to the plaintiffs' "factual and employment settings" (such as the employees' duties and supervision structures), the employer's available defenses, and fairness and procedural considerations. *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 537 (3d Cir. 2012). Some district court rulings within this circuit have endorsed the ad-hoc approach. *See, e.g., Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 14–15 (D.D.C. 2010) (Lamberth, J.); *Hunter v. Sprint Corp.*, 346 F. Supp. 2d 113, 117 (D.D.C. 2004) (Bates, J.).[11] Although this test risks deviating from the purpose of the FLSA and inappropriately applying Rule 23 standards, *Campbell*, 903 F.3d at 1112–17, courts applying the ad hoc test have found the "similarly situated" standard met when the similarities are material to the plaintiffs' theory of FLSA liability. *See, e.g., Monroe v. FTS USA, LLC*, 860 F.3d 389, 403 (6th Cir. 2017) (plaintiffs who held same position and alleged that the defendant violated the FLSA through "time-shaving" practices were similarly situated even though some were encouraged to work off the

[11] At least one judge in this district, however, has interpreted the FLSA's "similarly situated" requirement to be consistent with the same requirement in the D.C. Minimum wage Act, which states:

> 2 or more employees are similarly situated if they: (A) Are or were employed by the same employer or employers, whether concurrently or otherwise, at some point during the applicable statute of limitations period; (B) Allege one or more violations that raise similar questions as to liability; and (C) Seek similar forms of relief.

Stephens v. Farmers Rest. Grp., 291 F. Supp. 3d 95, 106 (D.D.C. 2018) (Kelly, J.) (citing D.C. Code § 32–1308(a)(2)–(3)).

clock and during lunch breaks, while others alleged that their time sheets were altered); *Morgan*, 551 F.3d at 1264 (plaintiffs who performed tasks "mandated by a one-size-fits-all corporate manual" were similarly situated for overtime claims despite defendant's argument that exemption defense required individual assessment); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918, 921 (7th Cir. 2017) (upholding denial of FLSA decertification where there was a common question whether "changing clothes and showering at work will significantly reduce the risk to the health of the employee" despite individual variations as to exposure to chemicals and underlying health risks). Thus, the ad-hoc test can be applied consistently with the standard followed in the Second and Ninth Circuits. Whichever standard the Court applies here, the outcome should be the same: Plaintiffs are similarly situated, and the collective should remain certified.

V. ARGUMENT

A. The Court Should Exercise its Discretion to Retain Certification of the Issues Common to Members of the Collective, as the Interests of Judicial Economy and the Remedial Purposes of the FLSA Warrant

Plaintiffs seek to resolve collectively common issues that would materially advance the resolution of their claims. Where Plaintiffs assert the same claims, district courts have "considerable discretion" under the FLSA to manage the litigation and form procedures to resolve the common issues efficiently. *E.g. Stephens*, 291 F. Supp. 3d at 105; *McNeil v. District of Columbia*, No. CIV. A. 98-3142HHKJM, 1999 WL 571004, at *2 (D.D.C. Aug. 5, 1999) (Facciola, J.). Because Plaintiffs seek to proceed collectively to adjudicate particular issues that will rely on evidence common to the collective, the continued certification of these claims is well within the Court's authority.

The FLSA is a remedial statute aimed to protect workers. *Hoffmann-La Roche*, 493 U.S. at 173; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, (1946). Collective treatment

here would further the purpose of the FLSA's collective action procedure by allowing the plaintiffs to pool resources enabling them to vindicate their rights more efficiently. *Hoffmann-La Roche*, 493 U.S. at 170. The threshold for collective treatment under the FLSA is lower than that required for class certification under Rule 23, and indeed is lower than the "relatively loose requirements for permissive joinder and consolidation at trial" permitted by Federal Rules of Civil Procedure 20 and 42. *Scott*, 954 F.3d at 519–20 (collecting cases and explaining that "employees have a substantive 'right' to proceed as a collective" where the plaintiffs are similarly situated). *Campbell*, 903 F.3d at 1112 (same).

1. Common Issues of Law and Fact Are Material to the Disposition of Plaintiffs' Claims

Plaintiffs seek to proceed collectively with respect to three common issues that are material to the resolution of their FLSA claims: (a) whether MTM qualifies as Plaintiffs' joint employer; (b) whether MTM suffered or permitted Plaintiffs to work; and (c) whether the time expended by Plaintiffs traveling between trips provided to MTM clients and waiting for MTM clients qualifies as compensable work under the FLSA. These issues require the court to decide legal questions that apply to all Plaintiffs and will be resolved through common evidence.

a. Whether MTM qualifies as Plaintiffs' joint employer.

The Court has already recognized that whether MTM is a joint employer is of central importance to the litigation and its adjudication would substantially advance the resolution of this action. Mem. Op. & Order 11, ECF No. 176 (describing the joint employer question as a "threshold question" necessary for Plaintiffs to make their claims and a "quintessential common question"). As Plaintiffs have twice already set forth evidence that is common to the class that may be used to determine whether MTM is Plaintiffs' joint employer under either of the two legal standards for joint employment, we ask the Court to incorporate by reference Plaintiffs'

Motion for Class Certification, and Plaintiffs' Supplemental Memorandum on In Support of Certification of Claims Pursuant to Rule 23(c)(4). *See* Pls. Mem. in Supp. Class Cert. 19–23, ECF No. 134 (arguing that MTM is a joint employer under the factors outlined in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), and those outlined in *Salinas v. Commercial Interiors, Inc*, 848 F.3d 125, 139–40 (4th Cir. 2017)); Pls. Suppl. Mem. in Supp. Cert. 9–12, ECF No. 179 (same). As the prior briefing makes clear, common evidence supports several issues that show MTM's status as a joint employer: (1) MTM and the subcontractors, at the very least, share responsibility for the essential conditions of the drivers' employment, (2) MTM is indirectly involved in maintaining the drivers' schedules, (3) MTM dictates standards of driver performance and appearance, and enforces those standards directly and indirectly, and (4) MTM's long history of controlling NEMT services in D.C. renders the drivers (whose compensation comes from payments MTM makes to the subcontractors for the drivers' NEMT services) economically dependent on MTM. *Id.*

MTM argues that the common joint employer question alone is insufficient to render Plaintiffs similarly situated because the fact that any entity is an employer does not show that there was an FLSA violation or that the violation was caused by a common employer practice. Def. Mot. at 19. This argument ignores the legal standard requiring that to be similarly situated, Plaintiffs need only show that there are common issues of law or fact that are material to their claims. *See supra* Section IV. Further, the Court rejected this simplistic reframing of the joint employer question when it found, in the class certification context, that it was a common issue material to Plaintiffs' D.C. wage claims. Mem. Op. & Order 10–11, ECF No. 176. There is no reason that the court should reach a different conclusion as to the materiality or commonality of the joint employer question in the FLSA context.

MTM argues that Plaintiffs cannot rely on the conditional certification decision in *Rivera v. Power Design, Inc.*, 172 F. Supp. 3d 321, 327 (D.D.C. 2016) (Chutkan, J.), to support their argument that MTM is a joint employer under the FLSA because in Rivera the subcontractors only delivered workers to job sites and served as a "pass though" to provide wages, whereas MTM alleges, citing nothing, that the "factual record now demonstrates the intensive and independent roles of the various transportation provider companies." Def. Mot. at 19–20. This argument, which misstates both the factual record and the joint employment standard, *see* Pls. Suppl. Mem. in Supp. Cert. 9–12, ECF No. 179 (describing the legal standards and collecting common evidence showing MTM's employment relationship with Plaintiffs), says nothing about the materiality or commonality of the joint employer question.

MTM's reliance on *Edmonds v. Amazon.com, Inc.*, an unpublished out-of-circuit decision, is also misplaced and, in any event, does not warrant decertification of the collective. No. C19-1613JLR, 2020 WL 5993908, at *1 (W.D. Wash. Oct. 9, 2020) (denying certification of a nationwide collective of delivery drivers). The facts of the *Edmonds* case render its fact-intensive ruling inapposite here, as the drivers who sought certification were scattered throughout the country and the only issue common to their claims was the joint employer status of Amazon. Here, by contrast, Plaintiffs seek to certify a narrower collective of drivers who all worked in the D.C. area providing services under MTM's contracts with the District of Columbia. In addition to being subject to common MTM policies that demonstrate that MTM is a joint employer, Plaintiffs are subject to common MTM policies that bear on whether their working time was compensable and whether MTM knew or should have known that they were performing such work. *See infra* Section V.A.1.b (describing MTM's trip records and trip assignment and waiting policies).

In addition, the *Edmonds* decision misapplied the collective certification standard under *Campbell*, which did not require that common issues be central to liability and predominate over any individual issues. *See* 2020 WL 5993908 at *6 (misinterpreting the Ninth Circuit's requirement that the court consider the remedial purposes of the statute to mean that the common issue must be pivotal to the theory of liability). Although identification of a uniform MTM policy leading directly to liability is not necessary to satisfy the similarly situated standard, the plaintiffs nevertheless have common evidence showing that MTM maintained a flat-rate payment system that failed to account for various categories of compensable time, including the duration of the trip, travel required between trips, and any compensable work performed before or after a trip. Pls. Ex. 63; Pls. Ex. 7, Moses I Dep. 163:4-164:3, 165:5-11, 166:3-15; Pls. Ex. 2, Moses II Dep. 29:11-16, 35:2-6, 37:11-16, 73:19-74:16, 75:17-21. While the Court held this policy was insufficient to satisfy Rule 23(b)(3)'s predominance requirement, *see* Mem. Op. & Order 11, it is nevertheless a common policy showing that MTM fails to pay for all compensable time worked, providing a common basis on which each of the plaintiffs will seek to prove liability. That is sufficient to warrant retaining certification of the collective.

b. Whether MTM suffered or permitted Plaintiffs to work.

Common evidence will show that MTM suffered or permitted work for which MTM did not account in its rate payments. The minimum wage and overtime requirements of the FLSA apply to work "suffered or permitted" by an employer. 29 U.S.C. § 203. An employer suffers or permits work when it knows or reasonably should know that the work is being performed. *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44, 53 (D.D.C. 2006) (Bates, J.) (citing 29 C.F.R. § 785.11); *Akinsinde v. Not-For-Profit Hosp. Corp.*, No. 16-CV-00437, 2018 WL 6251348, at *7 (D.D.C. Nov. 29, 2018) (Mehta, J.) (denying summary judgment for FLSA claims for unpaid

work during meal breaks where defendant "through the exercise of reasonable diligence, could have learned of such work").

Common evidence will show that MTM knew or reasonably should have known of Plaintiffs' uncompensated work because it required Plaintiffs to undertake those tasks and the trip logs excluded records of time expended on these activities that were necessary to the delivery of the services to MTM's clients. First, MTM's corporate policies, agreements with the subcontractors, and deposition testimony show that the NEMT system MTM required drivers to wait for clients when the drivers arrived to pick them up, assist limited mobility customers to and from the vehicles, and on occasion to walk customers to and from the door of the pick-up and drop off location. Pls. Ex. 5 at MTM 000932 ("Transportation Provider must allow a minimum of fifteen (15) minutes "wait time" at pick-up locations for scheduled passenger(s) to enter vehicle"); Pls. Ex. 69 at MTM 000843–45 (describing requirements to wait for clients); Pls. Ex. 54 (providing penalties for late pick-ups and drop-offs). Pls. Ex. 7, Moses I Dep. 163:4-17 (waiting for clients), 166:16-20 (assisting limited mobility passengers); Pls. Ex. 2, Moses II Dep. 73:19-74:16 (walking customers to the door). *Cf.* Pls. Reply in Supp. Class Cert. Ex. A Medical Transportation Services Agreement between MTM and Riverside Transportation, Inc., ECF No. 156-2 (compensating for trips based on mileage and compensating for wait time for certain longer trips in an MTM rate sheet not used in D.C.); Pls. Ex. 2, Moses II Dep. 56:9–57:15 (explaining that a sample rate sheet that compensated for mileage and wait time did not apply to NEMT trips, whether Medicaid or managed-care, for clients in D.C.). These same forms of common evidence make clear that MTM received records of the drivers' trips and it, therefore, should have known the volume of trips assigned to drivers, including the time each driver spent driving passengers. *See* Pls. Ex. 69 at MTM 000841-842 (training subcontractors on MTM's

requirements for logging completed trips); Pls. Ex. 70 (trip manifest). Because the trips did not all have the same drop off and pick up locations, MTM knew that drivers necessarily had to travel between trips. Pls. Ex. 7, Moses I Dep. 165:5-11; Pls. Ex. 2, Moses II Dep. 37:11-16.

Plaintiffs contend that MTM's flat-rate payment policy did not compensate drivers for the categories of time described above. MTM has argued that it was the subcontractors' responsibility to pay the drivers and that the subcontractors used varying methods in discharging that duty. Def. Mot. at 23. Nevertheless, while each drivers' hours worked and pay received may be determined individually, whether MTM knew, or had reason to believe, that time expended by the drivers in compensable work is plainly material to their FLSA claims. As the evidence demonstrating that MTM suffered or permitted the drivers to engage in compensable work for which it did not pay will come from common policies and trip log forms as well as MTM witness testimony, adjudication of this issue bearing directly on liability should be conducted collectively.

c. Whether the time expended by Plaintiffs traveling between trips provided to MTM clients and waiting for MTM clients qualifies as compensable work under the FLSA

To determine whether individual plaintiffs were paid less than the federally mandated minimum and overtime wages, it will be necessary to determine what time is compensable under the FLSA. As there can be no dispute that the time expended driving clients to and from their medical appointments in compensable, Plaintiffs will present factual evidence and legal arguments that other time expended—such as time expended traveling between trips and waiting for MTM clients—qualifies as compensable under the FLSA.

This mixture of factual evidence and legal arguments can and will be presented on behalf of the collective as a whole. *See* Pls. Mem. in Supp. Class Cert. 24–28, ECF No. 134. The legal arguments will address what qualifies as compensable work under the FLSA. As Plaintiffs will

argue at trial, work performed for the benefit of the employer is compensable. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (citing *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Although the Portal to Portal Act, 29 U.S.C. § 254(a), excludes from FLSA coverage most travel before and after an employee's first and last principal activities, respectively, it does not exclude travel performed for the benefit of the employer during the continuous workday. *IBP, Inc.*, 546 U.S. at 37; 29 C.F.R. § 785.38 ("Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked."). Similarly, waiting time spent for the benefit of the employer, where the employer knows or should know that the employee is working, is compensable working time. *See Dinkel v. MedStar Health Inc.*, No. CV 11-998(CKK), 2015 WL 5168006, at *10 (D.D.C. Sept. 1, 2015) (Kollar-Kotelly, J.). Thus, Plaintiffs will argue that time expended driving between trips and time spent waiting for clients is compensable under the FLSA because it is performed for MTM's benefit. This argument will be made on behalf of the entire collective.

The MTM protocols governing the service Plaintiffs provide to MTM clients are equally applicable to the entire collective. MTM requires the drivers to transport its clients to and from medical appointments. While MTM makes no provision in the logs it requires to record time expended between trips, necessarily the drivers must travel between the drop-off of one client to the pick-up of the next client. *See* Pls. Ex. 7, Moses I Dep. 164:12-165:11. As there is no dispute that the clients and their destinations are in different locations from each other, travel between client trips is a necessary feature of the service Plaintiffs provide. Pls. Mem. in Supp. Class Cert. 24–26, ECF No. 134. Plaintiffs will argue at trial that the time expended between client trips is compensable and will show with evidence common to the collective—MTM's

service agreements and corporate testimony—that these activities qualify as compensable work because they are expended for the benefit of the employer. *See* Pls. Ex. 5 at MTM 000913-14 (describing the NEMT services); Pls. Ex. 69 at MTM 000823 (describing transportation provider and client responsibilities).

The same is true for time expended waiting for clients. Evidence common to the collective will show that the drivers are required to wait for clients whose arrival or departure may be delayed beyond the times appointed. Pls. Ex. 69 at MTM 000843-45 (describing requirements to wait for clients); Pls. Ex. 5 at MTM 000932 ("Transportation Provider must allow a minimum of fifteen (15) minutes "wait time" at pick-up locations for scheduled passenger(s) to enter vehicle"), and MTM 000922 (imposing penalties if a driver is late to pick up a client); Pls. Ex. 2, Moses II Dep. 88:15-89:11 (acknowledging that MTM did not consider whether the driver had time to make additional trips between dropping a client off at a dialysis appointment and picking them up); Pls. Ex. 7, Moses I Dep. 163:8-17 (explaining that if a driver is on time but the passenger is 15 minutes late, the driver is not compensated for the 15 minutes of waiting); Pls. Ex. 54 (imposing penalties if a driver is late to pick up a client). Thus, this issue is a common issue material to the resolution of Plaintiffs' claims.

2. MTM Asks the Court to Impose a Standard that Does Not Apply, Nevertheless Plaintiffs Meet It

MTM asserts a different legal standard that would require Plaintiffs to demonstrate that MTM's liability under the FLSA "was the result of a common employer practice to which all members of the proposed collective were subject." Def. Mot. at 19. This requirement effectively imports the Rule 23 requirements to the FLSA context, an approach that has been rejected in the majority of Circuits. *Campbell*, 903 F.3d at 1111. Nevertheless, as described

above, Plaintiffs have identified several policies and practices affecting all members of the proposed collective that shape MTM's liability under the FLSA. *See supra* Section V.A.1.

Identification of a common policy by which a defendant could be shown to have violated the FLSA is sufficient, but not necessary, to show that a common issue of law or fact is material to the resolution of the collective claims. *O'Brien*, 575 F.3d at 585 ("We do not mean to require that all collective actions under § 216(b) be unified by common theories of defendants' statutory violations; however, this is one situation where a group of employees is similarly situated."). *Cf. Campbell*, 903 F.3d at 1120 (plaintiffs were not similarly situated where there was no evidence of a department-wide policy of discouraging overtime, which was "the sole justification advanced" for collective treatment); *Morgan* 551 F.3d at 1263 (evidence of a companywide overtime exemption policy was sufficient to allow collective treatment despite allegedly "significant" variations in manager's duties depending on each store's size, sales volume, region, and district). Further, as this Court recognized when it granted conditional certification, uniformity in the application of the defendant's policy is not required. Mem. Op. & Order 2–3 (ECF No. 48) (citing *Ayala v. Tito Contractors*, 12 F. Supp. 3d 167, 171 (D.D.C. 2014) (Boasberg, J.) and *Stephens*, 291 F. Supp. 3d at 106).

MTM cites a series of cases granting conditional certification to support its contention that Plaintiffs must identify a common policy by which MTM violated the FLSA. Def. Mot. at 14–15. However, the identification of a common policy or plan is a prerequisite for the court to facilitate notice to members of the proposed collective, *Galloway*, 263 F. Supp. 3d at 155, and is interpreted loosely with no requirement that its application be uniform. *Monroe*, 860 F.3d at 403 ("But neither the statutory language nor the purposes of FLSA collective actions require a violating policy to be implemented by a singular method."); *Ayala*, 12 F. Supp. 3d at 171 ("To

the extent Defendants argue lack of uniformity [in the policy], that is not the standard."). Once the plaintiffs have consented to join the collective, the FLSA requires only that they be "similarly situated," i.e. common issues of fact or law are material to their claims. *Galloway*, 263 F. Supp. 3d at 155.

In the alternative, if the Court finds that the requirements of Rule 23 apply to the second stage of collective certification under the FLSA, Plaintiffs nevertheless satisfy the predominance requirement as common questions predominate for the issues that would be certified, for the same reasons described in Plaintiffs' Supplemental Memorandum in Support of Certification of Claims Pursuant to Rule 23(c)(4), ECF No. 179. *See In re Johnson*, 760 F.3d 66, 74 (D.C. Cir. 2014) ("In the end, that is, only common issues will be handled on a classwide basis, so common issues necessarily predominate.").

3. Applying the Factors of the Ad Hoc Test Further Demonstrates that Plaintiffs are Similarly Situated with Respect to Material Issues

As Plaintiffs seek to try collectively only those issues that are common to the collective, Plaintiffs are necessarily similarly situated with respect to those three issues: whether MTM is a joint employer, whether MTM suffered or permitted Plaintiffs to work, and whether time expended traveling between trips and waiting for clients is compensable time. Plaintiffs need not be identical to be similarly situated under the FLSA. Mem. Op. & Order 2–3 (ECF No. 48); *Ayala*, 12 F. Supp. 3d at 170. None of the alleged variations MTM identifies affect the three issues that Plaintiffs seek to try collectively. *See* Def. Mot. at 9–11 (alleging that Plaintiffs were paid different amounts and by different methods, that Plaintiffs had different types of trip assignments, that Plaintiffs' shifts had different structures, and that Plaintiffs began and ended their workdays with different first and last principal activities).

In *Hunter v. Sprint Corp.*, another judge in this Court determined that, under the first prong of the ad hoc test, employees were not similarly situated where they worked in different groups with different classifications as to whether they were exempt from overtime, even though the defendant did not argue that the employees had different job responsibilities. 346 F. Supp. 2d at 118. In that case, the employees' work groups rendered them dissimilar because the case revolved around the central question of whether the employees were properly classified as exempt from overtime. *Id.* at 119–120. That question could not be answered collectively where the employees had different classifications. *Id.* In contrast, here, any variations in the amount and method that the drivers were paid, their shifts, or their trip assignments, do not affect whether they were subject to the MTM policies that show that MTM is a joint employer, that MTM knew or should have known about their compensable working time, and that the time spent traveling between trips and waiting for clients was for MTM's benefit and therefore compensable. *See supra* Section V.A.1.b; *Ventura*, 738 F. Supp. 2d at 14–15 (restaurant staff who worked as bussers, servers, and floor managers were similarly situated even though one employee was paid a salary as the owner's personal assistant where that employee performed many of the same duties as the employees who were paid hourly and made the same claims for unpaid tips, wages, and overtime). *See also Stephens*, 291 F. Supp. 3d at 106 (interpreting the FLSA consistently with D.C. law that "Employees shall not be considered dissimilar under this subsection solely because their: (A) Claims seek damages that differ in amount; or (B) Job titles or other means of classifying employees differ in ways that are unrelated to their claims"). Thus, the variations in the individual circumstances of the drivers do not render them too dissimilar for collective treatment under the FLSA.

In addition, under the second prong of the ad hoc test, any individualized defenses would relate only to the two factual issues that will be handled on an individual basis: determining the amount of time worked and the amount paid. In limiting the scope of the issues they seek to treat collectively, Plaintiffs eliminate any potential prejudice to MTM because MTM still retains the right to raise any individualized defenses.[12] *See Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1107 (10th Cir. 2001) (holding that district court erred in decertifying ADEA collective where "highly individualized" defenses could be handled individually in the second stage of the trial, if necessary). Moreover, individualized disputes about issues such as time worked and pay received do not render plaintiffs dissimilar, especially where the defendant failed to keep adequate records. *See Monroe*, 860 F.3d at 404–05 (upholding district court's denial of a motion for decertification where Plaintiffs used representative testimony to estimate an average number of unrecorded hours worked); *O'Brien*, 575 F.3d at 584–85 (plaintiffs were similarly situated where proof of theories of liability were "inevitably individualized and distinct"); *Stephens*, 291 F. Supp. 3d at 106 (interpreting the FLSA consistently with D.C. law that employees are not dissimilar solely because their claims seek different amounts of damages). *See also Mt.*

[12] Plaintiffs dispute the availability of the only individualized defense MTM identifies in its motion—alleging that Plaintiffs Frye and Franklin have inaccurately reported their hours—because it relies on evidence improperly withheld from initial disclosures and discovery. Mot. to Strike the Decl. of Christina Gunseor and Exs. Thereto, ECF No. 157. Further, as Plaintiffs have previously argued, there are serious discrepancies between the information contained in the exhibits and Ms. Gunseor's description of them. *See* Pls. Reply in Supp. Mot. for Class Cert. at 27–28, ECF No. 155. Plaintiffs previously filed their Motion to Strike the Declaration of Christina Gunseor and Exhibits Thereto because the declaration relied on information that had been improperly withheld and not disclosed. ECF No. 157. The Court later denied Plaintiffs Motion to Strike as moot. Mem. Op. & Order 28, ECF No. 176. To the extent MTM relies on that declaration and its exhibits in the present Motion, *see* Def. Mot. at 25, Plaintiffs renew their Motion to Strike. Further, while plaintiffs do not rely on these records for the purposes of responding to this motion, they will be subject to discovery at the merits stage and can be presented as common evidence that MTM suffered or permitted Plaintiffs to work.

Clemens, 328 U.S. at 687–88 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]."). As a result, the existence of any individualized defenses would not undermine the common issues of fact and law identified that are material to the drivers' claims.

Thus, the first two prongs of the ad hoc test show that collective treatment of Plaintiffs' common issues is appropriate. As will be described in more detail below, the third prong involving fairness and procedural considerations also favors collective treatment.

B. Manageability Considerations Favor Collective Treatment of Plaintiffs' Claims

Courts have held that, where common issues material to the claims are presented, the courts have broad discretion to structure the adjudication of individual issues that may arise. *See Scott*, 954 F.3d at 522 ("If named plaintiffs and opt-in plaintiffs are similar in some respects material to the disposition of their claims, collective treatment may be to that extent appropriate, as it may to that extent facilitate the collective litigation of collective plaintiffs' claims."); *O'Brien*, 575 F.3d at 584 (6th Cir. 2009) ("[S]uch a collection of individualized analyses is required of the district court."); *Campbell*, 903 F.3d at 1115 (explaining the limitations of the ad hoc test's procedural inquiry and emphasizing the plaintiffs' "power to decide in what form they wish to proceed"). It is also clear that manageability and fairness considerations that some courts require under the third prong of the ad hoc test further support collective treatment because trying the common issues collectively will be more efficient and will avoid the unfairness of disparate outcomes in the adjudication of common issues that rely on common evidence.

Any consideration of the manageability of Plaintiffs' FLSA claims collectively must account for the alternative scenario if the Court decertifies the collective. Plaintiffs acknowledge that an inevitable consequence of the Court's denial of class certification under Rule 23(b)(3) is

that, once the common issues are tried collectively, adjudication of liability and amounts of damages awardable will likely be conducted individually or in small groupings of drivers. But withdrawing certification of the collective, at least for the purpose of trying together the common issues identified, would lead to the trial of 155 separate actions in this Court, resulting in adjudication of the common issues in separate trials and the inevitable duplication of work and risk of inconsistent results. In contrast, the adjudication collectively of the common issues will conserve the resources of the Court and the parties and ensure the trial of common issues lead to common results.

While it is premature to settle upon a trial plan until discovery has concluded of records MTM apparently maintains but has not yet produced, the broad contours of such a plan for trial can be identified at this juncture, sufficient to assure the Court that adjudication of the common issues and even the individual issues of liability and damages is the preferred course to adjudication of all collective member claims individually. As all members of the collective would also be members of the Rule 23(c)(4) class, were the Court to grant such certification, the trial of the claims arising under the FLSA and the other statutory claims could be conducted together. To that end, Plaintiffs propose the following two-stage trial plan:

Stage 1—common issues under the FLSA and the Rule 23(c)(4)

In the Stage I trial of this action, the parties would adjudicate common factual issues necessary to the determination of liability for each plaintiff. First, Plaintiffs expect to use evidence common to the collective and the proposed class to demonstrate at trial that MTM is a joint employer. To do so Plaintiffs will provide evidence that would show:

(a) MTM was not completely disassociated from the subcontractors, and directly or indirectly controlled many aspects of their businesses;
(b) MTM directly and/or indirectly controlled the drivers' hiring and credentialing;

(c) MTM directly and/or indirectly controlled the drivers' training;
(d) MTM directly and/or indirectly controlled the drivers' performance of their work through rules and standards;
(e) MTM enforced the rules and standards against the drivers through field monitoring and on-site inspections of the subcontractors;
(f) MTM received and processed complaints against the drivers and reports of accidents involving drivers;
(g) MTM was the source of the drivers' work and the drivers were economically dependent on MTM as a result.

Second, Plaintiffs expect to use evidence common to the collective and the proposed class to show that waiting time and time spent traveling between trips were compensable working time. To do so Plaintiffs will provide evidence that such work benefited MTM. Such evidence would show that:

(a) MTM required drivers to wait for clients;
(b) MTM required drivers to assist limited mobility clients;
(c) MTM's required drivers to walk clients to the door;
(d) MTM prescribed times for drivers to pick up clients and required drivers to be on time;
(e) MTM assigned trips between a variety of locations in D.C., Virginia, and Maryland;
(f) Travel between trips was integral to the NEMT services MTM offered;
(g) Waiting for clients was necessary to perform the NEMT services MTM offered and comply with MTM's rules.

Third, Plaintiffs expect to provide evidence common to the collective that the MTM knew or should have known that the Plaintiffs were engaged in compensable work. To do so, in addition to the evidence above that various tasks were required by MTM, Plaintiffs expect to provide evidence that would show:

(a) MTM maintained logs of the drivers' trips;
(b) MTM knew the volume of trips assigned to drivers;
(c) MTM knew the times of the drivers' first and last trips of the day;
(d) MTM reasonably could have learned of the drivers' schedules.

Fourth, Plaintiffs expect to offer common evidence to demonstrate that MTM qualifies as a general contractor under D.C. law and, therefore, provide another basis on which MTM is jointly liable for any violations of the D.C. wage and hour laws. In addition, issues common to

all Plaintiffs' D.C. wage law claims, which can be adjudicated on a classwide basis, whether they are issues of law or mixed questions of law and fact include: whether the wage rates set by the Living Wage Act and the Service Contract Act apply to time worked on MTM's managed-care contracts. Therefore, at the first stage, Plaintiffs expect to offer common evidence to adjudicate the three common issues described above to determine liability for the collective under the FLSA, as well as those common issues necessary to determine liability for the class claims under D.C. law.

Stage 2—individual issues necessary to calculate damages and determine liability

Upon resolution of the common issues described above, the only questions remaining to determine liability would require evidence of the time actually worked by the drivers and the amounts each was compensated. This evidence of the wage rates paid may be available from records of compensation paid the drivers, if it was preserved. Proof of the entire amounts of time worked, however, would likely be unavailable from any records, as MTM's records necessarily omitted significant amounts of time expended by the drivers in their daily work. Some or all of this evidence, therefore, would require accounts from the drivers to show the amounts of time worked and/or the wages they were paid by a just and reasonable inference. Pls. Mem. in Supp. Class Cert. 27, ECF No. 134 (citing *Mt. Clemens*, 328 U.S. at 687). Some of this evidence may be collected in response to written questions if that would achieve any economies. And some of these issues might be adjudicated together for drivers who worked for the same subcontractor. Other economies may be discerned once discovery is conducted of records MTM maintains but hasn't yet produced and the parties have exhausted discovery of the subcontractors.

While the precise contours of the plan for adjudicating these issues material to liability as well as the determination of liability and damages necessarily remain subject to revision once

they are informed by additional discovery, it should be clear that retaining certification of the collective to try together those issues susceptible to such treatment is far superior to the total decertification of these claims that MTM seeks. Accordingly, MTM's motion to decertify the collective should be denied.

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Respectfully submitted,

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