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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiffs, in their motion for partial summary judgment, set forth an extensive record of undisputed evidence establishing MTM's role as a joint employer of the drivers directly employed by the Transportation Service Providers (TSPs). In its opposition, MTM denies that it jointly employs Plaintiffs by relying on a "the contract-made-me-do-it" defense, which the Court rejected earlier and is no more meritorious here. In so doing, MTM focuses on facts irrelevant to the joint employer issue and fails to dispute the ample record showing that MTM is not completely disassociated from the TSPs in determining the essential terms and conditions of the drivers' employment and has the authority to control key aspects of the drivers' employment. Accordingly, the Court should grant Plaintiffs' Motion for Partial Summary Judgment.

II. ARGUMENT

A. As the D.C. Circuit Has Not Yet Adopted a Standard for Determining Joint Employment Under the FLSA or D.C. Wage Laws, the Standard Adopted by the Fourth Circuit in *Salinas v. Commercial Interiors* Should Apply Here.

As Plaintiffs discussed at length in their opening brief, the Fourth Circuit's decision in *Salinas v. Commercial Interiors* provides the most useful framework for assessing joint employment. *See* Plaintiffs' Memorandum ("Pls.' Mem.") at 10-18, ECF No. 222. As this Court recognized in its decision denying MTM's motion to dismiss, "[t]he D.C. Circuit has not specified a test for determining whether an alleged employer is a 'joint employer' *for purposes of the FLSA*." *Harris v. Med. Transp. Mgmt., Inc.*, 300 F.Supp.3d 234, 240 (D.D.C. 2018) (emphasis added); *see Castro v. Tierno Care Home Health Agency, Inc.*, No. 21-282, 2021 WL 4940928, at *2 (D.D.C. Oct. 22, 2021) (same). The emphasized language is of critical importance because the FLSA's standard for determining joint-employer status extends beyond the traditional common-law agency principles incorporated in other statutes. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325–26 (1992). MTM fails to recognize this distinction and errs by asserting that the decision in

Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018), is "binding precedent" that requires the application of common-law principles to determine joint employment in the D.C. Circuit. Def.'s Mem. in Opp'n to Pls.' Mot. for Partial Summ. J. ("Opp. SJ") at 41-42, ECF No. 225.

In *Browning-Ferris*, the D.C. Circuit held that the test for joint-employer status under the National Labor Relations Act (NLRA) is determined by application of traditional common-law agency principles, and it held that the NLRB had correctly articulated the test used to determine whether two entities are joint employers of the workers in a petitioned-for bargaining unit. It found, however, that the NLRB had failed to correctly apply an element of the test, and it remanded the case for further proceedings. 911 F.3d at 1222–23. The joint-employer test that *Browning-Ferris* upheld as "fully consistent with the common law," *id.* at 1222, as explained fully below, is necessarily more restrictive than the standard applicable here because—unlike the NLRA—the FLSA's test for joint-employer status extends beyond the scope of the common law. *See* Pls.' Mem at 10-11.

MTM also errs by asserting that four of the nine factors considered by the D.C. Circuit in *Morrison v. International Programs Consortium, Inc*., 253 F.3d 5 (D.C. Cir. 2001), constitute the D.C. Circuit's test for joint-employer status under the FLSA. Opp. SJ at 12. First, MTM acknowledges only the four factors that *Morrison* drew from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), by way of *Henthorn v. Department of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994), and MTM ignores completely the additional five factors that *Morrison* drew from *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988). Thus, MTM's assertion that the D.C. Circuit relies solely on the four *Bonnette* factors is baseless. Second, and more fundamentally, *Morrison* did not address the appropriate test for joint-employer status

under the FLSA. Rather, *Morrison* addressed the issue of whether the worker was an employee or an independent contractor. *Morrison*, 253 F.3d at 11.

As Plaintiffs acknowledged in their opening memorandum, some courts have relied on the nine *Morrison* factors to assess joint employer status notwithstanding that *Morrison* never addressed the joint employment relationship. Pls.' Mem. at 14. In doing so, some courts have acknowledged that the "factors used to determine whether a worker is an employee or independent contractor are not relevant to the joint-employer inquiry," *id.* (citing cases). Conflating the independent-contractor inquiry with the joint-employer inquiry has created significant confusion. Although there is some overlap between the factors relevant to each inquiry, they are not the same. *See id.* at 13-14. Plaintiffs have therefore urged this Court to apply the standard set forth in *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125 (4th Cir. 2017), because it separates the two inquiries. Under the *Salinas* standard, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment," *id.* at 129–30, and (2) the worker is "an employee as opposed to an independent contractor," *id.* at 130. *Salinas* sets forth six non-exhaustive factors to consider in the first step of the framework, *id.* at 141–42, and six other factors to consider at the second step, *id.* at 150. Only the first step is relevant here, as it is undisputed that the drivers were employees rather than independent contractors.

B. MTM's Claim that Its Actions Were Taken to Comply with Government Contracts or Regulations Does Not Affect Its Liability as a Joint Employer.

MTM contends that it's absolved of liability here because any authority it has to co-determine the terms and conditions of the drivers' employment stems from its contract with the District of Columbia Medicaid regulations. *See* Opp. SJ at 7-11, 13-16. The reasons an entity has employer authority are irrelevant—if the entity has such authority, it qualifies as a joint employer.

See Mem. Op. & Order at 16, ECF No. 21 ("Defendant's implementation and enforcement of the District's contractually-imposed standards does not necessarily absolve it of liability under the FLSA."). As numerous courts have examined, the joint-employer inquiry requires an examination of "the nature and degree of the alleged employer's control, not *why* the alleged employer exercised such control." *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013) (emphasis added) (rejecting argument that the control exercised over workers was due to the nature of the business and thus could not lead to employer status); *Hughes v. Family Life Care, Inc.*, 117 F.Supp.3d 1365 (N.D. Fla. 2015) (employer status not vitiated where control exercised was needed to comply with a contract); *Hodgson v. Griffin & Brand of McAllen*, 471 F.2d 235, 238 (5th Cir. 1973) (holding that terms and conditions that corporate growers required crew leaders to apply to field workers qualified the crew leaders as joint employers); *S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 769 P.2d 399, 409 n.13 (Cal. 1989) (rejecting as "specious" the argument of cucumber harvesting company that it was not workers' employer because the control it exercised was pursuant to a contract and on behalf of its customer, and holding that defendant's reasons for its actions were irrelevant).

In *Hardgers-Powell v. Angels in Your Home LLC*, 330 F.R.D. 89 (W.D.N.Y. 2019), the court specifically cited to the regulations requiring the defendant to undertake various responsibilities as proof that it had exercised such control, *favoring* rather than undermining joint employer status. *Id.* at 109–11. In this case, home healthcare workers alleged that the broker to the state Medicaid program that funded their work was their joint employer due to division of responsibilities as required under the program, including screening potential workers, monitoring the direct employer, and maintaining employment records. In finding that the broker was a joint employer, the court noted that, under the statutory and regulatory scheme of the program,

operational control could not be attributed solely to either the direct or putative employer because their responsibilities were interwoven. *Id.* at 111. A fiscal intermediary or broker, on the other hand, had veto power over hiring and controlled disbursements of wages, and thus "treating the fiscal intermediary as an employer recognizes the interdependent control that participants and fiscal intermediaries have over [workers'] working conditions" and "ensures that the actor with the power to ensure compliance with the FLSA . . . has a sufficient incentive to do so." *Id.*

Similarly, in *Narayan v. EGL Inc.*, the court held that control exercised pursuant to a contract or government regulation is itself affirmative evidence of an employment relationship. The court also rejected the defendant's argument that its exercise of control should be disregarded because it was due to government regulations, business reasons, and customer requests, not its discretion. *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010) (finding delivery drivers were employees and not independent contractors, where defendant mandated that they wear uniforms, carry ID cards, and comply with rules on vehicle age and appearance). MTM has not offered a *single case* which supports its contention that "quality standards determined and contractually mandated by the District" should not be considered indicia of its joint-employer status. Opp. SJ at 10.

C. MTM and the TSPs are Joint Employers Under Step One of the *Salinas* Framework.

MTM's Opposition Brief does nothing to undercut the evidence adduced by Plaintiffs that MTM "shares or codetermines the essential terms and conditions" of the drivers' employment. *See Salinas*, 848 F.3d at 142. Indeed, the evidence of MTM's role here is virtually identical to the findings in *McCoy v. Transdev Services, Inc.* and *Young v. Act Fast Delivery of West Virginia, Inc.*—two cases in which entities were found to be joint employers of drivers directly employed by subcontracted transportation companies. *See generally* Pls.' Mem. at 19-22.

MTM concedes the following facts demonstrating that it jointly employed the drivers:

- MTM is required to ensure that TSPs and the drivers comply with MTM's contract with the District. Opp. SJ at 7-11; MTM Ex. 1 § C.1.e.
- MTM directly trains the drivers who provide NEMT services from its own MTM facilities through MTM employees. Opp. SJ at 10, 17-18, 29.
- MTM affixes inspection stickers with the MTM logo to each driver's vehicle indicating that a vehicle has passed MTM's inspection process. *Id.* at 10; Pls.' Mem. at 5.
- MTM employees provide a centralized "system of offering trips" to the TSPs, relaying trips for MTM clients and providing TSPs with add-on trips to provide to the drivers throughout the course of their runs. Opp. SJ at 24-25.
- MTM provides the drivers with the daily log form that creates their manifests, which dictate where and when the drivers travel during their shifts to serve MTM clients. *Id.* at 8 n.3, 33, 34.
- MTM employs field inspectors who monitor the drivers at regular pick-up locations. *Id*. at 10, 22, 28-30.
- If MTM clients have complaints about the TSPs or the drivers, MTM has an established grievance process to have such complaints exclusively reported to MTM. Each vehicle includes a phone number for comments or complaints that directs the caller to an MTM call center. *Id.* at 10.
- MTM has authority under the TSP Agreements to remove a driver from service of MTM clients and MTM exercises that authority. *Id.* at 20-21.

MTM cannot dispute and fails to rebut various material facts that it had power over the employment terms enumerated in nearly all of the six factors identified by the *Salinas* court to establish joint employment. "[O]ne factor alone can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment." 848 F.3d at 142. Here, five out of the six factors used by the *Salinas* court weigh in favor of finding that MTM and the TSPs share or codetermine the essential terms of the drivers' employment.

First factor —shared power to direct, control, or supervise drivers: MTM shares with the TSPs the authority to direct the manner in which the drivers provide transportation services. For example, MTM plays a key role in training the drivers; imposes detailed rules for how drivers perform their duties, including those requirements on how the drivers dress, behave, and complete trips; prohibits certain conduct by the drivers; requires random drug testing of drivers on a quarterly basis; and dictates the procedures that drivers must follow to report accidents. Pls.' Mem. at 2-4; Opp. SJ at 8. MTM also sets requirements on the timeliness of trips and closely regulates the vehicles used on trips. Pls.' Mem. at 6-7; Opp. SJ, Appendix A at 1-3. MTM supervises the drivers by sending its own inspectors to check on whether the drivers are complying with MTM's work rules, using an inspection form with MTM insignia that sets out a checklist of requirements, and surveilling drivers through devices installed on vehicles. Pls.' Mem. at 5; Opp. SJ at 28; MTM's Statement of Disputed Material Facts ("SODF") ¶¶ 56-58, ECF No. 225-1. MTM also supervises driver conduct and performance through MTM's mechanism and reporting system for complaints, accidents, and incidents involving MTM clients and by soliciting feedback from the public regarding the individual drivers' performance. Pls.' Mem. at 2-4; Opp. SJ at 10.

Rather than dispute that it shares the authority to direct, control, and supervise the drivers, MTM argues that it does so only because its contract with the District dictates the rules that MTM imposes on the drivers and requires that MTM engage in "quality control" measures. Opp. SJ at 9-11, 28-31. However, while its contract with the District includes general requirements regarding driver eligibility and performance, the contracts themselves are silent about the measures MTM must take to ensure those requirements are met, including the frequency of inspections, the mechanisms through which MTM clients may report driver performance issues, and the implementation of a robust training program. MTM Ex. 2 §§ C.5.2.3.2.8, C.5.2.3.4, C.5.2.3.3.4,

C.5.2.3.3.5, C.5.2.5.1.3. The District's basic provision of these terms does not undercut MTM's decision to be deeply involved in trainings, inspections, and driver performance, which extends far beyond quality control.

For example, MTM runs several onboarding operations for the drivers, choosing to have MTM employees conduct training sessions for drivers at its own offices and directing drivers to complete a mandatory training on professionalism and customer service. *See* Pls.' Mem. at 2-4; SODF ¶¶ 21-22, 29. Once drivers are employed, MTM retains control over drivers, including prohibiting NEMT drivers from using the vehicles for personal reasons without prior authorization from MTM while transporting MTM clients and holding the right to remove drivers for "good cause within MTM's sole discretion." Pls.' Mem. at 7-8; Opp. SJ at 20. And MTM handles all the vehicle and driver inspections, including installing surveillance devices in vehicles used to transport certain MTM clients, which constitute approximately half of all vehicles. Pls.' Mem. at 7; SODF ¶¶ 56-58. MTM's involvement in directing, controlling, and supervising the drivers is extensive, and nothing in MTM's Opposition Brief is to the contrary.[1]

MTM does not meaningfully rebut Plaintiffs' evidence regarding the extent and ramifications of MTM's power to monitor drivers. MTM cites testimony from two named plaintiffs, *both of whom* confirm that MTM performed field inspections and monitoring. *See* Opp. SJ at 28-30 (claiming that "inspections were also undisputedly limited and periodic in nature and

[1] MTM's "disputes" to these statements of fact are, on the whole, distinctions without a difference. While MTM doggedly disputes Plaintiffs' reference to TSPs as "subcontractors," it otherwise leaves undisputed that MTM employees conduct training session at MTM's offices. *See* SODF ¶¶ 21-22, 29. It, furthermore, claims that MTM only applies its performance requirement when drivers are transporting its clients; however, it fails to cite a contradictory source to substantiate this claim. *Id.* ¶ 49. All other facts referenced above are not disputed, even in name, by MTM.

not part of daily work activities" while citing to testimony from Plaintiff Frye in which he confirms that he regularly saw MTM inspectors at Washington Hospital Center and performed self-checks on his vehicle to ensure he would pass an inspection). MTM's 30(b)(6) witness specifically testified that if MTM identified an infraction during an inspection, "[w]e would notify the provider to remedy the situation." Moses Dep. 125:5-6, MTM Ex. 3.

The vast majority of evidence Plaintiffs cite regarding MTM's shared authority to direct, control, and supervise the drivers goes unchallenged by MTM. MTM has not pointed to any meaningful differences between the facts of *McCoy* and *Young*, where the courts found joint employment by entities other than the drivers' direct employers, and the case at bar.[2] As explained in Plaintiffs' opening brief, in *McCoy v. Transdev Services, Inc.*, No. DKC 19-2137, 2022 WL 951996, at *11 (D. Md. Mar. 30, 2022), the court held that the first *Salinas* factor weighed in favor of finding the entity that contracted with the Baltimore City Health Department to provide NEMT services (Transdev) qualified as a joint employer of the drivers because the TSP and Transdev shared control over training, and Transdev had a role in creating the trip manifests, conducted dispatch services, and required updates on accidents. *See* Pls.' Mem. at 19. MTM claims that the court's finding in *McCoy* that Transdev's supervision "went beyond double-checking compliance with the government contracts" is in direct contrast to the record here. Opp. SJ at 46 n.60. However, as discussed extensively in Plaintiffs' opening brief, *see* Pls.' Mem. at 2-7, MTM devised the programmatic structure from which directly flowed the day-to-day management of the drivers, such that MTM and the TSP's control were indistinguishable. And while MTM alleges that it does

[2] MTM's claim that the circumstances of hiring in this case are dissimilar from those in *McCoy* because MTM did not collect employment applications again attempts to impermissibly narrow the legal inquiry into joint-employer status. The court in *McCoy* found Transdev's ability to extend its authority into hiring as favoring finding Transdev a joint employer of the drivers, just as MTM extends its authority into training and credentialing.

not have authority to bar drivers from employment, it structured the relationship to retain within MTM's *sole* discretion the decision to remove drivers for good cause. CC Ex. 5, at MTM 000920. Regardless of whether the content of the rules is dictated by the District, MTM has chosen the extent and manner of implementation, which extends well beyond anything resembling quality control.

Furthermore, while MTM claims that *Young v. Act Fast Delivery of West Virginia, Inc.*, No. 16-CV-09788, 2018 WL 279996 (S.D. W. Va. Jan. 3, 2018) is inapplicable here, it conveniently ignores that the court found that the first *Salinas* factor indicated that a pharmaceutical company (Omnicare) was a joint employer of the drivers because Omnicare forbade the use of certain vehicles, required uniforms, and dictated standards for the drivers' appearance and behavior. Although some of those requirements stemmed from federal regulations, the court found that Omnicare's *application* of the rules "exceed mere quality control and the assurance of compliance with federal regulations." *Id.* at *7; *see* Pls.' Mem. at 20 (citing *Lima v. MH & WH, LLC*, No. 14-CV-896, 2019 WL 2602142, at *21–23 (E.D.N.C. Mar. 8, 2019) for its finding that the first *Salinas* factor was satisfied where a superintendent for the general contractor supervised the plaintiff as a matter of practice).

Second factor —shared power to hire, fire, or modify terms and conditions of employment: Plaintiffs' opening brief laid out the myriad ways in which MTM shares authority with the TSPs to hire, fire, and modify the terms and conditions of the drivers' employment. This includes crafting the TSP Agreements, determining whether drivers meet requirements for hire, requiring training—some of which occurred through MTM itself—requiring successful inspections, directly communicating with TSPs about driver complaints, auditing individual drivers to ensure compliance with MTM rules, and maintaining the authority to terminate a driver

for noncompliance with D.C. requirements within MTM's "sole discretion," including notifying the TSP if it determines that a driver is no longer authorized to transport NEMT beneficiaries. *See generally* Pls.' Mem. at 2-4, 7-9, 20-21. MTM does not dispute any of this evidence. *See* Opp. SJ at 8, 10, 20, Appendix A at 1-3; SODF ¶¶ 21-22, 56-58.

MTM focuses on the degree of control it actually exercised over the drivers. *See* Opp. SJ at 22-30. While the evidence of actual control MTM exercised over the drivers—and in many cases admits to exercising—is enough to show that MTM was a joint employer, the test is not so limited. Instead, an entity's shared authority to determine the terms and conditions of the drivers' employment also indicates joint employer status, whether or not that authority was actually exercised. In *Salinas*, the court held that focusing only on control contravened the plain language and purpose of the FLSA. 848 F.3d at 137 (concluding that common-law agency principles "do[] not square with Congress's intent that the FLSA's definition of 'employee' encompass a broader swath of workers than would constitute employees at common law"). The core of the joint employer analysis is not actually exercised control, but the power or authority to codetermine the terms and conditions of a worker's employment. *Id.* at 141 ("Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the *power* to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment." (emphasis added)). By ignoring the joint employment standard's focus on the power to exercise employer-like authority, whether directly or indirectly, MTM fails to dispute Plaintiffs' evidence that it had such power even when it did not exercise it.

MTM also argues that its oversight is limited to "quality control" and ensuring that contractual standards are met.[3] Yet MTM cannot dispute that its agreements with the TSPs give it the power to set hiring standards, veto the hire, and remove from service any driver working under the TSP Agreement, as well as a wide range of other controls over the TSPs and drivers, all of which amounts to codetermining the drivers' conditions of employment.[4]

Courts have recognized that having influence over the hiring and firing decision weighs in favor of joint employer status, even if the employer does not have sole or final say or defers to other entities to make the final decision. *See* Pls.' Mem. at 20-21, citing *Young*, 2018 WL 279996, at *7 (finding second *Salinas* factor met where "upon receiving complaints from its clients regarding deliveries, Omnicare directly communicated to Act Fast its wishes to have those drivers reassigned or terminated"); *Lima*, 2019 WL 2602142, at *22 (finding second *Salinas* factor weighed in favor of finding joint employment where general contractor could prohibit a laborer from working on a particular project without ultimate hiring or firing authority); *McCoy*, 2022 WL 951996, at *8 (finding second *Salinas* factor satisfied because Transdev had the power to require the TSP to remove a driver from providing services under the contract, even though the driver might still have been able to perform other work for the TSP); *cf. Rapczynski v. Directv, LLC*, No.

[3] MTM does not dispute the evidence Plaintiffs put forth to demonstrate that MTM shares authority with the TSPs to hire, fire, or modify terms and conditions of employment. Instead, it blandly contends in response to each fact that the requirement it set forth originated with the District. *See* MTM's SODF ¶¶ 9-15. As to the fact that the TSP Agreement provides that "MTM reserves the right to disapprove or suspend any driver or attendant for safety reasons; or where disqualification of a driver or attendant is requested by an MTM Client; or for other reasons of good cause within MTM's sole discretion," *see* Pls.' SOF ¶ 34, MTM cannot levy any disagreement.

[4] MTM concedes it has the authority to remove drivers from service but places the blame for those decisions on the District, with which it consults on removal. Opp. SJ at 20-21. Not only is the actual exercise of such power irrelevant, but MTM also concedes that it required that Plaintiff Frye be "removed from service" under the TSP Agreement. *See* MTM Ex. 16, Frye Dep. 34:1-35:19.

14-CV-2441, 2016 WL 1071022, at *5 (M.D. Pa. Mar. 17, 2016) (where defendant required workers to obtain certifications before being assigned to work for it and imposed quality standards, inference that defendant had authority over hiring was reasonable).

Finally, MTM recycles portions of its opposition to class certification brief, where it sought to show that there were differences among TSPs whether due to differences in the provision of schedules to drivers, the requirements for vehicle maintenance, or other minor differences in day-to-day supervision. Opp. SJ at 31 n.48. Yet none of that negates MTM's power to control the terms of employment that are the same for all drivers.

Third factor — the degree of permanency and duration of the relationship between the putative joint employers: TSPs often work exclusively or mostly for MTM and continue their contracts with MTM for many years. MTM does not dispute that it prohibits TSPs from contracting with other companies to provide the same services it provides to MTM without prior written approval from MTM. SODF at 2 (no dispute to Plaintiffs' Statement of Undisputed Facts ¶ 5).[5] In *Salinas* and *McCoy*, such facts satisfied the third factor where most of the subcontractor's work was for the general contractor. *Salinas*, 848 F.3d at 147; *McCoy*, 2022 WL 951996, at *8 (third *Salinas* factor satisfied relationship despite the fact that relationship between Transdev and TSP

[5] The fact that MTM places all TSPs at fifty percent capacity based on the assumption that the TSP has contracts with other providers is irrelevant to the permanence and economic dependence of their relationship, for two reasons: (1) MTM's corporate witness acknowledged that the assumption of fifty percent is not steeped in fact, but rather an arbitrary baseline, *see* MTM Ex. 22 at 84:7-14, 85:6-12; and (2) she further testified that TSPs are able to, and *do*, contact MTM on a daily basis to request additional trips, *id.* at 84:21-85:5, which is corroborated by numerous drivers who attested to receiving "add-on" trips on a daily basis from MTM, through their TSP. *See, e.g.,* MTM Ex. 23, Resp. to Interrog. No. 3 for Deidre Gaymon; MTM Ex. 24, Resp. to Interrog. No. 3 for Chandra Bantawa; MTM Ex. 25, Resp. to Interrog. No. 3 for William Randolph; MTM Ex. 26, Resp. to Interrog. No. 3 for Nakesha Vasser; MTM Ex. 27, Resp. to Interrog. Nos. 8 and 9 for Robert Lesesne.

was not exclusive, and the TSP was an independent company with business beyond its Transdev contracts).[6]

Fifth factor — ownership or control over the drivers' place of work: Although the TSPs own the vehicles operated by the drivers, through shared management, MTM exercises control over the drivers' place of work by mandating certain specifications for the vehicles and by requiring that the vehicles have particular signage and safety equipment and that they be maintained and operated in particular ways. Pls.' Mem. at 21-22. MTM also regularly inspects the vehicles, utilizing an MTM inspection sheet, to ensure compliance with MTM standards and local and federal law, and requiring both drivers and TSP employees to complete trainings held at MTM's facilities. While MTM again maintains that it hired MTM inspectors, held random field inspections, and required annual inspections all in accordance with its contract with the District, it concedes that it chooses to affix its own insignia to the vehicles that pass MTM inspections—thereby holding out those vehicles and drivers as MTM affiliates. MTM's SODF ¶¶ 72-76. In both *McCoy* and *Young*, the fact that the vehicles were not owned by the joint employer did not preclude a finding in the workers' favor. Pls.' Mem. at 22.

Sixth factor — shared responsibility for ordinary employer functions: MTM does not dispute—nor can it—that MTM creates the manifests that TSPs and drivers use to schedule and arrange drivers' trips and provides the paperwork used to record and verify the trips. *See McCoy*, 2022 WL 951996, at *9 ("Transdev was involved in providing equipment in the form of

[6] As Plaintiffs acknowledge in their opening brief, Pls.' Mem. at 21, there is no evidence that MTM has an ownership interest in the TSPs, the fourth factor in the *Salinas* test. However, no ownership interest was present in any of the four decisions finding joint employment under the *Salinas* standard in circumstances similar to those here, including in *Salinas* itself. *See Salinas*, 848 F.3d at 147; *McCoy*, 2022 WL 951996, at *8; *Lima*, 2019 WL 2602142, at *22; *Young*, 2018 WL 279996, at *7.

manifests."). Undisputed evidence shows that MTM provided drivers with manifests to complete on a daily basis that logged their trips for MTM clients—thereby controlling every moment of their shifts—and provides tools for TSPs to create schedules for drivers based on the assigned trips from MTM. Pls.' Mem. at 8-9. Further, MTM requires TSPs to include MTM as an insured on their auto liability and commercial general liability policies. *Id.* at 22.

For these reasons and those set out in Plaintiffs' opening brief, MTM is the drivers' joint employer under step one of the *Salinas* framework and Plaintiffs are entitled to summary judgment on that issue.

D. MTM is a Joint Employer Under the Multi-Factor Tests Derived from *Bonnette*.

As explained above (*supra* II.A.) and extensively in Plaintiffs' opening brief (Pls.' Mem. at 11-14), courts have used a variety of multi-factor, totality-of-the-circumstances tests to determine whether an entity is a joint employer. Plaintiffs urge the Court to apply the *Salinas* framework because it does not conflate the question of whether entities are joint employers with the separate question of whether workers are employees or independent contractors. Nevertheless, MTM is a joint employer under any of the multi-factor tests used to assess whether "an entity has functional control over workers even in the absence of the formal control." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003). If the Court should rely on factors set forth in other multi-factor tests, *see* Pls.' Mem. at 22-23, including the first four factors identified in *Morrison*, 253 F.3d at 11 and additional factors enumerated in *Zheng*, as MTM endorses (Opp. SJ at 12-13, 16-17), MTM is still a joint employer of the drivers.

Hiring and Firing. MTM's Opposition Brief does nothing to undercut the evidence adduced by Plaintiffs that MTM plays a significant role in determining driver eligibility for hiring and has authority to effectively fire drivers. Indeed, the evidence of MTM's role here is virtually

identical to the findings in *Perez*, in which the entity was found to be a joint employer. *See generally* Pls.' Mem. at 24. In opposition to these facts, MTM argues that drivers testified about applying directly and interviewing with TSPs and that the District maintains the authority to remove drivers from providing services. Opp. SJ at 18-21. Yet some drivers' identification of interviewing with their TSPs does not undercut MTM's deep involvement in recruitment and hiring, which extends far beyond identification of candidates.

MTM plays an integral role in recruitment operations, obtaining the required paperwork, and managing a detailed credentialing, training, and certification process. *Supra* 7-9; *see* Pls.' Mem. at 7-8. It is clear that MTM's involvement in recruitment and hiring is extensive, and nothing in MTM's Opposition Brief is to the contrary.

With regard to MTM's power to remove drivers—a characteristic which was identified as significant evidence of joint employer status in *Bonnette*—MTM cannot dispute its authority to remove drivers, as it has reserved the right to do in its sole discretion, but rather again attempts to blame the District for its ability to do so. Opp. SJ at 21. However, for the one removal MTM describes, that of Plaintiff Frye, the TSP notified Mr. Frye that the directive for his removal from providing services to MTM clients came from *MTM*, and MTM has offered no evidence to the contrary. *Id.* As such, MTM has conceded this point.

As it stands, the vast majority of evidence Plaintiffs cite regarding MTM's control over hiring and firing goes unchallenged by MTM. Nor has MTM pointed to any meaningful differences between the facts of *Perez* and *Schmidt*, and the case at bar.[7] In this holistic inquiry, MTM clearly satisfies this factor.

[7] While MTM vigorously rejects Plaintiffs' analogy to *Perez* and *Schmidt*, it is silent on the clear parallels with respect to *hiring and firing authority*, the factor for which Plaintiffs cite to these cases. Opp. SJ at 48-50. In *Perez*, the court found this factor favored joint employment where

Supervision and control over work. Plaintiffs' opening brief laid out the myriad ways in which MTM supervises and controls the work of the drivers. Pls.' Mem. at 25-28. This includes preparing and executing all necessary training for the drivers' job duties, exerting control over driver eligibility, requiring successful vehicle inspections, directly communicating with MTM clients and the TSPs about employment complaints, retaining authority to audit TSPs and drivers to ensure compliance with MTM rules, and maintaining the authority to terminate a member for noncompliance with requirements. In particular, involvement in resolution of disputes between workers and another joint employer, even when not usually involved in day-to-day supervision, has been held by the Ninth Circuit to provide evidence of joint employer status. *See Bonnette*, 704 F.2d at 1470; *see also Allen v. CH2M-WG, Idaho, LLC*, No. 08cv422, 2009 WL 1658018, at *4 (D. Idaho 2009) (discussing this in the staffing agency context); *Barfield v. NYC Health & Hosps. Corp.*, 537 F.3d 132, 144, 147 (2d Cir. 2008) (discussing staffing agency control over joint employees). MTM does not dispute any of this evidence.

Instead, MTM spends several pages arguing that it does not control the day-to-day operations of the TSPs. Opp. SJ at 21-31. MTM also argues that its involvement is limited to disseminating information to its TSPs to maximize compliance. Opp. SJ at 28-31. Yet MTM's argument actually emphasizes the many ways in which MTM exercises control over the drivers' conditions of employment, highlighting its inspections, involvement in concerns about compliance

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DirecTV established and *enforced* the eligibility requirements for workers, including requiring background checks, drug screens, and certifications—noting that, significantly, DirecTV set the requirement for certification, *not* the direct employer. *Perez v. Lantern Light Corp.*, No. C12-01406 RSM, 2015 WL 3451268, at *6 (W.D. Wash. May 29, 2015). Similarly, while DirecTV did not exercise direct control of firing, it relayed performance concerns to the direct employer, then leaving corrective action to the direct employer's discretion. *Id.* at *7. The court in *Schmidt* similarly found that setting eligibility requirements and retaining authority to terminate within the company's "sole discretion" favored plaintiffs on this factor. *See Schmidt v. DIRECTV, LLC*, No. CV 14-3000 (JRT/TNL), 2017 WL 3575849, at *4 (D. Minn. Aug. 17, 2017).

issues, and requiring drivers to wear uniforms and carry badges. *Id.* MTM also maintains the power to expel a driver from performing services for MTM if it fails to comply with contractual requirements. Pls.' Mem. at 7-8. The Ninth Circuit has clearly held that control over the "structure and conditions of employment" and intervening to resolve problems between the worker and the other joint employer—all factors present here—weigh strongly in favor of joint employment, even in the absence of a role in day-to-day supervision. *Bonnette*, 704 F.2d at 1470.

Pay Rates and Methods. MTM exerts control over driver pay, including by setting the rate for each trip taken by the drivers on behalf of MTM clients. Pls.' Mem. at 9, 28. Further evidence of MTM's responsibility for compensation of drivers is that MTM may deny TSP payment requests if not sufficiently substantiated by the driver and TSPs must "look solely to MTM for payment for services rendered." CC Ex. 5, at MTM 000921.

MTM does not dispute any of this. Rather, MTM argues that because it does not "set or determine" the drivers' pay rates, that it was not involved in setting compensation. Opp. SJ at 31-32. MTM is required by law and contract to set the rates for all driver trips and have drivers complete trip logs that MTM reviews before making payments to TSPs. Pls.' Mem. at 28; MTM Ex. 2 §§ C.5.2.3.10.3, C.5.4.9.1. MTM undisputedly aids the TSPs with payroll by tracking drivers' work performed under the Services Agreement. *See, e.g.*, CC Ex. 69, at MTM 000819, 841. Finally, MTM wrongly asserts that it was "[s]imply providing revenue" to the TSPs, as distinct from determining the method of pay to drivers. Opp. SJ at 32. The case on which MTM relies to support its position is a misclassification case in which the courts held that the payment structure of the third-party entities to set a service price was typical of "a relationship between a client and an independent contractor." *See Martin v. Sprint United Mgmt. Co.*, 273 F.Supp.3d 404, 428 (S.D.N.Y. 2017). Furthermore, as is the case for the joint employment inquiry, the district

court did not limit its discussion to the service pay but rather looked holistically at the pay structure for the putative employees; in contrast to MTM's relationship to the drivers, the third-party entity did not review or exercise control over employees' logs or conduct verification to receive payment. Furthermore, MTM fails to address the Third Circuit's conclusion in a *joint employer* inquiry, that although the putative joint employer did not "select the specific wage rate" for the plaintiff workers, the putative joint employer "caps the maximum rate [the workers] may receive" and "requires [the workers] and the [participating program providers] to submit time sheets, which [the putative joint employer] then reviews before paying the [workers]," as dispositive of the entity exercising control over the method of pay. Pls.' Mem. at 28 (quoting *Talarico v. Pub. P'ships, LLC*, 837 F. App'x 81, 85 (3d Cir. 2020)).

Maintenance of Employment Records. As MTM readily admits, it maintains driver records "proving that only eligible drivers are providing transportation for the program," including records of background checks and daily trip logs completed and signed by drivers with all requisite information requested by MTM. Opp. SJ at 33. MTM also maintains copies of the drivers' driver licenses, training records, certification records, and background checks; trip assignments; MTM's inspections of drivers and their vehicles; and all accidents and incidents involving MTM clients. Pls.' Mem. at 29. MTM also keeps logs of complaints from MTM clients involving TSP drivers in order to investigate those complaints about the drivers' employment. *Id*. Yet MTM nonsensically suggests that it does not maintain employment records, based purely on the fact that MTM maintains many of these voluminous files in accordance with its contract with the District. Opp. SJ at 32-35. As discussed above (*supra* II.B.), MTM cannot obviate its status as a joint employer because some of the control it exerts over drivers stems from the District contract.

Furthermore, none of the seven cases MTM cites for this proposition are analogous to the fulsome recordkeeping in which MTM engages. Opp. SJ at 33, 35. While the putative employers in each of these cases collected *some* of the same records as MTM such that the court found that the records only constituted quality control, none of the putative employers collected or maintained the full array of records MTM does. *See, e.g.*, *Vasto v. Credico (USA) LLC*, No. 15 CIV. 9298 (PAE), 2017 WL 4877424, at *12 (S.D.N.Y. Oct. 27, 2017), *aff'd,* 767 F. App'x 54 (2d Cir. 2019) (putative employer solely maintained onboarding records); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 692 (D. Md. 2010) (onboarding records and arrival and departure data for technicians).[8]

Courts have found the breadth of records, as well as maintaining employee performance records, such as complaints, weigh in favor of this factor in the joint-employment inquiry. Mem. at 29 (citing *Perez*, 2015 WL 3451268, at *11-12; *Senne v. Kan. City Royals Baseball Corp.*, No. 14-CV-00608-JCS, 2022 WL 783941, at *49 n.21 (N.D. Cal. Mar. 15, 2022)).

Use of MTM's premises and equipment. The Court should reject MTM's suggestion that it could not exercise control over the drivers because MTM did not own the vehicles in which drivers transported its clients or the TSPs' "premises." Opp. SJ at 35-36. The nature of transportation work is that employees spend most of their worktime driving and not on any "premises" other than a vehicle, and MTM controlled what drivers did with the vehicles they drove

[8] *See also In Re Domino's Pizza, Inc.*, No.16-cv-2492 (AJN)(KNF) (S.D.N.Y. Sept. 30, 2018) (putative employer only had *access* to direct employer's records); *Zampos v. W & E Commc'ns, Inc.*, 970 F.Supp.2d 794, 804 (N.D. Ill. 2013) (onboarding records and list of terminated ID numbers, *no* performance-based records); *Godlewska v. HDA*, 916 F.Supp.2d 246, 264 (E.D.N.Y. 2013), *aff'd sub nom. Godlewska v. Hum. Dev. Ass'n, Inc.*, 561 F. App'x 108 (2d Cir. 2014) (putative employer only had *access* to direct employer's records); *Martin*, 273 F.Supp.3d at 437–38 (*access* only); *Hugee v. SJC Grp., Inc.*, No. 13 CIV. 0423 (GBD), 2013 WL 4399226, at *5 (S.D.N.Y. Aug. 14, 2013) (timesheet records were maintained, but putative employer did not use to control aspects of technicians' employment).

by dictating every trip they took for MTM clients. *See Brock*, 840 F.2d at 1060 (in independent contractor misclassification case where nurses worked in patient's homes, noting that "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control"). Regardless, drivers were trained at MTM's facility, carried MTM-related information in and on their vehicles, completed daily trip logs that carried MTM's logos, and had MTM inspection stickers affixed to their vehicles. Pls.' Mem. at 30.

Integral part of MTM's work. MTM, again, advocates for an impermissibly narrow interpretation of the third *Zheng* factor to only apply to "plaintiffs [who] performed a discrete line-job integral to the putative employer's manufacturing production." Opp. SJ at 38. *Zheng* and its progeny do not support such an interpretation; while the Second Circuit certainly cautioned against "broad" interpretation of the integrity of the plaintiffs' work, it also recognized a spectrum spanning from, at one end, "piecework on a producer's premises that requires minimal training or equipment, and which constitutes an essential step in the producer's integrated manufacturing process" to, at the other end, "work that is not part of an integrated production unit, that is not performed on a predictable schedule, and that requires specialized skills or expensive technology." *Zheng*, 355 F.3d at 73. Ultimately, the court noted, "this factor, like the other factors . . ., is not independently determinative of a defendant's status[.]" *Id.* at 74.

In any event, the services rendered by the drivers are an integral part of MTM's business. In *Godlewska v. HDA*, which MTM inaccurately claims "disregarded" the third *Zheng* factor because the plaintiff in the case did not perform a discrete line job, the court did apply the factor and analogized the piecework duties of a line job to the plaintiffs' positions as home healthcare workers, ultimately holding that plaintiffs' work was not integral to New York City administration. *Godlewska*, 916 F. Supp. 2d at 264. By contrast, the drivers of MTM clients are indispensable to

the business objectives of MTM, as a company entirely dedicated to providing non-emergency medical transportation services to Medicaid and Medicare recipients. *See* MTM website, MTM, https://www.mtm-inc.net/#MTMLink (last visited Oct. 20, 2022) (referring to MTM as a "one-stop solution for Medicaid and Medicare transportation"). Drivers perform a discrete job—the transportation itself—"forming an integral part of the putative joint employer's . . . overall business objective[.]" *Zheng*, 355 F.3d at 68; *see* Pls.' Mem. at 30-31.

No material difference between contracts. It remains undisputed that drivers could pass from one TSP to another without material changes to their work responsibilities, such that this factor weighs in favor of MTM's joint-employer status. Pls.' Mem. at 31-32 (citing *Zheng*, 355 F.3d at 72; *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997)). While the individual trip rates enumerated in the Service Agreements are distinct between TSPs, MTM otherwise uses a standardized contractual agreement with all TSPs that stipulates how TSPs, and drivers, must perform NEMT work with exacting detail. Pls.' Mem. at 1-2. MTM contends without case support that the minutiae that TSPs control—such as whether to provide weekly or daily schedules or how drivers request time off—override MTM's use of standardized contracts that dictate the terms of providing transportation services to its client. Opp. SJ at 39. Courts are unconvinced by this argument. The fourth *Zheng* factor is intended to determine if it seems possible that "responsibility *under the contracts* could pass from one subcontractor to another without material changes." *Zheng*, 355 F.3d at 74 (emphasis added). Thus, in *Barfield v. New York City Health & Hospitals Corp.*, the Second Circuit held that the fourth factor favored finding that a nurse referral agency and hospital were joint employers of a nurse where the plaintiff's "work responsibilities at [the hospital's premises] remained the same regardless of which agency referred her for a particular assignment." 537 F.3d 132, 145 (2d Cir. 2008). Here, a reasonable factfinder

could find that, *as specified by the terms of the Service Agreements*, employment duties could pass between entities without material changes. Pls.' Mem. at 31-32 (collecting cases). Indeed, MTM itself cites to the testimony of numerous drivers who *did* pass to different TSPs without material changes.[9]

Exclusivity or predominance of work. Courts have held that this factor "would weigh in favor of joint employment if a subcontractor worked solely for a single client but had the ability to seek out other clients at any time." *See, e.g*, *Zheng*, 355 F.3d at 75 n.12. Here, MTM is contractually required to subcontract with the TSPs, which directly employ the drivers, thereby solidifying a permanent pipeline from which MTM has assumed the traditional indicia of employment. Pls.' Mem. at 32. While there are certainly TSPs that worked exclusively for MTM, Plaintiffs need not show that drivers only serviced MTM clients to meet this factor but, rather, that drivers' duties related to non-emergency medical transportation were performed exclusively with MTM or approved by MTM. *See Barfield*, 537 F.3d at 150 (acknowledging that plaintiff "was not employed as a full-time Bellevue employee," but that the work assigned was performed at the request of or approved exclusively by the putative employer). Here, it is undisputed that MTM's Services Agreements with the TSPs prohibit TSPs from subcontracting with other companies to provide the same services it provides to MTM without prior written approval from MTM. CC Ex. 5, at MTM 000916. MTM's reliance on *Zampos* and *Layton* is misplaced, as the courts explicitly

[9] *See, e.g.*, MTM Ex. 26, Resp. to Interrogs. Nos. 8 & 9 for Nakesha Vasser ("My duties, schedule, and communication about both stayed consistent between Dip & Sons and The Galaxy because these features of the work were controlled by MTM."); MTM Ex. 29, Resp. to Interrogs. No. 4 for Richard Smith (stating that across three different TSPs, Smith's duties as a driver were identical—"my job as a non-emergency medical transportation driver is to transport consumers to and from medical appointments"); MTM Ex. 31, Resp. to Interrogs. No. 5 for Que-Anna Evans (same; worked for two different TSPs); MTM Ex. 35, Resp. to Interrogs. No. 8 for Derrick Ford (same; worked for three different TSPs); MTM Ex. 36, Decl. of Michael Branch ¶ 2 (same; worked for three different TSPs).

note that those contracts are "non-exclusive" without reference to similar prohibitions on work embedded into the relevant employment contracts. Opp. SJ at 37.

E. MTM Meets the Definition of a General Contractor Such That It is Liable for Violations of D.C. Wage Laws by Its Subcontractors

1. TSPs are subcontractors to MTM within the plain meaning of the statute

MTM is a general contractor within the meaning of the D.C. wage laws. Pls.' Mem. at 33-34. The Court already stated at an early stage of the proceedings that MTM and the TSPs "comfortably fit within the definitions of general contractor and subcontractor, respectively," and the evidence of such has only grown since then. Mem. Op. & Order 19, ECF No. 21 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); *see* Pls.' Mem. at 33-34. Yet in an attempt to avoid liability, MTM argues that it does not hold a general contractor/subcontractor relationship with the TSPs within the meaning of the District's wage payment statutes. Opp. SJ at 54. MTM misunderstands the plain meaning of these terms, as well as the intent of the D.C. Minimum Wage Revision Act, D.C. Code § 32-1012(c), and the D.C. Wage Payment and Collection Law, D.C. Code § 32-1303(5).

The DC wage laws are structured to ensure that all employees under a covered contract are paid consistent with the statutes, by attaching joint and several liability to a general contractor for the wage violations of its subcontractor. D.C. Code § 32-1012(c); D.C. Code § 32-1303(5). The intent of these statutes is to provide an alternative path to placing liability on the entity with the power to remedy wage-payment problems, without having to use the cumbersome multi-factor tests for establishing joint-employer status. In the face of this broad, remedial, worker-friendly statutory framework, MTM hangs its hat on its unsupported contention that the TSPs are not its subcontractors because MTM is prohibited from performing the duties delegated to the TSPs itself. MTM can reach this conclusion only by ignoring the numerous examples of contractual

relationships in which the general contractor hires subcontractors to perform duties that the general contractor does not have the personnel or equipment to do on its own. *See Chi. Dist. Council of Carpenters Pension Fund v. Vacala Masonry, Inc.*, 946 F. Supp. 612, 621 (N.D. Ill. 1996) ("VCI is a general contractor, responsible for overseeing an entire project, while VMI is a subcontractor, only responsible for performing the masonry or carpentry work on a given project. Far from being a distinction without a difference, this distinction in the scope and purpose of VCI's and VMI's work is a critical indication that VMI and VCI serve different purposes and customers."); *see also* Michael T. Callahan et al., *Construction Disputes: Representing the Contractor* § 10.02 (4th ed., 2022) (noting that the general contractor procures subcontractors "to perform certain portions of the work *that the general contractor is not capable or desirous of performing*" (emphasis added)); 5 *Litigating Tort Cases* § 65:4 (Sept. 2022 update) (noting that general contractor coordinates work of subcontractors and "typically does not retain a sizable labor force"); Sarah B. Biser et al., *New York Construction Law Manual* § 3:1 (2d ed.) (Oct. 2022 update) ("Rare is the general contractor that performs all the necessary work and provides all needed materials by itself."). And while its contract with the District prohibits MTM from performing transportation services itself, it certainly contemplates that MTM will "farm[] out" those duties to other entities. *See* MTM Ex. 2, § C.3.7; Opp. SJ at 56.

Furthermore, MTM spills much ink to convince the Court that it only exercises "quality control" under its contract with the District over the TSPs. This contention only further evidences MTM's role as a general contractor. The D.C. Contracts clearly contemplate that MTM will manage the NEMT service system in the District, including contracting with, managing, and supervising the TSPs that provide NEMT. In this capacity, MTM serves as the general contractor for the subcontractor TSPs through which service to MTM clients is provided. While MTM argues

that it is contrary to the District's intent to hold MTM liable for the TSPs' wage violations, the Contract itself disagrees. MTM's contract with the District requires MTM to "comply with the most recent versions and future versions of all federal and District of Columbia laws . . . regulations, policies and subsequent amendments in the operation of its program." MTM Ex. 2, § C.2. For these reasons, and those expanded upon in Plaintiffs' opening brief, MTM qualifies as a "general contractor" as a matter of law under D.C. wage laws.[10]

2. Plaintiffs' claims under D.C. law are not preempted by the Medicaid Act and its implementing regulation.

MTM argues that plaintiffs' claims under D.C. law are preempted by 42 U.S.C. § 1396a(a)(70)(B) and 42 C.F.R. § 440.170(a)(4)(ii). Opp. SJ at 51. According to MTM, that statute and the implementing regulation require a separation between MTM and the TSPs that, as a matter of law, precludes a finding that MTM is a joint employer or a general contractor within the meaning of D.C. wage laws. MTM is not correct.

The statutory provision on which MTM relies, 42 U.S.C. § 1396a(a)(70)(B), allows a state to establish an NEMT brokerage program by contract so long as it requires the NEMT broker to avoid conflicts of interest as established by regulation. The regulation, 42 C.F.R. § 440.170(a)(4)(ii), prohibits an NEMT broker from using its own employees to provide NEMT services or from subcontracting with a TSP with whom the broker has an ownership or investment interest or compensation arrangement. The District's contract with MTM incorporates the regulatory requirements.

[10] Under a similar program administered by MTM in Texas, the TSPs were considered a subcontractor of MTM. *First Option EMS v. Med. Transp. Mgmt., Inc.*, No. CV G-13-277, 2014 WL 12537070, at *1 (S.D. Tex. Sept. 5, 2014), *report and recommendation adopted,* No. CV G-13-277, 2014 WL 12539245 (S.D. Tex. Sept. 24, 2014).

MTM argues that—regardless of whether its involvement in determining the drivers' terms and conditions of employment compels the conclusion that it is a joint employer for purposes of the FLSA, and by extension the D.C. wage laws that incorporate the FLSA's expansive definition of "employ,"—MTM cannot be held liable as a joint employer under D.C. law because doing so would mean that it had violated the federal financial conflicts of interest provisions by using its own employees to provide NEMT services. Opp. SJ at 51. Nothing in the statute or regulation it cites, however, supports MTM's theory that an NEMT broker cannot be held liable for wage violations when the facts establish that it is a joint employer. At most, finding that MTM is a joint employer *may* mean that MTM has breached its contract with the District because the District required that MTM not employ drivers, and, in turn, the District's NEMT program may not be in compliance with 42 C.F.R. § 440.170(a)(4)(ii). But such consequences do not establish preemption of the D.C. wage laws that incorporate the FLSA's definition of "employ." That an entity is found to be a joint employer under the FLSA's expansive definition, such that it is jointly and severally liable for the payment of wages is a wholly separate inquiry from whether it has violated other contractual or regulatory provisions that rely on more traditional definitions of "employ." But, in any event, such consequences do not mean that the wage payment laws cannot be enforced.

MTM also argues that to the extent its quality control function supports a finding that it is a "general contractor" and the TSPs "subcontractors" for purposes of the D.C. Minimum Wage Revision Act, D.C. Code § 32-1012(c), and the D.C. Wage Payment and Collection Law, D.C. Code § 32-1303(5), those laws are preempted because that "type of relationship … is explicitly prohibited under federal law." Opp. SJ at 53. MTM is wrong because the regulations at issue do not preclude general contractor/subcontractor relationships between NEMT brokers and TSPs. Rather, the regulations only prohibit subcontracting to a TSP with whom the broker has a financial

conflict of interest. *See* 42 C.F.R. § 440.170(a)(4)(ii)(A). There is no evidence that MTM has a financial interest in any of the TSPs with which it qualifies as a joint employer.

Finally, MTM's argument that its quality control function cannot support a finding of general contractor liability under the D.C. wage laws because the regulations require that it engage in quality control makes no sense. If MTM's quality control functions render it a general contractor jointly and severally liable for the wage violations of its subcontractors, the reason MTM engaged in quality control is irrelevant. *See supra* 4-5. Indeed, MTM's engagement in control of the drivers in pursuit of its quality control of their work is fully consistent with the joint and several liability such control creates, as the liability exposure creates additional incentive to ensure the quality control is effective.

F. MTM Has Failed to Justify Judgment in Its Favor Pursuant to Rule 56(f)

MTM has apparently invited the Court to grant summary judgment in its favor, notwithstanding that it has offered no affirmative record on which such judgment is warranted. Opp. SJ at 11. Nothing in the record that Plaintiffs have presented supports judgment in favor of MTM. Furthermore, the two legal grounds upon which MTM attempts to find refuge from liability—the control MTM exercises over the drivers is limited to "quality control" under the contract, and a cursory reference to the Medicaid Act—fail to justify summary judgment, for the reasons set forth above. *Supra* II.B., II.E.2.

To the extent that the Court finds that Plaintiffs have not met their burden to demonstrate that MTM is a joint employer and/or general contractor based on the undisputed material facts, this case should proceed to trial. MTM's half-hearted effort to seek judgment pursuant to Rule 56(f) should not be countenanced. MTM does not provide a distinct basis for its request for the Court to grant summary judgment in its favor. If MTM contends that the same facts upon which Plaintiffs rely support judgment in favor of MTM, that claim is wholly implausible and, in any

event, not one that MTM has made. Plaintiffs have relied on MTM's own evidence in their motion because it provides an undisputed record from which to show that MTM is a joint employer. Plaintiffs submit that they remain entitled to judgment. In the alternative, the evidence on quality control is disputed and resolution of this issue is not appropriate for summary judgment.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiffs' motion for partial summary judgment, the undisputed facts point to the inescapable conclusion that MTM is a joint employer and general contractor of the drivers.

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Respectfully submitted,

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