IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin brought this action against Defendant Medical Transportation Management, Inc. (MTM) for its failure to pay legally required wages to Plaintiffs. Plaintiffs have raised claims under the Fair Labor Standards Act (FLSA), D.C. wage laws, and as third-party beneficiaries of MTM's contracts with the District of Columbia. The essence of their complaint is straightforward: Plaintiffs—along with at least hundreds of other workers—were paid unlawfully low wages for months or years, and MTM is liable because of its direct and indirect involvement in their employment and its contractual obligation to the District of Columbia to ensure that the workers were paid in accordance with the law.

MTM's motion fails for two reasons. First, it rests on an erroneous and unduly narrow interpretation of jurisprudence interpreting joint-employer liability under the FLSA and D.C. wage laws. Second, rather than accepting the well-pleaded facts in the complaint at this juncture, as it must, MTM improperly relies on additional factual allegations not found in the complaint and seeks to draw inferences from them. When the governing authority is properly construed and

the sufficiency of the complaint is confined to its four corners, it is plain that the motion to dismiss must be denied.

BACKGROUND

MTM provides non-emergent medical transportation (NEMT) services to residents of the District of Columbia through a series of contracts with the District (the D.C. Contracts). *See* Compl., Dkt. 1, ¶¶ 21–22. MTM executes these contracts through subcontractors who perform the driving services. *See id.* ¶ 26. MTM retains substantial control over the subcontractors and the drivers working under the D.C. Contracts, including by hiring and firing drivers (or, at minimum, directing their hire, fire, and/or discipline), training drivers, paying drivers and/or ensuring that their payment complies with the law, retaining records on the drivers, establishing the terms and conditions of their employment and day-to-day responsibilities, and reserving the right to terminate relationships with a subcontractor upon MTM's sole determination of "good cause." *See id.* ¶¶ 25, 28–29, 31–40.[1]

NEMT drivers, including Plaintiffs, provide the actual transportation for Medicaid recipients to and from various medical appointments. *See id.* ¶ 42. Each of the Plaintiffs worked for MTM through various subcontractors providing NEMT services. *See id.* ¶¶ 49, 67, 78. MTM required that all of the Plaintiffs undergo a background check and drug test, as well as complete certain training at MTM's office led by MTM instructors, prior to beginning their employment as NEMT drivers. *See id.* ¶¶ 50–51, 68–69, 79–80. Plaintiffs' employment responsibilities consisted of obtaining a schedule of trips for MTM clients, transporting MTM clients to and from medical appointments, receiving client signatures on log sheets verifying pick-up and drop-off times, and ensuring their vehicles and uniforms complied with MTM's policies and standards. *See id.* ¶¶ 52,

[1] Further factual allegations will be discussed where relevant in the argument section below.

70, 81. Plaintiffs typically worked over 60 hours per week but were paid only a flat rate for their services. *See id.* ¶¶ 44–46. These flat rates, when divided by the number of hours worked, regularly fell below the applicable federal minimum wage, the D.C. minimum wage, and the D.C. living wage, and Plaintiffs have rarely if ever been paid an overtime premium for hours worked over 40 hours per week. *See id.* ¶¶ 47–48. Plaintiffs have alleged that MTM is responsible for these illegal underpayments, whether through its status as a joint employer, a general contractor, or through the requirements of the D.C. Contracts. *See id.* ¶¶ 2–3, 16-20, 25, 27, 39–41, 95–108. When Plaintiffs raised concerns about their low wages, they were typically ignored or even fired. *See id.* ¶¶ 58–61, 76–77.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." In order to survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Smith v. United States*, 157 F. Supp. 3d 32, 36 (D.D.C. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted)). Plausibility requires only that there be sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678). Moreover, "the court must accept a plaintiff's factual allegations as true and 'construe the complaint in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.'" *Id.* at 37 (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted)).

In evaluating a Rule 12(b)(6) motion, the court may "consider matters *within* the complaint" only, which include "the facts alleged in the complaint, documents attached as

exhibits or incorporated by reference in the complaint, or documents upon which the complaint necessarily relies." *Stocks v. Cordish Cos., Inc.*, 118 F. Supp. 3d 81, 84 (D.D.C. 2015) (internal quotation marks omitted).

ARGUMENT

Under any test this Court applies, Plaintiffs have alleged facts sufficient to establish that MTM is their employer under the FLSA and D.C. wage laws. As such, MTM's motion to dismiss Plaintiffs' claims on this ground must be denied. MTM has also moved to dismiss Plaintiffs' claims by arguing it is not a general contractor under D.C. wage laws, claiming coverage under a narrow exception to the D.C. Living Wage Act for "direct care" services, and contending Plaintiffs are not intended third-party beneficiaries of MTM's D.C. Contracts. However, these arguments must also be rejected because the D.C. Contracts make clear MTM is a general contractor, MTM does not provide—and has not argued that it provides—"direct care" services, and the terms of the D.C. Contracts establish Plaintiffs are intended third-party beneficiaries. Accordingly, MTM's motion must be denied.

I. MTM Employed Plaintiffs and Others Similarly Situated.

The pivotal question that governs whether MTM employed Plaintiffs is whether, as the FLSA requires, MTM "suffer[ed] or permit[ted] [Plaintiffs] to work." 29 U.S.C. § 203(g). Courts have applied several tests to determine whether an entity is properly considered a joint employer under the FLSA. Because of the FLSA's breadth, the correct interpretation of "employer" must extend beyond considerations of control and labels assigned to the working relationship. The same is true of the D.C. wage laws, which have a similarly broad definition of employment.

In a recent well-reasoned opinion, the Fourth Circuit synthesized existing case law regarding joint employment into a two-step test that examines joint employment more

comprehensively—without focusing solely on the putative joint employer's control over the employees—and in line with the FLSA's operative regulations. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132–45 (4th Cir. 2017). Because the D.C. Circuit has not articulated a joint-employment standard, this Court should adopt and apply the *Salinas* two-step test here rather than MTM's proffered four-factor test, which is improperly based on common-law principles of control. Moreover, MTM's primary support, *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (D. Md. 2010), was wholly rejected by the Fourth Circuit in *Salinas*.[2] But under either test, Plaintiffs allege sufficient facts to establish MTM as their employer. Therefore, the Court need not reach the issue of which test to apply in order to deny MTM's motion to dismiss.

A. Coverage under the FLSA and D.C. wage laws is intentionally broad.

The Supreme Court has repeatedly stressed the broad reach of the FLSA's "suffer or permit" standard for determining employer status. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) ("The [Supreme] Court has consistently construed the [FLSA] liberally to apply to the furthest reaches consistent with congressional direction." (internal quotation marks omitted)). As early as 1945, the Supreme Court explained that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see also id.* at 363 n.3 (explaining that the legislative history of the FLSA shows that "the term 'employee' ha[s] been given the broadest possible definition that has ever been included in one act" (quoting S. Rep. No. 75-884, at 6 (1937))). More recently, the Supreme Court observed that the FLSA's "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict

[2] The district court's decision in *Salinas* was also issued by the same judge as *Jacobson* and explicitly relied on *Jacobson*. *See Salinas v. Commercial Interiors, Inc.*, No. JFM-12-1973, at *2 (D. Md. Nov. 17, 2014), *rev'd*, 848 F.3d 125 (4th Cir. 2017).

application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). The D.C. Circuit and this Court have also emphasized the breadth of coverage under the FLSA. *See, e.g.*, *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 10 (D.C. Cir. 2001) ("The definition [of 'employ'] is necessarily a broad one in accordance with the remedial purpose of the [FLSA]."); *Wilson v. Hunam Inn, Inc.*, 126 F. Supp. 3d 1, 5 (D.D.C. 2015) ("The Supreme Court has emphasized the 'expansiveness of the [FLSA]'s definition of "employer."'" (quoting *Falk v. Brennan*, 414 U.S. 190, 195 (1973))).

The applicable definition of "employ" under D.C. law is identical to that under the FLSA. D.C. Code § 32-1002(1) ("The term 'employ' includes to suffer or permit to work."). And, as MTM concedes, this Court has consistently construed the reaches of employer liability under D.C. wage laws to be coextensive with the FLSA. Mot. to Dismiss at 16–17 (citing *Del Villar v. Flynn Architectural Finishes*, 664 F. Supp. 2d 94, 96 (D.D.C. 2009)); *see also Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139, 146 (D.D.C. 2011) ("[D]eterminations of employer and employee status under the FLSA apply equally under the District of Columbia wage laws.").

The breadth of the FLSA and D.C. wage laws plainly sweeps within their ambit the relationship between MTM and Plaintiffs. MTM's contention that it "did not perform the traditional functions of an employer" and that it merely "coordinated" the provision of NEMT services provides no protection from being accountable as an employer under the FLSA and the D.C. Wage laws. *See, e.g.*, Mot. to Dismiss at 3, 10. The origin of the "suffer or permit" standard in state child-labor laws makes clear that the standard is designed to cover "not only businesses that directly employed children but also . . . 'businesses that used middlemen to illegally hire and supervise children.'" *Salinas*, 848 F.3d at 133 (quoting *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n.7

(1947)); *see also Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208 n.26 (11th Cir. 2003) (noting the incorporation of the FLSA's definition of employ in the Migrant and Seasonal Worker Protection Act was intended to "protect[] all those hired by middlemen to toil in our nation's fields, vineyards, and orchards" (internal quotation marks omitted)). Whether or not MTM is in direct privity with Plaintiffs, therefore, the complaint plainly alleges that MTM's business model and profit is based on its provision of non-emergency medical transportation through Plaintiffs and other NEMT drivers. *See* Compl. ¶¶ 21–24, 42, 52, 70, 81.

B. Plaintiffs sufficiently alleged MTM was their employer under any of the potentially applicable tests.

The D.C. Circuit has yet to articulate a standard for determining joint employment under the FLSA or the D.C. wage laws. The most common historical test for joint employment is the four-factor "control" test derived from common-law agency principles, which finds its roots in the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).[3] Recently, this test has been reexamined, as it is poorly suited to evaluating the realities of modern joint-employment relationships and relies on common-law agency principles specifically rejected by Congress in crafting the FLSA's "suffer or permit" standard. *See Salinas*, 848 F.3d at 135–38. As *Salinas* explains, courts should examine, first, whether the putative joint employers were "not completely disassociated" with respect to the workers' employment and, second, whether the workers were economically dependent on "the combined entity, if they are joint employers, or each entity, if they are separate employers." *Id.* at 139–40.

[3] The four-factor *Bonnette* test is identical to the four-factor test from *Ivanov* relied upon by MTM. *Compare Bonnette*, 704 F.2d at 1470, *with* Mot. to Dismiss at 10 (quoting *Ivanov v. Sunset Pools Mgmt.*, 567 F. Supp. 2d 189, 194 (D.D.C. 2008)). Plaintiffs refer to this test as the *Bonnette* test throughout for consistency with case law.

Although the answer in this case is the same under either standard, the approach articulated in *Salinas* should govern here because it better comports with Congressional intent for this remedial statute and with Department of Labor (DOL) regulations regarding joint employment under the FLSA. DOL regulations explain that joint employment exists where "employment by one employer is *not completely disassociated* from employment by the other employer(s)." 29 C.F.R. § 791.2(a) (emphasis added). As under the DOL regulations, the primary focus of the Fourth Circuit's *Salinas* test is the relationship between the two employers. *See id.* § 791.2(a)–(b); *Salinas*, 848 F.3d at 142.

The remedial command of the FLSA and the breadth of who Congress intended to qualify as an employee under the statute likewise reflect the expectation that "the FLSA's definition of 'employee' encompass a broader swath of workers than would constitute employees at common law." *Salinas*, 848 F.3d at 137 (citing *Darden*, 503 U.S. at 326). Unlike the formulation enshrined in the common-law factors used in the *Bonnette* test, *Salinas* "remains true to Congress's intent to define employment more expansively in the FLSA than in other statutes." *Id.* at 143.

The *Salinas* test thus presents the best analytical framework for evaluating the joint-employment allegations in this case, and Plaintiffs encourage this Court to adopt the Fourth Circuit's approach here. But, as explained below, whether the Court applies the *Salinas* test or the control test, Plaintiffs have sufficiently alleged facts to support plausible claims against MTM as their employer.

1. Plaintiffs have alleged facts sufficient to establish that MTM is a joint employer under the *Salinas* test.

Applying the *Salinas* test, Plaintiffs have sufficiently alleged facts that would establish MTM is their joint employer. MTM maintained numerous and substantial associations with its subcontractors providing NEMT services, and Plaintiffs are economically dependent on MTM and the subcontractors jointly.

a. Plaintiffs sufficiently allege that MTM is not completely disassociated from its subcontractors with respect to Plaintiffs' employment as NEMT drivers.

The "fundamental question" in determining whether two entities are "not completely disassociated" with respect to a particular worker is whether the entities "share, agree to allocate responsibility for, or otherwise codetermine—formally, informally, directly or indirectly—the essential terms and conditions of the worker's employment." *Salinas*, 848 F.3d at 141. The DOL's regulations provide three examples of joint employment:

> (1) Where there is an arrangement between employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b). In this case, the facts alleged in the complaint make clear that MTM, at the very least, jointly determined the essential terms and conditions of Plaintiffs' employment as NEMT drivers, as described in 29 C.F.R. § 791.2(b). As alleged in the complaint, "MTM is responsible for hiring and firing NEMT drivers, paying NEMT drivers and/or ensuring that NEMT drivers are paid in accordance with D.C. and federal law, retaining records on NEMT

drivers, and establishing the terms and conditions of NEMT drivers' employment and day-to-day responsibilities, among other tasks." Compl. ¶ 25. Moreover, Plaintiffs allege that "MTM engages a number of subcontractors to assist in the delivery of the NEMT driving services," but "MTM retains control over the subcontractors' daily operations for the provision of NEMT services." *Id.* ¶¶ 26–27. The complaint further alleges many other ways in which MTM controls the hiring of NEMT drivers, the working conditions of NEMT drivers, NEMT equipment, and personnel files for NEMT drivers. *Id.* ¶¶ 34–37. Additionally, Plaintiffs allege that many of the subcontractors either work exclusively for MTM or receive a substantial portion of their business from MTM, *id.* ¶ 32, and also identify specific actions MTM required Plaintiffs to take in order to work as NEMT drivers with their respective subcontractors, *id.* ¶¶ 50–51, 68–69, 79–80. Accordingly, the relationship that Plaintiffs allege between MTM and the subcontractors fits readily into the second example of joint employment under 29 C.F.R. § 791.2(b), as the subcontractors' employment of NEMT drivers actively serves the interests of MTM. Thus, the complaint adequately alleges that MTM is Plaintiffs' employer and withstands MTM's motion to dismiss.

This conclusion is bolstered by application of the Fourth Circuit's test. *Salinas* identifies six non-exhaustive factors for assessing whether two entities are "completely disassociated" with respect to a worker's employment:

> (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;
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> (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 putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers 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 facilities, equipment, tools, or materials necessary to complete the work.

848 F.3d at 141–42.

Plaintiffs allege facts supporting the plausibility of joint employment under the majority of the factors identified by the Fourth Circuit. First, Plaintiffs allege that, both formally and as a matter of practice, MTM shares the power to direct, control, and supervise the workers, as MTM establishes Plaintiffs day-to-day responsibilities, retains control over NEMT daily operations, sets rules for Plaintiffs working conditions while they provide NEMT services, and directs that any recipient complaints regarding drivers' performances be sent to MTM for corrective action. *See* Compl. ¶¶ 25, 27, 35, 52, 70, 81–82. Second, Plaintiffs allege that MTM, both formally and as a matter of practice, shares the power to hire, fire, and modify the terms or conditions of employment of Plaintiffs. *See id.* ¶¶ 25, 27, 34–35, 50–52, 68–70, 79–82. Third, Plaintiffs allege that many subcontractors receive all or most of their business from MTM, *id.* ¶ 32, and that MTM has a long history of controlling NEMT services in D.C., *id.* ¶¶ 22–24, supporting an inference that the relationship between MTM and the subcontractors is reasonably permanent. Fourth, Plaintiffs allege that the majority of their work occurs in their van, *see id.* ¶¶ 21, 42–43, 52, 70, 81, such that their vans are properly considered the "premises" on which their work

occurred, and Plaintiffs allege that MTM set detailed requirements for the vans, *id.* ¶ 36. Accordingly, Plaintiffs allege that MTM controlled the premises on which their work occurred. Finally, MTM's control of the hiring, firing, training, and conditions of employment of Plaintiffs combined with the subcontractors' management of individual trip assignment and direct payment of wages to the drivers, *id.* ¶¶ 52, 54, 63–64, 70, 72, 81, 84–86, suggests a sharing or allocation of responsibility for the functions ordinarily carried out by an employer. As such, Plaintiffs have sufficiently alleged that MTM is "not completely disassociated" from the subcontractors with respect to their employment as NEMT drivers under the D.C. Contracts.

MTM protests that several of its actions with regard to the hiring, firing, training, and terms of employment of NEMT drivers "are not imposed by MTM, but are in fact required by the District of Columbia as reflected in the [D.C.] Contract[s]." Mot. to Dismiss at 11. But this argument has no bearing on MTM's status as a joint employer under the FLSA and D.C. wage laws, and MTM offers no explanation for why it should. Whether MTM's powers and responsibilities originated with it or were conferred by the D.C. Contracts is irrelevant in assessing whether it, in fact, exercises those powers and responsibilities. If MTM did not want to be burdened with the responsibilities of the D.C. Contracts, MTM was under no obligation to accept an $85 million contract from D.C. that requires it to take actions that make it a joint employer of the drivers.

As to particular factors, MTM argues that it had neither the power to hire and fire nor the power to control the conditions of Plaintiffs' employment. First, that factual dispute cannot be resolved on a motion to dismiss, as the Court is bound by allegations in the complaint. Second, both arguments are unpersuasive. MTM misconstrues the complaint to fit its argument, stating that the "certain requirements" Plaintiffs allege they had to satisfy and the conditions of

employment MTM allegedly controlled, Mot. to Dismiss at 10, "relate entirely to matters of quality control," *id.* at 11–14. Not so. Plaintiffs allege a detailed employment relationship, in which MTM retains substantial operational control that goes far beyond mere quality control. Specifically, they allege that "MTM is responsible for hiring and firing NEMT drivers, training drivers, . . . and establishing the terms and conditions of NEMT drivers' employment and day-to-day responsibilities," Compl. ¶ 25; "MTM retains control over the subcontractors' daily operations for the provision of NEMT services pursuant to the D.C. Contracts, including hiring and firing [and] the terms and conditions of employment and employees' daily responsibilities," *id.* ¶ 27; and "MTM reserves the right in its subcontracts to disapprove the hiring of, or suspend, any driver for good cause determined within MTM's sole discretion," *id.* ¶ 34(c). Plaintiffs further allege that MTM controls their working conditions by dictating rules they must follow while providing NEMT services, *id.* ¶ 35, and setting policies and standards with which they must comply, *id.* ¶¶ 52, 70, 81–82. They also allege direct involvement in the hiring of all three Plaintiffs as NEMT drivers, *id.* ¶¶ 50–51, 68–69, 79–80. Accepting these facts as true, as the Court must at this stage, Plaintiffs have properly alleged MTM had the power to hire and fire NEMT drivers, as well as to control their conditions of employment, and this power went well beyond a "quality control" check. *See Salinas*, 848 F.3d at 147–48 (rejecting argument that construction general contractor's supervision was merely "quality control" where general contractor "engaged in daily oversight of Plaintiffs' work and provided regular feedback and instruction, through [subcontractors], regarding the pace and quality of their work").

In addition, that MTM may have regularly communicated with the subcontractor companies rather than individual drivers matters little as "[t]he FLSA provides that indirect control is sufficient to render an entity an 'employer' under the statute," *id.* at 148 (citing 29

U.S.C. § 203(d)), and "the 'suffer or permit' standard was developed to assign responsibility to businesses that did *not* directly supervise putative employees," *id.* (internal quotation marks omitted). Accordingly, MTM's self-serving categorization of its role as mere "quality control," Mot. to Dismiss at 11–14, lacks persuasive value in determining its status as an employer under the FLSA and D.C. wage laws. Moreover, MTM's gloss on its conduct has no place in the Court's evaluation of a motion to dismiss as it requests that the Court improperly draw inferences in MTM's favor.

For the reasons stated above, Plaintiffs have alleged sufficient facts to meet the first step of the *Salinas* test by demonstrating that MTM and the subcontractors it uses to provide NEMT services are not completely disassociated with respect to Plaintiffs' employment as NEMT drivers. MTM's counterarguments are unavailing and should be rejected.

b. Plaintiffs have alleged that they are economically dependent on MTM and the subcontractors jointly.

As MTM and the subcontractors are "not completely dissociated" with respect to Plaintiffs' employment, the second step in the joint-employment analysis is to determine whether Plaintiffs are economically dependent on the joint employers together rather than each individual employer separately. *Salinas*, 848 F.3d at 150. MTM has never argued that Plaintiffs are not economically dependent on either the subcontractors or MTM, only that Plaintiffs were not dependent solely on MTM. *See* Mot. to Dismiss at 3 ("As the allegations of Plaintiffs' Complaint make clear, each Plaintiff was hired by, scheduled by, and paid by, the individual transportation companies identified in their Complaint.") Accordingly, after determining that MTM and the subcontractors are not completely disassociated with respect to Plaintiffs' employment as NEMT drivers, the Court need go no further to determine that Plaintiffs were economically dependent on their "one employment" as NEMT drivers. *See Salinas*, 848 F.3d at 150 ("Here, the district

court found—and the parties do not dispute—that Plaintiffs were [the subcontractor]'s employees. Because Plaintiffs were economically dependent on [the subcontractor] alone, they were necessarily dependent on [the general contractor] and [the subcontractor] in the aggregate.").

Again, *Salinas* bolsters the point. There, the Fourth Circuit applied a six-factor economic realities test to evaluate this issue:

> "(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business.

Id. at 850 (quoting *Schultz*, 466 F.3d at 304–05).[4] As both the Fourth Circuit and the D.C. Circuit have explained, no single factor is dispositive; rather, the appropriate analysis is one that considers the totality of the circumstances. *Schultz*, 466 F.3d at 305; *Morrison*, 253 F.3d at 11.[5]

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[4] The test as laid out in *Salinas* is essentially identical to the five-factor economic realities test approved of by the D.C. Circuit in *Morrison v. International Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001). The only apparent difference between the tests is that factors (2) and (3) from the *Salinas* test are collapsed into one factor in the five-factor test. *Compare id. with Salinas*, 466 F.3d at 304–05. Thus, the *Salinas* economic realities test is materially indistinguishable from the D.C. Circuit's test.

Morrison also approved of a four-factor test that is identical the *Bonnette* test as an "economic realities" test. *Morrison*, 253 F.3d at 11. Because MTM has relied on this test as its entire joint-employment test, Plaintiffs separately address the *Bonnette* test below with respect to MTM. *See infra* Part I.D. Because application of that test to MTM alone establishes that Plaintiffs are economically dependent on MTM, Plaintiffs would necessarily be economically dependent on MTM and the subcontractors in the aggregate if applied here. *See Salinas*, 848 F.3d at 150.

[5] The phrase "economic realities test" is used to refer to several different tests in case law. These tests have been designed for the purpose of differentiating independent contractors and employees under the FLSA. *See, e.g.*, *Salinas*, 848 F.3d at 850 (referring to the above six-factor test to determine "whether a worker constitutes an employee or independent contractor"); *Morrison*, 253 F.3d at 10 (referring to materially identical five-factor test to determine whether

• *Degree of control*: As alleged in the complaint, MTM had a significant degree of control over Plaintiffs' work as NEMT drivers. MTM established their day-to-day responsibilities, Compl. ¶ 25; controlled their working conditions as NEMT drivers, *id.* ¶ 34; and set policies and standards for their work equipment and uniforms, *id.* ¶¶ 35, 52, 70, 81–82. Moreover, Plaintiffs' allegations regarding their work duties establish, or at least support the inference, that all other aspects of their work as NEMT drivers, *i.e.*, their individual daily schedules and specific pay rates, were determined by the subcontractors based on information and instructions provided by MTM. *See id.* ¶¶ 52–55, 61, 63–65, 70–73 81, 83–87. Accordingly, there can be no question that MTM and the subcontractors jointly exercised a high degree of control over Plaintiffs' work as NEMT drivers.

• *Opportunity for Profit or Loss Dependent on Managerial Skill*: As the allegations of the complaint establish, Plaintiffs had no opportunity for profit from the joint MTM-subcontractor enterprise. Rather, Plaintiffs were regularly paid flat rates, as determined by the subcontractors either with MTM or based on MTM's payment structure, regardless of the number of hours worked. Compl. ¶¶ 44, 48, 54–55, 64–65, 72–73, 84–87; *see Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 142 (D.D.C. 2016) (noting that, because the revenue for the project was set by contract between the general contractor and subcontractor, the workers "were not in a position to profit . . . no matter how much effort they put into their work on the project"). There are no allegations to support even an inference that Plaintiffs' work as NEMT drivers involved

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consultant was an employee or independent contractor). Some courts have utilized similar but different "economic realities" tests for joint employment. *See Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 66–69, 72 (2d Cir. 2003) (explaining "[c]ompeting [e]conomic [r]ealities [t]ests in the Second Circuit and then adopting another "economic realities" test). Accordingly, case law discussing the "economic realities test" often intermingles determinations of joint employment with independent contractor evaluations.

any managerial skill. Plaintiffs' "only 'expenditures' from which they obtain a return is on their own labor," which "are more properly classified as wages, not profits," such that Plaintiffs "are more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investment." *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1050–51 (5th Cir. 1987) (internal alterations omitted).

• *Investment in Equipment or Material or Employment of Other Workers*: The complaint contains no allegations that Plaintiffs invested in any material or equipment for their work as NEMT drivers. Plaintiffs' allegations make clear that they simply showed up for work and were provided with the materials necessary for the job—van, client schedule, log sheets, etc.—by the MTM-subcontractor joint enterprise for which they worked. Compl. ¶¶ 42–46, 52, 70, 81. Additionally, Plaintiffs have not alleged that they had any authority over the employment of other workers. Rather, Plaintiffs have alleged that MTM maintained the power to hire and fire NEMT drivers. *See supra* Part I.B.

• *Degree of Skill Required*: Courts applying this factor have noted that the primary consideration is whether the work performed requires "specialized skill." *Thompson*, 779 F. Supp. 2d at 149; *see Escamilla*, 227 F. Supp. 3d at 51 (concluding this factor weighed in favor of company being employer where worker's position did not require "higher degree of education or any specialized certifications for his skills"). Plaintiffs' work as drivers can hardly be classified as requiring "specialized skill." The MTM-subcontractor joint enterprise provided all of the instructions and directions for how, when, and where Plaintiffs performed their work as NEMT drivers. Compl. ¶¶ 27–28, 33–36, 42–43, 51–52, 69–70, 80–81. Thus, this factor weighs in favor of concluding Plaintiffs were employees of MTM and the subcontractors jointly.

• *Permanence of the Working Relationship*: Under this factor, "the more permanent the employment relationship, the more likely a court will find an employee/employer relationship" and the concomitant economic dependence. *Perez*, 221 F. Supp. 3d at 142 (citing *Thompson*, 779 F. Supp. 2d at 150). Here, Plaintiffs have not alleged that they were employed for any specific term. Each worked collectively for MTM for over a year, with Mr. Harris continuing to work for MTM and Mr. Franklin having worked for MTM for nearly three years. Compl. ¶¶ 49, 67, 78. Even when Mr. Harris and Mr. Franklin worked under different subcontractors, they remained employed by MTM and performed the same work duties. *Id.* ¶¶ 49, 52, 78, 81. Accordingly, this factor weighs in favor of concluding that MTM was Plaintiffs' employer.

• *Degree to Which Services Rendered Are Integral to Employers' Businesses*: Finally, there can be no doubt that Plaintiffs' work as NEMT drivers is integral to both MTM's and the subcontractors' respective businesses. Plaintiffs have alleged that MTM has provided NEMT services in the District of Columbia since 2007, most recently under a contract worth over $85 million, Compl. ¶¶ 22–24, "coordinate[s] the administration of [D.C.'s] non-emergency transportation program," and "act[s] as the point of contact for the District's Medicaid recipients who require transportation for non-emergency medical services," Mot. to Dismiss at 3, 5. Plaintiffs' allegations regarding, as well as MTM's own description of, the subcontractors make clear that those businesses concern transportation services. Compl. ¶¶ 26–37; *see also* Mot. to Dismiss at 2 (describing the subcontractors as the entities that actually provide transportation services to recipients). Many subcontractors receive most or all of their revenue from their joint NEMT enterprises with MTM. Compl. ¶¶ 32. Accordingly, there can be no serious dispute that Plaintiffs, as drivers who actually provide NEMT services, are integral to both MTM's and the subcontractors' respective businesses.

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In short, Plaintiffs' complaint sufficiently alleges that MTM was not completely disassociated from the subcontractors with respect to Plaintiffs' employment as NEMT drivers. Plaintiffs also sufficiently allege that they were economically dependent on MTM and the subcontractors jointly. Accordingly, Plaintiffs have stated a plausible claim against MTM as their joint employer under the FLSA and D.C. wage laws, and MTM's motion to dismiss these claims must be denied.

2. In the alternative, Plaintiffs have sufficiently alleged that MTM employed Plaintiffs because MTM exercised control over Plaintiffs under the *Bonnette* test.

Even under MTM's proposed approach to the joint-employment analysis, whereby the Court applies the *Bonnette* test to MTM individually rather than jointly with the subcontractors, Plaintiffs have alleged sufficient facts to establish that MTM is their employer.

The four-factor *Bonnette* test considers whether the putative 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." *Morrison*, 253 F.3d at 11 (quoting *Henthorn*, 29 F.3d at 684). Because the FLSA and DOL's regulations specifically provide that an employer may supervise or control an employee directly or indirectly, 29 U.S.C. § 203(d) (defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee"); 29 C.F.R. § 791.2(b)(3) (explaining employers are joint employers where they "share control of the employee, directly or indirectly"), any powers MTM exercised through its direction to and control of the subcontractors are properly considered in evaluating the *Bonnette* factors. Application of this test does not depend on "technical concepts" or "one factor standing alone,"

but rather is an evaluation of the "totality of the circumstances." *Morrison*, 253 F.3d at 11; *see also Ivanov*, 567 F. Supp. 2d at 194 (Leon, J.). Here, all four of the *Bonnette* factors weigh in favor of finding Plaintiffs have sufficiently alleged that MTM is their employer, such that the Court need go no further to deny MTM's motion to dismiss.

a. Power to Hire and Fire

Plaintiffs have alleged that MTM had the power to hire and fire Plaintiffs. *See supra* Part I.B.1 (discussing Plaintiffs' allegations as to MTM's required driver criteria, paperwork, and trainings, amongst other allegations). MTM's labeling of this power as simply "quality control" does not control the outcome of the Court's analysis. *See Morrison*, 253 F.3d at 11 ("Facile labels . . . are only relevant to the extent that they mirror 'economic reality.'" (internal quotation marks omitted)). This "quality control" argument must fail for the same reasons discussed above.

b. Supervision and Control of Conditions of Employment

Plaintiffs have also alleged that MTM supervised Plaintiffs and controlled their conditions of employment. *See supra* Part I.B.1 (explaining that MTM controlled day-to-day responsibilities, working conditions, and standards and policies of work). Because MTM may be liable under this test through indirect control over NEMT drivers, Plaintiffs' allegations that MTM placed instructions and requirements on the subcontractors that were passed along to NEMT drivers through the subcontractors further supports finding Plaintiffs' allegations sufficient to render plausible MTM's liability as a joint employer. *See* Compl. ¶¶ 28 (explaining "subcontractors agree to abide by MTM's transportation standards, client protocols and procedures . . . , dispute resolution procedures . . . , accident/investigation procedures, and all terms and provisions in MTM's Transportation Provider Handbook").

c. Determination of Rate and Method of Payment

Plaintiffs have alleged that MTM had the authority to determine the rate or method of paying the drivers. The terms of the D.C. Contracts provide that MTM must ensure NEMT drivers are paid legally required wages, Compl. ¶ 25, and Plaintiffs have alleged that MTM retains control in its subcontracts over the payment of wages, *id.*¶ 27. Moreover, Plaintiffs allege that "[m]any subcontractors work exclusively for MTM under the D.C. Contracts or receive a substantial portion of their business from MTM's D.C. Contracts," *id.* ¶ 32, which raises at least an inference that MTM exercises de facto control over Plaintiffs' wages as MTM controls all, or nearly all, of the revenue the subcontractors receive. Thus, Plaintiffs have alleged several different sets of facts showing that MTM had the power to determine the rate of payment, even if it did not exercise that power; the reservation of this power alone is sufficient under this element of the *Bonnette* test. *See, e.g.*, *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1176, 1179 (11th Cir. 2012) (noting this factor is properly understood as "the power to determine the pay rates or the methods of payment of the workers"). Because MTM explicitly retained the power to ensure that drivers were paid legally compliant wages, it is irrelevant at this stage in the proceedings that various subcontractors may have paid drivers different (but all legally incompliant) rates.

d. Maintenance of Employment Records

MTM argues that it maintained records such as drug tests and background checks only for "quality control" purposes.[6] Mot. to Dismiss at 15–16. But drug test results and background checks—which are part of the file Plaintiffs allege MTM maintains on each NEMT driver—are

[6] Plaintiffs could not possibly know exactly which records MTM maintains on each NEMT driver, as such information is exclusively within the control of MTM; they can allege at this stage only what the D.C. Contracts required MTM to maintain, which is sufficient to withstand a motion to dismiss. The Court should reject MTM's attempt to contest the facts alleged, as only through the exchange of discovery can a full factual record be developed.

common employment records. MTM required these records before Plaintiffs and other NEMT drivers could even be hired to work, *see* Compl. ¶ 34(a), which suggests that they served as employment records in addition to, or rather than, quality control records.

More importantly, Plaintiffs' allegations are not limited to MTM's possession of drug tests and background checks; rather, Plaintiffs allege broadly that "MTM requires that the subcontractors retain certain records in the drivers' personnel files, including the results of background checks, driver history checks, and drug tests; training certifications; and other personnel documents" and that MTM also "mandates that the subcontractors provide these personnel files to MTM." Compl. ¶ 37; *see also id.* ¶ 38 ("MTM also maintains its own personnel file for each driver that provides NEMT services under the D.C. Contracts."). These allegations are sufficient at this stage to support Plaintiffs' joint employment allegations and to survive a motion to dismiss.

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In conclusion, under the *Bonnette* test—favored by MTM—Plaintiffs' complaint contains sufficient allegations to demonstrate that MTM had control over Plaintiffs' employment, even independent of MTM's relationship with the subcontractors, and the Court must accept these allegations as true. Specifically, Plaintiffs have alleged facts showing that MTM had the power to hire and fire them, controlled their conditions of employment, had the power to set their rate and method of payment, and maintained employment records on them. Accordingly, MTM's motion to dismiss Plaintiffs' FLSA and D.C. wage law claims on the basis that MTM is not their employer must be denied.

II. MTM Is Liable as a General Contractor Under D.C. Wage Laws.

As an alternative theory of liability, Plaintiffs allege that MTM is liable for Plaintiffs' wages because D.C. law imposes liability on general contractors for the wage violations of their subcontractors. *See* Compl. ¶¶ 3, 17–18, 140–42, 150–52, 160–62. Because Plaintiffs have adequately alleged that MTM is their employer under both the FLSA and D.C. wage laws, Plaintiffs claims survive dismissal on that basis, and the Court need not reach this alternative theory of liability.

To the extent the Court finds it necessary or useful to reach the issue, MTM's argument that Plaintiffs' claim "fundamentally misconstrues" MTM's role with regards to NEMT services in the District is not well taken. *See* Mot. to Dismiss at 17. MTM relies almost entirely on its label as a "broker" to insulate itself from liability as a "general contractor," asserting that it is merely "coordinat[ing] independent transportation providers." *Id.* at 17–18. But such labels cannot control this Court's analysis, particularly when the facts contradict those labels. *See Morrison*, 253 F.3d at 11 ("Facile labels . . . are only relevant to the extent that they mirror 'economic reality.'" (internal quotation marks omitted)). Perhaps MTM's argument would carry more weight had the District contracted with MTM solely to act as a dispatcher or to perform quality control checks of transportation providers under a dramatically smaller contract. But that is not what MTM's D.C. Contracts provide.

Rather, the D.C. Contracts provide that MTM will "[s]erve as the Gatekeeper . . . of transportation service requests" in the District and will "[n]egotiate and establish [agreements] with existing Transportation Providers . . . to establish a comprehensive transportation Network offering the number and variety of Transportation Providers to meet the needs of [Medicaid]

Recipients." Dkt. 10-1 at 5, § C.1[7]; *see also* Dkt. 10-2 at 6, § C.1. Moreover, the D.C. Contracts define the "broker" as

> An entity or company which assists Medicaid clients obtain [sic] transportation service options by matching [Medicaid] Recipients with appropriate Transportation Providers through a central trip request and administrative facility. *The entity also recruits and contracts with Transportation Providers, performs payment administration, gate keeping, trip assignments, quality assurance, administrative oversight and reporting*.

Dkt. 10-1 at 8–9, § C.1.2.6; *see also* Dkt. 10-2 at 10, § C.3.7. In other words, these contracts support Plaintiffs' allegations that MTM's role is to manage the entire NEMT service system in the District, including contracting with, managing, and supervising subcontractors that provide NEMT, which is why MTM's contract is for the full $85 million this complex NEMT system costs. In that way, MTM's role is that of a general contractor: MTM has a large contract for a complex project and subcontracts portions to other companies.

Other terms of and attachments to the D.C. Contracts also undermine MTM's argument. For example, in the section dealing with sanctions for noncompliance, the D.C. Contracts provide that "the District may impose sanctions against the Contractor for poor performance or noncompliance with Contract terms by the Contractor or *its subcontracted Transportation Providers*." Dkt. 10-1 at 124, § G.9.6 (emphasis added); *see also* Dkt. 10-2 at 136, § G.12.5.

The most recent contract between the District and MTM requires the submission of a subcontracting plan with all solicitation responses. Dkt. 10-2 at 143, § H.9.2. MTM's fourteen-page Subcontracting Plan for this contract states, "Medical Transportation Management, Inc. (MTM) understands that, by law, we must subcontract 35% of the total dollar volume of this contract to certified" subcontractors who "provide attendant and/or transportation services." Exh.

[7] Because the additional materials supplied by MTM are specifically referenced in the complaint, the Court may consider them in adjudicating MTM's motion under the Rule 12(b)(6) standard. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004).

4, Subcontracting Plan at 12, § H.9.2.[8] Eleven pages of this subcontracting plan further list the names and contact information for transportation providers categorized as "subcontractors," *id.* at 1–11; *see id.* at 12, § H.9.2.1. Thus, contrary to MTM's arguments in its brief, MTM acknowledges that its contract with the District required it to "subcontract" NEMT services to transportation providers and that, accordingly, the transportation providers were its subcontractors.

For these reasons, to the extent necessary, the Court should reject MTM's argument that it does not qualify as a "general contractor" as a matter of law under D.C. wage laws.

III. The D.C. Living Wage Act Applies to MTM's Contract with the District of Columbia.

By its terms, the D.C. Living Wage Act (LWA) applies to "[a]ll recipients of contracts or government assistance in the amount of $100,000 or more" and "[a]ll subcontractors of recipients of these contracts that receive funds of $15,000 or more." D.C. Code § 2-220.03(a). The LWA includes certain exceptions to coverage, and MTM relies only on the exception for "Medicaid provider agreements for direct care services to Medicaid recipients." *Id.* § 2-220.05(9). This exception, however, does not aid MTM because MTM does not provide, or purport to provide, "direct care services."

"Direct care" is a term of art in the healthcare field that includes "nurse aides, home health aides, and personal- and home-care aides." Inst. of Med. of the Nat'l Acads., *Retooling for an Aging America: Building the Health Care Workforce* 199 (2008), https://www.ncbi.nlm.nih.gov/books/NBK215401/pdf/Bookshelf_NBK215401.pdf; *see also* U.S. Dep't of Health & Human Servs., Understanding Direct Care Workers: A Snapshot of Two of

[8] Under the terms of the D.C. Contracts, because MTM is required to submit this Subcontracting Plan as part of its proposal, the Subcontracting Plan is part of the D.C. Contracts and can properly be considered here under the Rule 12(b)(6) standard.

America's Most Important Jobs vi (2011), https://aspe.hhs.gov/system/files/pdf/76186/CNAchart.pdf (defining "direct care workers" as certified nursing assistants and home health aides). Moreover, federal law defines "direct care workers" to include the DOL occupational classifications for home health aides, psychiatric aides, nursing assistants, and personal care aides. 42 U.S.C. § 295p(19). Review of these definitions makes clear that individuals performing "direct care services" generally provide assistance with medical care; none include the provision of transportation services, and none of the positions resemble Plaintiffs day-to-day work duties. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, 31-1011 Home Health Aides (Mar. 11, 2010), https://www.bls.gov/soc/2010/soc311011.htm.[9] Moreover, there are at least twenty-six occupational classifications for different types of drivers in the DOL's Standard Occupational Classification system, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Alphabetical List of SOC Occupations*, https://www.bls.gov/soc/2010/soc_alph.htm#D, none of which are included in the definition of "direct care workers."

Because transportation services do not qualify as "direct care services," MTM's D.C. Contracts are not exempt from the D.C. Living Wage Act. Accordingly, MTM's motion to dismiss this claim should be denied.

IV. Plaintiffs Have Properly Pled a Claim Under the D.C. Wage Payment and Collection Law.

MTM's only argument for dismissal of Plaintiffs' claim under the D.C. Wage Payment and Collection Law is that Plaintiffs have failed to state a claim under the D.C. Minimum Wage

[9] *See also* U.S. Dep't of Labor, Bureau of Labor Statistics, 31-1013 Psychiatric Aides (Mar. 11, 2010), *available at* https://www.bls.gov/soc/2010/soc311013.htm; U.S. Dep't of Labor, Bureau of Labor Statistics, 31-1014 Nursing Assistants (Mar. 11, 2010), *available at* https://www.bls.gov/soc/2010/soc311014.htm; U.S. Dep't of Labor, Bureau of Labor Statistics, 39-9021 Personal Care Aides (Mar. 11, 2010), *available at* https://www.bls.gov/soc/2010/soc399021.htm.

Revision Act and the D.C. Living Wage Act. *See* Mot. to Dismiss at 21. As explained above, *see supra* Parts I–III, Plaintiffs have properly alleged claims under both of these laws. Accordingly, MTM's motion to dismiss this claim should be denied.

V. Plaintiffs and Others Similarly Situated Are Intended Third-Party Beneficiaries of the Contract Between MTM and the District of Columbia.

Plaintiffs' complaint alleges that the NEMT drivers are the intended third-party beneficiaries of MTM's contractual obligation to ensure that drivers are paid no less than the living wage and therefore that these individuals can enforce that term of the contracts. Compl. ¶¶ 98–99, 163–69. In its motion to dismiss, MTM acknowledges that if the contracting parties had an "express or implied intention" to benefit the drivers, the drivers enjoy third-party beneficiary status. Mot. to Dismiss at 21 (citing *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008)). In the context of government contracts, the intent must be clear in order to distinguish beneficiaries from members of the *public* who might derive some benefit from the performance of the contract, such as the Medicaid patients that depend on MTM for NEMT services; this latter group are generally considered incidental—as opposed to intended—beneficiaries and lack the right to enforce the agreement. *See Fort Lincoln Civic Ass'n*, 944 A.2d at 1064–69 (discussing the distinction between intended and incidental beneficiaries); *see also* Restatement (Second) of Contracts § 313 cmt. (a) (Am. Law. Inst. 1981) ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.").

In its motion to dismiss, MTM argues that Plaintiffs failed "to identify [the] specific provisions of the Contract," Mot. to Dismiss at 22, but Plaintiffs have no obligation to do so at this stage in the proceedings. Plaintiffs' complaint put MTM on notice as to the claims asserted, and, as MTM notes in its motion, the terms of the contracts—which MTM itself attached to its

motion to dismiss—may be considered to have been incorporated by reference. *See* Mot. to Dismiss at 4 n.2.

The intent to benefit the drivers is clear from the contract language. First, the 2015 contract states explicitly that MTM "shall comply" with the D.C. Living Wage Act, Doc 10-2 at 140, § H.8.1, "shall pay its employees and subcontractors who perform services under the contract no less than the current living wage," *id.*, § H.8.2, and shall require its subcontractors to pay their employees "who perform services under the contract no less than the current living wage rate," *id.* at 141, § H.8.3. Use of the mandatory "shall" indicates an intent to benefit the drivers.

Second, the incorporation of the Living Wage Act in the contract indicates an intent to benefit the drivers because it requires that "affiliated employees" be paid no less than the living wage, D.C. Code § 2-220.03(a), and "affiliated employees" includes "any employee of a contractor or subcontractor" of the business that contracts with the District, *id.*, § 2-220.02(1). As employees of MTM, or even just as employees of the subcontractors, Plaintiffs and other NEMT drivers are "affiliated employees" under MTM's contract with the District; thus, they are intended beneficiaries of the contract.

Third, the living wage section of the contract does not include a provision barring third parties from enforcing its terms. In contrast, the HIPAA compliance section does. Dkt. 10-2 at 161–62, § H.10.10(e) ("[N]othing in the HIPAA Compliance Clause gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly, or otherwise, to third persons."). The absence of such language in the living wage section demonstrates an intent to allow third-party beneficiaries to enforce its terms; had the contracting parties not intended such a benefit, they would have expressly so stated as they did in other parts

of the contract. *Cf. Fort Lincoln Civic Ass'n*, 944 A.2d at 1069 (rejecting claim that third parties were intended beneficiaries where the contract explicitly prohibited enforcement by third parties); *Moore v. Gaither*, 767 A.2d 278, 288 (D.C. 2001) (same).

Finally, MTM argues that Plaintiffs cannot enforce the living wage provision of the contract as third-party beneficiaries because MTM is statutorily exempt from the requirements of the D.C. Living Wage Act. Mot. to Dismiss at 22. That argument, however, goes to the merits of whether MTM has breached the contract rather than whether the drivers may sue to enforce the contract. In any event, as explained in Part III, above, MTM is not exempt from the Living Wage Act because D.C. Contracts do not fall within the exemption for contracts to provide "direct care services" to Medicaid recipients.

Therefore, the Court should reject MTM's argument that it is not liable under Plaintiffs' third-party beneficiary allegations and deny MTM's motion to dismiss this claim.

CONCLUSION

For the above stated reasons, the Court should deny MTM's motion to dismiss.

Respectfully submitted,

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