

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MAINTAINING
CLASS CERTIFICATION FOLLOWING REMAND**

The Court of Appeals has remanded this Court's certification of an issue class under Federal Rule of Civil Procedure 23(c)(4) for further consideration and explanation of how the issue class meets Rule 23(a) and (b)'s preconditions to class status. The Court of Appeals did not vacate the certification order, which remains in effect. Plaintiffs respectfully request that the Court continue to maintain this case as a class action and that it issue an amended opinion and certification order to address the issues identified by the Court of Appeals.

BACKGROUND

On July 26, 2019, plaintiffs filed a motion seeking certification under Rule 23(b)(3) of the following class: Drivers who have provided transportation service to MTM clients in the District of Columbia under any contract with the District of Columbia at any time from three years prior to the filing of this action through the date on which notice is issued affording the right to opt out of any class certified pursuant to Rule 23(b)(3). ECF No. 134. Plaintiffs also sought appointment of class representatives and class counsel. The Court denied plaintiffs' motion. *Harris v. Med. Transp. Mgmt., Inc.*, No. 17-1372, 2020 WL 5702085 (D.D.C. Sept. 24, 2020). The Court held

that plaintiffs met Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, *id.* at *4–*7, and it held that plaintiffs satisfied Rule 23(b)(3)'s superiority requirement: “Class-wide resolution of certain central questions—particularly MTM’s status as a joint employer or general contractor—is superior to litigating that question in dozens, if not hundreds, of individual actions.” *Id.* at *7. The Court also held that plaintiffs satisfied Rule 23(b)(3)'s predominance requirement with respect to a particular issue: “the joint liability question can be resolved through the presentation of proof common to the class, and not individualized evidence. That question, at least, meets the predominance requirement of Rule 23(b)(3).” *Id.* at *9. Nevertheless, the Court denied class certification under Rule 23(b)(3) because it found that individual differences relevant to assessing MTM’s liability to each class member would vary, precluding proof of liability with evidence common to the class. *Id.* at *9–*12. The Court requested supplemental briefing on whether it should certify an issue class under Rule 23(c)(4) as to whether MTM is a joint employer or general contractor. *Id.* at *13. On December 7, 2020, plaintiffs filed a supplemental memorandum supporting certification of an issue class. ECF No. 179. On August 6, 2021, the Court granted plaintiffs’ motion for class certification under Rule 23(c)(4) “on the issues of whether MTM is a joint employer or a general contractor.” *Harris v. Med. Transp. Mgmt., Inc.*, No. 17-1372, 2021 WL 3472381, at *11 (D.D.C. Aug. 6, 2021).

On August 20, 2021, MTM filed a Rule 23(f) petition for permission to appeal the order granting issue class certification under Rule 23(c)(4), which the Court of Appeals granted on March 17, 2022. *In re Med. Transp. Mgmt., Inc.*, No. 21-8006, 2022 WL 829169, at *1 (D.C. Cir. Mar. 17, 2022). The Court of Appeals heard argument on November 8, 2022, and issued its decision on July 18, 2023. *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746 (D.C. Cir. 2023). The Court of Appeals did not vacate this Court’s class certification order. The class certification

remains in effect and the statute of limitations remains tolled for all class members. The Court of Appeals did, however, remand the certification of the issue class for further consideration of the class-action criteria specified in Rule 23(a) and (b).

Rule 23(c)(4) allows an action to be “maintained as a class action with respect to particular issues,” so long as all four prerequisites of Rule 23(a) are met, the proposed class satisfies one of the three subsections of Rule 23(b) with respect to those issues, and an issue class is “appropriate.” As the Court of Appeals explained, Rule 23(c)(4)’s “appropriateness inquiry naturally includes the elementary class-action requirements of Rules 23(a) and (b), which ensure that class litigation is fair, suitable, and advisable—that is, appropriate.” 77 F.4th at 758.

The Court of Appeals agreed with this Court that the four class-action prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy—are satisfied. *Id.* at 759. It held, however, that this Court “failed to find that within the issues for the certified class—whether MTM is a joint employer or general contractor—common questions of law or fact predominate over individual questions ... [and] that the use of an issue class to address those questions would be a superior litigation device to other available tools for resolving the common questions.” *Id.* at 760. Plaintiffs argued on appeal that this Court had made such findings when, in its decision denying certification of the entire case under Rule 23(b)(3), it stated that “the joint liability question ..., at least, meets the predominance requirement of Rule 23(b)(3),” 2020 WL 5702085, at *9, and that class-wide resolution of MTM’s status “is superior to litigating that question in dozens, if not hundreds, of individual actions,” *id.* at *7. The Court of Appeals disagreed, holding that “the class certification judgment omitted those key determinations.” 77 F.4th at 760.

ARGUMENT

I. Common questions within the certified issues predominate over any individual ones.

The Court of Appeals explained that “[a] certified issue class should encompass a reasonably and workably segregable aspect of the litigation,” *id.*, and gave examples including “proof of a key element of a cause of action, such that there is an issue class for that element; or ... another aspect of the controversy that, if decided, would materially advance the fair resolution of the litigation,” *id.* at 761. The joint-employer and general-contractor issues easily satisfy this standard. Plaintiffs must prove that MTM is a joint employer or general contractor as an element of their D.C. wage claims. Plaintiffs’ pending motion for summary judgment on the certified issues demonstrates that the issues can be resolved based on common—rather than individualized—evidence. Further, MTM’s status as a joint employer or general contractor is not “an overly narrow issue ... that predominates as to itself.” *Id.* at 762. Rather, it is a key threshold issue that can be resolved “within a reasonably and workably segregable component of the litigation,” *id.*, either on summary judgment or at trial, and determining the issues will materially advance the resolution of the case.

II. The use of an issue class is superior to other available methods for resolving the joint-employer and general-contractor issues.

Superiority must be assessed relative to any available alternatives. Here, the alternative to resolving the certified issues on a class-wide basis would be to decertify the class and decide the FLSA joint-employer issue for the 153 drivers in the FLSA collective, and decide the joint-employer and general-contractor issues under D.C. law for the three named plaintiffs and any former absent class members, including the FLSA-collective opt-ins, who bring their own cases to pursue relief under D.C. law. Pursuing that alternative is undesirable for at least two reasons.

First, the statute of limitations is tolled for every member of the certified class. If the class is decertified, the former absent class members would need to be notified and given an opportunity to file individual cases or intervene in this one. Such a process would be extremely inefficient and result in extensive delay in a case that has already been pending for more than six years. The Court would be faced with the prospect of either having to relitigate the issues in potentially hundreds of individual cases, or delaying decision until the hundreds of individual cases were filed and consolidated under Rule 42 for resolution of the common issues. It is much more efficient for the Court to decide the issues on behalf of the entire class at the same time the Court decides the FLSA joint-employer issue for the 153 drivers in the FLSA collective. *See* 2020 WL 5702085, at *7.

Second, if the class were decertified and the joint-employer and general-contractor questions decided in MTM's favor, that decision would not bind the former absent class members, each of whom would be able to muster their own evidence and relitigate the issue. In contrast, if either issue were decided in favor of the individual plaintiffs, the former absent class members would likely be able to take advantage of the decision by asserting non-mutual collateral estoppel. Deciding the issues on a class-wide basis promotes fairness because the decision binds both ways, and it promotes efficiency because it eliminates the need to litigate the issue of non-mutual collateral estoppel.

For these reasons, the use of an issue class to resolve the joint-employer and general-contractor issues serves judicial economy, conserves the parties' resources, and will "make[] the litigation more manageable and promote[] the prompt and efficient resolution of the case." 77 F.4th at 763 (citations omitted).

The Court of Appeals identified only one alternative to class litigation, suggesting that this Court should have considered, at the time the certification motion was submitted, whether "it

remained a superior form of litigation to certify an issue class rather than to resolve the threshold questions going to MTM's potential liability by way of a partial summary judgment motion (such as the Drivers' pending summary judgment motion on MTM's status as a joint employer or a general contractor)." *Id.* Regardless of whether this case might have presented the unusual circumstances under which it would have been proper to resolve a summary judgment motion before deciding class certification, that alternative is no longer viable because this Court granted certification, the Court of Appeals did not vacate the certification order, and to decertify the class at this late date would serve no purpose but, instead, create the delays and inefficiencies described above.

III. The Court should amend its certification order to conform to the requirements of Rule 23(c)(1)(B) and to direct notice to the class pursuant to Rule 23(c)(2)(B).

In a motion filed on November 10, 2022, ECF No. 228, plaintiffs requested that the Court amend its certification order to include the class definition and appointment of class counsel, and to direct appropriate notice to the class. Plaintiffs further requested that the Court delay ruling on the pending summary judgment motion until after the class has received notice and the period for requesting exclusion has passed.

Plaintiffs explained that a certification order "may be altered or amended before final judgment," Fed. R. Civ. P. 23(c)(1)(C), and the order "must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)," *id.* 23(c)(1)(B). Plaintiffs further explained that although the class definition and identity of class counsel can be ascertained from the briefing and corresponding opinions on class certification, Rule 23(c)(1)(B) seeks to gather in one order the class definition, class issues, and appointment of class counsel. Therefore, the Court should amend its class certification order to include all the required information.

The Court should also direct notice to the class. As set forth in their motion, Plaintiffs initially failed to appreciate the need for notice following the certification of an issue class under Rule 23(c)(4). However, given the preclusive effect of a decision on the certified issues, Plaintiffs on further reflection believe that this Court should direct notice to the class because a decision on the merits of the joint-employer and general-contractor issues will resolve an element of a damages claim and bind the absent class members. In that sense, this case is a (b)(3) class action with respect to particular issues as allowed by (c)(4), and due process requires that in (b)(3) class actions absent class members receive notice of the litigation and an opportunity to participate or exclude themselves. The decision of the Court of Appeals is in accord:

Because this issue class should have been handled as a Rule 23(b)(3) class type, all of the procedural protections of such a class apply. That includes notice of class certification. ... Because the resolution of the action will bind absent class members, basic principles of due process require that they be notified that their individual claims are being resolved, and that they may opt out of the action if they so choose.

77 F.4th at 764.

CONCLUSION

The Court should maintain its certification of a class on the issues of whether MTM is a joint employer or general contractor, issue an amended opinion explaining that common questions of law or fact predominate over individual questions and that the use of an issue class to address those questions is superior to any available alternatives, and amend its certification order to include the information required by Rule 23(c)(1)(B) and to direct notice to the class.

Dated: October 3, 2023

Respectfully submitted,

/s/ Wendy Liu

Michael T. Kirkpatrick (#486293)

Wendy Liu (#1600942)

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

mkirkpatrick@citizen.org

wliu@citizen.org

Joseph M. Sellers (#318410)

Harini Srinivasan (#1032002)

Cohen Milstein Sellers & Toll PLLC

1100 New York Avenue NW, Fifth Floor

Washington, DC 20005

(202) 408-4600

jsellers@cohenmilstein.com

hsrinivasan@cohenmilstein.com

Counsel for Plaintiffs