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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7033

[Filed July 18, 2023]

ISAAC HARRIS, ET AL.,
APPELLEES

v.

MEDICAL TRANSPORTATION MANAGEMENT, INC.,
APPELLANT

v.

STAR TRANSPORTATION LLC, ET AL.,
APPELLEES

Argued November 8, 2022 Decided July 18, 2023

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-01371)

Jean-Claude André argued the cause for appellant. With him on the briefs were *John J. Hathway*, *Darci F. Madden*, and *William F. Ryan*.

Jennifer B. Dickey, *Gilbert C. Dickey*, and *Jessica L. O'Brien* were on the brief for *amicus curiae* the Chamber of Commerce of the United States of America in support of appellant.

William M. Jay and *David J. Zimmer* were on the brief for *amicus curiae* Prof. Joan Steinman in support of appellant.

Michael T. Kirkpatrick argued the cause for appellees. With him on the brief were *Joseph M. Sellers*, *Harini Srinivasan*, and *Wendy Liu*.

Robert H. Klonoff, *Elizabeth J. Cabraser*, and *Samuel Issacharoff*, pro se, were on the brief for *amici curiae* Robert H. Klonoff, Elizabeth J. Cabraser, and Samuel Issacharoff, in support of appellees as to Rule 23(c)(4) standard.

Before: MILLETT and CHILDS, *Circuit Judges*, and ROGERS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: Isaac Harris, Darnell Frye, and Leo Franklin work as non-emergency medical transportation drivers. In July 2017, they brought a putative class action and Fair Labor Standards Act collective action against Medical Transportation Management, Inc. ("MTM"). Their complaint alleged that MTM is their employer and had failed to pay them and its other drivers their full wages as required by both federal and District of Columbia law.

MTM now appeals the district court's certification of an "issue class" under Federal Rule of Civil Procedure 23(c)(4), and its denial of MTM's motion to decertify plaintiffs' Fair Labor Standards Act collective action. We remand the district court's certification of the issue class because the court failed to ensure that it satisfies the class-action criteria specified in Rule 23(a) and (b). We decline to exercise pendent appellate jurisdiction to review the district court's separate decision on the Fair Labor Standards Act collective action.

I

A

Federal Rule of Civil Procedure 23 governs class action litigation in the federal courts. Rule 23(a) sets out the threshold criteria for eligibility as a class action, which are that (1) the proposed class be "so numerous that joinder of all members is impracticable"—the numerosity requirement; (2) class members' claims share common questions of law or fact—the commonality requirement; (3) the claims or defenses of the named representative parties be typical of all class members—the typicality requirement; and (4) the representative parties be capable of providing adequate representation to the whole class—the adequacy of representation requirement. FED. R. CIV. P. 23(a)(1)–(4).

In addition to meeting those four prerequisites, Rule 23(b) provides that a proposed class must also qualify as one of three specified "types of class actions." FED. R. CIV. P. 23(b)(1)–(3) (formatting modified); *see*

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997).

Rule 23(b)(1) defines the first type of class action as applying when there are multiple claims arising out of the same subject matter and the prosecution of separate actions by or against individual class members "would create a risk of" either "inconsistent or varying" judgments establishing "incompatible standards of conduct" for the party opposing the class. FED. R. CIV. P. 23(b)(1). A class can also proceed under Rule 23(b)(1) if resolution of individual class members' claims would, "as a practical matter" dispose of the interests of the non-party members of the class, or "would substantially impair or impede their ability to protect their interests[.]" *Id.*

Rule 23(b)(2) identifies a second type of class action, which may be maintained if the party opposing the class "has acted or refused to act on grounds that apply generally to the class," so that "final injunctive relief or corresponding declaratory relief" would be appropriate to resolve all class claims. FED. R. CIV. P. 23(b)(2).

Finally, a Rule 23(b)(3) class action can be maintained when "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

Other parts of Rule 23 set out the procedural and operational requirements of a class action. For example, upon certifying a class action, the district

court "must define the class and the class claims, issues, or defenses[.]" FED. R. CIV. P. 23(c)(1)(B). Also, for any class certified under Rule 23(b)(3), the district court is required to provide class members "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). The notice requires, among other things, a statement informing class members of their right to opt out of the action and thereby to maintain their ability to pursue any action individually. FED. R. CIV. P. 23(c)(2)(B)(v) ("The notice must clearly and concisely state in plain, easily understood language * * * that the court will exclude from the class any member who requests exclusion[.]"); *see also, e.g.*, FED. R. CIV. P. 23(e), (g).

In addition to all of those mandatory class-action requirements, Rule 23 has permissive provisions concerning the district court's management of class litigation. This case concerns the application of one of them, Rule 23(c)(4), which provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4).

This appeal asks us to decide what role Rule 23(c)(4) plays in class certification decisions and, in particular, whether a Rule 23(c)(4) issue class must also meet the Rule 23(a) and (b) class action requirements.

B

1

Non-emergency medical transportation services are used by individuals who receive Medicaid and lack transportation for their medical appointments. MTM contracts with the District of Columbia to provide District residents with such services. To fulfill those contracts, MTM engages dozens of subcontractors.

Plaintiffs Harris, Frye, and Franklin (collectively, "Drivers") are non-emergency medical transportation drivers in the District of Columbia. The Drivers allege that while they and hundreds of other drivers were working for MTM and its subcontractors, MTM failed to pay their legally mandated wages under federal and District law. They allege that they and the other drivers routinely started work between 5:00 a.m. and 7:00 a.m., and worked until between 5:00 p.m. and 8:00 p.m. Nevertheless, the Drivers were paid a flat rate for driver services that "regularly fell below" the legally required "minimum wage and the living wage rates" and omitted overtime wages. Compl. at 9–10, J.A. 40–41.

The Drivers brought suit against MTM under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), under District of Columbia wage-and-hour laws, *see* D.C. Code § 32-1001 (Minimum Wage Act); *id.* § 2-220.01 *et seq.* (Living Wage Act); *id.* § 32-1302 (Wage Payment and Collection Law), and for common-law breach of contract. As required to state a claim under those causes of action, the Drivers' complaint alleged that MTM was an employer of the Drivers

under federal law and a general contractor under District law.

Whether MTM is either an employer or a general contractor with respect to the Drivers is a threshold question of liability for MTM. If MTM is deemed the employer of the plaintiffs, or a joint employer with its subcontractors, MTM may be held liable under both the FLSA and District law. And if it is a "general contractor," that status would separately subject it to strict liability for violations of District law by its subcontractors. *See Harris v. Medical Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234, 246 (D.D.C. 2018) ("*Harris I*"). But if, as MTM argues, it neither employed nor acted as a general contractor in relation to the Drivers, it cannot be liable for any underpayment of wages. In that case, the subcontractors MTM engaged and to which the Drivers directly reported would be the only proper defendants.

2

MTM moved to dismiss the complaint in its entirety. The district court granted the motion as to the Drivers' common-law breach of contract claim, but denied it as to the Drivers' claims under federal and District statutory law. *Harris I*, 300 F. Supp. 3d at 237. Then the district court granted the Drivers' motion for conditional certification of an FLSA collective action, approved the Drivers' proposed collective action notice, and equitably tolled the limitations period for members of the collective action. *See Harris v. Medical Transp. Mgmt., Inc.*, 317 F. Supp. 3d 421, 423–424 (D.D.C. 2018) ("*Harris II*").

The Drivers subsequently filed a motion to certify a class action under Rule 23(b)(3) for the non-FLSA claims. The district court denied the motion. *Harris v. Medical Transp. Mgmt., Inc.*, No. 17 Civ. 01371, 2020 WL 5702085 (D.D.C. Sept. 24, 2020) ("*Harris III*"). The district court found that the proposed class action met the requirements of Rule 23(a), and the superiority requirement of Rule 23(b)(3)—that is, it found that a class action would be "superior to other available methods for fairly and effectively adjudicating the controversy[,]" FED. R. CIV. P. 23(b)(3). *Harris III*, 2020 WL 5702085, at *4–7. The district court also found that the question of whether MTM was, with its subcontractors, a joint employer of the putative class members "meets the predominance requirement of Rule 23(b)(3)" because evidence common to the class would be used to resolve it. *Id.* at *9.

But the district court held that individualized evidence would be required to assess whether MTM's payment system was responsible for the underpayment of wages, given "numerous metrics that would be relevant to assessing MTM's liability as to each class member." *Harris III*, 2020 WL 5702085, at *9. Accordingly, because the evidence common to the putative class as a whole did not predominate over such individual considerations, the district court declined to certify a class under Rule 23(b)(3). *Id.* at *12. The district court also denied without prejudice the Drivers' motion in the alternative to certify an issue class under Rule 23(c)(4). *Id.* at *13.

Following supplemental briefing, the district court granted in part the Drivers' renewed motion to certify

issue classes under Rule 23(c)(4). *Harris v. Medical Transp. Mgmt., Inc.*, No. 17 Civ. 01371, 2021 WL 3472381, at *1 (D.D.C. Aug. 6, 2021) ("*Harris IV*"). The district court certified one issue class, defining that class as encompassing the two questions of (1) whether MTM is a joint employer of the putative class members; and (2) whether MTM is a general contractor under D.C. law, and thereby strictly liable for any wage law violations committed by its subcontractors. *Id.* at *9. The district court reasoned that certifying an issue class for those two issues would "materially advance the litigation" because, if MTM is neither a joint employer nor a general contractor, it will not be liable in the lawsuit for any claims. *Id.* (citation omitted). But if MTM meets one or both of those definitions, the Drivers will have established a critical component of their case. *Id.*; *see also Harris III*, 2020 WL 5702085, at *6. The district court also noted that the Drivers would rely on evidence common to all proposed class members to attempt to prove that MTM is a joint employer or a general contractor. *Harris IV*, 2021 WL 3472381, at *9.

In the same opinion, the district court denied MTM's motion to decertify the plaintiffs' FLSA collective action. A collective action under the FLSA requires the members to be "similarly situated." 29 U.S.C. § 216. That term is not defined by the FLSA. Because our circuit has not yet established a standard for "similarly situated," the district court applied a test from the Second and Ninth Circuits, which asks whether "party plaintiffs [are] alike with regard to some *material* aspect of their litigation." *Harris IV*, 2021 WL 3472381, at *3 (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1113–1114 (9th Cir. 2018))

(emphasis in *Campbell*; alteration in *Harris*); *see also Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 515–522 (2d Cir. 2020), *cert. dismissed*, 142 S. Ct. 639 (2021). The district court then determined that the collective members were similarly situated with respect to the question of whether MTM is their joint employer and, because that inquiry is a material aspect of the litigation, the court denied MTM's motion to decertify the collective action. *Harris IV*, 2021 WL 3472381, at *6–7.

3

After filing a petition for leave to file an interlocutory appeal under Rule 23(f) in this court, *see In re Medical Transp. Mgmt., Inc.*, No. 21-8006, MTM also moved the district court to certify the FLSA decision for interlocutory review under 28 U.S.C. § 1292(b) and to stay proceedings pending the appeal. The district court denied both motions. *Harris v. Medical Transp. Mgmt., Inc.*, No. 17 Civ. 01371, 2021 WL 5446829, at *1 (D.D.C. Nov. 22, 2021) ("*Harris V*").

This court subsequently granted MTM's petition to file an appeal of the class certification decision and directed the parties to address whether we should also exercise pendent appellate jurisdiction over the FLSA decision. *In re Medical Transp. Mgmt., Inc.*, No. 21-8006, 2022 WL 829169, at *1 (D.C. Cir. March 17, 2022).

II

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and § 1367. We have jurisdiction to consider MTM's interlocutory appeal of

the district court's class certification order under 28 U.S.C. § 1292(e). We decline, though, to exercise pendent appellate jurisdiction to review the district court's denial of FLSA decertification.

III

While interlocutory appeals are generally disfavored, Rule 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification" under Rule 23. FED. R. CIV. P. 23(f). An appeal will generally be warranted "when: (1) 'there is a death-knell situation for either the plaintiff or defendant[,]' in that the class-certification decision will effectively end the party's ability to litigate; (2) 'the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review;' or (3) 'the district court's class certification decision is manifestly erroneous.'" *In re White*, 64 F.4th 302, 307 (D.C. Cir. 2023) (alteration in original) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002)).

Applying those factors, we hold that interlocutory review of the class certification decision is appropriate in this case. The district court's decision to certify an issue class "'presents an unsettled and fundamental issue of law relating to class actions' that is 'important' and 'likely to evade end-of-the-case review[.]'" *In re Medical Transp. Mgmt., Inc.*, 2022 WL 829169, at *1 (quoting *Lorazepam*, 289 F.3d at 99–100). More specifically, the question of under what conditions a Rule 23(c)(4) "issue class" can be certified when no

lawsuit or cause of action has been certified as a class is an "unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally[.]" *See Lorazepam*, 289 F.3d at 105. This court has not yet addressed that question. *Cf. In re Johnson*, 760 F.3d 66, 75 (D.C. Cir. 2014) (recognizing "a controversy over the proper use of issue classes," but declining to review "the district court's determination of how best to manage the issues before it" because "the appropriate use of an issue class was not raised or briefed"); *In re Brewer*, 863 F.3d 861, 875–876 (D.C. Cir. 2017) (finding no "manifest error" in district court's failure to "certif[y] a Rule 23(c)(4) issue class on liability alone").

Other circuits have applied Rule 23(c)(4) in a variety of ways. *See, e.g.*, *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226–227 (2d Cir. 2006) ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."); *Russell v. Educational Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 269–270 (3d Cir. 2021) ("[D]istrict courts may certify 'particular issues' for class treatment even if those issues, once resolved, do not resolve a defendant's liability, provided that such certification substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member[s] and defendants."), *cert. denied*, 142 S. Ct. 2706 (2022); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438–446 (4th Cir. 2003); *id.* at 441 ("[S]ubsection 23(c)(4) should be used to separate one

or more claims that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met.") (internal quotation marks omitted); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018) ("Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution."); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491–492 (7th Cir. 2012) (Rule 23(c)(4) issue class could be used to resolve only a disparate impact issue); *cf. Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.") (citing the earlier version of Rule 23(c)(4)).[1]

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[1] As originally adopted, Rule 23(c)(4) read: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into

Given the variety of approaches and the frequency with which the certification of issue classes arises, the propriety of the court's issue-class certification decision in this case presents "an important, recurring, and unsettled question of class action law." *See In re White*, 64 F.4th at 310.

In addition, the question of when issue classes can be certified is likely to evade end-of-the-case review. That would happen, for example, if the district court holds that MTM is neither an employer nor a general contractor, resolving this case on the merits in MTM's favor. MTM might lack any remaining injury from the class certification decision at that point and so be unable or unlikely to seek review of the question. Likewise, even if MTM is found to be a joint employer or a general contractor, it could prevail on the merits, resolving the suit in its favor. That too would make end-of-case review unlikely.

For those reasons, we find it appropriate to exercise our discretion to entertain this interlocutory appeal. *See In re White*, 64 F.4th at 312. We review the class certification decision for an abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006). The district court's interpretation of Rule 23 is a question of law that we review *de novo*. *See Orozco v. Garland*, 60 F.4th 684, 688 (D.C. Cir. 2023).

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subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." FED. R. CIV. P. 23(c)(4) (1966). After the 2007 amendments to Rule 23, the former Rule 23(c)(4)(B) is now Rule 23(c)(5).

IV

We hold that the district court abused its discretion by certifying the issue class under Rule 23(c)(4) without first determining that Rule 23's requirements for class certification were met as to the issue class. Rule 23(c)(4) does not create a fourth category of class action beyond those specified in Rule 23(b). Instead, Rule 23(c)(4) elucidates what district courts can do as part of managing Rule 23-qualifying class actions.

As a result, any "issue class" under Rule 23(c)(4) must also meet the threshold requirements of Rule 23(a) and be maintainable under one of the class action types laid out in Rule 23(b). Because the district court here did not explain how the issue class it certified met the requirements of Rule 23(a) and (b)—with (b)(3) being the relevant type of class action in this case—we remand for further consideration.

A

Under the plain text of Rule 23, all certified classes must meet both the threshold requirements of Rule 23(a) and be maintainable under one of Rule 23(b)'s categories. There is no freestanding class to be certified under Rule 23(c)(4).

To start, courts repeatedly have held that the district court must apply the requirements of Rule 23(a) and Rule 23(b) when certifying any class. Those criteria are fundamental prerequisites to the existence of a class action. *See* FED. R. CIV. P. 23(a) (describing "prerequisites" to class action); FED. R. CIV. P. 23(b)(3) (requiring district court to "find[]" predominance and superiority); *see also, e.g.*, *Tyson*

Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (Rule 23(b)(3) "requires that, before a class is certified under that subsection, a district court" make the required findings of predominance and superiority); *In re White*, 64 F.4th at 313 (abuse of discretion not to apply Rule 23(a) factors); *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013) ("A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004) ("A district court may, in its discretion, order that an action proceed as a class action only if it finds that the requirements of Federal Rule of Civil Procedure 23 have been satisfied."); *In re LifeUSA Holding Inc.*, 242 F.3d 136, 143 (3d Cir. 2001) ("In order to be certified, a class must satisfy the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure[.] * * * If these Rule 23(a) requirements are satisfied, the court must also find that the class is maintainable under Rule 23(b)(1), (2), or (3).").

Rule 23(c)(4) does not give the district court a pass on those preconditions. To the contrary, Rule 23(c)(4) says upfront that an issue class may only be certified "[w]hen appropriate[.]" FED. R. CIV. P. 23(c)(4). That appropriateness inquiry naturally includes the elementary class-action requirements of Rules 23(a) and (b), which ensure that class litigation is fair, suitable, and advisable—that is, appropriate.

What is more, Rule 23(c)(4)'s use of the phrase "maintained as a class action" echoes Rule 23(b)'s language that "[a] class action may be maintained" if,

and only if, Rule 23(a) is satisfied and if the proposed class falls into one of Rule 23(b)'s types. Plus, Rule 23(c)(4) continues (and ends) by stating that "an action may be brought or maintained *as a class action* with respect to particular issues." FED. R. CIV. P. 23(c)(4) (emphasis added). That textually directs the court right back to the requirements of Rule 23(a) and Rule 23(b) that set out the basic ground rules for bringing or maintaining a class action. *See also Russell*, 15 F.4th at 262; 2 NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 4:92 (6th ed.) ("[T]he proponent of an issue class—like the proponent of any other class action—must demonstrate that the proposed issue class meets all of the requirements of Rule 23(a) and fits into one of the categories of Rule 23(b)[.]").

Finally, the structure of Rule 23 in general and Rule 23(c) in particular counsel against finding a standalone Rule 23(c)(4) class. Rule 23(c)(2) spells out the notice requirements for each variant of a Rule 23(b) class. But it is silent about any notice provisions under Rule 23(c)(4) alone. *See* FED. R. CIV. P. 23(c)(2). Nor does Rule 23(c)(4) contain any substantive criteria or requirements of its own for determining if class status is warranted or protecting the rights of absent class members. It would be passing strange for a Rule as systematized, specific, and detailed as Rule 23 to unleash a distinct and wholly unregulated class device in (c)(4)'s single sentence.

In short, Rule 23's text and structure offer no quarter to the view that Rule 23(c)(4) creates an independent type of class action that is freed from all of Rule 23's other class-action prerequisites. So the

district court should have ensured that the issue class it certified met all, and not just some, of Rule 23(a) and (b)'s preconditions to class status.

B

1

Applying Rule 23(a) to the issue class before us, we agree with the district court that those class-action prerequisites are satisfied.

First, the proposed class meets Rule 23(a)(1)'s numerosity requirement. *See Harris III*, 2020 WL 5702085, at *4–5. "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980).

In this case, there are 862 putative issue class members. *See Harris III*, 2020 WL 5702085, at *5. MTM "does not dispute these numbers and makes no arguments against numerosity[.]" *Id.* We agree with the district court that such a class qualifies as "so numerous that joinder of all members is impracticable[.]" *See* FED. R. CIV. P. 23(a)(1).

Second, the proposed class meets Rule 23(a)(2)'s commonality requirement. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury[.]'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–350 (2011) (quoting *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). That means that putative class members' "claims must depend upon a common contention[.]" *Id.* at 350.

In this case, there are "at least two" questions of law or fact common to the class: "(1) Whether MTM qualifies as a 'joint employer' and (2) whether MTM qualifies as a general contractor" under D.C. law. *Harris III*, 2020 WL 5702085, at *5. Those common contentions and proposed common answer cut across all putative class members and depend on common evidence, satisfying the commonality requirement.

MTM argues that the commonality requirement is not met because there is no "common policy or course of conduct" by MTM across the class. MTM Opening Br. 34 (citing *Dukes*, 564 U.S. at 344–345). But Rule 23(a)(2) does not require that a single policy or course of conduct be the throughline for all plaintiffs. Rather, the putative class members must have a "common contention" of "such a nature 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. The questions of whether MTM is a joint employer to the Drivers or a general contractor under D.C. law are two such questions. That is, determining whether MTM crosses the threshold of liability is "central to" and potentially dispositive of "the validity" of the Drivers' claims, *see id.*

Finally, the district court found, and MTM does not dispute, that the Drivers' claims and defenses are typical of the class and that they and their counsel will fairly and adequately represent the class. *See* FED. R. CIV. P. 23(a)(3–4); *Harris III*, 2020 WL 5702085, at *6–7. We agree. On this record, no distinction between

the Drivers' claims and defenses and those of the other class members has been identified. *See J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (per curiam) ("[T]o destroy typicality, a distinction must differentiate the 'claims or defenses' of the representatives from those of the class.") (emphasis omitted). Nor is there any conflict of interest between them and the class. *See Amchem Prods., Inc.*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.").

2

a

Where the district court erred was in failing to ensure that the issue class also satisfied one of the three types of authorized class actions under Rule 23(b). The parties agree that the only relevant class type in this case is a (b)(3) class. The Drivers originally sought certification under Rule 23(b)(3), and the district court examined only the relationship between Rule 23(b)(3) and Rule 23(c)(4) before certifying the issue class.

The problem, though, is that the district court failed to find that within the issues for the certified class—whether MTM is a joint employer or general contractor—common questions of law or fact predominate over individual questions, as Rule 23(b)(3) requires. *See* FED. R. CIV. P. 23(b)(3). The court also failed to find that the use of an issue class to address those questions would be a superior litigation device to other available tools for resolving the common

questions. *See id*. Without those predicate determinations, the district court erred in certifying an issue class under Rule 23(c)(4). In addition, because the issue class arises under Rule 23(b)(3), the district court had to determine how notice could effectively be given in the case. *See* FED. R. CIV. P. 23(c)(2)(B). Notice is an indispensable component of a class action under Rule 23(b)(3). Yet the court did not address how notice would be administrable for this class.

The Drivers argue that the district court did make the required (b)(3) findings when it ruled on the initial motion for class certification, *see Harris III*, 2020 WL 5702085, at *7, and that it silently incorporated those findings into its certification of the issue class. *See* Harris Br. 6; Oral Arg. Tr. 48.

The Drivers are mistaken. The district court said that it would consider predominance only "*after* identifying issues suitable for class treatment[,]" and then it only reviewed predominance as to the two issues for which it did *not* certify an issue class. *See Harris IV*, 2021 WL 3472381, at *8, *10–11; *see also* Oral Arg. Tr. 48–50 (Drivers' counsel unable to point the court to predominance analysis for the certified issues); *see also* Harris Br. 6 (describing the district court as relying on *Harris III* analysis "except as to predominance"). Nor did the district court ever find—in the original class-certification decision or otherwise—that the issue class met the superiority requirement.

Because the analysis underlying the class certification judgment omitted those key determinations, we remand for the district court to determine whether its issue class can appropriately be

maintained under all of the Rule 23(b)(3) criteria and consistent with Rule 23(c)(2)(B)'s notice mandate. We outline next some of the key elements of those inquiries implicated in this case.

b

In undertaking the predominance inquiry on remand, the district court must ensure that the common questions within the certified issues predominate over any individual ones. The district court must also evaluate the relationship any certified issues have as to the dispute as a whole. A certified issue class should encompass a reasonably and workably segregable aspect of the litigation. For example, an issue class may be appropriate where common questions predominate as to (i) the determination of liability, giving rise to a liability-only issue class; (ii) proof of a key element of a cause of action, such that there is an issue class for that element; or (iii) another aspect of the controversy that, if decided, would materially advance the fair resolution of the litigation.

We start with common ground, which is that Rule 23(c)(4) may be used to certify an issue that is less than an entire cause of action. *See* Harris Br. 9; Oral Arg. Tr. 11, 15, 19; *see also* FED. R. CIV. P. 23(c)(1)(B) (district court's order certifying class action "must define the class and the class * * * issues").

One common use of Rule 23(c)(4) is for resolving the issue of liability. *See In re Brewer*, 863 F.3d at 875–876 (noting that district courts have the discretion to "certif[y] a Rule 23(c)(4) issue class on liability alone").

Even where damages for a putative class action may require individualized calculations, courts have routinely held that those individual considerations do not necessarily preclude certification of a class—as long as the liability issue is common to the class and that commonality predominates over any other individualized components of the litigation. *See Tyson Foods*, 577 U.S. at 453–454 (Where "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (citation omitted); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984) ("A district court should, of course, ordinarily consider such well-established methods as bifurcating the trial into liability and damages phases before denying certification."); *id.* ("[T]he mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification.").

Similarly, courts have embraced the use of a Rule 23(c)(4) issue class for liability only, even if the remedial claims destroy predominance for the cause of action as a whole. *See, e.g.*, *Nassau County*, 461 F.3d at 227 ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (per curiam) ("A district court has the discretion to split a case * * * by certifying a class

for liability alone where damages * * * may require individualized assessments.").[2]

As MTM pointed out at oral argument, certification of an issue class can also be appropriate where there is an affirmative defense applicable to a large number but not all class members. *See* Oral Arg. Tr. 6, 11, 15; *cf. Nassau County*, 461 F.3d at 230 (holding that district court erred by finding that presence of affirmative defense barred certification of liability class); *see also Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) (discussing the role of affirmative defenses in Rule 23(b)(3) predominance analysis).

Courts have also recognized other appropriate issues for (c)(4) issue classes. *See*, *e.g.*, *Russell*, 15 F.4th at 270 (holding that "district courts may certify 'particular issues' for class treatment even if those issues, once resolved, do not resolve a defendant's liability") (quoting FED. R. CIV. P. 23(c)(4)); *McReynolds*, 672 F.3d at 490–491 (finding that disparate impact claims could "most efficiently be determined on a class-wide basis, consistent with" Rule 23(c)(4)); *Valentino*, 97 F.3d at 1234 ("Rule 23

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[2] *See also, e.g.*, FED. R. CIV. P. 23 Advisory Committee's Note to 1966 amendment, 39 F.R.D. 69, 106 (1966) (Under Rule 23(c)(4), "in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."); *cf. Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("[E]ven if individualized determinations were necessary to calculate damages, Rule (23)(c)(4)(A) would still allow the court to maintain the class action with respect to other issues.") (referring to the pre-2007 version of Rule 23(c)(4)).

authorizes the district court in appropriate cases to isolate the common issues under [Rule 23(c)(4)] and proceed with class treatment of these particular issues."). Only one circuit has suggested otherwise. *See Castano*, 84 F.3d at 745 n.21 (observing in dicta that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)").

But when creating issue classes, district courts must heed Rule 23's carefully calibrated limits on class certification. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant" class litigation of their substantive claims, rather than bringing individual suits. *See Amchem Prods., Inc.*, 521 U.S. at 623. In that way, the predominance inquiry is an important safeguard against unreasonably fractured litigation, and simultaneously protects the rights of named parties and absent class members alike. *See id.* at 615 (Predominance ensures that the class action is "promot[ing] * * * uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.") (internal quotation marks omitted). Predominance also helps courts establish that evidence can be fairly and sensibly presented in a way that protects the parties' competing interests. *See Russell*, 15 F.4th at 270; 2 NEWBERG & RUBENSTEIN § 4:49 (The predominance requirement ensures that individual class members are "sufficiently similarly situated" such that "due process permits their claims to be compromised in the aggregate.").

So district courts must ensure that Rule 23(c)(4)'s authorization of issue classes does not end up at war

with Rule 23(b)(3)'s predominance requirement: Plaintiffs cannot effectively skirt the functional demands of the predominance requirement by seeking certification of an overly narrow issue class and then arguing that the issue (inevitably) predominates as to itself. *Cf. Castano*, 84 F.3d at 745 n.21 (noting that such an interpretation would "eviscerate the predominance requirement").

Nor can predominance become a tautological inquiry. Instead, when certifying any issue class, the district court must explain how, within the context of the particular litigation before it, common questions predominate within a reasonably and workably segregable component of the litigation. An issue class cannot consist of a single common question that predominates as to itself. Lastly, because the baseline for predominance is the resolution of all issues within a fair and administrable trial process, courts must also address how dividing the litigation through the creation of an issue class protects all parties' interests in the full presentation of their claims and evidence.

c

In applying the superiority requirement on remand, the district court must explain how the use of issue classes is "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). This requirement "reinforce[s] the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy[.]" FED. R. CIV. P. 23 Advisory Committee's Note to 1966 amendment, 39 F.R.D. 69, 103 (1966).

The superiority requirement ensures that class adjudication makes the litigation more manageable and promotes the prompt and efficient resolution of the case. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999) ("One great advantage of class action treatment of mass tort cases [at issue in *Ortiz*] is the opportunity to save the enormous transaction costs of piecemeal litigation[.]"); *Califano*, 442 U.S. at 701 ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting [the putative class members] to be litigated in an economical fashion under Rule 23.").

The district court here did not explain how creating this issue class was superior to other potential ways of handling the litigation. Neither was the Drivers' counsel at oral argument able to identify any benefits to judicial economy that would make class litigation superior to other trial management tools in this case, beyond tolling the statute of limitations. *See* Oral Arg. Tr. 41–43.

Yet one alternative to class litigation might be deciding a partial summary judgment motion focused on the issues proposed to be certified—such as MTM's employer or general contractor status. *See Wright v. Schock*, 742 F.2d 541, 543–544 (9th Cir. 1984) ("Under the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue.").

To be sure, Rule 23(c)(1)(A) directs the district court to determine the question of certification "[a]t an early

practicable time[.]" FED. R. CIV. P. 23(c)(1)(A). And our district court's Local Rules require a certification motion within 90 days of filing the complaint, absent an extension by the district court. *See* Local Rule 23.1(b).

But the district court in this case suspended the 90-day deadline pending the resolution of MTM's motion to dismiss. *See* Minute Order, *Harris*, No. 17 Civ. 01371 (D.D.C. Oct. 26, 2017). And the litigation here unfolded at such a pace that the motion to certify the class was not fully submitted until the case was nearly three years old. The district court therefore should at least have considered whether, at that point, it remained a superior form of litigation to certify an issue class rather than to resolve the threshold questions going to MTM's potential liability by way of a partial summary judgment motion (such as the Drivers' pending summary judgment motion on MTM's status as a joint employer or a general contractor).

d

Finally, the district court's indication that notice is not required for an issue class under Rule 23(b)(3) was incorrect. In acting on MTM's renewed motion for a stay pending appeal, the court dismissed MTM's argument that it would be irreparably harmed by the issuance of class notice that might have to be withdrawn later. The court explained that there would be no irreparable harm to MTM, agreeing with the Drivers that no notice needed to be issued for the (c)(4) class. *See Harris v. Medical Transp. Mgmt., Inc.*, No. 17 Civ. 01371, 2022 WL 1908822, at *2 (D.D.C. June 3, 2022) (citing Pls. Mem. Opp. Mot. Stay Pending Appeal

at 6–7, No. 17 Civ. 01371 (D.D.C. April 8, 2022), Dkt. 213).[3]

That cannot be correct. Because this issue class should have been handled as a Rule 23(b)(3) class type, all of the procedural protections of such a class apply. That includes notice of class certification. *Compare* FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class."), *with* FED. R. CIV. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3) * * * the court *must* direct to class members the best notice that is practicable under the circumstances[.]") (emphases added).

Rule 23(b)(3)'s notice mandate means what it says, and for good reason. Because the resolution of the action will bind absent class members, basic principles of due process require that they be notified that their individual claims are being resolved, and that they may opt out of the action if they so choose. *See Dukes*, 564 U.S. at 363; *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985).

So if the district court certifies the issue class under Rule 23(b)(3) on remand, it must direct "the best notice

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[3] Following oral argument in this court, the Drivers asked the district court to direct notice to the class, a request that MTM opposed. *See* Pls. Mot. Amend the Cert. Order & Direct Notice to the Class, *Harris*, No. 17 Civ. 01371 (D.D.C. Nov. 10, 2022), Dkt. 228; Mem. Opp. to Pls. Mot. to Amend/Correct Cert. Order & Direct Notice to the Class, *Harris*, No. 17 Civ. 01371 (D.D.C. Nov. 23, 2022), Dkt. 229. That motion remains pending.

that is practicable" as part of any certification order. *See* FED. R. CIV. P. 23(c)(2)(B).

V

MTM separately urges this court to exercise pendent appellate jurisdiction and reverse the district court's denial of its motion to decertify the FLSA collective. We decline to review that portion of the district court's decision.

A

The FLSA sets out certain wage-and-hour protections for eligible employees. For example, covered employers must pay a minimum hourly wage and provide overtime pay to employees for hours worked beyond 40 hours a week. 29 U.S.C. §§ 206, 207. The FLSA also authorizes aggrieved employees to file suit to enforce their rights under the statute. *See id.* § 216.

As relevant here, the FLSA authorizes "collective action" litigation. An FLSA collective action may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To be bound by the judgment or to recover in an FLSA collective action, an employee must affirmatively opt into the litigation by filing written consent with the district court. *See id.*; *Lindsay v. Government Emps. Ins. Co.*, 448 F.3d 416, 419 (D.C. Cir. 2006).

Separate from its class action ruling, the district court ruled that the Drivers' collective action to enforce the wage provisions of the FLSA was proper and could

go forward, denying MTM's motion to decertify the FLSA class.

B

This court has jurisdiction to review "final decisions" of the district courts, 28 U.S.C. § 1291, as well as certain types of interlocutory orders, *see, e.g.*, *id.* §§ 158(d)(2)(A); 1292; 18 U.S.C. § 3731; FED. R. CIV. P. 23(f).

The district court's denial of MTM's motion to decertify the FLSA collective is a nonfinal order that is not within our ordinary jurisdiction because it does not terminate the action on the merits. *See Gelboim v. Bank of America Corp.*, 574 U.S. 405, 408–409 (2015) ("A 'final decision' is one 'by which a district court disassociates itself from a case.'") (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)); *Catlin v. United States*, 324 U.S. 229, 233 (1945) (A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). Nor does any law authorize the interlocutory review of collective action determinations under the FLSA.

So to review the district court's denial of MTM's motion to decertify the FLSA collective, we would have to exercise pendent appellate jurisdiction over the FLSA dispute as part of our review under Rule 23(f) of the separately certified issue class.

Pendent appellate jurisdiction operates "when, in the course of reviewing an order from which an appeal is within its jurisdiction," an appellate court also reviews "another order that, while part of the same

case or controversy, would not otherwise be within its statutory jurisdiction." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996). Because interlocutory appeals are generally disfavored and neither a statute nor rule specifically authorizes the use of pendent jurisdiction, we exercise such jurisdiction "sparingly" and only "when substantial considerations of fairness or efficiency demand it." *See id.* at 678–679; *id.* at 680 (finding "no occasion to take the disfavored step of exercising pendent jurisdiction" "[w]ithout a reason to believe that the interests of judicial economy and fairness to the parties would be served") (internal quotation marks and citation omitted).

Pendent jurisdiction might be warranted, though, "when the nonappealable order is 'inextricably intertwined' with the appealable order, or when review of the former is 'necessary to ensure meaningful review of the latter.'" *Gilda Marx*, 85 F.3d at 679 (quoting *Swint*, 514 U.S. at 51). Yet even if that standard is met, the ultimate decision whether to grant pendent appellate jurisdiction lies within the court's discretion. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1136 (D.C. Cir. 2004) ("In the final balance, whether or not we have authority to exercise pendent appellate jurisdiction in this case, there is no question that we have discretion to decline to do so.").

On this record, an exercise of pendent appellate jurisdiction is not warranted for three reasons.

First, because collective actions differ materially from Rule 23 class actions and because they each

enforce different substantive claims, our review of the district court's collective action ruling would stand distinct from—not be intertwined with—our Rule 23(f) review of the class action certification order. Which means that appellate review of the former is not at all necessary to our review of the latter. Rule 23 actions, in fact, "are fundamentally different from collective actions under the FLSA[.]" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). Our analysis of Rule 23's application to the issue class certified by the district court has little relevant overlap with the decision whether or not to allow the FLSA collective action, which is not an issue-specific action and turns on a distinct legal analysis. The collective action covers all identified FLSA issues as a group, not issue by issue.

In addition, the two group litigation mechanisms diverge in terms of their substantive requirements. While Rule 23 mandates several prerequisites for class certification and management of the litigation—including, for example, Rule 23(b)(3)'s predominance and superiority requirements—the FLSA only provides that party plaintiffs must be "similarly situated" to certify a collective. Those are quite different questions, requiring different textual and precedential analyses. *See Myers v. Hertz Corp.*, 624 F.3d 537, 555–556 (2d Cir. 2010) (declining to exercise pendent appellate jurisdiction over FLSA decision because it was not inextricably intertwined with Rule 23; rather, Section 216(b)'s "similarly situated" inquiry is "quite distinct from the question whether plaintiffs have satisfied the much higher threshold" of Rule 23(b)(3) predominance).

Nor does the collective action implicate the due process concerns underlying the Rule 23(b)(3) issue classes and their notice requirements. While Rule 23(b)(3) presumes that absent class members are represented in the litigation, unless they opt out, FLSA actions only include individuals who affirmatively opt into the litigation. *Compare* FED. R. CIV. P. 23(c)(2)(B) *and* FED. R. CIV. P. 23(e)(4), *with* 29 U.S.C. § 216(b); *see also Lindsay*, 448 F.3d at 419 ("Unlike the procedure set out in 29 U.S.C. § 216(b), Rule 23[(b)(3)] class certification requires notice to all potential class members that they must affirmatively decline to join ('opt out [of]') the lawsuit if they do not want to be class members.").

These "significant differences between certification under [Rule] 23 and the joinder process under [Section] 216(b)[,]" *Genesis Healthcare Corp.*, 569 U.S. at 71 n.1, illustrate how review of the collective action certification and the Rule 23 class certification share little common ground and, instead, "are fundamentally different creatures." *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 131 (3d Cir. 2018).

MTM argues that pendent appellate jurisdiction is warranted because the district court described the question of whether to certify an issue class in the same terms as the question of whether to decertify the FLSA collective—namely, as hinging on whether it would "materially advance the litigation[.]" *See Harris IV*, 2021 WL 3472381, at *9 (quoting *McLaughlin*, 522 F.3d at 234).

That is not sufficient. This court is not bound by the district court's characterization of the questions before

it. Rather, "it is the 'issues presented' to this Court that must be 'inextricably intertwined' for pendent appellate jurisdiction to be properly exercised, not the issues presented to the district court." *Myers*, 624 F.3d at 556 (quoting *CFTC v. Walsh*, 618 F.3d 218, 225 n.3 (2d Cir. 2010)). The class action analysis undertaken on this appeal has no relevant overlap with the collective action objections that MTM raises.

Second, several considerations affirmatively weigh against the exercise of pendent appellate jurisdiction. *See generally Gilda Marx*, 85 F.3d at 679. To begin, the FLSA appeal concerns a different cause of action altogether from the Rule 23(f) petition. *See id.* at 678. What is more, the FLSA appeal would require us to set out a standard for "similarly situated," which this circuit has not yet done, and which would require wading into a circuit conflict.[4] Given that, granting

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[4] *Compare, e.g.*, *Scott*, 954 F.3d at 516 ("[T]o be 'similarly situated' means that named plaintiffs and opt-in plaintiffs are alike with regard to some material aspect of their litigation."), *and Campbell*, 903 F.3d at 1114 ("[P]arty plaintiffs must be alike with regard to some *material* aspect of their litigation."), *with Thiessen v. General Elec. Cap. Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) (weighing "several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations") (internal quotation marks omitted); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007) ("[T]he similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions.") (internal quotation marks and citation omitted); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1262 (11th Cir. 2008) ("[T]he district court must consider whether the defenses that apply to the opt-in plaintiffs'

pendent appellate review would add weighty and entirely distinct issues to our interlocutory review—issues that have no overlap with the Rule 23 question of issue-class certification.

Review of the FLSA order would also be interlocutory, which further weighs against exercising pendent appellate jurisdiction. *See Gilda Marx*, 85 F.3d at 679. Granting review would compound the departure from ordinary principles of finality. *See id.* And because the issues to review have no overlap with the Rule 23 inquiry, the disruption to district court proceedings would be doubled. Plus, were we to review the FLSA question, we would be "reaching an issue that might be mooted or altered by subsequent district court proceedings." *See id.*

Third, the district court declined to certify the collective action question for interlocutory review under 28 U.S.C. § 1292(b). *Harris V*, 2021 WL 5446829, at *4. The court explained that MTM had failed to demonstrate "that interlocutory appeal will materially advance the disposition of the litigation." *Id.* While the district court's Section 1292(b) judgment does not control our pendent jurisdiction decision, the district court's expert judgment on trial management is a relevant consideration weighing against an exceptional

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claims are similar to one another or whether they vary significantly.") (citing *Anderson*, 488 F.3d at 954 n.8); *and Halle v. West Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 226 (3d Cir. 2016) ("Our Court * * * consider[s] all relevant factors and mak[es] a determination on a case-by-case basis as to whether the named plaintiffs have satisfied this burden by a preponderance of the evidence.").

exercise of pendent jurisdiction. *See Swint*, 514 U.S. at 47 ("Congress * * * chose to confer on district courts first line discretion to allow interlocutory appeals.").

For those reasons, pendent appellate jurisdiction would not be appropriate in this case.

VI

Because the district court failed to determine whether the classes it certified met Rule 23(a) and (b)'s prerequisites, we remand the order certifying an issue class under Federal Rule of Civil Procedure 23(c)(4) for further consideration consistent with this opinion. We decline to exercise pendent appellate jurisdiction over the district court's denial of decertification of the FLSA collective.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-8006
September Term, 2021
1:17-cv-01371-APM

[Filed March 17, 2022]

In re: Medical Transportation Management, Inc., Petitioner	)

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of the petition for permission to file an interlocutory appeal pursuant to Federal Rule of Civil Procedure 23(f), which contains a request for the court to exercise pendent jurisdiction over the district court's denial of petitioner's motion to decertify a collective action under the Fair Labor Standards Act, the response thereto, and the reply; the motions to govern further proceedings; and the letters filed pursuant to Federal Rule of Appellate Procedure 28(j), and the responses thereto, it is

ORDERED that petitioner be permitted to file an appeal of the district court's order with respect to issue

class certification under Federal Rule of Civil Procedure 23(c)(4). Petitioner has demonstrated that the district court's decision "presents an unsettled and fundamental issue of law relating to class actions" that is "important" and "likely to evade end-of-the-case review . . . ." In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002). Permission to appeal is without prejudice to reconsideration by the merits panel.

In addition to addressing the merits of the issue class certification decision, the parties are directed to address in their briefs whether this court should exercise pendent jurisdiction over the district court's disposition of the Fair Labor Standards Act collective action issue, as well as the merits of the district court's disposition of that issue.

The Clerk is directed to transmit a certified copy of this order to the district court. The court will file the order as a notice of appeal pursuant to Federal Rule of Appellate Procedure 5 and collect the mandatory filing and docketing fee from appellant. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will be assigned a general docket number and will proceed in the normal course.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 17-cv-01371 (APM)

[Filed August 6, 2021]

ISAAC HARRIS, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MEDICAL TRANSPORTATION MANAGEMENT, INC.,	)
	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

Defendant Medical Transportation Management, Inc. ("MTM") is a private company that contracts with the District of Columbia to "manage and administer" non-emergency medical transportation ("NEMT") services for the District's Medicaid recipients. MTM does not employ drivers directly to deliver NEMT services; rather, it contracts with dozens of transportation service providers ("TSPs") that employ the drivers. Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin are three such drivers. They bring this

action individually and on behalf of all others similarly situated (collectively, "Plaintiffs") against MTM to recover unpaid wages under (1) the Fair Labor Standards Act ("FLSA"), 29 U.S.C § 201 *et seq*.; (2) the D.C. Minimum Wage Act, D.C. Code § 32-1001 *et seq*.; (3) the D.C. Living Wage Act, D.C. Code § 2-220.01 *et seq*.; and (4) the D.C. Wage Payment and Collection Law, D.C. Code § 32-1301. Plaintiffs allege that because MTM is both their joint employer and the general contractor of the TSPs, MTM is liable for their unpaid wages under federal and District of Columbia wage laws.

On July 17, 2018, this court ordered that Plaintiffs' FLSA minimum wage and overtime claims be conditionally certified as a collective action and that notice be sent to potential opt-in plaintiffs. *See Harris v. Med. Transp. Mgmt., Inc.* (*Harris II*), 317 F. Supp. 3d 421, 424 (D.D.C. 2018). Since then, 155 current and former NEMT drivers have filed consent forms to join the collective action, each alleging wage and overtime claims against MTM under the FLSA. Thereafter, Plaintiffs sought certification of a class of approximately 800 drivers under Federal Rule of Civil Procedure 23 for their District of Columbia wage claims. The court denied class certification on the ground that Plaintiffs had failed to meet the predominance requirements of Rule 23(b)(3). *See Harris v. Med. Transp. Mgmt., Inc.* (*Harris III*), No. 17-cv-1371 (APM), 2020 WL 5702085, at *1 (D.D.C. Sept. 24, 2020). The court left open the possibility, however, of certifying an issue class under Rule 23(c)(4) and invited supplemental briefing on the issue. *See id.* at *13.

Now before the court are two motions: (1) MTM's Motion to Decertify the FLSA Collective Action; and (2) Plaintiffs' supplemental motion to certify claims pursuant to Rule 23(c)(4) and for clarification that the limitations period remains tolled. For the reasons that follow, the Court (1) will not decertify the FLSA collective action and (2) will certify an issue class under Rule 23(c)(4) on the questions of whether MTM is a joint employer or a general contractor. The court also confirms that the statute of limitations for the putative class members' claims remained tolled during the pendency of these motions.

I. DISCUSSION[1]

A. Decertification of the FLSA Collective Action

1. Legal Standard

a. Statutory background

The FLSA requires that employers pay covered employees both a statutory minimum wage and overtime for hours worked in excess of forty hours per week. 29 U.S.C. §§ 206–207. "'Congress passed the FLSA with broad remedial intent' to address 'unfair method[s] of competition in commerce' that cause 'labor

[1] The court assumes familiarity with the facts and procedural history detailed in its prior opinions in this action and therefore does not formally recite them here. *See Harris v. Med. Transp. Mgmt., Inc.* (*Harris I*), 300 F. Supp. 3d 234, 237–39 (D.D.C. 2018); *Harris III*, 2020 WL 5702085, at *1–3. To the extent that certain facts are particularly relevant to the issues raised in the instant motions, the court includes them in the discussion below.

conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Monroe v. FTS USA, LLC*, 860 F.3d 389, 396 (6th Cir. 2017) (alteration in original) (first quoting *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015), and then quoting 29 U.S.C. § 202(a)). In keeping with this remedial intent, when an employer fails to comply with the statute's requirements, under section 216(b) of the FLSA, employees can pursue an action against an employer in a representative capacity on behalf of "other employees similarly situated." 29 U.S.C. § 216(b). This type of action, known as a "collective action," allows employees who are similarly situated to the named plaintiffs to file a written consent to opt into the case. *See id.*

The purpose of collective action under the FLSA is to give "plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources," and to benefit the judicial system "by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity." *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). "The Supreme Court has characterized § 216(b) as a 'joinder process.'" *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 515 (2d Cir. 2020) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 n.1 (2013)). Importantly, "[r]ather than providing for a mere procedural mechanism, as is the case with [class actions under] Rule 23, section 216(b) establishes a '*right* . . . to bring an action by or on behalf of any employee, and [a] *right* of any employee to become a party plaintiff to any such action,' so long as certain

preconditions are met." *Id.* (quoting 29 U.S.C. § 216(b)); *see also Hoffmann-La Roche Inc.*, 493 U.S. at 173 (noting that Congress gave employees the "right" to proceed collectively); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018) ("The FLSA leaves no doubt that 'every plaintiff who opts in to a collective action has party status.'" (quoting *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 225 (3d Cir. 2016))).

For an action to proceed collectively, section 216(b) sets two basic requirements: (1) members must be "similarly situated" and (2) members must affirmatively consent to join the action. 29 U.S.C. § 216(b). Although the statute does not prescribe a process for certifying a collective proceeding, the "near-universal practice" among courts involves a two-step process. *Campbell*, 903 F.3d at 1100 (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)); *see also Ayala v. Tito Contractors*, 12 F. Supp. 3d 167, 170 (D.D.C. 2014) (applying two-step certification process). At the first stage—what is often called "preliminary" or "conditional" certification—"the court mak[es] an initial determination to send notice to potential opt-in plaintiffs who *may be* 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) (emphasis added); *see also Dinkel v. MedStar Health, Inc.*, 880 F. Supp. 2d 49, 52–53 (D.D.C. 2012) (collecting cases). This stage requires only "a 'modest factual showing sufficient to demonstrate that [named] and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Castillo v. P & R Enters.*,

517 F. Supp. 2d 440, 445 (D.D.C. 2007) (quoting *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 200 (D.D.C. 2005)). "[T]he district court's analysis is typically focused on a review of the pleadings but may sometimes be supplemented by declarations or limited other evidence." *Campbell*, 903 F.3d at 1109. "The level of consideration is 'lenient' . . . [and] loosely akin to a plausibility standard." *Id.* (quoting *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013)).

The second step of the process is triggered when defendants move to decertify the conditional collective action following the conclusion of discovery. *See id.* During this stage of the analysis, the court employs a stricter standard for determining whether plaintiffs are "similarly situated," as there is more information on which to base its decision. *Id.* Plaintiffs bear the burden of showing, by a preponderance of the evidence, that they are similarly situated to the remainder of the proposed collective action members. *See Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 537 (3d Cir. 2012); *see also O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) ("The lead plaintiffs bear the burden of showing that the opt-in plaintiffs are similarly situated to the lead plaintiffs."); *cf. Campbell*, 903 F.3d at 1118 (applying summary judgment standard to decertification). If the court concludes that plaintiffs are similarly situated, the case proceeds to trial as a collective action; if plaintiffs fail to meet their burden, the court decertifies the conditional collective action.

This case is at the second stage, and therefore the question for the court is whether Plaintiffs have

satisfied their burden of showing that the named and opt-in plaintiffs are "similarly situated."

b. Similarly situated

The term "similarly situated" is not defined under the FLSA, and the D.C. Circuit has not yet spoken on this issue. *See Ayala*, 12 F. Supp. 3d at 170. The Circuits that have weighed in have not settled on a single approach, and there have been recent developments on the topic. For years, the majority approach—and the only approach adopted at the Circuit level—was the so-called "ad hoc" approach. Under this flexible approach, courts employ a three-prong test to determine whether party plaintiffs[2] are similarly situated, considering the "(1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to defendants which appear to be individual to each plaintiff; and (3) fairness and procedural considerations counseling for or against collective action treatment." *Scott*, 954 F.3d at 517 (internal quotation marks omitted); *see also Zavala*, 691 F.3d at 536 (adopting ad hoc approach); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1262–64 (11th Cir. 2008) (same); *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (upholding the district court's application of the ad hoc approach as "[a]rguably . . . the best . . . approach[]").

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[2] "The FLSA does not use the terms 'original' or 'opt-in' plaintiff at all; the FLSA instead refers to *all* plaintiffs in a collective action as 'party plaintiff[s].'" *Campbell*, 903 F.3d at 1104 (alteration in original) (quoting 29 U.S.C. § 256(a)).

"The minority approach," on the other hand, has been to "treat a collective as an opt-in analogue to a Rule 23(b)(3) class." *Campbell*, 903 F.3d at 1111. "District courts following the minority approach tend to expect a collective to satisfy the requirements of numerosity, commonality, typicality, adequacy, predominance, and superiority." *Id.* (citing Fed. R. Civ. P. 23(b)(3)); *see, e.g.*, *Shushan v. Univ. of Colo.*, 132 F.R.D. 263, 268 (D. Colo. 1990). "No circuit court has adopted the minority approach in toto." *Campbell*, 903 F.3d at 1111. "The Seventh Circuit has imported the 'predominance' requirement of Rule 23(b)(3)" only, *id.* (citing *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010)), whereas "[a]ll other circuits to have considered the issue . . . have rejected the analogy to Rule 23," *id.*; *see, e.g.*, *Monroe*, 860 F.3d at 405–06; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

More recently, the Ninth Circuit has taken a different tack, with the Second Circuit following suit. In *Campbell v. City of Los Angeles*, the Ninth Circuit considered whether approximately 2,500 police officers who had moved for certification of a collective action on the basis of a "pervasive, unwritten policy discouraging the reporting of overtime" were similarly situated. 903 F.3d at 1099. In tackling that question, the court first expressed its disapproval of the two prevailing approaches. *Id.* at 1110–16. With regard to the minority approach, the court "agree[d] with the consensus view that . . . [it] rests improperly on an analogy to Rule 23 lacking in support in either the FLSA or the Federal Rules of Civil Procedure." *Id.* at 1111. And as for the ad hoc approach, the court opined

that it too "import[s], through a back door, . . . the Rule 23(b)(3) requirements of adequacy of representation, superiority of the group litigation mechanism, or predominance of common questions." *Id.* at 1115. More pointedly, the court found the ad hoc approach "inadequately accounts for the meaning of 'similarly situated'" in the context of the FLSA. *Id.* at 1117. It focuses "on points of potential factual or legal *dissimilarity* between party plaintiffs" when the focus should be, "in light of the collective action's reason for being within the FLSA," whether the "party plaintiffs [are] alike with regard to some *material* aspect of their litigation." *Id.* at 1113–14.

The only Circuit to address the issue since *Campbell* has adopted its approach. In *Scott v. Chipotle Mexican Grill, Inc.*—a case about Chipotle's alleged misclassification of certain employees as exempt from overtime in violation of federal and state labor laws—the Second Circuit echoed the Ninth Circuit's concerns with the "ad hoc" approach. 954 F.3d at 517. Primary among those concerns was that "district courts employing the ad hoc factors consider the ways in which the plaintiffs are factually *disparate* and the defenses are *individualized*" instead of "considering the ways in which the opt-in plaintiffs are *similar* in ways material to the disposition of their FLSA claims." *Id.* This misplaced focus, the court opined, conflicts with the FLSA and unduly limits plaintiffs' "right" to proceed collectively. *See id.* at 515–17.

This court agrees that the *Campbell* approach is the superior of the three, as it is the most in tune with the text and purpose of section 216(b). In so finding, the

court agrees with *Scott*, *Campbell*, and countless other courts that have found that the FLSA, by design, imposes a lower bar to collective action than Rule 23. *Id.* at 520 (finding that the FLSA not only "'imposes a bar lower [than Rule 23, but also] in some sense [lower than] even [] Rules 20 and 42, which set forth the relatively loose requirements for permissive joinder and consolidation at trial'" (quoting *Campbell*, 903 F.3d at 1112)).[3] Recall that the purpose of collective action under the FLSA is to give "plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources," and to benefit the judicial system "by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity." *Hoffmann–La Roche Inc.*, 493 U.S. at 170. As noted in *Scott*, "[t]his result . . . can only be achieved to the extent that [the party plaintiffs] . . . share one or more issues of law or fact that are material to the disposition of their FLSA claims." 954 F.3d at 516. Focusing on differences, rather than similarities, is contrary to the terms of section 216(b) and risks "import[ing], through a back door, requirements with no application to the FLSA." *Campbell*, 903 F.3d at 1115.

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[3] *Cf. also Calderone v. Scott*, 838 F.3d 1101, 1104 (11th Cir. 2016) (describing Rule 23 as "more demanding" than § 216(b)); *O'Brien*, 575 F.3d at 584–85 (describing Rule 23 as "a more stringent standard" than § 216(b)); *Thiessen*, 267 F.3d at 1105 ("Congress clearly chose not to have the Rule 23 standards apply to [collective actions], and instead adopted the 'similarly situated' standard."); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) (describing actions under § 216(b) and Rule 23 as "mutually exclusive and irreconcilable").

The court therefore will apply the *Campbell* test to determine whether the party plaintiffs in this case are similarly situated. Thus, in deciding whether to decertify, the court primarily asks whether plaintiffs are "alike with regard to some material aspect of their litigation." *Scott*, 954 F.3d at 516 (citing *Campbell*, 903 F.3d at 1114). The court turns now to that inquiry.

2. Analysis

Plaintiffs argue that because there are common issues of law or fact "material to the disposition" of their FLSA claims, any dissimilarities among the 155 party plaintiffs do not defeat collective treatment. *See* Pls.' Mem. in Opp'n to Def.'s Mot. to Decertify FLSA Collective Action, ECF No. 181 [hereinafter Pls.' Opp'n], at 7. Plaintiffs acknowledge that certain questions regarding MTM's liability, as well as the matter of damages, will require "trial individually or in small groups of plaintiffs." *Id.* at 1. Nevertheless, Plaintiffs contend, there are three common issues that warrant collective treatment, as they will "require the court to decide legal questions that apply to all Plaintiffs and will be resolved through common evidence." *Id.* at 10. Those issues are: (1) "whether MTM qualifies as Plaintiffs' joint employer"; (2) "whether MTM suffered or permitted Plaintiffs to work";[4] and (3) "whether the time expended by

[4] The minimum wage and overtime requirements of the FLSA apply to work "suffer[ed] or permit[ed]" by an employer. 29 U.S.C. § 203. An employer suffers or permits work when it knows or reasonably should know that work is being performed. *See Akinsinde v. Not-For-Profit Hosp. Corp.*, No. 16-cv-437 (APM), 2018 WL 6251348, at *7 (D.D.C. Nov. 29, 2018).

Plaintiffs traveling between trips provided to MTM clients and waiting for MTM clients qualifies as compensable work under the FLSA." *Id*.

MTM makes several arguments as to why the court should decertify the collective action. First, MTM rejects as improper Plaintiffs' request to certify "issues" under the FLSA, *see* Reply in Supp. of Def.'s Mot. to Decertify FLSA Collective Action, ECF No. 183 [hereinafter Def.'s Reply], at 1, arguing that the language of section 216(b) allows for a collective action only "'to recover the liability' for a violation of the statute," and therefore cannot be read to permit the bifurcation of issues as Plaintiffs seek, *id*. at 6 (quoting 29 U.S.C. § 216(b)). Second, even if the statute could be read to permit issue certification, MTM argues, evidence of a "collective-wide policy or practice that violated the FLSA" is paramount and the absence of one in this case means Plaintiffs are not similarly situated under any standard. *See* Def.'s Mot. to Decertify FLSA Collective Action, ECF No. 180, Mem. in Supp. of Def.'s Mot. to Decertify FLSA Collective Action, ECF No. 180-1 [hereinafter Def.'s Mem.], at 14; *see also* Def.'s Reply at 10–14. Finally, MTM argues, even if a common policy or practice were not a requirement under the *Campbell* test, Plaintiffs' proposed issues would not materially advance the disposition of the party Plaintiffs' FLSA claims since the issues would have to be resolved on an individualized, driver-by-driver basis. *See* Def.'s Reply at 15–20. For that same reason, MTM adds, manageability and fairness considerations weigh against the maintenance of a collective action because, among other things, there is "no 'fairness' in permitting

Plaintiffs to create a collective action out of non-dispositive issues requiring plaintiff-specific analysis." *Id.* at 21; *see id.* at 20–24.

The fundamental flaw with MTM's latter argument is that one of the issues proposed by Plaintiffs *is* potentially dispositive: the antecedent question of whether MTM qualifies as Plaintiffs' joint employer. Only an "employer" may be held liable under the FLSA. *See* 28 U.S.C. § 216(b). The definition of "employer" has been recognized as broad enough to encompass a "joint employer." *See Harris I*, 300 F. Supp. 3d at 240 (citing 29 C.F.R. § 791.2(a)). Thus, if MTM is found *not* to be a joint employer, the case goes away.

The D.C. Circuit applies an "economic reality" test to determine whether an employer-employee relationship exists. *See Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001); *see also Harris I*, 300 F. Supp. 3d at 240–41 (observing that *Morrison* did not involve a "joint employer" inquiry but finding the factors relevant). The factors to be considered under that test are whether MTM "(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 v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994)). MTM contends that the very application of a four-factor test shows this issue is "inherently fact intensive" and unsuitable for collective resolution. Def.'s Mem. at 22. It explains, "[t]he joint employer analysis involves an assessment of the relationship between the individual

transportation providers and the drivers in their respective employ as to the factors the D.C. Circuit has instructed courts to examine." *Id.* Moreover, MTM contends, "the evidentiary record shows that drivers' individual work schedules and assignments are not directed by MTM and that the transportation providers alone controlled the means and manner of the drivers' work." *Id.* "The transportation providers decide how each of their driver's workday is structured"; "the manner by which each work day begins and ends"; and "the manner, as well as the amount, of their drivers' respective pay, with such manners ranging variously from hourly, bi-weekly, per trip or per mileage." *Id.* at 23 (footnotes omitted). The court disagrees that these differences defeat a collective proceeding.

Although evidence regarding each driver's schedule, assignments, and pay may be individualized, MTM's role in devising those terms of employment is not. Its role is likely to be defined by policies and practices that are broadly applicable to all TSPs, and thus subject to a common defense. MTM does not, for example, argue that it might be a joint employer as to some TSPs and not others. MTM is likely to be a joint employer for all drivers or for none at all. The court therefore stands by its assessment, as articulated in its Memorandum Opinion on class certification, that "[c]ommon evidence is likely to resolve the joint employer question" under both the FLSA and the state law claims. *Harris III*, 2020 WL 5702085, at *9. "For example, [the parties] no doubt will look to MTM's policy documents and service agreements with subcontractors, as well as testimony by MTM employees regarding its hiring and training practices and the rules and standards MTM requires

drivers to follow." *Id.* To the extent MTM maintains that "the evidentiary record shows that the various [TSPs], not MTM, set the drivers' individual work schedules and that the drivers had vastly different individual experiences with respect to" compensation, MTM will rely on that evidence, collectively, to show that it is not a joint employer. Def.'s Reply at 17–18. In that sense, even the uncommon evidence is common.

MTM's other arguments fare no better. The court sees no reason why it cannot certify a collective on one or more issues so long as those common issues are "material to the resolution of the party plaintiffs' claims." *Campbell*, 903 F.3d at 1115. Indeed, the *Campbell* court seemed to contemplate such a result, explaining that "[u]nder section 216(b), if the party plaintiffs are similar in some respects material to the disposition of their claims, collective treatment may be *to that extent* appropriate, as it may *to that extent* facilitate the collective litigation of the party plaintiffs' claims." *Id.* "District courts have ample experience managing cases in this way. For example, Rule 42, which offers a closer analogy to the collective mechanism than Rule 23, already provides for the possibility of partial consolidation for trial, to the extent separate actions involve common questions of law or fact." *Id.* (citing Fed. R. Civ. P. 42(a)(1)).[5]

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[5] MTM also argues that Plaintiffs cannot now "pivot" and seek issue certification when it was not requested in the Complaint or in Plaintiffs' Motion for Conditional FLSA Certification. *See* Def.'s Reply at 5. But the court sees no reason why, following discovery, Plaintiffs cannot defend against decertification by seeking a narrower collective proceeding that is consistent with the evidence, even if the Complaint articulated a broader theory of collective

Nor is the court persuaded by MTM's insistence that there *must* be evidence of a common FLSA-violating policy or practice to satisfy the similarly situated standard. *See* Def.'s Reply at 10–15. To be sure, the vast majority of cases involving the question of whether party plaintiffs are similarly situated have turned on the existence of a common violative policy or practice. *See, e.g., Campbell*, 903 F.3d at 1099; *Monroe*, 860 F.3d at 404; *Morgan*, 551 F.3d at 1263. In *Campbell*, for instance, the lack of a common FLSA-violating policy was dispositive because it was the only justification for collective action offered by the plaintiffs. *See Campbell*, 903 F.3d at 1120 (finding plaintiffs were not similarly situated where there was no evidence of a department-wide policy of discouraging overtime, which was "*the sole justification advanced*" for collective treatment (emphasis added)). Although a common policy or practice might be *sufficient* to show party plaintiffs are similarly situated, this case illustrates why a common policy or practice is not *necessary*. *Cf. O'Brien*, 575 F.3d at 585 ("We do not mean to require that all collective actions under

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action. Certainly, proceeding on a narrower theory presents no problem of notice, and MTM has not articulated how it is prejudiced by a narrower theory of collective action. For example, MTM has not said that it would have demanded additional evidence from drivers or sought more evidence from TSPs had it understood that Plaintiffs would seek to proceed collectively only on the question of joint employer status. MTM's attempt to equate this shift in theory to an improper amendment of the Complaint, *see id.* (citing *Arbitraje Casa De Cambio v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003)), is therefore misplaced, and MTM has offered no case law to support its position.

§ 216(b) be unified by common theories of defendants' statutory violations . . . .").

Moving this matter forward collectively is potentially dispositive of the case: if Plaintiffs cannot carry their burden to show that MTM is a joint employer, they are out of luck. If they can make such a showing, the case moves forward. That is the definition of material, and it is precisely the type of issue Congress anticipated employees could pursue collectively. *See Hoffman-La Roche*, 493 U.S. at 170. While a defendant in a putative collective action under the FLSA has a right to defend against individualized claims on an individual basis, courts have held that "this right must be balanced [against] the rights of the plaintiffs—many of whom would likely be unable to bear the costs of an individual trial—to have their day in court." *Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1026 (D. Minn. 2007); *see Hoffman-La Roche*, 493 U.S. at 170. And there can be no doubt that permitting this case to proceed as a collective action on the issue of whether MTM is a joint employer will benefit individual plaintiffs and the judicial system by the efficient resolution in one proceeding of a common issue of law and fact. *See Hoffman-La Roche*, 493 U.S. at 170. When that is the case, and the party plaintiffs are similarly situated, "decertification of a collective action . . . cannot be permitted unless the collective mechanism is truly infeasible." *Campbell*, 903 F.3d at 1116. It is not truly infeasible here.

The court recognizes that at least two district courts, in cases factually similar to this one, have come out the other way—rejecting certification of a collective

action on the issue of whether defendant is a joint employer and holding that evidence of a common FLSA-violating policy or practice is required for plaintiffs to be similarly situated. *See, e.g.*, *Edmonds v. Amazon.com, Inc.*, No. C19-1613, 2020 WL 5993908, at *5 (W.D. Wash. Oct. 9, 2020); *Gibbs v. MLK Express Servs., LLC*, No. 18-cv-434, 2019 WL 2635746, at *9 (M.D. Fla. June 27, 2019). But those decisions are in no way binding on this court, and to the extent that *Edmonds*, in particular, found that the "absence of a plausibly alleged common plan or policy is dispositive," 2020 WL 5993908, at *6, this court respectfully disagrees for the reasons articulated above.

In sum, because the court finds that Plaintiffs have demonstrated that they are similarly situated as to one of the three issues they have identified—whether MTM is a joint employer—the court denies MTM's motion to decertify the collective action.

B. Certification of an Issue Class Under Rule 23(c)(4)

In its Memorandum Opinion denying Plaintiffs' motion for class certification, the court denied without prejudice Plaintiffs' motion to certify an issue class under Rule 23(c)(4), as the issue had not been fully briefed by the parties. *See Harris III*, 2020 WL 5702085, at *13. The court observed that Rule 23(c)(4) is not without controversy, as courts and commentators have split on its proper interaction with Rule 23(b)(3)'s requirement that common issues predominate. *Id.* at *12 (citing 2 Newberg on Class Actions § 4:91 (5th ed. 2020)). The court now discusses the state of the law on this issue before addressing the parties' arguments.

1. Legal Standard

Rule 23(c)(4) provides, "[w]hen appropriate[,] an action may be brought or maintained as a class action with respect to *particular issues*." Fed. R. Civ. P. 23(c)(4) (emphasis added). Historically, there had been a "sharp split in early academic commentary and a minor split in early cases" regarding Rule 23(c)(4)'s proper interaction with Rule 23(b)(3)'s requirement that for a class to be certified, "'the questions of law or fact common to class members [must] predominate over any questions affecting only individual members.'" 2 Newberg on Class Actions § 4:91 (alteration in original) (quoting Fed. R. Civ. P. 23(b)(3)). The two primary schools of thought on this interplay have been characterized as the "broad" and "narrow" views. *Id.* Proponents of the broad view believe that courts should apply Rule 23(b)(3)'s predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The broad view thus permits certification under Rule 23(c)(4) even when, as the court has already ruled in this case, predominance has not been satisfied for the cause of action as a whole. *See, e.g.*, *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (permitting issue certification "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)[ ] and proceed with

class treatment of these particular issues."). The majority of Circuits has expressed at least some support for this approach. In addition to the Second and Ninth Circuits, the Sixth Circuit has expressly endorsed it, *see Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 412 (6th Cir. 2018), and the Third, Fourth, Seventh, and Eighth Circuits "have indicated support for it," 2 Newberg on Class Actions § 4:91 (citing cases).

The only Circuit to subscribe to "the narrow view" has been the Fifth Circuit, which in a footnote to a 1996 opinion "appear[ed] to reject issue class certification unless the case itself meets the predominance requirements." *Id.* (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.")). Subsequent caselaw from within the Fifth Circuit, however, "indicates that any potency the narrow view once held there has dwindled." *Martin*, 896 F.3d at 412 (citing *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (noting that bifurcation might serve "as a remedy for the obstacles preventing a finding of predominance" but that the plaintiffs had not made such a proposal to the district court)); *see also* 2 Newberg on Class Actions § 4:91 (explaining that "[a] more recent Fifth Circuit decision casts some doubt on the continuing validity of" the footnote in *Castano* and citing *In re Deepwater Horizon*, 739 F.3d 790, 807 n.65 (5th Cir. 2014)).

Neither the Supreme Court nor the D.C. Circuit has weighed in on the scope of Rule 23(c)(4).[6] Although one court in this District has adopted the narrow view, *see Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394 (D.D.C. 2017), this court agrees with the vast majority of appellate courts that have found the broad view to be the better approach.

First, the broad approach is consistent with the structure of Rule 23. It "respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous." *Martin*, 896 F.3d at 413. The predominance inquiry is not discarded entirely but applied *after* identifying issues suitable for class treatment. By contrast, "the narrow view would virtually nullify Rule 23(c)(4)." *Id.*; *see also In re Nassau Cnty. Strip Search Cases*, 461 F.3d at 226 (observing that the narrow view contravenes the "well-settled principle that courts should avoid statutory interpretations that render provisions superfluous" (cleaned up)); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439–40 (4th Cir. 2003) (same).

Second, the broad view comports with the plain language of Rule 23, which provides for certification of

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[6] Plaintiffs place much stock *In re Johnson*, where the D.C. Circuit held that the district court had not manifestly erred "by in effect certifying an issue class action" because "a district court has a good deal of discretion in the management of the litigation before it." 760 F.3d 66, 75 (D.C. Cir. 2014). But this reliance is misplaced. *Johnson* was on review for manifest error, and the court expressly declined to weigh in on the "appropriate use of an issue class," as it had not been "raised or briefed." *Id.*

an issue class "[w]hen appropriate." Fed. R. Civ. P. 23(c)(4). "A prior version of Rule 23 even instructed that, after selecting issues for class treatment, the remainder of Rule 23's provisions 'shall then be construed and applied accordingly.'" *Martin*, 896 F.3d at 413; *In re Nassau Cnty. Strip Search Cases*, 461 F.3d at 226. Although that language changed with the 2007 amendment of the Rule, "the Advisory Committee made clear that the changes to the Rule's language were 'stylistic only.'" *Martin*, 896 F.3d at 413 (quoting Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 2007 amend.).[7] The Advisory Committee Notes lend further support for the broad view, citing as an example the fact that "in a fraud or similar case[,] the action may retain its 'class' character *only* through the adjudication of liability to the class[,]" and "the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.'" *In re Nassau Cnty. Strip Search Cases*, 461 F.3d at 226 (emphasis added) (quoting Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1966 amend.). That language suggests that "a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character, *i.e.*,

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[7] The Sixth Circuit in *Martin* also observed that the "Advisory Committee has [] declined to alter the language of Rule 23(c)(4) to reflect the narrow view or otherwise limit the use of issues classes." *Id.* (citing Advisory Committee on Civil Rules, *Rule 23 Subcommittee Report* 90–91 (2015), http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf (indicating that the broad approach's dominance reflects the proper understanding of the Rule—"[t]he various circuits seem to be in accord about the propriety of such [issue] treatment 'when appropriate,' as Rule 23(c)(4) now says")).

when common questions predominate only as to the 'particular issues' of which the provision speaks." *Id.*

Finally, as noted by the Sixth Circuit in *Martin*, "the concomitant application of Rule 23(b)(3)'s superiority requirement ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution." 896 F.3d at 413.

For these reasons, the court is persuaded that the broad view is the better interpretation of Rule 23(c)(4), and turns now to assessing whether, under that approach, issue certification is warranted in this case.

2. Analysis

In arguing for certification of an issue class under Rule 23(c)(4), Plaintiffs identify four issues that "are common to all class members and as to which the proof and defense can be resolved for the class as whole." Pls.' Suppl. Mem. in Supp. of Certification of Claims Pursuant to Rule 23(c)(4) & Clarification that the Limitations Period Remains Tolled, ECF No. 179 [hereinafter Pls.' Mem.], at 8. Those issues are:

> 1. Whether MTM qualifies as a joint employer of the putative class members;
>
> 2. Whether MTM is a general contractor that is strictly liable for any violations of the wage laws committed by its subcontractors;
>
> 3. Whether the time expended by putative class members traveling between trips provided to

> MTM clients and waiting for MTM clients qualifies as compensable work under the laws invoked by this action; and
>
> 4. Whether the wage rates set by the Living Wage Act and the Service Contract Act apply to time worked on MTM's managedcare contracts.

Id. Plaintiffs contend that "[b]ecause resolution of these issues on a class-wide basis will advance the resolution of this action, these issues can and should be certified pursuant to Rule 23(c)(4)." *Id.* (citing *Martin*, 896 F.3d at 415–16). The court agrees as to the first and second issues—whether MTM is a joint employer or general contractor—but not as to the latter two.

Ultimately, the question here is the same as it was in determining whether to decertify the collective action under the FLSA: Would certifying an issue class "materially advance the litigation"? *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also Gonzalez v. Owens Corning*, 885 F.3d 186, 203 (3d Cir. 2018) (amended Apr. 4, 2018) ("The District Court therefore correctly determined that a Rule 23(c)(4) class would not 'materially advance resolution of the underlying claims . . . .'"); *Valentino*, 97 F.3d at 1229 (holding that the district court did not properly consider Rule 23(c)(4) when it "did not discuss whether the adjudication of the certified issues would significantly advance the resolution of the underlying case"). The answer to that question under Rule 23(c)(4) is the same as in the collective action context of the FLSA: Yes.

As the court observed in its Memorandum Opinion denying class certification, "[i]f MTM is neither a joint employer nor a general contractor, that would bring an end to the case—it cannot be held liable under District of Columbia law for underpayment of wages." *Harris III*, 2020 WL 5702085, at *6. "On the other hand, if MTM does qualify as a joint employer or a general contractor, that legal conclusion would answer a threshold question in Plaintiffs' favor that is necessary to make out their claims." *Id.* Moreover, Plaintiffs have shown that they intend to rely on evidence common to the class, including MTM's service agreements, training policies and manuals, and corporate testimony, to show that MTM is a joint employer or general contractor for the purposes of their District of Columbia wage claims. *See id.* at *10.

MTM asserts two overarching arguments in opposition to certification of an issue class. First, it argues that "certification pursuant to Rule 23(c)(4) is appropriate only where the requirements of both Rule 23(a) and one of the subsections of Rule 23(b) are satisfied with respect to the entire action or a specific cause of action." Def.'s Opp'n to Pls.' Mot., ECF No. 182 [hereinafter Def.'s Opp'n], at 1. The court already has rejected this argument, finding that the broad view is the superior of the two prevailing approaches. *See supra* at p. 18.

Next, MTM argues that certification of an issue class is proper only if the issue "at least substantially resolve[s] the merits of liability on a class-wide basis." Def.'s Opp'n at 17; *see id.* at 17–25. This argument is similar in kind to the one MTM asserted in the context

of the FLSA collective—that proof of a common FLSA-violating policy is *necessary* to satisfy the similarly situated standard. But, as Plaintiffs point out, courts within this Circuit and others have rejected a requirement that an issue class fully resolve liability in the context of 23(b)(3) and 23(c)(4) alike. *See* Pls.' Reply Mem. in Supp. of Mot. for Cert. of Claims Pursuant to Rule 23(c)(4), ECF No. 184 [hereinafter Pls.' Reply], at 4; *see also In re Prograf Antitrust Litig.*, No. 11-MD-02242, 2014 WL 4745954, at *1 (D. Mass. June 10, 2014) (collecting cases and noting "[c]ertification can also be of more limited scope, covering specific common issues short of completely resolving liability"); *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 160 (D.D.C. 2014) ("'[T]he common issues need only be predominant, not dispositive of the litigation.'" (quoting *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 116 (D.D.C. 2007))); *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 307 (D.D.C. 2007) (same); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001) (same). At bottom, MTM's argument that an issue class is appropriate only where the issue would "substantially resolve" the case is not supported by either the text of Rule 23(c)(4) or the case law.[8] In any event, the antecedent question of whether MTM is a joint employer or general

[8] MTM also argues that several cases Plaintiffs rely on involved a discrete common policy, and because Plaintiffs have not alleged such a policy here, certification of an issue class is not warranted. Def.'s Opp'n at 18, 23. Just as the court noted in the context of an FLSA collective, however, although a common policy might in some cases be sufficient to warrant issue certification, MTM cites no case suggesting that a common policy is *required*. *See supra* p. 13.

contractor does "go[] directly to the heart of . . . liability." Def.'s Opp'n at 1. MTM cannot be held liable for Plaintiffs' District of Columbia statutory wage claims if it is not a joint employer or a general contractor. Resolving such a dispositive issue would "materially advance the litigation." *McLaughlin*, 522 F.3d at 234. Accordingly, the court will grant Plaintiffs' request to certify a class on the issue of whether MTM is a joint employer or general contractor.

The court agrees with MTM, however, that the other two issues Plaintiffs seek to certify are not suitable for class-wide resolution. The issue of whether the time expended by putative class members traveling between trips provided to MTM clients and waiting for MTM clients qualifies as compensable work under District of Columbia wage laws is fact intensive and highly individualized. Indeed, as noted above, the record shows that at least some TSPs compensated their drivers for such time. *See* Def.'s Opp'n to Pl.'s Mot. for Class Cert., ECF No. 142-2 [hereinafter Def.'s Opp'n to Class Cert.], Decl. of Omar Amit of AB&B Transportation, ECF No. 142-18, ¶ 7; Def.'s Opp'n for Class Cert., Decl. of Merlin Fossi of MBI, ECF No. 142-8, ¶ 7; Def.'s Opp'n to Class Cert., Decl. of Saidou Ouedraogo of Mariet & B, ECF No. 142-22, ¶ 7. As "questions of law or fact common to class members [do not] predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3), it is an issue that will need to be decided on a driver-by-driver basis, and it is therefore not suitable for issue certification, *see Martin*, 896 F.3d at 411 ("Under . . . the broad view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common

issues have been identified for class treatment under Rule 23(c)(4).").

And as for the issue of whether the wage rates set by the Living Wage Act and the Service Contract Act apply to time worked on MTM's managed-care contracts, that is an ancillary legal question better left for the damages phase of the litigation. Its resolution will not "materially advance the litigation." *McLaughlin*, 522 F.3d at 234. The parties agree that individual trials to determine damages will be necessary, *see, e.g.*, Pls.' Mem. at 16, and certifying an issue class on a damages-related legal question is premature before MTM's liability has been established. The court thus denies Plaintiffs' request to certify a class as to the proper wage rate. *See Martin*, 896 F.3d at 413 ("[T]he concomitant application of Rule 23(b)(3)'s superiority requirement ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution.").

C. Tolling of Statute of Limitations

Finally, Plaintiffs seek clarification that the statute of limitations for the putative class members' claims remains tolled notwithstanding the court's denial without prejudice of Plaintiffs' request to certify a class under Rule 23(c)(4). *See* Pls.' Mem. at 17–20. The court concurs with Plaintiffs that the statute of limitations remains tolled because the court's Memorandum Opinion denying class certification under Rule 23(b)(3) left open the possibility of certification of an issue class under Rule 23(c)(4), *Harris III*, 2020 WL 5702085, at

*13. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) ("[C]ommencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.").

MTM's argument that tolling is not warranted because it "would not promote efficiency and economy of litigation," Def.'s Opp'n at 33, is not well taken. The concerns articulated by the Supreme Court in *American Pipe & Construction Company v. Utah* are equally valid here. 414 U.S. at 554 ("A contrary rule . . . would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principle purpose of the procedure."). "If the statute of limitations were not tolled . . . then each class member would have to file individual actions to preserve their right to relief—which is precisely what class actions suits are designed to avoid." *Barryman-Turner v. District of Columbia*, 115 F. Supp. 3d 126, 131 (D.D.C. 2015) (citing *Am. Pipe*, 414 U.S. at 551); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350–51 (1983) ("[Without tolling,] putative class member[s] who fear[] that class certification may be denied would have every incentive to file a separate action prior to the expiration of [their] own period of limitations.").

If tolling had ceased with the court's denial of class certification under Rule 23(b)(3), then the putative class members would have to move to intervene or file their own complaints in order to protect their rights. But it would not make sense for them to do so prior to the court deciding whether certification of an issue

class under Rule 23(c)(4) is proper—a possibility left plainly open by the court's prior opinion. *See Harris III*, 2020 WL 5702085, at *13. As the Seventh Circuit held in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, "[t]olling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action." 642 F.3d 560, 563 (7th Cir. 2011). That day has not yet come in this case.

II. CONCLUSION AND ORDER

For the reasons set forth above, the court denies MTM's motion to decertify the FLSA collective, ECF No. 180, and grants Plaintiffs' motion for certification of an issue class under Rule 23(c)(4), ECF No. 179, on the issues of whether MTM is a joint employer or a general contractor.

/s/ Amit P. Mehta
Amit P. Mehta
United States District Judge

Dated: August 6, 2021

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 17-cv-01371 (APM)

[Filed September 24, 2020]

ISAAC HARRIS, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MEDICAL TRANSPORTATION MANAGEMENT, INC.,	)
	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

Plaintiffs in this putative class action are drivers who claim that they have been underpaid in violation of federal and local wage laws for transporting Medicaid patients in the District of Columbia. Defendant Medical Transportation Management, Inc. ("MTM") is a private company that contracts with the District of Columbia to "manage and administer" non-emergency transportation services for Medicaid recipients. While MTM does not employ drivers directly, it contracts with various transportation

service providers who directly employ drivers—Plaintiffs in this case—to fulfill its contracts with the District. Following class discovery, Plaintiffs move to certify the class and appoint Plaintiffs' counsel as class counsel. MTM opposes certification and, as part of that effort, seeks to exclude Plaintiffs' expert. Plaintiffs also move to strike one of MTM's declarants.

For the reasons that follow, the court denies the motion for class certification. Although Plaintiffs' request for class certification passes muster under Federal Rule of Civil Procedure Rule 23(a), Plaintiffs fail to establish that "questions of law or fact common to class members predominate over any questions affecting only individual members," as required under Rule 23(b)(3). Additionally, Plaintiffs' request for certification of an issue class under Rule 23(c)(4) is denied without prejudice, because that request is not sufficiently briefed. Finally, the court denies as moot the parties' respective motions to strike.

I. BACKGROUND

A. Factual Background

Defendant MTM contracts with the District of Columbia to provide non-emergency medical transportation ("NEMT") to and from medical appointments for District of Columbia residents eligible for Medicaid. Compl., ECF No. 1 [hereinafter Compl.], ¶ 15; Pls.' Mot. for Leave to File Excess Pages, ECF No. 130, Ex. 1, ECF No. 130-3 [hereinafter PEX 1].[1] The

[1] Plaintiffs' exhibits to their class certification motion and reply motion, noted as "PEX," are found at ECF Nos. 130, 131, 155, and 156.

District first contracted with Defendant around 2007, and during the last decade, the parties have entered into new agreements or extensions multiple times. *See* Compl. ¶¶ 22–24. The most recent contract—a three-year, $85 million contract—took effect in December 2015. *See id.* at ¶ 24.

MTM does not employ drivers directly but instead functions like a "transportation broker" or a "[g]atekeeper of transportation service requests." *Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234, 237 (D.D.C. 2018) (citations omitted). MTM operates a call center to receive and process Medicaid recipients' transportation requests, validates the requesters' eligibility, and assesses the medical necessity of the requested transportation. *Id.* MTM then assigns the request to a transportation service provider. *Id.*; *see also* Compl. ¶ 18. MTM subcontracts with over 80 transportation service providers, or TSPs, and these companies employ drivers to perform the transportation services required by MTM's contracts. *See* Compl. ¶¶ 18–19; *see also* PEX 5.

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin are current or former drivers for transportation service companies that provide NEMT services to Medicaid patients in the District of Columbia. Compl. ¶¶ 1, 21–22. The TSPs who employ Plaintiffs have agreements with MTM to provide transportation services. *Id.* ¶ 19. Plaintiffs claim that, although each individual TSP sets its drivers' wages and work schedules, MTM dictates other aspects of the drivers' work through the service agreements between MTM and the TSP. *Id.* ¶ 27. For example, MTM

controls the process of approving the hiring of new drivers by requiring that the driver be "fully credentialed and approved by MTM." *Id*. ¶¶ 34a, 50, 68, 79; *see also* PEX 5 at MTM 000920. MTM trains the TSPs on what is needed for drivers to be approved to work, maintains an online portal for TSPs to upload documents proving that the drivers meet MTM's requirements, and stores the drivers' information in an MTM database. Compl. ¶ 37; PEX 53. And MTM can cancel its contract with a TSP if it uses an unapproved driver on MTM trips. PEX 54; PEX 51 at MTM 000807.

Further, MTM oversees the drivers' training. Compl. ¶¶ 51, 69, 80. MTM employees hold trainings that must be completed by each potential new driver. PEX 55, at 1; PEX 7 at 186:10-187:11. These include a defensive driving training; CPR and first aid training; a fraud, waste, and abuse training; and an MTM driver certification training. PEX 7 at 83:6-20, 84:10-13; 85:8-12; 85:14-22, 86:19–88:13. The MTM driver certification training alone contains nine individual training components. *Id.* at 88:2-8, 168:22–171:5; 186:10–187:11; PEX 56; PEX 57; PEX 58. And, MTM requires that drivers submit to periodic retraining. PEX 7 at 171:12-13.

MTM's standard agreement with TSPs also lists rules that apply to drivers and govern their work performance. PEX 5 at MTM 000917-918, 934. These include rules regarding the drivers' appearance, including requiring them to wear authorized uniforms, Ex. 5 at MTM 000917, 934; *see also* PEX 7 at 108:10–109:4, as well as rules regarding MTM's

customer service standards, PEX 56 at MTM 000531–35.

B. Procedural History

On July 13, 2017, Plaintiffs filed a putative class and collective action against MTM, asserting five causes of action. *See generally* Compl. In Count One, they allege that MTM violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., by failing to pay Plaintiffs the minimum wage and overtime rates required by federal law. Compl. ¶¶ 124–32. Counts Two, Three, and Four allege that MTM violated, respectively, (1) the D.C. Minimum Wage Act, D.C. Code § 32–1001 *et seq*.; (2) the D.C. Living Wage Act, D.C. § 2–220.01 *et seq*.; and (3) the D.C. Wage Payment and Collection Law, D.C. Code § 32–1301 *et seq*. Compl. ¶¶ 133–62. Finally, Count Five alleges that Defendant breached its contract with the District of Columbia by violating the Living Wage Act. *Id*. ¶¶ 163–69.

Plaintiffs' theory of liability turns on MTM's relationship to individual drivers. Although MTM is not their "employer" in the traditional sense—drivers are not on MTM's payroll, for example—Plaintiffs assert that MTM is nevertheless liable for their underpaid wages because it is a "joint employer" or "general contractor" under these federal and local laws, and it therefore "has the responsibility to ensure that the drivers are paid the legally required wages." *See* Pls.' Mem. in Supp. of Class Certification, ECF No. 134 [hereinafter Pls.' Mot.], at 38 (citing *Ventura v. Bebo Foods, Inc*., 738 F. Supp. 2d 8, 35 (D.D.C. 2010), and *Perez v. C.R. Calderon Constr., Inc*., 221 F. Supp. 3d

115, 157 (D.D.C. 2016)); *see also id.* at 23–24 (citing D.C. Code § 32-1012(c); *id.* § 32-1303(5)). Plaintiffs say that MTM's payment of a flat rate per trip, under the terms of its contracts with TSPs, is the reason TSPs are not able to pay drivers in accordance with federal and local laws. *Id.* at 36–38; *see also* Pls.' Reply in Supp. of their Mot. for Class Cert., ECF No. 155-2 [hereinafter Pls.' Reply], at 5–6. The flat rate is based only on (1) whether the trips take place within or between geographic zones—MTM divides the District into three zones; (2) whether the trip involves an ambulatory or para-lift wheelchair passenger; and (3) whether the trip occurs during regular daytime hours. Pls.' Mot. at 12–13; PEX 2 29–32; *see also* PEX 64, Decl. of Marc Bendick, Jr., Ph.D., [hereinafter Bendick Decl.], at 7–8. The flat rate does not expressly account for factors like the duration of the trip, the distance of the trip, the time drivers spend waiting for passengers or assisting passengers, or the time spent driving between trips. Pls.' Mot. at 12–13; PEX 2 at 36–37.

MTM initially moved to dismiss Plaintiffs' Complaint on the basis that it cannot be held liable for the alleged wage violations because it is neither a "joint employer" nor "general contractor." *See* Def.'s Motion to Dismiss, ECF No. 10 [hereinafter Def.'s Mot.]. The court denied that motion. *See Harris*, 300 F. Supp. 3d at 243. MTM also filed its own complaint against third-party transportation providers, *see* Third Party Complaint, ECF No. 24, and the court denied the motions to dismiss that complaint, *see* Order, ECF No. 49.

In July 2018, the court granted Plaintiffs' motion for conditional class certification, *see* Order, ECF No. 48, and the parties proceeded to class certification discovery. A number of disputes arose during discovery, two of which bear mentioning. First, Plaintiffs sought from MTM evidence regarding wages paid, hours worked, and other information concerning drivers on the theory that, through its contracts, MTM had the right to demand such information from the TSPs. *See* 7/18/2018 Hr'g Tr., ECF No. 52, at 14–15; Joint Status Report on Class Not., ECF No. 54, at 2; 8/23/2018 Hr'g Tr., ECF No. 71, at 5–6. MTM attempted to obtain these records by document requests and by subpoena. *See* 4/25/19 Hr'g Tr., ECF No. 128 [hereinafter 4/25/19 Hr'g Tr.], at 38–40. However, as reported at the hearing on class certification, MTM's subpoenas resulted in the production of very limited information. 7/16/2020 Draft Hr'g Tr., at 6–7.

Plaintiffs also sought the production of MTM assignment sheets and trip logs, that is, 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 member names. Pls.' Mot. at 36. When MTM protested that the trip logs were too voluminous to produce, Plaintiffs asked the court to order MTM to produce a statistically representative sample of the assignment sheets and trip logs. *See* Mot. for Discovery, ECF No. 118. In response, MTM informed the court that it routinely purges assignment sheets from its files, so records reflecting past trip assignments "do not exist." Mem. in Opp'n to Mot. for Discovery, ECF No. 120, at 2; *see also* 4/25/19 Hr'g Tr., at 30. MTM also argued that

assignment sheets and trip logs would not be relevant to class certification. Mem. in Opp'n to Mot. for Discovery at 2; *see also* 4/25/19 Hr'g Tr., at 19–20. Ultimately, Plaintiffs agreed to defer resolving the dispute, pending MTM's response to their motion for class certification. 4/25/19 Hr'g Tr., at 35–36.

Plaintiffs moved for class certification on July 26, 2019. *See* Pls.' Mot. for Class Cert., ECF No. 130-2 [hereinafter Pls.' Mot.]. MTM opposed, *see* Def.'s Opp'n to Pls.' Mot., ECF No. 142-2 [hereinafter Def.'s Opp'n], and moved to strike the declaration of Plaintiffs' Expert, Dr. Marc Bendick, *see* Def.'s Mot. to Strike Decl. of Marc Bendick, ECF No. 143 [hereinafter Def.'s Mot. to Strike]. Plaintiffs in turn moved to strike the declaration of Christina Gunseor and the accompanying exhibits, on the ground that her declaration relied on trip records and trip logs that MTM had failed to produce during discovery. *See* Pls.' Mot. to Strike the Decl. of Christina Gunseor and Exhibits Thereto, ECF No. 157, Mem. in Supp., ECF No. 157-2, at 2. The court heard argument on Plaintiffs' motion for class certification on July 16, 2020. *See generally* 7/16/2020 Draft Hr'g Tr.

II. LEGAL STANDARD

Rule 23 of the Federal Rules of Civil Procedure, which governs class certification, permits certification only if:

> (1) the class is so numerous that joinder of all members is 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). In addition to meeting these requirements, a class must satisfy at least one of the three subsections of Rule 23(b). Here, Plaintiffs seek certification under subsection (b)(3), which is satisfied when "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). A court evaluating a proposed class under (b)(3) must consider:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Id. Alternatively, Plaintiffs seek certification under Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4).[2]

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). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," and that "[a]ctual, not presumed, conformance with Rule 23(a) remains indispensable." *Id.* at. 350–51 (cleaned up). At the certification stage, 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, 466 (2013).

III. DISCUSSION

The court begins with an analysis of the Rule 23(a) factors before turning its attention to the criteria for certification of a class under Rule 23(b)(3). The court then considers Plaintiffs' request for class certification with respect to particular issues under Rule 23(c)(4).

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[2] This provision is the subject of vigorous debate among courts and commentators. *See* discussion *infra* Section III.C.

A. Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity does not "impose[ ] [an] absolute limitation[ ]," but rather "requires examination of the specific facts of each case." *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Courts in this District generally find that numerosity is satisfied and that joinder is impracticable where a proposed class has at least forty members. *See Cohen v. Chilcott*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007); *Bynum v. District of Columbia*, 214 F.R.D. 27, 32–33 (D.D.C. 2003). Plaintiffs need not provide the exact number of potential class members to satisfy the requirement, but can provide an estimate supported by a reasonable basis to believe it to be accurate. *Bynum*, 214 F.R.D. at 32–33.

Here, 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. MTM does not dispute these numbers and makes no arguments against numerosity in its opposition to class certification. The court therefore finds that the proposed class contains sufficient numbers to make joinder impracticable and satisfies the numerosity requirement of Rule 23(a)(1).

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has explained that

commonality requires that the plaintiffs' claims "depend upon a common contention . . . of such a nature 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." *Wal-Mart*, 564 U.S. at 350. "A plaintiff's burden is to 'bridge the gap' between her individual claim and 'the existence of a class of persons who have suffered the same injury as that individual.'" *Moore v. Napolitano*, 926 F. Supp. 2d 8, 29 (D.D.C. 2013) (quoting *General Telephone Co. of the Sw. v. Falcon*, 457 U.S. 147 (2013)). Plaintiffs need only show that one issue is common to all proposed class members in order to satisfy the commonality requirement. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

Plaintiffs argue that the proposed class meets the commonality standard because a number of questions are common to the class, including (1) whether MTM is a joint employer, (2) whether MTM is a general contractor, (3) whether the time class members spent traveling between trips and waiting for clients is compensable, and (4) whether MTM's flat-rate payment system accounts for all compensable time. Pls.' Mot. at 18.

MTM counters that Plaintiffs flunk the commonality requirement because they "have failed to identify a uniform policy to which they and the other members of their proposed class were subjected that explains how or provides the reasons that each member of the proposed class was allegedly not paid appropriately." Def.'s Mot. at 18. As MTM sees it, there

is no uniform class-wide policy as to drivers' wages and hours because the drivers' wages were structured differently, they were paid at different rates, had different driving assignments, and their work hours were set differently depending on which TSP employed them. *Id.* at 21.

The presence of these individualized issues does not defeat the element of commonality. Recall, to satisfy the element of commonality requires plaintiffs to show only one issue common to the class. *See Tyson Foods*, 136 S. Ct. at 1045. Here, there are at least two: (1) Whether MTM qualifies as a "joint employer" and (2) whether MTM qualifies as a general contractor for purposes of establishing joint liability for any unpaid wages under District of Columbia law. *See Harris*, 300 F. Supp. 3d at 246–47 (describing Plaintiffs' alternative theories of liability under District of Columbia wage statutes). Those issues are capable of class-wide resolution "in one stroke," as their resolution will depend on common evidence concerning, among other things, MTM's hiring, training, and performance requirements. *Wal-Mart*, 564 U.S. at 350; *see also Harris*, 300 F. Supp. 3d at 243–44 (describing the type of evidence relevant to a joint employer determination).

MTM resists this conclusion. It asserts that questions about MTM's status as a joint employer or a general contractor are not the type of "common question" that satisfies Rule 23(a)(2), and are more like the question "Do all of us plaintiffs indeed work for Wal-Mart" that the Supreme Court offered would be insufficient to obtain class certification in *Wal-Mart*. *See* Def.'s Opp'n at 17–18. But the comparison to *Wal-*

Mart is strained, to say the least. The question posed in that case was whether female Walmart employees had been discriminated against by virtue of their sex, an issue which was not common to all class members since plaintiffs had not bridged the gap between their individual experiences of discrimination and a "general policy" of discrimination that was applicable to all class members. *See Wal-Mart*, 564 U.S. at 353. Here, on the other hand, the questions concerning MTM's status as a joint employer or general contractor are *legal* questions that do not depend on individualized facts regarding MTM's relationships with specific plaintiffs. And once answered, those questions would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Stated another way, resolving whether MTM is a joint employer or general contractor would "generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 132 (2009)). If MTM is neither a joint employer nor a general contractor, that would bring an end to the case—it cannot be held liable under District of Columbia law for underpayment of wages. On the other hand, if MTM does qualify as a joint employer or a general contractor, that legal conclusion would answer a threshold question in Plaintiffs' favor that is necessary to make out their claims. MTM's legal status as joint employer or general contractor thus presents a quintessential "common question" under Rule 23(a)(2).

3. Typicality and Adequacy

The third and fourth prerequisites of Rule 23(a) concern the suitability of the class representatives. Rule 23(a)(3) requires a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This typicality requirement ensures "that the class representatives have suffered injuries in the same general fashion as absent class members." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 260 (D.D.C. 2002) (quoting *Thomas v. Albright*, 139 F.3d 227, 228 (D.C. Cir. 1998)). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member's where his or her claims are based on the same legal theory." *Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (quoting *EEOC v. Printing Indus.*, 92 F.R.D. 51, 54 (D.D.C. 1981)). Relatedly, Rule 23(a)(4) requires a finding that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (quoting *Nat'l Ass'n of Reg'l Medical Programs v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)).

Plaintiffs argue that typicality is satisfied because the claims of named plaintiffs Isaac Harris, Darnell Frye, and Franklin "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." Pls.' Mot. at 40. As to adequacy, Plaintiffs submit that the named Plaintiffs are not antagonistic to the unnamed class members and are able to vigorously represent the interests of the class. *Id.* at 42.

MTM, however, raises a number of objections to the named plaintiffs, including that (1) Frye should have been disqualified as a driver from the NEMT program because of a domestic violence conviction; (2) Harris has filed and settled claims against one TSP, Star Transportation; and (3) Frye and Harris allegedly "submitted falsified driving trip records which cast serious doubt on their credibility and ability to serve as a class representative." Def.'s Opp'n at 42–45.

These objections are unpersuasive. First, none of MTM's assertions have any bearing on typicality, which is concerned with distinctions that "differentiate the 'claims or defenses' of the representatives from those of the class." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019). Nor are allegations that potential class representatives lack character or credibility relevant to adequacy unless the allegations reveal a conflict among the class members or an inability to vigorously pursue the case. *See Johns v. Rozet*, 141 F.R.D. 211, 217 (D.D.C. 1992). The allegations levied

against Frye and Franklin do not meet this standard. Finally, that Harris may have settled claims against Star Transportation says nothing about MTM's liability for underpayment of wages. While it is possible that Harris's settlement with Star may be a defense as to damages as to him, "the ultimate inability to maintain an individual claim for damages due to a legitimate defense to that named plaintiff's claim . . . does not create a conflict of interest that destroys the adequacy of class representatives." *Little v. Wash. Metropolitan Area Transit Auth.*, 249 F. Supp. 3d 394, 422 (D.D.C. 2017).

Accordingly, the court finds the named plaintiffs claims are typical of those of the class and that the named plaintiffs are adequate representatives of the class. Additionally, Plaintiffs' counsel are experienced in class actions and other complex litigation, Pls.' Mot. at 42, and thus adequate to represent the class. MTM does not contend otherwise.

B. Rule 23(b)(3)

To certify a class under Rule 23(b)(3), as Plaintiffs request here, the court must find 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). The court takes these requirements in reverse order, starting with superiority.

1. Superiority

Rule 23(b)(3)'s superiority requirement is intended to "ensure[ ] that resolution by class action will 'achieve economies of time, effort, and expense and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences.'" *Vista Healthplan, Inc. v. Warner Holdings Co.*, 246 F.R.D. 349, 359–60 (D.D.C. 2007) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). Superiority is met when a court determines that a class action is superior to other available means of adjudication. In making that determination, courts consider "the class members' interests in individually controlling the prosecution or defense of separate actions," "any litigation concerning the controversy already begun by or against class members," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

MTM argues that Plaintiffs have failed to satisfy the superiority requirement because (1) the claims of each class member are not "so small that each individual would lack the motivation to pursue such a claim" in individual litigation; (2) at least three drivers have previously pursued claims against MTM and/or their subcontractors; and (3) "Plaintiffs have failed to identify any viable common method of adjudicating the claims of class members on a common, class-wide basis." Def.'s Opp'n at 52–55.

MTM's arguments are unpersuasive. First, superiority is often found when use of the class action device would "enable[ ] 'vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" 2 Newberg on Class Actions § 4:65 (5th ed. 2020) (quoting *Amchem*, 521 U.S. at 617); *see also Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 162 (D.D.C. 2014) ("[C]lass actions are appropriate where many individuals have small claims, and otherwise would not be incentivized to pursue them."). Here, even if some class members' claims may be large enough to incentivize such persons to pursue individual claims, that is not evidently true for most or even many class members. Class-wide resolution of certain central questions—particularly MTM's status as a joint employer or general contractor—is superior to litigating that question in dozens, if not hundreds, of individual actions. Second, that "no fewer than three drivers," Def's Opp'n at 53, out of a potential class of more than 800, have already brought individual claims against MTM and/or its subcontractors does not render this class action against MTM an undesirable forum for litigation. Again, one of the key questions presented in this case is whether MTM is jointly liable with its subcontractors for underpaying drivers. That question would not be contested in separate suits brought solely against subcontractors, and though some claims have been lodged against MTM, deciding the joint liability question in a single case covering an entire putative class is superior to multiple individual actions. Finally, as to MTM's contention that this class action would be unmanageable because of Plaintiffs' failure to identify a common method of adjudicating claims, this concern

crosses over into the predominance analysis, which the court discusses next.

2. Predominance

The second requirement of Rule 23(b)(3) is that common issues predominate over issues that affect only individual class members. "The predominance requirement is meant to assess whether the class's interests are 'sufficiently cohesive to warrant adjudication by representation.'" 2 Newberg on Class Actions § 4.49 (5th ed. 2020) (quoting *Amchem*, 521 U.S. at 623). Although this inquiry is related to the commonality requirement, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding." *Comcast Corp. v. Behrand*, 569 U.S. 27, 34 (2013).

"[T]he predominance analysis logically entails two distinct steps—the characterization step and the weighing step." 2 Newberg on Class Actions § 4:50 (5th ed. 2020). First, the court must "characterize the issues in the case as common or individual . . . primarily based on the nature of the evidence." *Id*. "Evidence is considered 'common' to the class if the same evidence can be used to prove an element of the cause of action for each member," but evidence is individualized when "members of the proposed class would need to present evidence that varies from person to person." *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 22 (D.D.C. 2012). Second, the court must "compare the issues subject to common proof against the issues subject solely to individualized proof to *assess* whether the common issues predominate." 2 Newberg on Class Actions § 4:50 (5th ed. 2020). This comparison is "more

of a qualitative than quantitative" concept. *Id.* At this weighing step, the court must keep in mind that "common liability issues are typically far more important and contested and the individual damage calculations often formulaic." *Id.* § 4:54 (5th ed. 2020); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) ("Where common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." (cleaned up)). "[T]he mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984); *see also* 2 Newberg on Class Actions § 4:54 (5th ed. 2020) ("[C]ourts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations.").

Plaintiffs argue that two issues "underlie every putative class member's claim": (1) whether MTM is a joint employer of the class members, and (2) whether MTM's flat-rate payment system "failed to ensure that the drivers were paid for all compensable time." Pls. Mot. at 43–44. They assert that they can answer these questions through representative proof common to the class, including with "MTM's policy documents, testimony from MTM's representative, and expert economic analysis of MTM's universal D.C. rate scheme." *Id.* at 44. The court agrees that common evidence can resolve the first question, but not the second. Individualized proof, as opposed to representative evidence, ultimately will be necessary to

determine whether MTM violated wage laws with respect to any particular class member, and that individualized proof will overwhelm the common questions presented.

i. Whether MTM is a "joint employer"

As this court explained in its Memorandum Opinion denying MTM's motion to dismiss, the D.C. Circuit has not specified a test for determining whether an alleged employer is a "joint employer" for purposes of the FLSA. *Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234, 240–41 (D.D.C. 2018). However, in a case that considered whether a worker is a "consultant" or an "employee" for purposes of the FLSA, the Circuit explained that the question turns on the "economic reality" of the employment arrangement rather than "technical concepts." *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32–33 (1961)). The Circuit instructed courts to examine "the extent to which [four] typical employer prerogatives govern the relationship between the putative employer and employee": (1) the power to hire and fire employees; (2) the ability to supervise and control employees' work schedules or conditions of employment; (3) the authority to determine the rate and method of payment; and (4) the maintenance of employment records. *Id.* (citing *Henthorn v. Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994)). These same factors would apply to the joint employer inquiry for purposes of Plaintiffs' District of Columbia wage claims. *See Wilson v. Hunam Inn., Inc.*, 126 F. Supp. 3d 1, 5–6 (D.D.C. 2015) (stating that courts construe the

FLSA and the D.C. Minimum Wage Act "coterminously for purposes of determining who is liable as an employer").

Common evidence is likely to resolve the joint employer question. For example, Plaintiffs no doubt will look to MTM's policy documents and service agreements with subcontractors, as well as testimony by MTM employees regarding its hiring and training practices and the rules and standards MTM requires drivers to follow. Plaintiffs will use this evidence—which would be applicable to all class members—to show that MTM has the power to hire and fire drivers, and has the authority to control or affect the conditions of the drivers' employment. None of this is to say that the court has reached any conclusion about the merits of Plaintiffs' theory of joint employment. But what is clear, however, is that the joint liability question can be resolved through the presentation of proof common to the class, and not individualized evidence. That question, at least, meets the predominance requirement of Rule 23(b)(3).

ii. Whether MTM's flat-rate payment system failed to ensure that the drivers were paid for all compensable time

The court reaches a different conclusion, however, as to whether Plaintiffs have offered class-wide proof supporting the second issue underpinning their claims: whether MTM's payment system is responsible for underpayment of wages. The crux of Plaintiffs' theory of liability is that, because MTM is a joint employer (or a general contractor), it has "an affirmative obligation

to ensure that its employees are paid 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, D.C. Code § 32-1302, 41 U.S.C. § 6703." Pls.' Reply at 4. MTM failed in this obligation, according to Plaintiffs, because it utilizes a flat-rate payment system that does not compensate drivers for time between trips, time in traffic, or time waiting for and assisting clients. Plaintiffs present testimony from class members and a methodology developed by their expert, Dr. Marc Bendick, as class-wide proof.

MTM, on the other hand, insists that individualized inquiries will be necessary to determine which class members were underpaid, and thus whether MTM is liable. In MTM's view, these inquiries would overwhelm the litigation because wide variations of proof exist within the class on key aspects of establishing liability, including: (1) the different rate MTM negotiated with each TSP; (2) the compensation structure for each class member (hourly, daily, per trip, weekly, or biweekly); (3) how much each class member was compensated; (4) the hours each class member worked; and (5) the years in which each class member worked and the minimum wage at those times. *See* Def.'s Opp'n at 51. "The need for such an extensive individualized inquiry as to each class member," MTM submits, "is fundamentally irreconcilable with Plaintiffs' contention that common issues predominate such that certification is permissible under Rule 23(b)(3)." *Id.* The court agrees.

The record reflects wide variation among putative class members across numerous metrics that would be relevant to assessing MTM's liability as to each class member. Putative class members are employed by over eighty TSPs, each of whom negotiated an individualized rate structure with MTM. *See* Bendick Decl. at 7 (providing average rates of payment between MTM and 77 TSPs). Variations are particularly striking as to putative class members' pay. For example, some reported that they were paid hourly and received overtime, *see, e.g.*, PEX 13 at 2, while others were paid hourly but received no overtime, *see, e.g.*, PEX 17 at 2; PEX 15 at 2–3; PEX 28 at 3; PEX 35 at 2, and others were paid per trip and received no overtime, *see, e.g.*, PEX 37 at 2; PEX 26 at 2; PEX 27 at 2; PEX 45 at 3; PEX 49 at 2. Some putative class members were paid weekly, *see, e.g.*, PEX 18 at 2; PEX 20 at 2; PEX 34 at 2; PEX 47 at 2, others bi-weekly, *see, e.g.*, PEX 23 at 2, and still others daily, *see, e.g.*, PEX 19 at 2; PEX 25 at 2. One reported receiving wages as high as $1,200 every two weeks, *see* PEX 13 at 2, while another reported wages as low as $5 per trip, or what amounted to $1.89 to $2.38 per hour, *see* PEX 27 at 2. Some putative class members were compensated for break periods, *see, e.g.*, PEX 18 at 3, but others were not, *see, e.g.*, PEX 17 at 3. And putative class members also reported working different numbers of hours, not only when compared to one another, *compare* PEX 17 at 2 (reporting up to 90 hours per week) *with* Def.'s Unopposed Mot. for Leave to File Excess Pages, ECF

No. 142, Ex. 6, ECF No. 142-8 [hereinafter DEX 6][3] at PDF p. 45 (providing compensation for 6 hours over a two-week pay period), but also across different pay periods, *see* DEX 6 at PDF pp. 49, 51 (a single putative class member might work only 9 hours in one pay period but 71 hours in a different pay period). Many putative class members were employed by several different TSPs at different points in time, *see e.g.*, PEX 17 at 1; PEX 18 at 1; PEX 22 at 1; PEX 27 at 1, and others reported working for a single TSP but being paid at different rates at different times, *see, e.g.*, PEX 12 at 2; PEX 20 at 2, PEX 28 at 2–3, PEX 32 at 2–3. And, because the proposed class spans six years, the D.C. Minimum Wage, and D.C. Living Wage have also changed several times during this period. *See* Bendick Decl., Table A. These differences between putative class members overwhelm the issues common to the class. *See Little*, 249 F. Supp. 3d at 425 (holding that individual issues predominate where the factfinder would need to evaluate, among other things, reasons for failing to hire a class member, what steps were required before extending an employment offer, and whether a class member obtained another position thereby mitigating potential backpay damages).

Plaintiffs attempt to gloss over these differences by reiterating that they have "identified a common MTM policy—paying a flat rate for trips that does not account for all working time—that led to the harm of underpayment of wages." Pls.' Reply at 5. Citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. at 1036, Plaintiffs

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[33] Defendant MTM's exhibits to its opposition to Plaintiffs' motion for class certification, noted as "DEX," are found at ECF No. 142.

contend that any differences regarding the "the precise number of hours worked each day, the number of trips per day, and the rate paid to each driver . . . will be relevant only to calculating the damages owed to each driver" and "do not impede Plaintiffs ability to demonstrate liability with evidence common to the class." *Id.* at 20–21. But the differences between class members presented in *Tyson Foods* are a far cry from the glaring and pervasive differences between class members identified here. In *Tyson Foods*, the Court held that it was permissible for the plaintiffs to "introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records" in order to prove their overtime claim. 136 S. Ct. at 1047. The plaintiffs relied on the opinion of an industrial relations expert who conducted 744 videotaped observations to determine the average time class members had spent donning and doffing required protective equipment in different departments. *Id.* at 1043. The employer had not kept records of its employees' donning and doffing time but did have records of the class members' time at their work stations, which another expert used, in combination with the estimated donning and doffing times, to determine how many class members had worked overtime without receiving overtime compensation. *Id.* These minor variations in the time required to don and doff protective equipment in *Tyson Foods* are of a different type altogether than the variations in this case, which implicate not just differences in uncompensated time (i.e. rest breaks, breaks between trips, overtime), but also differences in pay structure, pay rates, hours worked, and differences in the rates MTM paid each TSP. Such differences will

"give rise to a plethora of individualized inquiries relating to the determination of the amount of compensable work Plaintiffs performed." *Senne v. Kansas City Royals Baseball Corp.*, 315 F.RD. 523, 586 (N.D. Cal. 2016); *see also Babineau v. Federal Exp. Corp.*, 576 F.3d 1183, 1194 (11th Cir. 2009) (affirming that individualized issues predominate where proving or disproving claims about unpaid breaks would require individualized inquiries into why packages were scanned during unpaid breaks).

Nor are Plaintiffs' offerings of class-wide proof sufficient to show liability as to the class. Plaintiffs contend they will be able to prove their claims with common proof by using representative data. Pls.' Mot at 14. They offer a "Driver Data Chart" based on an interview survey of 40 drivers, PEX 65, Decl. of Seth Groveunder [hereinafter Groveunder Decl.] at 1, as well as declarations from 39 of the surveyed drivers, *see generally* Plaintiffs' Exhibits 8–50. This collection of drivers is not a representative sampling of the class but consists of 33 opt-in Plaintiffs who had previously submitted interrogatory responses to MTM under a limited discovery agreement between the parties, and an additional seven drivers who filed consent forms to join the FLSA collective action. *Id.* at 1–2. Plaintiffs again rely on the Supreme Court's recent decision in *Tyson Foods v. Bouaphakeo*, in support of their position that such representative evidence is permissible to prove liability and damages where, as here, an employer has failed to keep adequate records. But, once again, *Tyson Foods* does not remedy the problems with Plaintiffs' offer of proof. There, the Court explained

> [a] representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is *reliable* in proving or disproving the elements of the relevant cause of action.

136 S. Ct. at 1046 (emphasis added). While representative testimony by class members can be used to establish liability in wage cases, *see Monroe v. FTS USA LLC*, 860 F.3d 389, 408, 409 (6th Cir. 2017) (surveying cases); *Morgan v. Family Dollar Store, Inc.*, 551 F.3d 1233, 1278–79 (8th Cir. 2008) (same), the problem with Plaintiffs' representative testimony is that MTM has proffered evidence that directly contradicts various class members' representations. For example, class member Lenora Adams reported that, while driving for one transportation service provider, MBI Logistics, from April 2017 through November 2018, she "regularly worked at least 55 hours per week" and did not receive overtime pay. PEX 15 at 2–3. However, MTM submitted MBI timecards from September through November 2018 that indicate Adams worked varying hours per week, ranging from 0 hours to 16 hours to 44 hours, but more often than not worked fewer than 40 hours each week. DEX 6 at PDF pp. 26–29. Moreover, an earnings statement from November 30, 2018, shows that Adams earned $1,296.72 in overtime during that year. *Id.* at PDF p. 35. Similarly, class member Cynthia West testified that she "regularly worked around 75 hours a week" for MBI between March 2016 and November 2016, PEX 50 at 1–2, but MBI timecards show that West worked

fewer than 80 hours for nearly every two-week pay period from March 2015 to July 2016, including working as few as 6 and 9.75 hours during two pay periods. DEX 6 at PDF pp. 44–51. Likewise, class member Michael Branch testified that MBI did not pay him overtime, PEX 18 at 2, but MTM submitted an earnings statement dated November 30, 2018, that indicates Branch had earned $553.81 year-to-date in overtime pay, DEX 6 at PDF p. 41.

These discrepancies between what class members remember as to their pay and hours, often for positions held years ago, and the actual timecards and earnings statements from that period highlight the perils of relying on class members' direct testimony. While the Supreme Court has admonished that when an employer violates its statutory duty to keep proper records, the employee should not be penalized "by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work," the Court has also made clear that plaintiffs must "prove[ ] that [they have] in fact performed work for which [they were] improperly compensated" and "produce [ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds as stated in Integrity Staffing Sols. v. Busk*, 574 U.S. 27, 32 (2014). In a case such as this, where differences in pay rates and hours between class members is particularly stark, Plaintiffs have not demonstrated that relying on class member testimony as representative evidence is a reliable method for proving liability on a class-wide basis. *Tyson Foods,*

136 S. Ct. at 1048 ("Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked.").

Presumably recognizing the shortcomings of relying solely on class member testimony, Plaintiffs also offer a methodological analysis crafted by their expert economist, Dr. Marc Bendick. Plaintiffs argue that Dr. Bendick's methodology shows "that MTM's policies and practices of refusing to pay for certain categories of compensable time is insufficient to sustain the legally required wages." Pls.' Mot. at 14. Specifically, Dr. Bendick's analysis attempts to determine what wage rates a TSP could have paid its drivers given MTM's policy of compensating the TSPs using a flat-rate. Bendick Decl. at 4. To that end, Dr. Bendick assessed a "reasonable, conservative estimate" of the revenue an average TSP earned from MTM as well as a "reasonable, conservative estimate of the average TSP's non-driver costs," and compared those figures with an average of compensable hours worked by drivers. *Id.* at 4–5. Dr. Bendick concluded that the maximum wage rate a TSP could pay its drivers while remaining in business was $7.63 per hour, well below the Federal Minimum Wage, the District of Columbia Minimum Wage, and the District of Columbia Living Wage. *Id.* at 5–6. Dr. Bendick's analysis is based on interviews with a "convenience sample" of 40 drivers employed by 46 TSPs, or 56.8% of the 81 TSPs. *Id.* at 2 n.1.

MTM raises a number of objections to Dr. Bendick's analysis, *see generally* Def.'s Mot. to Strike, but even

setting aside these objections, Dr. Bendick's analysis on its face fails to propose a method by which a fact-finder could determine liability on a class-wide basis. Plaintiffs may show that representational evidence like Dr. Bendick's analysis "is a permissible method of proving classwide liability [ ] by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Tyson*, 136 S. Ct. at 1046–47. Or, as one district court put it, in order for plaintiffs to use representative testimony "in the form of an expert report, the Court must ask whether the experiences of a subset of employees can be probative as to the experiences of all of them." *Sullivan v. PJ United*, 362 F. Supp. 3d 1139, 1152 (N.D. Ala. 2018), *vacated in part on reconsideration by Sullivan v. PJ United, Inc.*, 7:13-cv-01275-LSC, 2018 WL 6220092 (N.D. Ala. Aug. 28, 2018). But here, not only is Dr. Bendick's methodology based on a non-representative sampling of drivers and TSPs, it requires a logical leap to conclude that MTM's flat-rate compensation policy is responsible for the underpayment for any specific driver. Other factors, such as variable overhead costs or compensation or profits paid to TSP owners, could account for or contribute to the underpayment of a particular driver. Moreover, Dr. Bendick's analysis relies exclusively on the memories of drivers for critical inputs, such as wage rates and hours worked, the reliability of which MTM has shown at this stage is not free of doubt. While Dr. Bendick's report is an interesting academic exercise, at most it can only corroborate that this industry operates with low margins, rendering individual drivers vulnerable to an economic ecosystem that can make it challenging for

TSPs to pay a living wage. It cannot, however, be generalized to the practice of over 80 different TSPs and the potential underpayment of over 800 class members.

Accordingly, because questions of individualized proof ultimately will predominate over those issues based on common evidence to establish MTM's liability, Plaintiffs have not carried their burden of certifying a class under Rule 23(b)(3).

C. Rule 23(c)(4)

As an alternative to certification under Rule 23(b)(3), Plaintiffs suggest, almost in passing, that the court may "certify only the liability issue under Rule 23(c)(4)." *See* Pls.' Mot. at 50. Rule 23(c)(4) provides "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." *See generally* 2 Newberg on Class Actions § 4:38 (5th ed. 2020). Some courts have interpreted this provision to grant them discretion to certify a class on an issue such as liability, "so long [as] the proposed class satisfies the requirements of Rule 23(a) and (b) with respect to [that issue]." *Little*, 249 F. Supp. 3d at 425–26 (second alteration added) (quoting *Houser v. Pritzker,* 28 F. Supp. 3d 222, 253–54 (S.D.N.Y. 2014)); *Nassau Cty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (holding that a district court has discretion to certify a class as to liability); *cf. In re Brewer*, 863 F.3d 861, 876 (D.C. Cir. 2017) (acknowledging that certification of a Rule 23(c)(4) liability class is one of several discretionary tools of the trial court). But that interpretation is not without controversy.

Circuits have split on the proper application of Rule 23(c)(4) given its inherent tension with Rule 23(b)(3)'s requirement that common issues predominate. *See* 2 Newberg on Class Actions § 4:91 (5th ed. 2020) ("[C]ourts and commentators are sharply split on when issue certification is proper under Rule 23(c)(4)."). "The Fifth Circuit has adopted a 'strict application' of Rule 23(b)(3)'s predominance requirement," *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006), requiring "a cause of action, as a whole, [to] satisfy the predominance requirement of (b)(3)," and viewing "(c)(4) [merely as] a housekeeping rule that allows courts to sever the common issues for a class trial," *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (admonishing that "manufactur[ing] predominance" where it is otherwise absent portends "automatic certification in every case where there is a common issue, a result that could not have been intended"). As discussed above, Plaintiffs have not carried their burden of showing that common issues predominate over issues that affect only individual class members on their wage claims *as a whole*. The Second Circuit, to the contrary, takes a "broad view"[4] of issue certification, arguing that "the Fifth Circuit's [narrow] view renders subsection (c)(4) virtually null." *In re Nassau County Strip Search Cases*, 461 F.3d 219,

[4] For in-depth analysis of what he dubs the "broad" and "narrow" views of issue certification, see Professor Rubenstein's discussion in 2 Newberg on Class Actions § 4:91 (5th ed. 2020). *See also In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 664–65 (D. Kan. 2013) (discussing circuit split and collecting cases).

226–27 (2d Cir. 2006) ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.").[5] Others still have looked to the American Law Institute's ("ALI") *Principles of the Law of Aggregate Litigation* for guidance on the proper application of Rule 23(c)(4). *See, e.g.*, *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011); *see also* 2 Newberg on Class Actions § 4:91 (5th ed. 2020) (discussing merits of this approach and providing cases). The ALI advises that "issue certification is appropriate when resolution of the common issue would 'materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies . . . .'" 2 Newberg on Class Actions § 4:91 (5th ed. 2020) (quoting Principles of the L. of Aggregate Litig. § 2.02 (Am. L. Inst. 2010)).[6] The ALI approach involves weighing eight "non-exclusive" factors (none of which the parties have addressed here) to determine whether certification is appropriate under Rule 23(c)(4). *See Gates*, 655 F.3d at 273. Neither the

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[5] A majority of Circuits seem to agree with this "broad view." *See* 2 Newberg on Class Actions § 4:91 (5th ed. 2020) ("Three circuits (the Second, Sixth, and Ninth) have expressly endorsed the broad view, and four other circuits (the Third, Fourth, Seventh, and Eighth) have indicated support for it." (internal citations omitted)).

[6] *Cf. In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (declining to certify issue classes because they "would do little to increase the efficiency of the litigation").

Supreme Court nor the D.C. Circuit have weighed in on the scope of Rule 23(c)(4).[7]

Certifying an issue class could "materially advance the resolution" of this case. For instance, certifying a class as to whether MTM is a "joint employer" and/or a "general contractor" for purposes of determining whether it is jointly liable for unpaid wages under federal and District of Columbia wage laws has some appeal. Those questions are potentially dispositive. If MTM is neither a joint employer nor a general contractor, the case would come to an end. But if MTM is found to be a joint employer or a general contractor, it would be liable for the underpayment of wages to an individual class member if that individual can demonstrate a violation of District wage laws.

Regardless, because neither party has briefed the legal complexities associated with issue certification and its interplay with Rule 23(b)(3), it would be premature for the court to certify an issue class without further input from the parties. Accordingly, Plaintiffs' request to certify a class under Rule 23(c)(4) is denied without prejudice.

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[7] In March 2019, the Supreme Court denied a petition for *certiorari* "in a case in which the Sixth Circuit affirmed the use of issue classes despite the absence of predominantly common issues across the whole case[,] arguably provid[ing] further legitimacy to the [practice]." 2 Newberg on Class Actions § 4:91 (5th ed. 2020) (citing *Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019)).

IV. CONCLUSION AND ORDER

For the reasons set forth above, the court denies Plaintiffs' Motion for Class Certification, ECF No. 134. The court also denies as moot Defendant's Motion to Strike, ECF No. 143, and Plaintiffs' Motion to Strike, ECF No. 157.

/s/ Amit P. Mehta
Amit P. Mehta
United States District Judge

Dated: September 24, 2020

APPENDIX E

Fed. R. Civ. P. 23

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is 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.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members

not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds 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. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only

after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to

individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within

14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this

subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).