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' MOTION FOR CLASS CERTIFICATION

Plaintiffs Isaac Harris, Darnell Frye, Leo Franklin ("Plaintiffs") respectfully move the Court to certify their claims as a class action under Federal Rule of Civil Procedure 23. Plaintiffs seek certification 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).

In addition, Plaintiffs respectfully move for the appointment of Plaintiffs Isaac Harris, Darnell Frye, Leo Franklin as representatives of the class, and for the appointment of Cohen Milstein Sellers & Toll PLLC and Public Citizen Litigation Group as class counsel. The grounds for this motion are set forth in the attached Memorandum, accompanying exhibits, and additional exhibits, to be filed separately under seal.

THEREFORE, Plaintiffs respectfully request that this Court certify their claims as a class action; appoint Plaintiffs Isaac Harris, Darnell Frye, Leo Franklin as class representatives; and appoint Cohen Milstein Sellers & Toll PLLC and Public Citizen Litigation Group as class counsel under Federal Rule of Civil Procedure 23.

Dated: July 26, 2019

Respectfully submitted,

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I. INTRODUCTION

This Motion seeks to certify a class of drivers who provide transportation services to clients of Defendant Medical Transportation Management, Inc. ("MTM"), which MTM has contracted with the District of Columbia to provide. Plaintiffs claim, and will prove by evidence common to the proposed class, the following elements that together will establish liability by MTM to members of the class:

1. MTM jointly employs the drivers because it controls or allocates responsibility with the subcontractors in setting the essential terms and conditions of the drivers' employment—their working conditions, the circumstances in which they may be hired and fired, and their compensation. Further, MTM oversees the drivers' work and they are economically dependent on MTM.

2. MTM compensates the drivers by paying the subcontractors prescribed amounts for each trip the drivers provide to MTM clients.

3. MTM refuses to pay the drivers for all time they work.

4. In particular, MTM does not pay the drivers for time expended driving between trips provided to MTM customers, waiting for MTM customers, assisting MTM customers with limited mobility, and maintaining the vehicles, all during the continuous workday. In addition, MTM pays rates for trips that generally do not vary by the length of the trip or amount of time the trips consume.

5. As a result of these practices, the wages paid to the drivers jointly employed by MTM will be shown on average, by just and reasonable inference, to fall below the legally required minimum levels.

6. The amounts of unpaid wages owed to each member of the putative class, if any, can be adjudicated by means that are manageable and will distinguish between those class

members entitled to relief and those who are not.

The drivers in this case work long hours, often more than 60 hours per week, with meager compensation. Common evidence will show that compensation MTM pays for the services delivered to its clients, on average, falls below the D.C. minimum wage, D.C. Code §§ 32-1001, *et seq.*, the D.C. living wage, D.C. Code §§ 2-220.01, *et seq.*, and the applicable prevailing wage rates under the Service Contract Act.[1] These failures, in turn, violate the D.C. Wage Payment and Collection Law, D.C. Code § 32-1302. Due to the time and expense of litigation, any one driver is ill-positioned to hold MTM accountable for its systemic wage violations absent class certification. Therefore, Plaintiffs bring this motion to certify their claims as a class action.

II. FACTUAL BACKGROUND

A. MTM Has Contracted with the District of Columbia and with Managed-Care Companies to Provide Non-Emergency Medical Transportation ("NEMT") in D.C. and the Surrounding Areas.

The primary service MTM provides the District of Columbia is transportation for medical appointments for D.C. residents eligible for Medicaid, a service referred to as non-emergency medical transportation ("NEMT"). MTM also provides the District transportation for children to their schools, a service that makes up a very small percentage of MTM's work in D.C., less than 10% of trips. *See generally* Award/Contract between the Superintendent of Education and MTM, attached as Ex. 1; Excerpts from the 30(b)(6) Dep. of Michelle Moses, Mar. 14, 2019 ("Moses II"), 65:4-9, to be filed separately under seal as Ex. 2. In addition to the services MTM

[1] Plaintiffs do not attempt to bring a private claim under the Service Contract Act. Rather, Plaintiffs allege that MTM's failure to pay the applicable wage rates under the Service Contract Act violates D.C. Wage Payment and Collection Law, D.C. Code § 32-1302. In addition, Plaintiffs assert minimum wage and overtime claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* The court has conditionally certified the collective action for these claims. *See generally* Order, ECF No. 48. Because the FLSA claims are not subject to this motion for class certification, Plaintiffs do not address them here.

provides for D.C, MTM provides NEMT services for private "managed-care companies" for D.C. residents with private insurance. *E.g.* Medical Transportation Services Agreement between MTM and Medstar at MTM 003597, to be filed separately under seal as Ex. 3. These NEMT services for managed-care companies are the same as those provided to the D.C. government; the only difference is the types of destinations that qualify as medical appointments. Moses II Dep. 60:12-61:7, Ex. 2.

MTM has a series of contracts with D.C. to provide the NEMT and school transportation services to the District. *See, e.g.*, Excerpts from Award/Contract between the Department of Healthcare Finance and MTM at MTM 000002, attached as Ex. 4; Ex. 1. The cost of the contracts with D.C. is for more than $100,000, thereby implicating the requirement that MTM must pay its employees the wages required under the Living Wage Act., D.C. Code § 2-220.03(a). These contracts explicitly require compliance with the Service Contract Act and incorporate prevailing wage determinations made by the U.S. Department of Labor under the Service Contract Act. Ex. 4 at MTM 000312; Ex. 1 at 16. MTM also has a series of contracts with private managed-care companies to perform NEMT services for D.C. residents with private insurance. *E.g.* Ex. 3.

MTM has, in turn, entered into Service Agreements by which subcontractors' drivers perform the transportation services outlined in both the D.C. NEMT Contract and the managed-care contracts. *See generally* Medical Transportation Services Agreement between MTM and Star Transportation, attached as Ex. 5; Moses II Dep. at 56:14-57:6, Ex. 2; MTM Resp. to Plaintiffs' Second Requests for Production, No. 13, attached as Ex. 6 ("[S]ee contracts between MTM and transportation providers that were previously produced by MTM; there are no separate contracts between MTM and the transportation providers with respect to managed care

organizations."). The Service Agreements do not distinguish between Medicaid trips and managed-care trips, and the drivers perform trips submitted by MTM without distinction as to whether the trip is a managed-care trip or a Medicaid trip. *See generally* Ex. 5; Moses II Dep. at 60:12-61:7, Ex. 2. Plaintiffs and the putative class members provide the actual transportation for Medicaid recipients and individuals with managed-care insurance to and from various medical appointments. Excerpts from the 30(b)(6) Dep. of Michelle Moses, December 20, 2018 ("Moses I") at 25:17-19, to be filed separately under seal as Ex. 7; Excerpts from the Dep. of Leo Franklin ("Franklin") at 24:14-17, 34:16-35:1, attached as Ex. 8; Excerpts from the Dep. of Darnell Frye ("Frye") at 98:11-98:14, attached as Ex. 9; Excerpts from the Dep. of Isaac Harris ("Harris") at 56:6-9, attached as Ex. 10.[2] Each of the Plaintiffs and putative class members worked for MTM

[2] *See also* Decl. of Leo Franklin at ¶ 2, attached as Ex. 11; Decl. of Darnell Frye at ¶ 2, attached as Ex. 12; Decl. of Isaac Harris at ¶ 2, attached as Ex. 13; Decl. of Carol Adams at ¶¶ 1,2, attached as Ex. 14; Decl. of Lenora Adams at ¶¶ 1,2, attached as Ex. 15; Decl. of Maurice Alexander at ¶¶ 1,2, attached as Ex. 16; Decl. of Michael Banks at ¶¶ 1,2, attached as Ex. 17; Decl. of Michael Branch at ¶¶ 1,2, attached as Ex. 18; Decl. of Ashley Brinkley at ¶¶ 1,2, attached as Ex. 19; Decl. of Anthony Brockington at ¶¶ 1,2, attached as Ex. 20; Decl. of Patricia Byrd at ¶¶ 1,2, attached as Ex. 21; Decl. of Reginald Cox at ¶¶ 1,2, attached as Ex. 22; Decl. of Donnell Dixon at ¶¶ 1,2, attached as Ex. 23; Decl. of Signe Douglas at ¶¶ 1,2, attached as Ex. 24; Decl. of Tina Edwards at ¶¶ 1,2, attached as Ex. 25; Decl. of Daniel Faison at ¶¶ 1,2, attached as Ex. 26; Decl. of Derrick Ford at ¶¶ 1,2, attached as Ex. 27; Decl. of Ramont Gray at ¶¶ 1,2, attached as Ex. 28; Decl. of Angelo Gregory at ¶¶ 1,2, attached as Ex. 29; Decl. of Stanley Haigler at ¶¶ 1,2, attached as Ex. 30; Decl. of Helen Hall at ¶¶ 1,2, attached as Ex. 31; Decl. of Theodore Hammond at ¶¶ 1,2, attached as Ex. 32; Decl. of Maxine Hampton at ¶¶ 1,2, attached as Ex. 33; Decl. of Robert Harper at ¶¶ 1,2, attached as Ex. 34; Decl. of Dante Hinton at ¶¶ 1,2, attached as Ex. 35; Decl. of Valerie Holmes at ¶¶ 1,2, attached as Ex. 36; Decl. of Ronald Jackson at ¶¶ 1,2, attached as Ex. 37; Decl. of Philip Johnson at ¶¶ 1,2, attached as Ex. 38; Decl. of Louis Luck at ¶¶ 1,2, attached as Ex. 39; Decl. of Katrina Means at ¶¶ 1,2, attached as Ex. 40; Decl. of Alvin Miles at ¶¶ 1,2, attached as Ex. 41; Decl. of Joyce Nabinett at ¶¶ 1,2, attached as Ex. 42; Decl. of Christopher Osborne at ¶¶ 1,2, attached as Ex. 43; Decl. of Alonzo Pelham at ¶¶ 1,2, attached as Ex. 44; Decl. of Zanette Perkins at ¶¶ 1,2, attached as Ex. 45; Decl. of Michael Pittman at ¶¶ 1,2, attached as Ex. 46; Decl. of Peggie Scott at ¶¶ 1,2, attached as Ex. 47; Decl. of Debra Sinclair at ¶¶ 1,2, attached as Ex. 48; Decl. of Natasha Smith at ¶¶ 1,2, attached as Ex. 49; Decl. of Cynthia West at ¶¶ 1,2, attached as Ex. 50.

through various subcontractors providing NEMT services. Moses I Dep. at 25:17-19, Ex. 7.[3]

B. MTM is a Joint Employer and General Contractor liable for the wage payment violations of its subcontractors.

1. MTM's Agreements with the Subcontractors Provide for MTM's Oversight of the Drivers

MTM maintains its authority, through its Service Agreements, to control and direct each aspect of the drivers work. *See* Ex. 5 at MTM 000917-921 (listing rules for drivers and enforcement mechanisms).

i. MTM Oversees the Process of Hiring and Credentialing Drivers.

First, MTM controls the process of approving the hire of new drivers by each subcontractor to deliver services to MTM clients. *See* Ex. 5 at MTM 000920 ("No driver may perform transportation services for MTM until the driver has been fully credentialed and approved by MTM"); Moses I Dep. at 74:17-20, Ex. 7; Corporate Policy: Transportation Provider On-Site Visits, at MTM 000807, to be filed separately under seal as Ex. 51 ("MTM will review and verify all documentation before approving the transportation provider, drivers and vehicles."); Corporate Procedure: Credentialing Requirements, at MTM 003348, to be filed separately under seal as Ex. 52 (describing the "credentialing" process, including the process of

[3] *See also* Harris Decl., Ex. 13 at ¶ 1; Frye Decl., Ex. 12 at ¶ 1; Franklin Decl., Ex. 11 at ¶ 1; C. Adams Decl., Ex. 14 at ¶ 1; L. Adams Decl., Ex. 15 at ¶ 1; Alexander Decl., Ex. 16 at ¶ 1; Banks Decl., Ex. 17 at ¶ 1; Branch Decl., Ex. 18 at ¶ 1; Brinkley Decl., Ex. 19 at ¶ 1; Brockington Decl., Ex. 20 at ¶ 1; Byrd Decl., Ex. 21 at ¶ 1; Cox Decl., Ex. 22 at ¶ 1; Dixon Decl., Ex. 23 at ¶ 1; Douglas Decl., Ex. 24 at ¶ 1; Edwards Decl., Ex. 25 at ¶ 1; Faison Decl., Ex. 26 at ¶ 1; Ford Decl., Ex. 27 at ¶ 1; Gray Decl., Ex. 28 at ¶ 1; Gregory Decl., Ex. 29 at ¶ 1; Haigler Decl., Ex. 30 at ¶ 1; Hall Decl., Ex. 31 at ¶ 1; Hammond Decl., Ex. 32 at ¶ 1; Hampton Decl., Ex. 33 at ¶ 1; Harper Decl., Ex. 34 at ¶ 1; Hinton Decl., Ex. 35 at ¶ 1; Holmes Decl., Ex. 36 at ¶ 1; Jackson Decl., Ex. 37 at ¶ 1; Johnson Decl., Ex. 38 at ¶ 1; Luck Decl., Ex. 39 at ¶ 1; Means Decl., Ex. 40 at ¶ 1; Miles Decl., Ex. 41 at ¶ 1; Nabinett Decl., Ex. 42 at ¶ 1; Osborne Decl., Ex. 43 at ¶ 1; Pelham Decl., Ex. 44 at ¶ 1; Perkins Decl., Ex. 45 at ¶ 1; Pittman Decl., Ex. 46 at ¶ 1; Scott Decl., Ex. 47 at ¶ 1; Sinclair Decl., Ex. 48 at ¶ 1; Smith Decl., Ex. 49 at ¶ 1; West Decl., Ex. 50 at ¶ 1.

approving new drivers). MTM trains the subcontractors on what is needed for drivers to be approved to work, maintains an online portal for subcontractors to upload documents proving that the drivers meet MTM's requirements, and stores the drivers' information in an MTM database. Credentialing Website Training, to be filed separately under seal as Ex. 53 (training MTM subcontractors about MTM's "credentialing" process and online portal); Moses I Dep. at 75:18-77:13, 80:21-81:7, Ex. 7. MTM ultimately decides whether or not a driver is approved for hire. Ex. 53 (training MTM subcontractors about MTM's "credentialing" process and online portal); Moses I Dep. at 75:18-77:13, 80:21-81:7, Ex. 7. Subcontractors face cancellation of their contracts with MTM if they engage an unapproved driver on MTM trips. Schedule B: Liquidated Damages, at MTM 001010, to be filed separately under seal as Ex. 54; Ex. 51 at MTM 000807.

Further, in the credentialing process, a new driver must satisfy a litany of prerequisites before she can be approved to drive for MTM. *See* Medical Transportation Services Agreement Appendix B, at 1, attached as Ex. 55 (listing 14 documents or credentials that must be provided to MTM before a driver may be approved). Among other prerequisites, potential new drivers must submit to a federal background check and an internal verification by MTM that the driver does not have a negative record within the System for Award Management database, which tracks certain types of negligence and abuse complaints within D.C. Ex. 5 at MTM 000920; Ex. 55, at 1; Moses I Dep. at 82:11-22, 86:1-18, Ex. 7.[4] A potential new driver must undergo a drug

[4] *See also* Harris Dep. at 22:5-13, Ex. 10; Franklin Dep. at 34:1-35:11, Ex. 8; Frye Dep. at 119:17-19, Ex. 9; C. Adams decl., Ex. 14 at ¶ 3; L. Adams decl., Ex. 15 at ¶ 3; Alexander decl., Ex. 16 at ¶ 3; Banks decl., Ex. 17 at ¶ 3; Branch decl., Ex. 18 at ¶ 3; Brockington decl., Ex. 20 at ¶ 3; Byrd decl., Ex. 21 at ¶ 3; Cox decl., Ex. 22 at ¶ 3; Dixon decl., Ex. 23 at ¶ 3; Douglas decl., Ex. 24 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Ford decl., Ex. 27 at ¶ 3; Gray decl., Ex. 28 at ¶ 3; Gregory decl., Ex. 29 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hammond decl., Ex. 32 at ¶ 3; Hampton decl., Ex. 33 at ¶ 3; Harper decl., Ex. 34 at ¶ 3; Holmes decl., Ex.

screening. Ex. 5 at MTM 000919; Moses Ex. 55, at 1; Moses I Dep. 85:4-6; Harris Dep. at 22:12-13, Ex. 10; Frye Dep. at 141:21-142:6, Ex. 9; Franklin Dep. at 35:1-4; 168:7-168:17, Ex. 8.[5] A potential new driver must also submit her driver's license information and motor vehicle record to MTM. Ex. 5 at MTM 000917, 919; Moses Ex. 55, at 1; Moses I Dep. at 83:1-5, 84:13-85:2, Ex. 7; Franklin Dep. at 34:1-15, Ex. 8.[6]

ii. MTM Oversees the Drivers' Training Process and Trains Drivers Directly.

A potential new driver must attend various trainings, many of which are performed by MTM employees, often at MTM's offices. Ex. 55, at 1; Moses I Dep at 186:10-187:11, Ex. 7. MTM's standard agreement with the subcontractors lists trainings that must be completed by the drivers before they may be approved for hire. Ex. 55, at 1. All potential new drivers must attend a defensive driving training, Moses I Dep. at 83:6-20, Ex. 7, a CPR and first aid training, *id.* at 84:10-13, a fraud waste and abuse training, *id.* at 85:8-12, and an MTM driver certification training, which is sometimes referred to as the "DDS" training, *id.* at 85:14-22, 86:19-88:13.

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36 at ¶ 4; Hinton decl., Ex. 35 at ¶ 3. Jackson Decl., Ex. 37 at ¶ 4; Johnson decl., Ex. 38 at ¶ 3; Luck decl., Ex. 39 at ¶ 3; Nabinett decl., Ex. 42 at ¶ 3; Osborne decl., Ex. 43 at ¶ 3; Pelham decl., Ex. 44 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Pittman decl., Ex. 46 at ¶ 3; Scott decl., Ex. 47 at ¶ 3; Sinclair decl., Ex. 48 at ¶ 3; Smith decl., Ex. 49 at ¶ 3; West decl., Ex. 50 at ¶ 3.

[5] *See also* C. Adams decl., Ex. 14 at ¶ 3; L. Adams decl., Ex. 15 at ¶ 3; Brinkley decl., Ex. 19 at ¶ 3; Dixon decl., Ex. 23 at ¶ 3; Edwards decl., Ex. 25 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Ford decl., Ex. 27 at ¶ 3; Gray decl., Ex. 28 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hammond decl., Ex. 32 at ¶ 3; Hampton decl., Ex. 33 at ¶ 3; Jackson Decl., Ex. 37 at ¶ 4; Luck decl., Ex. 39 at ¶ 3; Nabinett decl., Ex. 42 at ¶ 3; Osborne decl., Ex. 43 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Pittman decl., Ex. 46 at ¶ 3; Scott decl., Ex. 47 at ¶ 3; Sinclair decl., Ex. 48 at ¶ 3; Smith decl., Ex. 49 at ¶ 3; West decl., Ex. 50 at ¶ 3.

[6] *See also* C. Adams decl., Ex. 14 at ¶ 3; Banks decl., Ex. 17 at ¶ 3; Brinkley decl., Ex. 19 at ¶ 3; ; Brockington decl., Ex. 20 at ¶ 3; Douglas decl., Ex. 24 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Gray decl., Ex. 28 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Hammond decl., Ex. 32 at ¶ 3; Hampton decl., Ex. 33 at ¶ 3; Harper decl., Ex. 34 at ¶ 3; Hinton decl., Ex. 35 at ¶ 3; Osborne decl., Ex. 43 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Scott decl., Ex. 47 at ¶ 3.

See also Harris Dep. at 21:8-9, 24:16-25:3, Ex. 10; Frye Dep. at 63:19-64:5, 64:19-65:6, 82:10-83:7, 97:22-98:3, Ex. 9 (explaining the training requirements), 141:15-144:6 (explaining that his MTM certifications transferred when he moved subcontractors); Franklin Dep. at 35:9-11; 98:13-99:2, 169:11-171:1, Ex. 8.[7] The MTM driver certification training contains at least nine individual training components, and an MTM representative trains the drivers on each component. Moses I Dep. at 88:2-8, 168:22-171:5; 186:10-187:11, Ex. 7. *See generally* Driver/Attendant Training Course: Ethics & Professionalism, to be filed separately under seal as Ex. 56 (providing training to the drivers on various standards of conduct MTM applies to their work); Assisting Passengers with Disabilities and Emergency Situation Training Course, to be filed separately under seal as Ex. 57 (providing MTM branded training about passengers with disabilities and how to respond to emergencies); Sexual Harassment, to be filed separately under seal as Ex. 58 (providing MTM branded training about sexual harassment); Moses I Dep. at 179:21-180:4, Ex. 7 (explaining that the training on sexual harassment in Exhibit 58 to this Motion was included in D.C. trainings). Drivers must submit a certificate that they completed the MTM driver certification training. Ex. 5 at MTM 000919; Moses I Dep at 188:14-17, Ex. 7;

[7] *See also* C. Adams decl., Ex. 14 at ¶ 3; L. Adams decl., Ex. 15 at ¶ 3; Alexander decl., Ex. 16 at ¶ 3; Banks decl., Ex. 17 at ¶ 3; Brinkley decl., Ex. 19 at ¶ 3; Brockington decl., Ex. 20 at ¶ 3; Byrd decl., Ex. 21 at ¶ 3; Cox decl., Ex. 22 at ¶ 3; Dixon decl., Ex. 23 at ¶ 3; Edwards decl., Ex. 25 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Ford decl., Ex. 27 at ¶ 3; Gray decl., Ex. 28 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hammond decl., Ex. 32 at ¶ 3; Hampton decl., Ex. 33 at ¶ 3; Harper decl., Ex. 34 at ¶ 3; Hinton decl., Ex. 35 at ¶ 3; Holmes decl., Ex. 36 at ¶ 4; Jackson decl., Ex. 37 at ¶ 4; Johnson decl., Ex. 38 at ¶ 3; Luck decl., Ex. 39 at ¶ 3; Miles decl., Ex. 41 at ¶ 3; Nabinett decl., Ex. 42 at ¶ 3; Osborne decl., Ex. 43 at ¶ 3; Pelham decl., Ex. 44 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Pittman decl., Ex. 46 at ¶ 3; Sinclair decl., Ex. 48 at ¶ 3; ; Smith decl., Ex. 49 at ¶ 3; West decl., Ex. 50 at ¶ 3.

Certificate of Completion, attached as Ex. 59; Franklin Dep. at 35:9-11, Ex. 8.[8] Further, MTM requires that the drivers submit to periodic retraining. Moses I Dep. at 171:22-13, Ex. 7.[9]

iii. MTM Provides Conditions for Driver Performance

MTM's standard agreement with the subcontractors lists rules that apply to the drivers and govern the performance of their work. Ex. 5 at MTM 000917-918, 934. The rules include requirements for the drivers' appearance, including that they must wear a uniform and a photo identification badge. Ex. 5 at MTM 000917 ("Drivers must maintain an acceptable standard of dress, personal grooming and behavior in order to present a neat, clean and professional appearance."), MTM 000934 ("Drivers and attendants must wear authorized uniforms (pants and shirts required) worn in an approved manner including shirts worn tucked inside the pants with no other logos than those approved by MTM"); Moses I Dep. 108:10-109:4, Ex. 7. MTM enforces the rules for the drivers contained in the service agreements with the subcontractors. Ex. 5 at MTM 000915-916; Moses I Dep at 110:14-17, Ex. 7. Moreover, MTM trains the drivers on MTM's customer service standards and how drivers can meet MTM expectations for the performance of their work. Ex. 56 at MTM 000531-535.

[8] *See also* Harris decl., Ex. 13 at ¶ 5; Frye decl., Ex. 12 at ¶ 4; Franklin decl., Ex. 11 at ¶ 4; L. Adams decl., Ex. 15 at ¶ 3; Alexander decl., Ex. 16 at ¶ 3; Byrd decl., Ex. 21 at ¶ 3; Dixon decl., Ex. 23 at ¶ 3; Edwards decl., Ex. 25 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hampton decl., Ex. 33 at ¶ 3; Holmes decl., Ex. 36 at ¶ 4; Jackson decl., Ex. 37 at ¶ 4; Luck decl., Ex. 39 at ¶ 3; Osborne decl., Ex. 43 at ¶ 3; Pelham decl., Ex. 44 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Pittman decl., Ex. 46 at ¶ 3; Sinclair decl., Ex. 48 at ¶ 3; West decl., Ex. 50 at ¶ 3.

[9] *See also* Franklin Dep. at 99:6-10, 166:3-168:7, Ex. 8; Harris decl., Ex. 13 at ¶ 5; Frye decl., Ex. 12 at ¶ 4; Franklin decl., Ex. 11 at ¶ 4; Alexander decl., Ex. 16 at ¶ 3; Cox decl., Ex. 22 at ¶ 3; Edwards decl., Ex. 25 at ¶ 3; Faison decl., Ex. 26 at ¶ 3; Gray decl., Ex. 28 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hinton decl., Ex. 35 at ¶ 3; Holmes decl., Ex. 36 at ¶ 4; Jackson decl., Ex. 37 at ¶ 4; Osborne decl., Ex. 43 at ¶ 3; Pelham decl., Ex. 44 at ¶ 3; Perkins decl., Ex. 45 at ¶¶ 4, 5; Sinclair decl., Ex. 48 at ¶ 3.

iv. MTM Monitors Driver Performance

MTM uses a variety of mechanisms to enforce the rules it imposes on the drivers and engages directly with the drivers while they are working. MTM enforces the rules passively through requirements that the drivers' vehicles contain signs on both the inside and outside. Inside the vehicles, MTM requires signs that say, "No smoking" and "No eating." Moses I Dep. at 119:7-9, 119:20-120:3, Ex. 7; Ex. 5 at MTM 000917. MTM also requires the vehicles to have MTM's name and phone number displayed on the inside of the vehicle. Moses I Dep. at 119:10-12, 119:20-120:3, Ex. 7. On the outside of the vehicles, MTM requires the subcontractor's name to be displayed and a "How's my driving?" sign with MTM's phone number to report complaints. Moses I Dep. at 119:2-5, 119:15-19, Ex. 7. MTM also oversees driver performance through its other reporting mechanisms. MTM requires drivers to report accidents and other "incidents" to MTM and to report the details on forms MTM prescribes. Ex. 57 at MTM 000418, 423. MTM also requires drivers to report incidents of sexual harassment directly to MTM. Ex. 58 at MTM 000706-707.

MTM representatives also actively monitor the drivers' performance and compliance with MTM's rules through in-person inspections. MTM representatives (interchangeably referred to as field monitors, inspectors, or liaisons) conduct random inspections in which they observe the drivers' "pick up and drop off activity," and check to see if the drivers maintain a professional appearance, carry the required identification, properly document their trips, and properly maintain their vehicles. Corporate Procedure: Field Liaisons, to be filed separately under seal as Ex. 60. *See also* Moses I Dep. at 112:10-12, 113:19-115:12, Ex. 7 (describing field monitors' random monitoring of driver behavior), 135:11-137:20 (explaining that Exhibit 60 to this Motion accurately describes the field monitors' work, except where it says they perform inspections on predetermined days of the week); Ex. 51 at MTM000807-808 (outlining the MTM

policy in which MTM employees conduct on-site visits to the subcontractors and on-street observations to monitor the drivers). MTM field monitors make their own judgments about whether the drivers' behavior complies with MTM rules. Moses I Dep. at 115:14-117:20, Ex. 7. They use a checklist provided by MTM's corporate office to determine if the vehicles and drivers meet MTM's standards and report the results of their performance assessments back to MTM. Moses I Dep. at 120:4-123:5, Ex. 7. Moreover, MTM installs surveillance cameras in some drivers' vehicles that record driver behavior. Corporate Procedure: Vehicle Surveillance, to be filed separately under seal as Ex. 61.

Finally, MTM had ultimate control over whether drivers could work for MTM. In addition to its driver approval process described above, MTM had the authority to remove drivers from service:

> *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*. Transportation Provider acknowledges that the offenses listed herein are not an exclusive listing, but that there are other offenses and pertinent circumstances which can result in the disapproval of a driver or attendant.

Ex. 5 at MTM 000920 (emphasis added).[10]

MTM maintains control over the subcontractors (and therefore the drivers) through its longstanding relationship with the District and access to the trips awarded under the D.C. Contracts and managed-care contracts. D.C. Department of Healthcare Finance, Inspection of

[10] *See also* Franklin Dep. at 172:22-173:6, 198:16-200:18, Ex. 8; L. Adams decl., Ex. 15 at ¶ 5; Banks decl., Ex. 17 at ¶ 3; Cox decl., Ex. 22 at ¶ 5; Dixon decl., Ex. 23 at ¶ 5; Douglas decl., Ex. 24 at ¶ 5; Edwards decl., Ex. 25 at ¶¶ 3, 6; Ford decl., Ex. 27 at ¶ 3; Haigler decl., Ex. 30 at ¶ 3; Harper decl., Ex. 34 at ¶ 4; Jackson decl., Ex. 37 at ¶ 12; Luck decl., Ex. 39 at ¶ 5; Nabinett decl., Ex. 42 at ¶ 5; Perkins decl., Ex. 45 at ¶ 9.

the Non-Emergency Medical Transportation Program (September 2017) at DHCF000062 n.3, 64-65, attached as Ex. 62 (explaining that MTM was awarded its first contract with the Department of Health when the NEMT program was first privatized in 2007, and between 2014 and 2016, MTM was awarded the NEMT contract through a sole source award and repeated sole-source extensions); Ex. 4; Ex. 3.

2. MTM's Payment System Does Not Pay For All Compensable Time

MTM's payment system does not compensate the drivers for all time in which they engage in compensable work by delivering services for the benefit of MTM. MTM compensates the subcontractors using a common system that categorizes trips by geographic zone, by type of trip—ambulatory (if the client can walk), paralift (if the client uses a wheelchair)—and by time of day: 6 a.m. to 5:59 p.m. vs. 6 p.m. to 5:59 a.m. Standard D.C. Medicaid Trip Rate, to be filed separately under seal as Ex. 63; Moses II Dep. at 29:11-16, 75:17-21, Ex. 2 (explaining that the rate sheet in Exhibit 63 to this Motion is the standard rate structure in MTM's NEMT contracts with all of the D.C. subcontractors). MTM pays only for the individual trip, e.g. the drive from a client's home to the hospital, or the drive from the hospital to the client's home. Moses I Dep. at 165:5-11, Ex. 7; Ex. 63. It does not pay for any of the other services drivers necessarily provide in order to deliver the transportation to MTM's clients, such as time spent waiting for clients, as MTM requires, time required to drive between client trips, time spent in traffic, and time spent on other work integral to providing the trips, such as time helping clients with limited mobility. Moses I Dep. at 163:4-164:3, 165:5-11, 166:3-20, Ex. 7; Moses II Dep. at 35:2-6, 37:11-16, 73:19-74:16, Ex. 2. In fact, the compensation MTM pays for service to its clients is not based on the time expended to perform the work; instead, the compensation is based only on the number of client trips performed. As a result, the compensation MTM pays generally does not account for the distance driven on each trip. Rather, it pays the same rate for all trips within the same

geographic "zone." For example, "Zone 1" is defined to encompass all locations with zip codes within the Washington "Beltway," which is comprised of an area encompassing all of the District of Columbia and parts of Maryland and Virginia. Moses II Dep. at 29:22-30:6, Ex. 2. Most MTM trips are compensated in accordance with the rates established for Zone 1. Moses I Dep. at 50:9-11, Ex. 7; Moses II Dep. at 30:2-6; 32:5-9, Ex. 2. As a result, the compensation paid by MTM for the services rendered to its clients does not account for the actual distance traveled, Moses II Dep. at 36:3-37:6, Ex. 2, nor does MTM consider the D.C. Minimum Wage Act, the D.C. Living Wage Act, or the Service Contract Act in setting the amounts it pays in compensation for the services rendered to its clients. Moses II Dep. at 79:16-80:5; 98:7-13, Ex. 2.

Other features of MTM's payment system and method of assigning trips contributed further to its failure to ensure the drivers are paid for all compensable work. First, MTM pays nothing for trips at which the client does not show up. Moses I Dep. at 163:18-164:3, Ex. 7. Second, MTM imposes fines on the subcontractors for a laundry list of infractions including $10.00 per occurrence for "failure to deliver an MTM passenger on time," loss of payment for the trip for "use of an unauthorized vehicle," $50.00 per occurrence for "cancellation within 24 hours or 'no show' for an MTM scheduled Provider Audit," and $25 per occurrence for "cancellation or reassignment of a trip [if not] reported … more than 24 (twenty-four) hours of trip assignment." Ex. 54; *see* Ex. 5 at MTM 000922; Moses I Dep. at 70:3-12, 72:7-11, Ex. 7.

3. Through its Payment Policies, MTM Failed to Ensure that the Drivers Were Paid the Legally Required Wages

As a joint employer, MTM has an obligation to ensure that the drivers were paid the legally required wages. In an analysis of interviews with a sample of drivers, 91.2% to 100%[11] reported being paid less than the District of Columbia Minimum Wage, and 100% reported being paid less than the D.C. living wage and the prevailing wage under the Service Contract Act.[12] Decl. of Marc Bendick, Jr., Ph.D. at ¶ 9(g), attached as Ex. 64; *see generally* Decl. of Seth Groveunder, attached as Ex. 65. The nonpayment of the legally required wages is sufficient to show MTM's liability as a joint employer for any individual driver. Nevertheless, Dr. Bendick's analysis goes further, showing that MTM's policies and practices of refusing to pay for certain categories of compensable time is insufficient to sustain the legally required wages. *Id.*, Ex. 64 at ¶¶ 9(d)–(f). Dr. Bendick's analysis of MTM's payment rates, the operating costs for the subcontractors, and the reported working hours of the drivers reveals that the maximum amount per hour amount a subcontractor can pay its drivers while remaining financially viable is $7.63 per hour, a figure that includes overtime compensation for a driver working 62 hours per week. *Id.*, Ex. 64 at ¶ 9(d).

Having developed numerous methods of control and oversight to render it a joint employer, MTM cannot simply rely on the subcontractors to pay the correct wages. To be sure, MTM can delegate the task of payment to its subcontractors, but it does so at its own risk. After delegating that task, MTM has failed to maintain records that would show that that drivers are paid for all time worked. MTM Resp. to First Requests for Production, No. 11, attached as Ex.

[11] Some drivers reported a pay range, such as $300 to $400 per week. *See, e.g.*, Scott decl., Ex. 47 at ¶ 8.

[12] This report demonstrates how a statistically representative sample could be compiled and presented at trial to show deficient wages across the class.

66. MTM sent subpoenas to 50 subcontractors requesting documentation of pay stubs and time records. *See generally* Notice of Service Pursuant to Fed. R. Civ. P. 45, attached as Ex. 67. Yet it received a paltry response, with only 6 subcontractors responding, often with incomplete records and records that show driving time but not all compensable work time. *See, e.g.,* Time record, attached as Ex. 68.

MTM's own records do not account for the drivers' payments or compensable time either. In addition to compensating by the trip, MTM appears to track only the pick-up and drop-off times of trips with passengers. *See* Transportation Provider Handbook at MTM 000841-842, to be filed separately under seal as Ex. 69 (training subcontractors on MTM's requirements for logging completed trips). MTM provides trip manifests to the subcontractors with assigned appointment times for each client as well as the addresses for the pick-up and drop-off location. Ex. 69 at MTM 000835; Trip Manifest, to be filed separately under seal as Ex. 70.[13] On a separate document, drivers are required to log the pick-up and drop-off time of each trip and obtain a client's signature verifying that the trip was completed. Ex. 69 at MTM 000841-842; Ex. 54 at MTM 001010 (providing a $5 fine "per trip with any missing pick up/drop off information").[14] MTM requires drivers to wait for clients for "a minimum of fifteen (15)

[13] *See also* C. Adams decl., Ex. 14 at ¶ 4; L. Adams decl., Ex. 15 at ¶ 4; Branch decl., Ex. 18 at ¶ 4; Byrd decl., Ex. 21 at ¶ 4; Cox decl., Ex. 22 at ¶ 4; Dixon decl., Ex. 23 at ¶ 4; Douglas decl., Ex. 24 at ¶ 4; Edwards decl., Ex. 25 at ¶ 4; Faison decl., Ex. 26 at ¶ 4; Gray decl., Ex. 28 at ¶ 3; Hall decl., Ex. 31 at ¶ 3; Hammond decl., Ex. 32 at ¶ 4; Hinton decl., Ex. 35 at ¶ 4; Holmes decl., Ex. 36 at ¶ 4; Luck decl., Ex. 39 at ¶ 4; Miles decl., Ex. 41 at ¶ 4; Perkins decl., Ex. 45 at ¶¶ 5-7; Pittman decl., Ex. 46 at ¶ 4; Sinclair decl., Ex. 48 at ¶ 4.

[14] *See also* C. Adams decl., Ex. 14 at ¶ 8; L. Adams decl., Ex. 15 at ¶ 11; Alexander decl., Ex. 16 at ¶ 11; Banks decl., Ex. 17 at ¶ 9; Branch decl., Ex. 18 at ¶ 9; Byrd decl., Ex. 21 at ¶ 11; Cox decl., Ex. 22 at ¶ 10; Dixon decl., Ex. 23 at ¶ 11; Douglas decl., Ex. 24 at ¶ 10; Edwards decl., Ex. 25 at ¶ 11; Faison decl., Ex. 26 at ¶ 10; Ford decl., Ex. 27 at ¶¶ 3, 7, 11; Gray decl., Ex. 28 at ¶ 11; Haigler decl., Ex. 30 at ¶ 10; Hall decl., Ex. 31 at ¶ 11; Hammond decl., Ex. 32 at ¶ 13; Hampton decl., Ex. 33 at ¶ 11; Harper decl., Ex. 34 at ¶ 8; Hinton decl., Ex. 35 at ¶ 9; Jackson decl., Ex. 37 at ¶ 11; Luck decl., Ex. 39 at ¶¶ 5, 9; Means decl., Ex. 40 at ¶ 8; Miles

minutes" when the drivers arrive at the clients' homes or at the location of their medical appointment for the return trip. Ex. 5 at MTM 000932. Yet, MTM does not track that waiting time. Further, because MTM only records the time spent driving a passenger, it does not record any time spent driving between trips. MTM assigns trip numbers that distinguishes between trips under the D.C. Contracts or the managed-care contracts. Moses II Dep. at 65:12-66:12, Ex. 2. *E.g.*, Ex. 70; Ex. 71. But, there is no similar method to determine whether any of the drivers' other working time is spent under the D.C. Contracts or the managed-care contracts.

III. LEGAL STANDARD

A class qualifies for certification where the proposed class satisfies all prongs of Rule 23(a) and one prong of Rule 23(b). Rule 23(a) requires that:

> (1) the class is so numerous that joinder of all members impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Plaintiffs seek to certify the class under Rule 23(b)(3), which requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The party seeking class certification must demonstrate that the requirements of Rule 23 are met by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 88 (D.D.C. 2017).

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decl., Ex. 41 at ¶ 9; Nabinett decl., Ex. 42 at ¶ 11; Osborne decl., Ex. 43 at ¶ 9; Pelham decl., Ex. 44 at ¶ 9; Pittman decl., Ex. 46 at ¶ 9; Scott decl., Ex. 47 at ¶ 4; Sinclair decl., Ex. 48 at ¶ 12. *See also, e.g.*, Daily Trip Log, to be filed separately under seal as Ex. 71.

While the court should perform a "rigorous analysis" to determine whether the Rule 23 requirements have been satisfied, an inquiry into the merits of the claims may be considered "to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 465-66 (2013).

IV. ARGUMENT

Plaintiffs have met each of the Rule 23(a) and (b) requirements and request that the Court certify 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).

A. The Proposed Class Satisfies Rule 23(a)

Class certification should be granted because Plaintiffs have met Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements.

1. The Proposed Class is Sufficiently Numerous

The putative class is sufficiently numerous to be certified under Rule 23(a) because there are estimated to be more than 800 drivers who delivered NEMT services to MTM clients during the proposed class period, making joinder of their claims impracticable, as Rule 23(a)(1) requires. Fed. R. Civ. P. 23(a)(1). As courts in the District of Columbia have certified classes comprised of at least 40 members, the size of this proposed class is more than sufficient to satisfy the numerosity requirement. *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 160 (D.D.C. 2014). Given that notice was issued to 862 potential class members whom MTM identified as having provided NEMT services to its clients during the period covered by the

FLSA collective action, the estimation that the proposed class may exceed 800 drivers is reasonable.[15]

2. Questions of Law or Fact are Common to the Proposed Class.

Plaintiffs' claims are capable of classwide resolution. The second prong, commonality, requires that Plaintiffs' claims "depend upon a common contention . . . that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Plaintiffs need only show that one issue is common to all proposed class members in order to satisfy the commonality requirement. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

The following central questions can be answered on a class-wide basis:

1. whether MTM is a joint employer of the putative class members;
2. whether MTM is a general contractor that is strictly liable for the wage violations of its subcontractors;
3. whether the time expended traveling between trips and waiting for clients is compensable;
4. whether time expended under MTM's managed-care contracts is compensable under the Living Wage Act and the Service Contract Act;
5. whether MTM's flat-rate payment system accounts for all compensable time;
6. whether MTM's failure to ensure the putative class members were paid for all compensable time violates the D.C. Minimum Wage Act and the Wage Payment and Collection Law;
7. whether MTM's failure to ensure the putative class members were paid for all compensable time violates the Living Wage Act and the Wage Payment and Collection Law; and
8. whether MTM's failure to ensure the putative class members were paid for all compensable time at the prevailing wages determined under the Service Contract Act violates the Wage Payment and Collection Law.

[15] That only 152 drivers, in addition to the Named Plaintiffs, consented to join the FLSA collective action, which drivers had to affirmatively take action to join, bears no relationship to the size of the Rule 23 class in which they would be members unless they opt out.

i. Whether MTM is a joint employer of the putative class members.

Evidence common to the class will show that MTM is a joint employer of the putative class members. Using the two-step test outlined in *Salinas v. Commercial Interiors, Inc.* to determine if joint employment exists, "courts must first determine whether two entities should be treated as joint employers and then analyze whether the worker constitutes an employee or independent contractor of the combined entity, if they are joint employers, or each entity, if they are separate employer." 848 F.3d 125, 139-40 (4th Cir. 2017). The first step asks whether the two entities "are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment." *Id.* at 141. During the second step, courts examine the following six non-exhaustive list of factors:

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) 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;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
>
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers'

> compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

Id. at 141–42. In its Order on MTM's Motion to Dismiss, the Court declined to determine whether the *Salinas* test, the set of factors outlined in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), or some other standard applied to determine whether MTM was a joint employer.[16] Mem. Op. and Order at 13-14, ECF No. 21. Instead, the Court found that Plaintiffs had pled plausible claims that the economic reality of the Plaintiffs' working arrangements showed an employment relationship with MTM. *Id.* Plaintiffs continue to maintain that the factors outlined in *Salinas* determine whether a joint employment relationship exists and that MTM is a joint employer under both the *Salinas* and *Bonnette* tests.[17] *See id.* at 13; Pl. Mem. in Resp. Mot. to Dismiss 4, 7–22, ECF No. 13. Plaintiffs' allegations about MTM's control of the drivers have only been confirmed and expanded following the 30(b)(6) deposition of MTM's designated representative, and Plaintiffs now offer ample evidence supporting their allegations. *See* Section II.B above. The choice of the legal standard that governs will present a common question of law, and whether MTM qualifies as a joint employer presents a question common to the class that will be proved with evidence common to the class.

Evidence common to the class will show that the economic realities of the putative class members' work demonstrate an employment relationship with MTM. As will be described

[16] The *Bonnette* factors examine "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1470.

[17] For a more detailed analysis of the *Salinas* test and the factors that show that the Plaintiffs were economically dependent on MTM and the subcontractors jointly, *see* Mem in Resp. Mot. to Dismiss 4, 7-22, ECF No. 13. In the interests of judicial economy, and because Plaintiffs do not need to prove the merits of their claims here, they will not recount the analysis here.

below, MTM maintains numerous and substantial associations with its subcontractors providing NEMT services, and the drivers are economically dependent on MTM and the subcontractors jointly. MTM's policy documents and testimony applicable to all class members will show that MTM jointly determined the essential terms and conditions of the putative class members' employment as NEMT drivers.

Evidence common to the class will satisfy the first step of the *Salinas* test in showing that MTM and each of its subcontractors, in the very least, share responsibility for the essential conditions of the drivers' employment. MTM's Service Agreements with each Subcontractor provide rules governing the hiring of each driver, their training, the rules and standards they must follow while working, and ultimately give MTM the authority to remove a driver from service—an act that is equivalent to termination.[18] Ex. 5 at MTM 000917-921. MTM's designated representative has confirmed MTM's practices with respect to each of the terms and conditions of employment described above. Moses I Dep. at 74:17-20, 75:18-77:13, 80:21-81:7, 82:11-22, 83:1-5, 84:13-85:6, 86:1-18, Ex. 7 (hiring); *id.* at 83:6-88:13, 171:22-13, 186:10-187:11, 188:14-17 (training); *id.* at 108:10-109:4, 110:14-17, 119:7-9, 119:20-120:3 (rules and standards); *id.* at 132:14-22 (removal from service). MTM's other policy documents and training manuals also confirm MTM's oversight in these respects. Ex. 69 at MTM 000829-831, Ex. 55 at 1 (hiring);

[18] MTM has previously argued that it is not a joint employer because the District of Columbia requires many of the rules that MTM imposes on the drivers. However, whether or not any of the requirements originated with D.C. is irrelevant where MTM satisfies the joint employer test vis-à-vis the drivers. *See* Mem. Op. 16–17 (explaining MTM's "implementation and enforcement of the District's contractually-imposed standards does not necessarily absolve it of liability"); *Hardgers-Powell v. Angels in Your Home LLC*, 330 F.R.D. 89, 110–11 (W.D.N.Y. 2019) (finding that where a regimented state home health care program allocated significant responsibility to a "participant" to provide services, who in turn hired a "fiscal intermediary," to assist in implementing the program, both the participant and fiscal intermediary were joint employers).

Ex. 55 at 1, Ex. 56, Ex. 57, Ex. 58 (training); Ex. 56 at MTM 000531-535, Understanding Cultural Competency, to be filed separately under seal as Ex. 72 (rules and standards); Ex. 60, Ex. 61, Ex. 51 (enforcement).

Evidence common to the class will satisfy the non-exhaustive factors under the second step of the *Salinas* test. Beyond the evidence of MTM's involvement in the terms of the drivers' employment described above, MTM's service agreements and other policy documents provide for MTM's enforcement of the rules and standards through inspections, on-site visits to the subcontractors' offices, and through MTM-controlled complaint and reporting procedures. Ex. 5 at MTM 000916, Ex. 60 (inspections); Ex. 51 at MTM 000807-808 (on-site visits); Ex. 57 at MTM 000418, 423 (incident reports). *See also* Moses I Dep. at 112:10-12, 113:19-117:20, 135:11-137:20, Ex. 7 (confirming that MTM engages in random inspections and on-site visits) and 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); Moses II Dep. at 48:10-21, Ex. 2 (same). MTM maintains indirect involvement in the drivers schedules through its provision of manifests containing trips which are then assigned among the drivers. Ex. 69 at MTM 000834-841. *See also* Moses I Dep. at 148:13-149:4, Ex. 7 (describing the process that MTM uses to assign trips); Moses II Dep. at 97:16-98:1, Ex. 2 (describing the factors that MTM considers when assigning trip to the subcontractors). MTM requires each driver to maintain a log of each of the trips, which MTM ultimately retains. Ex. 69 at MTM 000840-841.[19] Further, MTM has a

[19] *See also* C. Adams decl., Ex. 14 at ¶ 8; L. Adams decl., Ex. 15 at ¶ 11; Alexander decl., Ex. 16 at ¶ 11; Banks decl., Ex. 17 at ¶ 9; Branch decl., Ex. 18 at ¶ 9; Byrd decl., Ex. 21 at ¶ 11; Cox decl., Ex. 22 at ¶ 10; Dixon decl., Ex. 23 at ¶ 11; Douglas decl., Ex. 24 at ¶ 10; Edwards decl., Ex. 25 at ¶ 11; Faison decl., Ex. 26 at ¶ 10; Ford decl., Ex. 27 at ¶¶ 3, 7, 11; Gray decl., Ex. 28 at ¶ 11; Haigler decl., Ex. 30 at ¶ 10; Hall decl., Ex. 31 at ¶ 11; Hammond decl., Ex. 32 at ¶ 13; Hampton decl., Ex. 33 at ¶ 11; Harper decl., Ex. 34 at ¶ 8; Hinton decl., Ex. 35 at ¶ 9; Jackson decl., ex. 37 at ¶ 11; Luck decl., Ex. 39 at ¶¶ 5, 9; Miles decl., Ex. 41 at ¶ 9; Nabinett

long history of controlling NEMT services in D.C. Ex. 62 at DHCF000062 n.3, 64-65 (explaining that MTM was awarded its first contract with the Department of Health when the NEMT program was first privatized in 2007). MTM has direct relationships with D.C. and the managed-care companies, which the subcontractors, and therefore the drivers, rely on for trips. *See* Ex. 4 at MTM 000002; Ex. 3 at MTM 003597.

These MTM policy documents and testimony, applicable to all of the drivers, show that MTM entered into agreements with the subcontractors through which the entities determined the essential terms of the drivers' employment—their hiring, training, how they must perform their work, and the mechanisms to enforce the rules, including termination—and that the drivers' work was economically dependent on MTM. Thus, evidence common to the class will determine whether MTM is a joint employer of the class members.

ii. Whether MTM is a general contractor that is strictly liable for the wage violations of its subcontractors

Under D.C. law, a general contractor is jointly and severally liable for the wage violations of its subcontractors. D.C. Code § 32-1012(c); *id.* § 32-1303(5). MTM's role was at least that of a "general contractor" with respect to its subcontractors. In denying MTM's motion to dismiss on this basis, the Court concluded—largely based on the language of the D.C. NEMT Contracts—that "[MTM] and the transportation companies comfortably fit within the definitions of general contractor and subcontractor, respectively." Mem. Op. & Order 19, ECF No. 21. Based on largely the same information—along with further evidence of MTM's overall control of the NEMT system in D.C.—Plaintiffs contend that MTM is strictly liable for the wage

decl., Ex. 42 at ¶ 11; Osborne decl., Ex. 43 at ¶ 9; Pelham decl., Ex. 44 at ¶ 9; Pittman decl., Ex. 46 at ¶ 9; Scott decl., Ex. 47 at ¶ 4; Sinclair decl., Ex. 48 at ¶ 12.

violations of the subcontractors. Accordingly, evidence common to the class will answer whether MTM is a general contractor with respect to its subcontractors under D.C. wage laws.

iii. Whether time expended traveling between trips and waiting for clients is compensable time

The questions whether the time expended traveling between trips and time expended waiting for clients are compensable time can be answered for the putative class as a matter of law. The D.C. Minimum Wage Act defines working time as:

> all the time the employee: (A) Is required to be on the employer's premises, on duty, or at a prescribed place; (B) Is permitted to work; (C) Is required to travel in connection with the business of the employer; or (D) Waits on the employer's premises for work.

D.C. Code § 32-1002(10). The Act explicitly states that working time shall be interpreted consistently with the FLSA's definition of working time except for any references or interpretations of the Portal-to-Portal Act. *Id.* Thus, at a minimum, under both federal and D.C. law, employees are entitled to be paid for all time worked during the continuous workday, *see IBP, Inc. v. Alvarez,* 546 U.S. 21, 37 (2005), except for bona fide breaks, during which the employee must be completely relieved from duty, and which must be long enough for the employee to use the time for her own purposes, 29 C.F.R. § 785.16. Breaks of 20 minutes or less in duration are automatically compensable. *See* 29 C.F.R. § 785.18. The key determination for breaks longer than 20 minutes is whether time is spent on activities that are primarily for the benefit of the employer. *Freeman v. MedStar Health Inc.*, 87 F. Supp. 3d 249, 257 (D.D.C. 2015) (holding that hospital workers sufficiently pled compensable work during meal breaks because the activities performed—delivering linens and registering new patients—were for the primary benefit of the employer); *Blount v. U.S. Sec. Assocs.*, 945 F. Supp. 2d 88, 95 (D.D.C. 2013) (holding that security guards had sufficiently alleged a common policy of automatically deducting time for meal breaks to allow conditional certification even though there were

variations among the guards as to the extent to which they were required to perform work during their breaks); *Al-Quraan v. 4115 8th St. NW, LLC,* 123 F. Supp. 3d 1, 2 (D.D.C. 2015) (holding that the plaintiff's "meal breaks" were compensable time when they "were not taken with any regularity, and consisted primarily of him leaving the front desk and relocating to the kitchen, which was contained within the same room as the front desk, to prepare his own food. [The plaintiff] remained at all times responsible for responding to any job duties that arose while he was eating").

The D.C. Minimum Wage Act's coverage is more expansive than the FLSA because it explicitly excludes application of the Portal-to-Portal Act. D.C. Code § 32-1002(10). As a result, it defines work to include three categories that were curtailed by the Portal-to-Portal Act, "all the time the employee: (A) Is required to be on the employer's premises, on duty, or at a prescribed place; . . . (C) Is required to travel in connection with the business of the employer; or (D) Waits on the employer's premises for work." *Id*; *Dinkel v. MedStar Health Inc.*, No. CV 11-998(CKK), 2015 WL 5168006, at *7–8 (D.D.C. Sept. 1, 2015) (describing various ways in which the D.C. Minimum Wage Act disavows interpretations of the FLSA that rely on the Portal-Portal Act). As a result, compensable working time under the D.C. Minimum Wage Act includes "all employee time—whether it entails exertion or entails waiting—'controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *Dinkel*, 2015 WL 5168006, at *10 (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)).

Putative class members, as NEMT drivers, primarily drive clients to and from medical appointments. For each trip, after one client is dropped off at an appointment, the driver must then drive to another location to pick up the next client. This time spent traveling between trips

with clients is a central requirement of the position and is necessarily expended for the purpose of the employer. D.C. law addresses the compensability of this time directly, stating, "'working time' means all time the employee . . . [i]s required to travel in connection with the business of the employer." D.C. Code § 32-1002(10)(C). Further, although the Portal-to-Portal Act amended the FLSA by defining as not compensable such activity that is preliminary or postliminary to the principal activities in which the workers are engaged, the travel time that occurs here between client drop-offs and pick-ups during the workday is compensable even under the FLSA. 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, time spent waiting for clients is compensable because it is expended for the benefit of the employer. *See Dinkel*, 2015 WL 5168006, at *10. MTM requires that drivers wait for clients at least 15 minutes when they arrive at the clients' homes or at the location of their medical appointment for the return trip. 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."). *See also* Moses I Dep at 163:8-17, Ex. 7 (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). While MTM expects drivers to make other trips during the time that a client is at a medical appointment, that is not always possible, especially where the next trips assigned are not proximate to the drop-off point at which the driver is waiting for the client. Moses II Dep. 87:4-89:11, Ex. 2; Perkins decl., Ex. 45 at ¶ 16. While ordinarily drivers do not wait for long periods of time during the appointments, when the next trip is not near the drop-off point,

the drivers may be required to wait for the client in order to ensure they are available when the client is ready for a return trip.[20] In such circumstances, the waiting time is fully compensable.

As a joint employer of the putative class members, MTM had the obligation to maintain records of the drivers' working time, bona fide breaks, and pay. *See* 29 U.S.C. § 211(c); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) ("It is the employer who has the duty under § 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed."). There is no evidence that MTM maintained such records or that it ensured that the subcontractors did so on its behalf. Although MTM sent subpoenas to 50 subcontractors requesting documentation of pay stubs and time records, only six subcontractors responded.

Because MTM has failed to keep adequate records of compensable time, the Court may rely on other evidence and a just and reasonable inference to approximate the data that MTM failed to maintain. *See Akinsinde v. Not-For-Profit Hosp. Corp.*, No. 16-CV-00437 (APM), 2018 WL 6251348, at *5 (D.D.C. Nov. 29, 2018) (Judge Mehta presiding) (explaining that where the employer failed to maintain proper records, the employee's burden of proving she was compensated improperly is lessened); *Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 13 (D.D.C. 2010) ("Because the Court has already found that defendants did not maintain proper payroll records . . . the Court may approximate damages under the FLSA based on 'just and reasonable' inferences."); *Tyson Foods*, 136 S. Ct. at 1040 (holding that representative evidence

[20] In fact, MTM imposed penalty fees when drivers were late to pick up clients. Ex. 5 at MTM 000922; Ex. 54.

could be used to prove liability, where an employer failed to maintain records and the class members could have used that representative evidence in individual lawsuits).

iv. Whether time expended under MTM's managed-care contracts is compensable under the Living Wage Act and the Service Contract Act.

The questions whether the time expended under MTM's managed-care contracts is compensable under the Living Wage Act and prevailing wage determinations under Service Contract Act can be answered for the putative class as a matter of law. By its terms, the Living Wage Act applies to all work performed by the drivers that worked under MTM's D.C. contracts. As to the Service Contract Act there is no question that the respective prevailing wage determinations apply to work performed under MTM's D.C. contracts.[21] However, MTM and its subcontractors have failed to keep sufficient records differentiating between work performed under its D.C. contracts and work performed under the managed care contracts. Accordingly, Plaintiffs intend to show that MTM is required to pay the putative class members the Living Wage rate and the wage rate provided by the Service Contract Act wage determinations for all time worked, not only work performed under the D.C. contracts.

a. Living Wage Act

The Living Wage Act provides that "[a]ll recipients of contracts or government assistance in the amount of $100,000 or more shall pay their affiliated employees no less than the living wage." D.C. Code § 2-220.03(a). By its plain language, the living-wage requirement is not restricted to the hours worked by employees under a government contract. The Living Wage Act restricts the *employees* covered by the act but not the *hours* worked. *Id.* It further defines

[21] Moreover, MTM's D.C. contracts (both its NEMT Contract and its D.C. Schools contract with the District of Columbia) require MTM to follow the Living Wage Act and the Service Contract Act in paying its employees.

"affiliated employees" as "any individual employed by a recipient who received compensation directly from government assistance or a contract with the District of Columbia government ("District Government"), including any employee of a contractor or subcontractor of a recipient who performs services pursuant to government assistance or contract." *Id.* § 2-220.02. A straight-forward reading of the statute makes clear that any driver that performed work under MTM's D.C. contracts is an "affiliated employee" that "shall [be] pa[id] … no less than the living wage," regardless of whether the work occurs under the D.C. contracts. This understanding is reinforced by the relevant regulation from the D.C. Department of Employment Services, which provides that the term "affiliated employee" applies to all recipient employees and subcontractor employees, except those that "perform only intermittent or incidental services for the contract" or that receive no compensation based on the government contract. D.C. Mun. Regs. tit. 7, § 1099.1. In other words, so long as the employee works under the government contract and her work is more than "intermittent or incidental," she is entitled to the living wage for all hours worked.

Although Plaintiffs' Counsel could find no cases examining this aspect of the D.C. Living Wage Act, courts' interpretations of similar statutes are instructive. Such cases establish that the relevant determination is whether an explicit provision limits the wage law to the hours worked on the contract. In *Amaral v. Cintas Corp. No. 2*, the court found that the City of Hayward's Living Wage Order covered all hours worked where its plain language covered employees "working 'on or under the authority of' a service contract." 78 Cal. Rptr. 3d 572, 593 (Ct. App. 2008). The court noted that the City "could have easily inserted the phrase 'for hours worked on the contract,'" but did not. *Id.* at 594. Similarly, in *Aguiar v. Superior Court*, the court emphasized the importance of statutory construction and found that the Los Angeles Living

Wage Order covered all time worked because it defined employee as "any person . . . who is employed . . . as a service employee of a contractor or subcontractor on or under the authority of one or more service contracts and who expends *any of his or her time thereon*. . . . " 87 Cal. Rptr. 3d 813, 820–821 (Ct. App. 2009).

Here, the same factors reinforce that the D.C. Council intended the Living Wage Act to apply to all work done by affiliated employees, not just work specifically performed under the contract. The fact that the drafters chose to define the employees by their affiliation with the contract but not the hours indicates that the law covers all hours worked. *See Amaral*, 78 Cal. Rptr. 3d at 594–95. Indeed, other portions of the D.C. Code make clear that the D.C. Council knows how to make requirements apply to hours worked only under a contract when it wishes. For example, another subdivision provides that recipients of government contracts or assistance between $300,000 and $5,000,000 must ensure that "at least 51% of the new employees hired to work on the project or contract shall be District residents." D.C. Code § 2-219.03(e)(1)(A). But recipients of government construction contracts or assistance of $5 million or more must ensure that various percentages of "hours [worked] by trade shall be performed by District residents." *Id.* § 2-219.03(e)(1A)(A). This subdivision further specifies the such recipients may receive double credit for "hours worked" by "hard to employ" District residents and also may count "any hours worked by District residents on other completed project or contracts subject to and in excess of" these requirements. *Id.* § 2-219.03(e)(1A)(G)–(H). There can be little question, then, that the D.C. Council differentiates between hours-worked requirements and employee requirements and chose the latter in the case of the Living Wage Act.[22]

[22] Similar statutes from other localities further illustrate that local legislatures easily can and do delimit wage requirements to work performed under a particular contract. *See, e.g.*, Marin Cty. Code § 2.50.050(a) ("The County of Marin, contractors and subcontractors shall pay

The Living Wage Act's purpose further confirms its coverage extends to all work performed by affiliated employees. Its purpose of increasing the standard of living for disadvantaged workers supports that the law covers all hours worked, not just those that happen to fall under the government contract. *See* Council of the District of Columbia Committee on Government Operations, Report on Bill 16-286, at 7 (Nov. 22, 2005), http://lims.dccouncil.us/Download/1134/B16-0286-COMMITTEEREPORT.pdf. (describing the purpose of the act). In *Aguiar*, the court relied heavily on the purpose of the ordinance:

> It is difficult to conceive how the remedial purpose of raising wages and workers' standard of living is well served (or served at all) if the LWO [Living Wage Order] wages are limited to the comparatively small number of hours a month a worker may spend on the city's contract.

87 Cal. Rptr. 3d at 826. *See also Amaral*, 78 Cal. Rptr. 3d at 593 (citing the Living Wage Order's broad remedial purpose and finding that it covered all work performed). Similarly, here, the benefit to the drivers' standard of living would be curtailed if the Living Wage Act applied only to the hours worked under the contract. Because whether the Living Wage Act applies to all work done by the drivers is primarily a question of statutory interpretation, it is a question of law common to the class.

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employees a living wage *for services financed by county funds for the time those employees are engaged in providing services to the county*." (emphasis added)); San Diego Code § 22.4205 ("Covered employee means any individual employed on a full-time, part-time, temporary, or seasonal basis by (a) a service contractor *with regard to any hours worked in performance of a service contract*." (emphasis added)); Mo. Ann. Stat. § 290.300 ("Any worker employed by the contractor or by any subcontractor under the contractor who shall be paid for his or her services in a sum less than the stipulated rates *for work done under the contract*, shall have a right of action … ." (emphasis added)); N.Y.C. Code § 6-109(b)(1)(b) ("These requirements apply for each hour that the employee works performing the city service contract or subcontract."); 34 Pa. Code § 9.103(3) ("The contract provisions apply to work performed on the contract by the contractor and to work performed on the contract by subcontractors.").

b. Service Contract Act

Under the D.C. Wage Payment and Collection Law, employers are required to pay "all wages earned" to their employees on regular paydays that are at least twice per month. D.C. Code § 32-1302. The D.C. Wage Payment and Collection Law further defines "wages" as "all monetary compensation after lawful deductions, owed by an employer" and specifically includes "other remuneration promised or owed … Pursuant to a contract between an employer and another person or entity; or … Pursuant to District or federal law." *Id.* § 32-1301(3). The law further specifies that "the remuneration promised by an employer to an employee shall be presumed to be at least the amount required by federal law, including federal law requiring the payment of prevailing wages, or by District law." *Id.* § 32-1305(b). Under the Service Contract Act, all contracts made by "the Federal Government or the District of Columbia" for "an amount exceeding $2500" and "having as its principal purpose the furnishing of services in the United States through the use of service employees" must require the payment of specified prevailing wage rates and fringe benefits to "each class of service employee engaged in the performance of the contract or any subcontract." 41 U.S.C. §§ 6702, 6703(1)–(2). "Service employees" are those individuals employed under a contract "the principal purpose of which is to furnish services in the United States." *Id.* § 6701(3)(A).

The applicable prevailing wage rates under the Service Contract Act apply to the putative class members for two reasons. First, the "remuneration promised or owed" to the putative class members must be presumed to be "federal law requiring the payment of prevailing wages," D.C. Code § 32-1305(b); *see also id.* § 32-1301(3)(E)(iii), which plainly includes those required under the Service Contract Act. Because MTM's D.C. Contracts are contracts with the District of Columbia for the provision of "services," the Service Contract Act prevailing wage rates apply;

indeed, as required by the Service Contract Act, MTM's NEMT contracts with the District of Columbia specifically provide that MTM "shall be bound by the wage rates" contained in a specified Department of Labor Wage Determination. Ex. 4 at MTM 000312; *see also* Ex. 1 at 16. Moreover, MTM included the prevailing wage rates required by two DOL Wage Determinations—one for the NEMT Medicaid contracts and one for the D.C. Schools contracts—in its service agreements with the subcontractors. Ex. 5 at MTM 000938. Second, these wage rates are included in "a contract between an employer and another person or entity," D.C. Code § 32-1301(3)(E)(ii), specifically in a contract between MTM and the District of Columbia. As such, MTM has agreed to be bound by these wage determinations, and the D.C. Wage Payment and Collection Law requires that this promise by MTM be enforceable as wages earned by its employees.

Plaintiffs seek to enforce the Service Contract Act wage rates as provided by the D.C. Wage Payment and Collection Law, which explicitly adopts "prevailing wages" owed by federal law as the measure of wages promised to workers under D.C. law. D.C. Code § 32-1305(b). As another court in this district explained in analyzing an analogous claim under the D.C. Wage Payment and Collection Law based on failure to pay prevailing wage rates under the Davis-Bacon Act—a law "largely parallel to the [Service Contract Act]" for construction instead of service contracts—such a claim does not "short-circuit the [SCA]'s administrative process or embroil the Court in legal determinations Congress intended the Department of Labor to resolve." *Garcia v. Skanska USA Bldg., Inc.*, 324 F. Supp. 3d 76, 84–85 (D.D.C. 2018).

While the prevailing wage rates may be limited to work done by an employee "engaged in the performance of the contract," 41 U.S.C. § 6703(1), i.e. to work performed under the contract, MTM's failure to maintain records clearly differentiating between hours worked under

the D.C. contracts and hours worked under the managed-care contracts renders meaningless any distinction between hours worked that require the prevailing wage rate and those that do not. DOL regulations enforcing the Service Contract Act specifically require that the employer to "make and maintain for 3 years from the completion of the work records" which must contain, among other things, the appropriate Service Contract Act classification rates, and the "number of daily and weekly hours so worked by each employee." 29 C.F.R. § 4.6(g)(1). As another court in this district has explained:

> This is not merely a ministerial requirement. Under most labor laws, it is the burden of the complainant to "prov[e] that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). But because the employer, not the employee, "is in position to know and to produce the most probative facts concerning the nature and amount of work performed," the SCA, like most labor laws, charges the employer with "keep[ing] proper records of wages, hours and other conditions and practices of employment." *Id.* An employer that fails to keep such records seriously impedes efforts by employees—or, here, by the Secretary—to hold the employer accountable for violating federal labor laws.

Tri-Cty. Contractors, Inc. v. Perez, 155 F. Supp. 3d 81, 92–93 (D.D.C. 2016). Indeed, DOL regulations emphasize that contractors and subcontractors subject to the Service Contract Act must maintain "adequate records" that segregate "Government contract work" from non-contract work; where a contractor or subcontractor fails to do so, "all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance" and "an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek," unless the contractor or subcontractor provides "affirmative proof establishing the contrary." 29 C.F.R. § 4.179; *see also id.* § 4.178 (stating that unless contract and non-contract hours are "are

adequately segregated … compensation in according with the [Service Contract Act] will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract"). Given that the implications are the same, there is no reason why the Court should not also apply a similar presumption to enforcement of the prevailing wage rates under the D.C. Wage Payment and Collection Law.

Here, MTM has failed to maintain *any* records concerning the hours worked by drivers, much less records that segregate hours based on Service Contract Act-covered work and non-Service Contract Act-covered work.[23] The only records produced by MTM that appear to have been created for purposes of tracking the hours worked by drivers are scattered paystubs and timesheets from the subcontractors, none of which segregate the hours worked between the D.C. contracts and other contracts. Moreover, in the absence of records accurately segregating such time, a presumption that all hours worked for MTM are subject to the Service Contract Act is particularly appropriate here given the nature of the work performed. MTM has entered into Service Agreements by which subcontractors' drivers perform the transportation services outlined in the D.C. NEMT Contracts and the managed-care contracts. Ex. 5; Ex. 6, No. 13. The Service Agreements do not distinguish between Medicaid trips performed under the D.C. NEMT Contracts and trips performed under the managed-care contracts. *See generally* Ex. 5. The drivers perform trips submitted by MTM without distinction as to whether the trip is a managed-care trip or a Medicaid trip; for example, at each of the three Named Plaintiffs' respective depositions, counsel for MTM asked whether they could identify managed-care trips, none were

[23] While MTM may have delegated or agreed to allocate to the subcontractors the responsibility for creating such records, MTM was nevertheless required to maintain—or at least maintain access to—such records to fulfill its obligations as an employer. From meager responses to subpoenas sent by MTM to its subcontractors, such records generally either do not exist or are not available to MTM.

able to do so. Harris Dep. at 252:22-253:16, Ex. 10; Frye Dep. at 76:15-77:8, Ex. 9; Franklin Dep. at 160:5-12, Ex. 8. Indeed, MTM's 30(b)(6) deponent explained that managed-care trips are "the same service" as the D.C. Medicaid trips, Moses I Dep. at 64:19-65:2, Ex. 7, and was unable to identify the proportion of trips that were under managed-care contracts as opposed to the D.C. NEMT contracts, Moses II Dep. at 99:6-19, Ex. 2. MTM cannot benefit from its own failure to maintain records that would distinguish between the drivers work under the D.C. contracts and the managed-care contracts.

Although MTM maintains at least some trip logs and the trip ID number for each trip on a log, such records are insufficient to overcome the presumption the putative class members are entitled to. First, the trip logs are plainly not records identifying the "number of daily and weekly hours … worked by each employee" that segregate "non-covered work from the work performed on or in connection with" the D.C. Contracts. 29 C.F.R. §§ 4.6, 4.179. Instead, the trip logs are records of each trip performed and the information relevant to the completion of the trip, such as the pick-up and drop-off times, pick-up and drop-off addresses, and name of the member; they do not provide any explicit calculation of the hours worked, much less segregate the hours worked into particular categories. To the extent the information contained in the trip logs would be relied upon by MTM to segregate hours worked, MTM would bear the burden of doing so and explaining how such segregation would be accurate and clear, in light of its failure to maintain the required records in the first place.

v. Whether MTM's flat rate payment system accounts for all compensable time.

Evidence common to the class will show that MTM's common system of paying the subcontractors a flat rate per trip does not ensure that the putative class members are paid for all compensable time. MTM paid the subcontractors a flat rate per trip that did not account for the

duration of the trip and, for all trips within MTM's "Zone 1," the distance of the trip. Ex. 63; Moses II Dep at 29:11-16; 75:17-21, Ex. 2 (explaining that the rate sheet in Exhibit 63 to this Motion is the standard rate structure in MTM's NEMT contracts with all of the D.C. subcontractors). MTM has admitted that Zone 1 includes all the zip codes in D.C., Maryland, and Virginia, that are within D.C.'s "Beltway." Moses I Dep. at 50:9-11, Ex. 7; Moses II Dep. at 30:2-6, Ex. 2. *See also* Ex. 45 at ¶ 12. Thus, trips within Zone 1 are not all the same distance. In determining its rate structure, MTM has given no consideration to mileage or to smaller zones to account for differences in distance. Moses II Dep. at 36:3-37:6, Ex. 2. MTM has admitted that its rate structure does not account for the time it takes to make the trips within Zone 1. *Id.* at 37:7-10. MTM has further admitted that Zone 1 accounts for most of the trips. Moses II Dep. at 32:5-9, Ex. 2.

MTM's rates do not account for numerous other components that extends the drivers' working time. The rates do not account for time spent driving between trips. Moses I Dep. at 165:5-11, Ex. 7; Moses II Dep. at 37:11-16, Ex. 2. The rates do not account for any delays, such as those caused by traffic or construction. Moses I Dep. at 166:3-15, Ex. 7; Moses II Dep. at 35:2-6, Ex. 2. The rates do not compensate for time drivers spend waiting for clients. Moses I Dep. at 163:4-17, Ex. 7. The rates do not compensate for time driving to pick up a customer if the customer does not show up. Moses I Dep. at 163:18-164:3, Ex. 7. The rates do not account for additional time spent assisting limited mobility ambulatory customers. Moses I Dep. at 166:16-20, Ex. 7. The rates do not account for time spent walking a customer to the door or other variations in time spent helping customers. Moses II Dep. at 73:19-74:16, Ex. 2. Further, MTM's policy of assigning trips based on the location of the subcontractor's office, rather than

the drivers' location, increased the uncompensated time driving between trips. *See* Moses II Dep. at 81:3-82:4, Ex. 2 (explaining MTM's system of assigning trips).

vi. Whether MTM's rate system failed to ensure that the putative class members were paid the legally required wages under the D.C. Minimum Wage Act, the Living Wage Act, the Service Contract Act, and the Wage Collection and Payment Law.

Evidence common to the class will show that MTM's method of paying the subcontractors failed to ensure that drivers were paid the wages mandated by the Minimum Wage Act, the Living Wage Act, the prevailing wage rates under the Service Contract Act incorporated into the D.C. Contracts, and the Wage Collection and Payment Law. In setting its rates, MTM did not consider what amount would be necessary to pay the drivers the legally required federal minimum and overtime wages, D.C. minimum wage, the D.C. living wage, or the Service Contract Act wage. Moses II Dep. at 79:16-80:5, 98:7-99:4, Ex. 2.

Because MTM is a joint employer of the putative class, it has the responsibility to ensure that the drivers are paid the legally required wages. *Ventura*, 738 F. Supp. 2d at 35 (a joint employer is jointly and severally liable for wage payment violations); *Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 157 (D.D.C. 2016). It does not matter if individual subcontractors paid the drivers directly or if there are variations in the means by which the subcontractors paid deficient wages. *See Tyson Foods*, 136 S. Ct. at 1045 (upholding class certification decision despite variations in donning and doffing time). Rather, Plaintiffs need only show that MTM's payment system failed to ensure that the subcontractors paid the drivers the legal wages.

Evidence common to the class will show that MTM established low "guardrail" trip rates with only slight modifications for individual subcontractors. Moses I Dep. at 37:1-4, 29:11-16, Ex. 7. As described above, these rates did not account for most variations in the duration of

trips and did not account for any time expended on other tasks necessary to complete the trips, such as time spent driving between trips. See Ex. 63; Moses I Dep. at 163:4-164:3, 165:5-11, 166:3-20, Ex. 7; Moses II Dep. at 35:2-6, 37:11-16, 73:19-74:16, Ex. 2.[24] Further, MTM established penalty fees that further reduced the compensation to subcontractors. Ex. 5 at MTM 000922; Ex. 54. Moses I Dep. at 70:3-12, 72:7-11, Ex. 7. MTM's corporate office enforces these penalties and imposes them on subcontractors at least once per day. Moses I Dep. at 72:13-73:2, Ex. 7. These components of MTM's rate system result in payments to the subcontractors that cannot sustain the payments to the putative class members at the legally required rates.

As explained above, the Supreme Court has approved of the use of statistical sampling to prove liability through a just and reasonable inference, where, as here, the employer has failed to maintain adequate employment records. *Tyson Foods,* 136 S. Ct. at 1045. Here, MTM failed to keep records itself, and it appears from meager responses to subpoenas that such records generally either do not exist or are not available to MTM. As a result, Plaintiffs have compiled a sample of drivers—all subject to the same MTM policies that make it a joint employer—as a basis to determine the average time worked and wages paid to the drivers.

Relying on the information gathered in driver interviews, other information about the NEMT industry, and MTM's reimbursement rates, Dr. Bendick developed a methodology to estimate the maximum hourly rate a subcontractor can pay its drivers while remaining financially viable: $7.63. Bendick decl., Ex. 64 at 5. This amount includes overtime pay and assumes that the driver is working 62 hours per week. *Id.* at 4-5. Dr. Bendick's analysis further determined

[24] *See also* C. Adams decl., Ex. 14 at ¶ 5; L. Adams decl., Ex. 15 at ¶ 8; Alexander decl., Ex. 16 at ¶ 7; Byrd decl., Ex. 21 at ¶ 8; Edwards decl., Ex. 25 at ¶ 8; Ford decl., Ex. 27 at ¶¶ 6-9; Hall decl., Ex. 31 at ¶ 7; Hampton decl., Ex. 33 at ¶ 7; Nabinett decl., Ex. 42 at ¶ 8; Pelham decl., Ex. 44 at ¶ 6; Perkins decl., Ex. 45 at ¶¶ 10, 12; Pittman decl., Ex. 46 at ¶ 6; Smith decl., Ex. 49 at ¶ 7.

that MTM's reimbursement rates fail to provide the subcontractors with sufficient revenue to pay the legally required wage under any of the causes of action in this case. *See id.* at 5. Dr. Bendick concluded that he could perform the same analysis to determine the maximum feasible rate for all subcontractors and that, "[n]o employment circumstances for any driver, and no behavior for any [subcontractor], required handling outside the scope of that analysis." *Id.* at 21.

Further, if MTM is able to produce more records, such as trip manifests and trip logs, as the case proceeds through liability discovery, Dr. Bendick could perform the same analysis using those records to determine liability. *Id.* Although Plaintiffs need not prove liability at this stage, Dr. Bendick's report makes clear that the issue of liability can be determined with evidence common to the class—using a single method of analysis—if the class is certified.

3. Plaintiffs' Claims Are Typical of the Class

Under Rule 23, the class representatives' claims or defenses must be typical of those of the class. Fed. R. Civ. P. 23(a)(3). At a minimum, the class representatives' claims are typical if their "injuries arise from the same course of conduct that gives rise to the other class members' claims." *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010). Factual variations alone do not negate typicality. *Little v. Washington Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 420 (D.D.C. 2017); *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) ("But to destroy typicality, a distinction must differentiate the *"claims or defenses"* of the representatives from those of the class.").

Mr. Harris, Mr. Frye, and Mr. Franklin have claims that are typical of the class because they arise from the same course of conduct that gives rise to the claims of the absent class members, namely MTM's system of employing NEMT drivers through subcontractors and paying the subcontractors a flat rate per trip without regard to the time the drivers spent working. Mr. Harris was employed by MTM through its subcontractor, Star Transportation, from March

11, 2016, until September 24, 2016, and through its subcontractor, MBI, from November 2016 until approximately November 2018 as an NEMT driver working under MTM's D.C. Contracts. Harris decl., Ex. 13 at ¶¶ 1, 4; Harris Dep. at 33:10-34:18, Ex. 10. Mr. Frye was employed by MTM through its subcontractor Star Transportation from approximately October 2015 until approximately June 2016 as an NEMT driver working under MTM's D.C. Contracts. Frye decl., Ex. 12 at ¶¶ 1, 3. Mr. Franklin was employed by MTM through its subcontractor Generations from approximately January 2014 until approximately July 2014 and through its subcontractor Kolex Group from July 14, 2014 until September 15, 2016 as an NEMT driver working under MTM's D.C. Contracts. Franklin decl., Ex. 11 at ¶¶ 1, 3. Mr. Harris, Mr. Frye, and Mr. Franklin all allege that they were jointly employed by MTM and their respective subcontractors and they were subject to MTM's policies that gave MTM the authority to control their hiring, training, performance of the work, and termination. Complaint at ¶¶ 25-29, 29-51, 67-70, 78-81, ECF No. 1; Harris decl., Ex. 13 at 5-8, 13; Frye decl., Ex. 12 at ¶¶ 2, 4, 11; Franklin decl., Ex. 11 at ¶¶ 2, 4, 13.[25] Mr. Harris, Mr. Frye, and Mr. Franklin each allege that through its rate system MTM failed to ensure that they were paid the legally required wages under the D.C. Minimum Wage Act, D.C. Code §§ 32-1001, *et seq.*, the D.C. Living Wage Act, D.C. Code §§ 2-220.01, *et seq.*, the Service Contract Act,[26] and the D.C. Wage Payment and Collection Law, D.C. Code § 32-1302. Complaint at 22–27, ECF No. 1.

[25] *See also* Franklin Dep. at 168:7-171:21, 172:22-173:6,198:16-200:18, Ex. 8; Frye Dep. at 63:19-64:5, 64:19-65:6, 82:10-83:7, 97:22-3, 152:22-153:3, 158:21-159:18, Ex. 9.

[26] Plaintiffs and the putative class do not assert a separate cause of action under the Service Contract Act, but rather allege that MTM's failure to pay the required prevailing wages under the Service Contract Act is a violation of the D.C. Wage Payment and Collection Law, D.C. Code § 32-1302.

4. Plaintiffs and Their Counsel are Adequate Class Representatives

i. Plaintiffs are Adequate Class Representatives

The adequacy requirement ensures that absent class members are fairly represented before they are bound by the outcome of a lawsuit. *J.D. v. Azar*, 925 F.3d at 1312 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). An adequate class member (1) will not have any conflicts of interest with the class, and (2) will vigorously prosecute the interests of the class. *Id.* at 1312; *Encinas*, 265 F.R.D. at 9.

The Named Plaintiffs here have an ample interest in vigorously pursuing the class claims. No conflicts of interest exist between the Named Plaintiffs and the proposed class. The Named Plaintiffs and the proposed class seek to recover unpaid wages from MTM. Further Mr. Harris, Mr. Franklin, and Mr. Frye have all served the class by assisting with preparing the Complaint, sitting for their deposition, and working with counsel throughout this process.

i. Plaintiffs' Counsel are Adequate

In determining whether class counsel is adequate, courts consider the following factors: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Plaintiffs are represented by Cohen Milstein Sellers & Toll, PLLC, and Public Citizen Litigation Group. Counsel from Cohen Milstein have significant experience and skill in representing plaintiffs in class and collective litigation. Decl. of Joseph M. Sellers, attached as Ex. 73. Likewise, counsel from Public Citizen significant experience in public interest, class action, and wage and hour litigation. Decl. of Michael T. Kirkpatrick, attached as Ex. 74. Accordingly, the Court should appoint Cohen Milstein and Public Citizen as class counsel.

B. The Proposed Class Satisfies the Requirements of Rule 23(b) and Plaintiffs Have Proposed a Manageable Trial Plan

Plaintiffs assert class treatment under Rule 23(b)(3). Certification of a Rule 23(b)(3) class requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Both requirements are satisfied as to the class at issue here.

1. Common Questions Predominate

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance factor "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Alvarez*, 303 F.R.D. at 162 (*quoting Amchem*, 521 U.S. at 623). This test typically involves two steps: the court first categorizes the issues as common or individual before qualitatively weighing the common issues against the individual issues. *Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 85 (D.D.C. 2015). The weighing step considers whether the common issues in a proposed class action "are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (internal quotations omitted). This test does not require that the common issues be dispositive of the litigation, only that they predominate over individual issues. *Alvarez*, 303 F.R.D. at 162. Predominance is not defeated "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045.

To succeed on the merits of their claims, the primary issues that Plaintiffs and the proposed class members must establish are that: (1) MTM is a joint employer of the class

members and (2) that MTM's rate system failed to ensure that the drivers were paid for all compensable time. These issues underlie every putative class member's claim. As described in detail above, Plaintiffs will answer these questions through common representative proof, including MTM's policy documents, testimony from MTM's representative, and expert economic analysis of MTM's universal D.C. rate scheme. Individual differences, such as the precise activity that started and ended each drivers' day, the method by which the subcontractors paid the drivers, or the method by which the subcontractors communicated the schedules to the drivers, do not defeat predominance. *See Coleman through Bunn*, 306 F.R.D. at 87 (finding that minor differences among class members does not defeat predominance, especially where the differences can be addressed using a common calculation method); *Kinard v. E. Capitol Family Rental, L.P.*, No. CV 15-1935 (TJK), 2019 WL 2289490, at *5 (D.D.C. May 28, 2019) (same). MTM has previously argued, while opposing conditional certification, that any differences in the rates and methods by which the subcontractors pay the drivers defeats Plaintiffs' ability to prove MTM's liability collectively. Def.'s Opp. Mot. Conditional Cert. at 6-7, ECF No. 33. On the contrary, while such differences, if any, may bear on the remedies available to each driver, they have no bearing on the unlawfulness of MTM's conduct or Plaintiffs' ability to prove that unlawfulness through common evidence.

2. A Class Action is Superior.

The superiority factor ensures that "resolution by class action will achieve economies of time, effort, and expense as well as promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences." *Alvarez*, 303 F.R.D. at 162 (internal quotation marks and citations omitted); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (describing the purpose as articulated by the Advisory Committee for the 1966 Rule 23 revision). Class actions are superior

to other methods of adjudication "where many individuals have small claims, and otherwise would not be incentivized to pursue them." *Alvarez*, 303 F.R.D. at 162.

Where individuals allege harm caused by systemic practices and require expert analyses, class procedure is the only effective mechanism available to address such harm. The reality is that the modest economic value of individual claims makes it very unlikely that Plaintiffs, who are in low-paying positions and who are of very modest means, can afford to prosecute their claims individually. *See Amchem*, 521 U.S. at 617 (noting that the text of Rule 23(b)(3) keeps in mind vindication of the rights of people who individually would be without effective strength to bring actions at all); *Prince v. Aramark Corp.*, No. 16-CV-1477 (CKK), 2017 WL 9471949, at *4 (D.D.C. Mar. 14, 2017) (finding that class treatment was a superior method of adjudicating low-wage housekeepers' claims "because the cost to each potential class member of litigating his or her own claim would likely outweigh the damages the class member might receive at trial"); *Alvarez*, 303 F.R.D. at 162 (finding class treatment superior to adjudicate construction workers' wage claims "where many individuals have small claims, and otherwise would not be incentivized to pursue them").

Further, while some potential class members have chosen to pursue individual claims against the subcontractors, class treatment is the only reliable way to hold MTM accountable for its systemic underpayment of wages. Through this action, Plaintiffs intend to show that they were not paid lawful wages for the services they provided to MTM's clients, as MTM's rate system provides such meager compensation as to preclude its subcontractors from paying lawful wages to the drivers after their overhead costs are defrayed. Accordingly, the handful of individual claims brought against the subcontractors will neither permit relief to the other,

aggrieved drivers nor address the root cause of these unlawful wage practices, which derives from MTM's rate structure.

3. This Dispute is Manageable.

Class-wide adjudication is more manageable and efficient than separate individual proceedings, since it will permit the adjudication of overarching issues in a single proceeding and avoid inconsistent and perhaps conflicting judgments that might arise from multiple individual proceedings.[27] *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540 (N.D. Cal. 2012). As demonstrated by the trial plan described in this section, the application of a class proceeding is the "metho[d] best suited to the adjudication of [this] controversy fairly and efficiently." *Amgen*, 568 U.S. at 460 (internal quotation marks omitted).

Plaintiffs propose a two-stage trial plan. Both before and after *Dukes*, courts have routinely approved a two-stage trial plan. *Moore v. Napolitano*, 926 F. Supp. 2d 8, 33-34 n.16 (D.D.C. 2013) (granting class certification and citing the bifurcated liability and damages trial plan in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977)); *Neal v. Dir., D.C. Dep't of Corr.*, No. CIV. A. 93-2420 (RCL), 1995 WL 517248, at *9 (D.D.C. Aug. 9, 1995) (adopting a two-stage trial plan to determine liability separately from damages); *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004) ("As the district court properly noted, it can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special master or by another method."); *Ellis*, 285 F.R.D.at 539 (plaintiffs' proposed plan for addressing individualized claims and defenses in "a second phase of trial if liability is established" is appropriate). *C.f. Johnson v. District of Columbia*, 248

[27] For example, in the absence of class certification, any of the at least 888 potential class members who wish to litigate their claims would have to do so separately.

F.R.D. 46, 57 (D.D.C. 2008) (granting class certification and reserving ruling on whether to approve a damages matrix or statistical sampling to determine damages).

In the Stage I trial of this action, the Jury would consider liability to the class and adjudicate factual issues necessary to that liability determination. The liability issues common to the class are set forth below for the FLSA Claims, the D.C. Minimum Wage and Wage Payment and Collection Law claims, the D.C. Living Wage Act and Wage Payment and Collection Law claims, and the Wage Payment and Collection Law claims for nonpayment of the prevailing wages under the Service Contract Act.

STAGE 1--Liability: Plaintiffs will prove liability with evidence common to the class.

First, Plaintiffs will use evidence common to the class to demonstrate at trial that MTM is a joint employer to members of the class and is the general contractor to the subcontractors under D.C. law. To do so Plaintiffs will provide evidence that may include:

(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 will use evidence common to the class to demonstrate at trial that, despite the payment systems used by various subcontractors, wage violations occur across subcontractors because of the shortcomings in MTM's system that does not provide compensation for:

(a) time spent driving between trips,
(b) time spent waiting for clients,
(c) time spent assisting clients with limited mobility,
(d) time spent inspecting and maintaining the vehicles, and
(e) time spent receiving trip manifests or routes.

Third, Plaintiffs will use evidence common to the class to demonstrate at trial that MTM's compensation rates do not account for variations in trip time caused by the following:

(a) traffic,
(b) construction,
(c) variations in the lengths of trips for all trips within MTM's Zone 1,
(d) variations in the lengths of trips for all trips from MTM's Zone 1 to MTM's Zone 2, and
(e) variations in the lengths of trips for all trips from MTM's Zone 1 to MTM's Zone 3.

Fourth, Plaintiffs will use evidence common to the class to demonstrate at trial that, as a consequence of the deficiencies described above, MTM's compensation to subcontractors is insufficient to ensure that drivers will be paid the federal minimum wage, the D.C. minimum wage, the D.C. living wage, and prevailing wages determined under the Service Contract Act, including corresponding overtime. Plaintiffs will establish the insufficiency of MTM's compensation using the same model of analysis that Dr. Bendick provided for this Motion. *See generally* Ex. 64. Dr. Bendick's report illustrates how the economic model operates. In consultation with Dr. Bendick, Plaintiffs' counsel gathered information from putative class members with which to compute the average time expended and wages paid for the drivers surveyed. Before the first stage of the trial, plaintiffs will collect data using statistical sampling methods that can be analyzed using this model to show that MTM's compensation system is insufficient to ensure that the drivers are paid the legally required wages.

Finally, the Jury will decide:

1. Whether MTM is a joint employer of the putative class;

2. Whether MTM's compensation system fails to ensure that the putative class members were compensated at the required minimum and overtime wages under the FLSA, the D.C. Minimum Wage Act, the D.C. Living Wage Act, and the Service Contract Act;

3. Whether each of these deficiencies results in a violation of the Wage Payment and Collection Law.

STAGE 2 –Damages:

In the second phase of trial, the Jury will decide:

1. The amounts of back pay awarded to class members eligible for such relief.

The Court need not specify the procedures for the Stage II trial at this time. However, examining procedures used by other courts in Stage II trials (such as the use of class-wide calculations of damages or an efficient claims process) underscores the manageability of this case as a class action.

Class-wide Calculation of Damages. In the second trial stage, Plaintiffs will conduct statistical sampling to determine the damages owed to the class members. Monetary damages such as back pay owed to individual class members may be calculated for the class as a whole. *See also Ellis*, 285 F.R.D. at 538 n.38 (presenting calculation of class-wide damages). In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court approved use of statistical sampling to determine damages in a wage and hour collective action where the plaintiffs were challenging the same employment practices and they were required to estimate the amount of unpaid time worked where the employer had failed to maintain legally-required records, as has occurred here. 136 S. Ct. at 1045.

If the Jury finds that MTM violated the FLSA, the D.C. Minimum Wage Act, the D.C. Living Wage Act, and/or the DCWPCL, Plaintiffs will present statistical evidence to estimate the amount of unpaid work from a sample of drivers and the corresponding amount of wages owed

eligible drivers. The sample collected to date is not necessarily a representative sample but provides a model for analyzing damages if Plaintiffs are permitted to proceed as a class.[28] Dr. Bendick's report, Ex. 64.

Efficient Notice and Claims Process. Alternatively, the Court may establish a notice and claims procedure in order to "implement a workable process by which the … potential victims can be identified and compensated." *United States v. City of New York*, 681 F. Supp. 2d 274, 284-85 (E.D.N.Y. 2010). Class members would be presented with the opportunity to submit claims showing their eligibility for monetary relief by a just and reasonable inference. The Court or the Jury would adjudicate the sufficiency of the evidence and determine to whom to award monetary relief. *Id*. at 285-87. *See also In re Vivendi Universal, S.A. Sec. Litig.*, 284 F.R.D. 144, 155 (S.D.N.Y. 2012) (adopting similar notice and claims procedure in order to permit defendant to challenge whether the presumption of reliance by an investor on the fraud was in fact applicable; based upon the information supplied, defendant could send interrogatories to a specific category of "sophisticated" investors who might be susceptible to a successful challenge).

C. Alternatively, the Court May Certify a Rule 23(c)(4) Liability Class

As an alternative to certification under Rule 23(b)(3), the Court may certify only the liability issue under Rule 23(c)(4). This rule provides that "[w]hen appropriate, an action may be

[28] In making a determination of monetary harm to individuals that results from a class-based wrong, the Supreme Court has stated that the "[c]alculation need not be exact." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ([I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of the injured party.").

brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). *See also Comcast Corp.*, 569 U.S. at 41 n.* ("[A] class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings."); *In re Brewer*, 863 F.3d 861, 876 (D.C. Cir. 2017) (certification of a Rule 23(c)(4) liability class is one of several discretionary tools of the trial court). The practices challenged in this case present issues that can most efficiently be determined on a class-wide basis, consistent with this rule.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that their Motion for Class Certification be granted.

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Respectfully submitted,

/s/ Stacy N. Cammarano

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