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' RESPONSE TO DEFENDANT'S "SUBMISSION REGARDING DISTRICT OF COLUMBIA CIRCUIT'S OPINION"

Plaintiffs submit this response pursuant to the Court's September 19, 2023, Minute Order to respond to the October 3 submission (ECF No. 234) of defendant Medical Transportation Management, Inc. (MTM) regarding the maintenance of the issue class certified by this Court, in light of the D.C. Circuit's remand order. *See Harris v. MTM*, 77 F.4th 746 (D.C. Cir. 2023).

This Court has already determined that "the joint liability question …, at least, meets the predominance requirement of Rule 23(b)(3)," *Harris v. MTM*, 2020 WL 5702085, at *9 (D.D.C. Sept. 24, 2020), ECF No. 176, and that "[c]lass-wide resolution of [that] central question[] … is superior to litigating that question in dozens, if not hundreds, of individual actions," *id.* at *7. MTM's submission largely rehashes arguments that the Court rejected in making those findings. For the reasons explained in plaintiffs' opening memorandum (ECF No. 233) and below, plaintiffs respectfully request that the Court continue to maintain the issue class, that it issue an amended opinion and certification order, and that it direct notice to the class.

I. Predominance is met for the issues of whether MTM is a joint employer or general contractor.

As the D.C. Circuit stated, an issue class "should encompass a reasonably and workably segregable aspect of the litigation" and "may be appropriate where common questions predominate as to … 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." *Harris*, 77 F.4th at 760–61. Here, MTM does not appear to contest that MTM's status as a joint employer or general contractor can be resolved in a reasonably and workably segregable manner (like through the pending partial summary judgment motion or at trial). MTM also does not dispute that the issues of whether MTM is a joint employer or general contractor are key threshold questions of liability. *See* MTM Mem. 3 (stating that the "two issues" are "preliminary to the merits of the drivers' wage claims"). Further, this Court has already concluded that resolution of this "dispositive issue" on a class-wide basis will "'materially advance the litigation.'" *Harris v. MTM*, 2021 WL 3472381, at *10 (D.D.C. Aug. 6, 2021), ECF No. 187. These circumstances squarely satisfy the predominance inquiry and the D.C. Circuit's discussion of it.

Although the D.C. Circuit cautioned against "certification of an overly narrow issue class" where "the issue (inevitably) predominates as to itself," *Harris*, 77 F.4th at 762, this case does not present that concern. Rather, as this Court has stated, the certified issue class is for a key "antecedent question" that "'go[es] directly to the heart of ... liability.'" 2021 WL 3472381, at *10. MTM asserts that certification of the issue class "carve[s] away" individualized issues of liability and damages. MTM Mem. 4; *see id.* 6–7. But as the D.C. Circuit explained, issue classes may be appropriately certified where individualized damages assessments may remain, *see Harris*, 77

F.4th at 761, or the resolution of the certified issues may not fully resolve liability, *id.* at 762 (citing *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 270 (3rd Cir. 2021)).

MTM complains that resolution of the certified issues would not fully answer "the question of whether the drivers can succeed on their wage claims." MTM Mem. 7. This Court has already addressed—and rejected—that argument, explaining that "MTM's argument that an issue class is appropriate only where the issue would 'substantially resolve' the case is not supported by either the text of Rule 23(c)(4) or the case law." 2021 WL 3472381, at *10 (footnote omitted). Similarly, the D.C. Circuit stated that "Rule 23(c)(4) may be used to certify an issue that is less than an entire cause of action." *Harris*, 77 F.4th at 761.

MTM also asserts that a "multitude" of individualized questions, MTM Mem. 7, preclude the issue class from being "sufficiently cohesive," *id.* at 4 (citation omitted). "Cohesiveness" is not a separate Rule 23(b)(3) requirement, as MTM suggests. The relevant Rule 23 requirement is "predominance": the question "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) (citation omitted); *see also Lightfoot v. District of Columbia*, 273 F.R.D. 314, 329 n.12 (D.D.C. 2011) (stating that "district courts should avoid conflating the cohesiveness requirement under Rule 23(b)(2) with the predominance requirement under Rule 23(b)(3), though the two serve similar ends"). Here, as plaintiffs demonstrated in their pending summary judgment motion (ECF No. 222), and as this Court has explained repeatedly, the common questions of whether MTM is a joint employer or general contractor can be resolved using common evidence. 2020 WL 5702085, at *9; *see* 2021 WL 3472381, at *5. Although MTM asserts otherwise, MTM Mem. 7–8, this Court has already explained that in answering whether MTM is a joint employer under the FLSA, to the extent that

"evidence regarding each driver's schedule, assignments, and pay may be individualized, MTM's role in devising those terms of employment is not." 2021 WL 3472381, at *5. Moreover, such evidence does not defeat predominance because "MTM will rely on that evidence, collectively, to show that it is not a joint employer," and "[i]n that sense, even the uncommon evidence is common." *Id.*

Further, MTM's assertion that the common evidence of MTM's manuals and policies does not support MTM's status as a joint employer or general contractor, *see* MTM Mem. 7–8, confuses the propriety of class certification with the merits of plaintiffs' claims. Win or lose, the answer to the common issues will "materially advance the litigation," 2021 WL 3472381, at *10—either by "bring[ing] an end to the case" or by "answer[ing] a threshold question in Plaintiffs' favor that is necessary to make out their claims," *id.* at *9.

II. Superiority is met for the issue class.

MTM makes no serious argument that an issue class to resolve the common issues of joint employer and general contractor fails to satisfy the superiority requirement. MTM's cursory assertions that an issue class will not "make[] the litigation more manageable" or "promote the prompt and efficient resolution of the case," MTM Mem. 9, are wrong for the reasons plaintiffs have previously explained. *See* Pls. Mem. 4–6. MTM refers to plaintiffs' pending partial summary judgment motion to contend that a motion for summary judgment might be an alternative to an issue class. MTM Mem. 9. MTM offers no argument, however, to explain how that motion—or any other vehicle—would be a superior alternative. And as plaintiffs have explained, resolution of the issues on a class-wide basis is superior for at least two reasons. Pls. Mem. 5.

MTM's contention that resolution of the certified issues will not fully resolve whether plaintiffs have prevailed on their claims, MTM Mem. 9, confuses predominance with superiority:

Whereas predominance looks at the "relation between common and individual questions in a case," *Tyson Foods*, 577 U.S. at 453, superiority examines "the relative advantages of alternative procedures," 77 F.4th at 762 (quoting Fed. R. Civ. P. 23, advisory committee's note to 1966 amendment). And here, as this Court has found, "[c]lass-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." 2020 WL 5702085, at *7. That additional proceedings may be required at a later stage to determine individual damages, for example, does not negate the significant efficiencies that would result from class-wide resolution of the key threshold issues of whether MTM is a joint employer or general contractor.

III. This Court should amend its certification order and direct notice to the class.

A certified issue class requires appropriate notice to the class. *See* 77 F.4th at 764 (stating that "notice of class certification" is required for an "issue class … handled as a Rule 23(b)(3) class type"). Accordingly, this Court should amend its class certification order to include all the required information under Rule 23(c)(1)(B) and direct notice to the class. Pls. Mem. 6–7.

CONCLUSION

For the foregoing reasons, and as explained in plaintiffs' opening memorandum, 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 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 11, 2023

Respectfully submitted,

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