No. 15-88

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAZHAR SALEEM, Individually and on behalf of all others similarly situated, JAGJIT SINGH, Individually and on behalf of all others similarly situated, ANJUM ALI, MALOOK SINGH, CARLOTA BRIONES, JAIRO BAUTISTA, JOSE CABRERA, MARLENE PINEDO, MIRIAM SOLORZANO, MOHAMMAD MIAN, MOHAMMAD SIDDIQUI, S. PEDRO DUMAN, RAJAN KAPOOR, WILMAN MARTINEZ, JOSE SOLORZANO, LUIS A. PEREZ, RANJIT S. BHULLAR, LUIS M. SANCHEZ, ANWAR BHATTI, AVNEET KOURA, MAHER MAQSOOD, ATIF RAZAQ, BHAVESH SHAH, KHUSHWANT SINGH, JAMSHED CHOUDHRY, AZIZ URREHMAN, HASAN KHALBASH, PETER PANZICA, ROBINSON MATA, HILARIO A. SANCHEZ, MANSOR AHMED RANA, BAUDWIN KOURI,

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On Appeal from the United States District Court, Southern District of New York, Honorable Jesse M. Furman, Judge, Case No. 1:12-CV-08450-JMF

PAGE PROOF BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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AHMED ISMAIL, MUNISH KUMAR, PAUL GLADKEVITCH, TARLOCMAN PAL SINGH (T.P.), ADAM KLAG, AL WONG ZHANG, MUSTAPHA RAHMOUWI, MAHAMMAD ALI SIDDIQUE, SHENG ZHANG LU, GUSTAVO GARCIA, ASHWIN KUMAR, INDERJIT SINGH, MAN CHENG, BALWINDER SINGH, JAWAID KAYANI, SUKHDEV SINGH, FERNANDO AVENDANO, XIONG WEI MI, MOHAMMAD ISLAM, DONGSEOG YOU, TAOJOCHAN SIHGH, RATIC SHIVIONOV, JAGDISH KAL, GABRIEL PIZHA, ANOMWAR I. CHOWDHURY, SAMSON LIAU, NESTOR TERAN, RAJAN DODEJA, SOCRATES GREGORIADIS, SAAD ATTIA, ANTHONY KHAN, RAMON A. ALMONTE, BADLANI PRAKASH, JUAN A. SOTO, MUNJED SHABANEH, JOSE SOLORE, JOSE M.S., ROXANA A. ZETINO, IRFAN SHAFI, ARCELIA BARROS, CHEUNG YEUNG, POINT TO POINT CAR & LIMO, INC., VISHAMBER TUKREL, YING TIAN LEI, MIKHAIL ZEMKO, TAHIR AZIZ, WEN ZHONG LI, KE GENG SHI, N. WESESINGHE, CHRISTINA SANCHEZ MONTERO, KULYK OLEG, ARIEL RESTITUYO, SHUHRAT KHAKBERDIYER, ANGEL M. GAYA, BAYRAM ONBASI, JORGE CONTRERAS, JUAN C. MOGROVEJO, XUN LI FAN, SAMEH S. BASILY, JOSE PINTO, RAMADAN S. KENAWI, DONAVAN JAMES, IBRAHIM ONBASI, AMANDA SINGH, SULEYMAN ISSI, WAZIR MUGHAL, ETIENNE TCHITCHUI, DIOGENES PION, IJAZ MAHBOOB, PEDRO PAZMINO, JING JING WANG, AZID RIAZ, GURMAIL SINGH, ASAND FARA, LAWRENCE CALLISTE, GUO BAO XUAM, JEETU MULTANI, KING WAH YIU, ANJUM ALI, GURMAIL SINGH, AHMED ALJAHMI, BUO XUAN GUO, AMERICAN CAR LIMO TOURS, INC., MOHAMED ABDELAAL, KHEMLHAND KALIKA, MUNISH KUMAR, SHAHIDULLAH DULAL,

Plaintiffs-Appellants,

v.

CORPORATE TRANSPORTATION GROUP, LTD., CORPORATE TRANSPORTATION GROUP INTERNATIONAL, CORPORATE TRANSPORTATION GROUP WORLDWIDE, INC., NYC 2-WAY INTERNATIONAL, LTD., ALLSTATE CAR & LIMOUSINE, INC., ARISTA CAR & LIMOUSINE, LTD., TWR CAR & LIMOUSINE SERVICE, LTD., EXCELSIOR CAR AND LIMOUSINE, INC., HYBRID LIMO EXPRESS, INC., EDUARD SLININ, GALINA SLININ,

Defendants-Appellees.

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STATEMENT OF THE ISSUE

Whether the district court erred when it ruled, on summary judgment, that drivers of "black cars" were not entitled to the protections of the Fair Labor Standards Act ("FLSA") because they were independent contractors as a matter of law, despite significant evidence that the drivers were not, as a matter of economic reality, in business for themselves.

INTEREST OF THE SECRETARY AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. He is committed to opposing the misclassification of workers who are employees under the FLSA as independent contractors, thereby depriving them of the Act's protections.

The Secretary has successfully pursued numerous enforcement actions against employers who misclassify workers under the FLSA. See, e.g., Solis v. Cascom, Inc., No. 3:09-cv-257, 2013 WL 4537109, at *4 (S.D. Ohio Aug. 27, 2013) (awarding $1.474 million following determination that cable installers were employees, not independent contractors); Solis v. Kansas City Transp. Grp., No. 10-0887-CV-W-REL, 2012 WL 3753736, at *10 (W.D. Mo. Aug. 28, 2012) (drivers of disabled passengers and schoolchildren were employees, not independent contractors). He also recently participated successfully as amicus in

two appellate cases on behalf of misclassified workers. See Chapman v. A.S.U.I. Healthcare & Dev. Ctr., 562 F. App'x 182, 185 (5th Cir. 2014) (affirming judgment that caregivers in group homes were employees); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1319 (11th Cir. 2013) (reversing judgment that cable installers were independent contractors).

The Secretary has authority to file pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Defendants

Defendants provide transportation services in New York, New Jersey, and Connecticut. They include six "Franchisor" companies, as well as Corporate Transportation Group, Ltd. ("CTG"), which provides dispatching, sales, billing, and other services on the Franchisors' behalf. Defs.' Stmt. of Material Facts (ECF No. 479) ("Defs.' SoF") ¶¶ 3 & n.3, 11-12, Joint Appendix ("JA") __, __. These companies constitute a single integrated enterprise and/or joint employer for purposes of the FLSA. Defs.' Counter-Stmt. of Material Facts (ECF No. 503) ("Defs.' CS") ¶ 2, JA__. Defendants also include Eduard Slinin, who is president and at least part owner of each of the Defendant companies, and his wife Galina, who holds several executive positions with these companies.

Each of the Franchisors holds a "base license" from the New York City Taxi and Limousine Commission ("TLC") to provide "black car" service. Defs.' SoF ¶ 37, JA__. Black car service is a subset of "for-hire service," see New York City, N.Y. ("NYC") Rules Tit. 35 ch. 59, which is distinct from taxicab service, see id. ch. 58. Black cars are prohibited by the TLC from picking up street hails or waiting at taxi stands. See id. §§ 55-19(a-b), 59A-11(e). Instead, the Franchisors serve corporate clients such as law firms and financial services companies, primarily through prearranged appointments. See id. § 55-19(a); Pls.' Stmt. of Material Facts (ECF No. 484) ("Pls.' SoF") ¶¶ 1, 113, JA__, __. These clients have contracts with the Franchisors, and CTG, through the Franchisors, negotiates their rates. Defs.' SoF ¶ 26, JA__; Pls.' SoF ¶¶ 47-49, JA__. CTG also has a contract with the Metropolitan Transit Authority ("MTA") to transport disabled passengers. Defs.' SoF ¶ 166, JA__.

CTG has approximately 120 employees. See Pls.' SoF ¶¶ 14-18, JA__. Its headquarters is an office of approximately 20,000 square feet, and CTG designed, owns, and operates a computerized dispatching system that transmits work assignments to drivers. Id. ¶¶ 13, 57-62, JA__, __. CTG has an information technology infrastructure of several computers, an internal computer network, a cellular network, and database management software. Id. ¶ 63, JA__.

B. The Plaintiffs

Plaintiffs are drivers who work for the Franchisors. Plaintiffs either own or rent "franchises." Defs.' SoF ¶ 94, JA__. Purchasing a franchise from a Franchisor costs between $20,000 and $60,000, except for one Franchisor that charges no franchise fee for one of its types of franchises. Defs.' SoF ¶ 45, JA__; ECF No. 506-11 at CTG14794 ¶ 1, JA__. Renting a franchise entails a $2,000 deposit and a weekly rent of $130-$150. Defs.' SoF ¶ 53, JA__. Owners of a franchise can drive a black car themselves, pay someone to drive the car, or rent the franchise to someone else if the Franchisor consents. Id. ¶ 87, JA__. Owners can also sell franchises on the secondary market, in which case the purchaser pays the Franchisor a "transfer fee." Defs.' CS ¶ 29, JA__.

Franchise purchasers or renters must execute a franchise agreement. Defs.' SoF ¶ 70, JA__. Until July 2012, the Franchisors' agreements ran for three-year terms that could be renewed for $1; since that date, the agreements run indefinitely. Pls.' SoF ¶¶ 26-27, JA__. Of the Plaintiffs for whom the record contains information about the length of time they drove for the Franchisors, all did so for extended periods of time ranging from two to eighteen years. Pls.' Add'l Stmt. of Disputed Material Facts (ECF No. 502 at 98-110) ("Pls.' ASF") ¶ 50; JA__, Pls.' SoF ¶¶ 215, 219, 225, 230, 232, 236, 242, 251, 255, 259, 261, 264, 266, JA__.

Plaintiffs are not required to have any level of driving skill apart from being

licensed as a driver and by the TLC. Pls.' SoF ¶¶ 39-42, JA__. They are responsible for buying or leasing their cars and for vehicle-related costs such as maintenance, gasoline, and inspections. Defs.' SoF ¶¶ 193-209, JA__.

C. How Plaintiffs Receive Work from Defendants

Drivers receive work from Defendants in one of three ways:

1. CTG's Dispatch System

Drivers primarily receive work assignments through CTG's dispatching system. Pls.' SoF ¶ 113, JA__. Each driver logs into the system using a smartphone with CTG's "app" and "books in" to one of several geographic "zones." Defs.' SoF ¶¶ 121-22, 125-28, JA__. Before booking in, drivers can see only limited information about a zone: the number of cars available, the number already booked in, the number of reservations within the next hour, and the number of passengers who have requested to be picked up without a reservation. Pls.' SoF ¶ 120, JA__. Once booked in, a driver is placed at the bottom of a queue, and it can take up to approximately two hours to reach the top. Id. ¶ 119, JA__; Defs.' CS ¶ 119, JA__.

When a driver reaches the top of a zone's queue, the system offers the driver the next job available. Pls.' SoF ¶ 118, JA__. No information is provided about the location, destination, passenger(s), account, or fare. Id. ¶ 124, JA__. The driver has 45 seconds to accept or reject the job. Id. ¶¶ 123, 126, JA__. If the

driver rejects the job or fails to respond, the driver is booked out of the zone, and must wait five minutes before booking in again, at which point the driver starts from the bottom of the queue. Id. ¶¶ 126-27, JA__.

Once a driver accepts a job, the driver receives information about the location, passengers, account, destination, and fare. Pls.' SoF ¶ 125, JA__. If the driver then decides that he or she does not want the job or cannot complete it, the driver may "bail out." Id. ¶ 130, JA__. Drivers who bail out are prevented from booking into any zone for a period of time – one hour if due to car trouble or other extenuating circumstances, three hours otherwise – and must then begin at the bottom of the queue. Id. ¶ 131, JA__; Pls.' ASF ¶ 27, JA__.

2. Waiting In Lines

Drivers may also receive jobs from Defendants' clients by waiting in one of ten high-volume lines of cars outside certain clients' offices. Defs. SoF ¶¶ 159-61, JA__. This does not require booking into the dispatching system.

3. The MTA Hotline

Finally, drivers may receive jobs through Defendants' MTA client by calling a hotline and providing times they will be available the following day and which borough they wish to work in. Defs.' SoF ¶¶ 165-73, JA__; Pls.' Counter-Stmt. of Material Facts (ECF No. 502) ("Pls.' CS") ¶ 172, JA__. They are then assigned jobs accordingly. Defs.' SoF ¶ 173, JA__; Pls.' CS ¶ 173, JA__.

D. The Terms of Plaintiffs' Work for Defendants

When drivers serve one of Defendants' clients, they must process the billing through CTG's system. Defs.' SoF ¶ 54, JA__; Pls.' SoF ¶ 34, JA__. After a trip, a customer signs a voucher, which the driver later submits to CTG for payment. Defs.' SoF ¶¶ 56-57, JA__. Defendants then pay the drivers the fare minus commissions – which can be up to one-third of the fare, see Appellants' Br. at 12 & n.23 – a $1 fee, and other "deductions." Id. ¶¶ 59-60, JA__. Some drivers have violated their franchise agreements by driving Franchisor customers without processing their payments through CTG, and Defendants have sued one of the Plaintiffs as a result. Pls.' CS ¶ 185, JA__; Defs.' CS ¶ 35, JA__.

Defendants' franchise agreements do not otherwise explicitly prohibit drivers from picking up street hails or driving for private customers or for other black car companies, and some drivers do so. See Defs.' SoF ¶¶ 257-62, 265-66, JA__. However, these practices are illegal. TLC regulations prohibit black car drivers from picking up street hails and from providing services other than through prearrangement through a licensed black car base (a company, such as the Franchisors, that holds a TLC base license), and further mandate that a black car may be affiliated with only one base at a time. See Pls.' CS ¶ 184, JA__; Defs.' SoF ¶ 39, JA__; NYC Rules, Tit. 35, §§ 55-19(a); 59A-04(h-i); 59A-11(e).

E. Defendants' Supervision and Discipline of Plaintiffs

Each Franchisor has a Communications Committee and a Security Committee ("Committees"), Defs.' SoF ¶ 226, JA__, which play significant roles in setting rules for drivers and monitoring and disciplining them. Specifically, the Security Committees penalize drivers for violations of their "Rulebooks" such as late arrivals, dirty cars, poor treatment of customers, dress code violations, failure to maintain licenses, and other activities. Defs.' SoF ¶ 234, JA__; Pls.' SoF ¶¶ 36-38, JA__; see, e.g., ECF No. 491-45 at CTG34792-34801, JA__ (list of "Security Violations" from one Rulebook). The Committees' Rulebooks are incorporated into Defendants' franchise agreements. Pls.' SoF ¶ 175, JA__.

While the Committees are formally composed of drivers, the record contains considerable evidence that Defendants exert significant influence on Committee membership and decisions, including discipline. See Pls.' CS ¶ 227, JA__. For example, CTG reports Rulebook violations to the Security Committees by issuing "10/5 forms," and warns drivers that consequences for violations include the issuance of such forms. Pls.' SoF ¶¶ 68, 104-05, JA__, __. CTG also has met with the Committees to discuss rules enforcement, discipline, and other issues. Id. ¶ 106, JA__; Pls.' ASF ¶ 18, JA__. CTG's driver relations manager works "hand in hand" with the Committees to handle customer service issues. Pls.' SoF ¶¶ 102-03, JA__. For example, he has contacted the Committees to recommend fining

drivers in response to complaints, and has suggested to CTG that it request that the Committees fine certain drivers. Pls.' SoF ¶¶ 107-08, 110, JA__; Defs.' CS ¶¶ 107-08, 110, JA__. Finally, the record contains evidence that CTG has disciplined and fined drivers without consulting the Committees, Pls.' SoF ¶¶ 111-12, JA__, that members of CTG management have attended the Committees' disciplinary hearings, Pls.' CS ¶ 298, JA__, and that CTG has interfered with the Committees' selection of members and chairmen, id.¶ 227, JA__.

CTG also supervises the drivers through other means, such as using GPS to review drivers' activities, Pls.' SoF ¶ 69, JA__, reducing a driver's pay for improper billing, Defs.' CS ¶ 69, JA__, speaking to drivers about vehicle conditions and customer relations, Pls.' SoF ¶¶ 74-76, JA__, inspecting drivers and vehicles, id. ¶¶ 77-83, 96-101, JA__, __, taking test drives with drivers, id. ¶¶ 87-88, JA__, removing drivers from accounts after customer complaints, id. ¶¶ 85-86, JA__, and remotely shutting off drivers' handheld devices to force drivers to come to headquarters, id. ¶ 90, JA__. CTG's driver relations manager has also spoken to drivers about dress code issues, which he characterized as "keeping them aware that we're watching what's going on." Id. ¶ 84, JA__.

II. PROCEDURAL HISTORY

Mazhar Saleem and Jagjit Singh (the "Named Plaintiffs") filed their Complaint on November 19, 2012, alleging violations of the FLSA and the New

York Labor Law ("NYLL"). ECF No. 1, JA__. The district court conditionally certified an FLSA collective action on June 17, 2013, and approximately 211 plaintiffs opted in (the "Opt-In Plaintiffs"). ECF No. 67, JA__; see Appellants' Br. at 1 n.1. On July 31, 2014, Plaintiffs moved to certify a class under the NYLL pursuant to Federal Rule of Civil Procedure 23. ECF No. 160, JA__. The court denied that motion on November 15, 2013. ECF No. 430, JA__.

On January 14, 2014, Defendants moved for summary judgment. See ECF No. 482, JA__. Defendants argued that Plaintiffs are independent contractors under the FLSA and NYLL, and that even if Plaintiffs are employees under the FLSA, they are exempt from overtime under the FLSA's "taxicab exemption." See id. at 17-35, JA__. In the alternative, Defendants argued that the court should decertify the FLSA collective action, grant them summary judgment as to the Named Plaintiffs, and dismiss the claims against Galina Slinin. See id. at 35-38, JA__.

Plaintiffs also moved for summary judgment, but only as to the Named Plaintiffs and eleven Opt-In Plaintiffs who had been deposed and produced discovery, see ECF No. 481 at 1 n.1, JA__, and only as to the FLSA, see id. at 12 n.7, JA__. Plaintiffs argued that these individuals were employees under the FLSA, see id. at 12-27, JA__, and that Eduard Slinin was individually liable as a joint employer, see id. at 27-29, JA__.

On September 16, 2014, the district court granted Defendants' motion and denied Plaintiffs'. See ECF No. 532 ("Mem. Op."), JA__. Citing this Court's test for determining whether workers are employees or independent contractors, the court found that only one of the five relevant factors weighed strongly in favor of employee status, while three weighed (to varying degrees) in favor of independent contractor status and one did not strongly favor either. See id. at 18-28, JA__. In assessing the "totality of the circumstances," the court concluded that Plaintiffs were independent contractors, granted Defendants summary judgment on Plaintiffs' FLSA claims, and concluded that there was no need to reach Defendants' "taxicab exemption" argument. Id. at 29 & n.6, JA__. The court also concluded that Plaintiffs were independent contractors under the NYLL, and denied all other pending motions as moot. See id. at 30-33, JA__.

On December 9, 2014, the court granted Plaintiffs' motion to alter or amend the judgment, concluding that it had incorrectly dismissed the Opt-In Plaintiffs' NYLL claims because they had opted in only under the FLSA. ECF No. 542, JA__. This appeal followed.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT PLAINTIFFS WERE INDEPENDENT CONTRACTORS UNDER THE FLSA AS A MATTER OF LAW

This Court applies a five-factor test to determine whether workers are employees or independent contractors:

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988). While these factors provide helpful guidance, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." Id. at 1059.

Although the district court identified the relevant test, its conclusion was erroneous because the facts, viewed in the light most favorable to Plaintiffs, can reasonably support a conclusion that the drivers were employees. The drivers were subject to significant control by Defendants, including supervision, discipline, and control over the essential aspects of their work. They had minimal ability to affect their earnings beyond working more hours, as Defendants determined the fares for their services and how they could seek out work. Defendants' investments in office space, 120 employees, and dispatching and information technology systems

dwarfed a driver's "investment" in his or her car and franchise fee. The drivers possessed limited skills, exercised little, if any, managerial initiative, and worked for Defendants for lengthy periods of time – up to eighteen years. Finally, the drivers were integral to Defendants' business; indeed, they were its core workforce. In concluding that the drivers were independent contractors, the district court prioritized superficial indicators of their alleged independence such as schedule flexibility and their ability to work for other companies. It ignored significant evidence, especially when viewed in a light most favorable to Plaintiffs, that could reasonably lead a jury to the conclusion that the drivers were not in business for themselves, but rather depended on Defendants for the opportunity to render service.

A. The Court Placed Undue Emphasis on Plaintiffs' Control over Their Schedules and Their Seeming Ability to Work for Other Employers While Minimizing the Significant Control Defendants Actually Exerted over Them.

In finding that the first factor, the degree of control exercised by the alleged employer, "favor[ed] independent contractor status, but not overwhelmingly so," Mem. Op. at 18, JA__, the court gave too much weight to Plaintiffs' abilities to set their own schedules. While Plaintiffs can "book in" and "book out" at their discretion, have no minimum or maximum hours, and may reject job offers, "flexibility in work schedules is common to many businesses and is not significant in and of itself." Dole v. Snell, 875 F.2d 802, 806 (10th Cir. 1989). Notably, this

Court concluded that the home care nurses in Superior Care were subject to their employers' control even though, like Plaintiffs, they were "free to decline a proposed referral for any reason." 840 F.2d at 1057, 1061. Moreover, Plaintiffs' discretion to accept or reject work is sharply limited by the substantial penalties for rejecting jobs or "bailing out."

The court similarly overemphasized the fact that Plaintiffs were not prohibited by Defendants from working for other black car companies, and in some cases did so. As a threshold matter, contrary to the court's conclusion, "employees may work for more than one employer without losing their benefits under the FLSA." Superior Care, 840 F.2d at 1060; see McLaughlin v. Seafood, Inc., 861 F.2d 450, 452-53 (5th Cir. 1988) ("[U]nless a worker possesses specialized and widely-demanded skills, [the] freedom [to work for multiple employers] is hardly the same as true economic independence."); Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013) (noting that "countless workers . . . who are undeniably employees under the FLSA – for example, waiters, ushers, and bartenders" – work for multiple employers).

Moreover, while Defendants may not prohibit drivers from working for other companies or picking up street hails, the TLC does. In reasoning that the TLC's regulations were "irrelevant" because "the control factor focuses on the control exercised by Defendants," Mem. Op. at 20, JA__ (emphasis in original),

the district court lost sight of the fact that "the ultimate concern is whether . . . the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." Superior Care, 840 F.2d at 1059. Under the TLC's regulations, for-hire drivers must affiliate with a black car base – and only one base – to be licensed. See NYC Rules, Tit. 35, § 59A-04(h-i). Thus, Plaintiffs depend on Defendants to render service, because they are prohibited from operating independently. Furthermore, even those drivers who illegally work for other companies are not independent; they simply have multiple employers because they depend on those companies for work in addition to Defendants. Finally, although some drivers pick up street hails, Defendants have sought to control this practice by complaining to the TLC, see Pls.' SoF ¶ 22, JA__; Defs.' CS ¶ 22, JA__, and the record indicates that the drivers pick up street hails largely on an occasional basis, just as many employees try to earn extra money in addition to their "regular" jobs, see, e.g., Bhatti Dep. (ECF No. 477-4) 80:6-7, JA__ (driver picked up a street hail "once"); Siddiqui Dep. (ECF No. 477-11) 111:19-21, JA__ ("When I don't have work, I try [to pick up street hails]."), 269:9-13, JA__ ("Normally, we don't [pick up street hails]. But if we are standing there and somebody comes, then we do it.").

As one court explained, "the question [a] court must resolve is whether a [worker's] freedom to work when she wants and for whomever she wants reflects

economic independence, or whether those freedoms merely mask the economic reality of dependence." Reich v. Priba Corp., 890 F. Supp. 586, 592 (N.D. Tx. 1995) (citing Mednick v. Albert Enters., Inc., 508 F.2d 297, 300, 301-02 (5th Cir. 1975)). Here, a reasonable jury could find that the facts point toward dependence because, when Plaintiffs are working for Defendants, Defendants control the essential aspects of their ability to earn money – whom they drive, where they drive, and how much money they make – through Defendants' client base, dispatching system, and advance negotiation of rates without the drivers' involvement. See Kansas City Transp. Grp., 2012 WL 3753736, at *8 ("While drivers controlled . . . whether or not to take a route, once the driver decided to take a route the details of the work were all controlled by Defendant.").

The court also minimized Defendants' control over Plaintiffs through supervision and discipline. Under the law of this Circuit, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control." Superior Care, 840 F.2d at 1060 (nurse referral service's visits to jobsites once or twice a month demonstrated control because the service "unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes"); cf. Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999) ("Control may be restricted, or exercised only occasionally, without removing the

employment relationship from the protections of the FLSA[.]"). Yet the district court characterized as "limited" CTG's use of the Committees to discipline drivers through "10/5 forms," recommendations of fines and other discipline, "hand in hand" work on customer service and enforcement issues, and collection of fines through payroll deductions, as well as CTG's direct supervision and discipline through meetings with drivers, inspections and investigations, removal of drivers from accounts in response to complaints, attendance at disciplinary hearings, and imposition of fines, see supra at 8-9, all of which "keep[] [the drivers] aware that [Defendants are] watching what's going on." Pls.' SoF ¶ 84, JA__. Such monitoring and discipline is far from "limited" and is sufficient to demonstrate control.

B. Plaintiffs' Opportunity for Profit or Loss Did Not Depend on Their Managerial Skill, and Any Investments by Plaintiffs Were Small Relative to Defendants'.

The court also erred when it concluded that the second factor, "the workers' opportunity for profit or loss and their investment in the business," favored independent contractor status. Mem. Op. at 22-25, JA__. First, the court's finding that Plaintiffs "controlled . . . how much overall money [they] earned as a result of the number of [jobs they] took," id. at 22, JA__ (internal quotation marks and citation omitted), is not a meaningful distinction between employees and contractors, both of whom can earn more if they work more and there is more work

available. What differentiates the two is whether the opportunity for profit or loss is a function of the worker's managerial skill. See Scantland, 721 F.3d at 1316-17; Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 307 (4th Cir. 2006); Martin v. Selker Bros., 949 F.2d 1286, 1293-94 (3d Cir. 1991); Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754-55 (9th Cir. 1979); see also Snell, 875 F.2d at 810 ("profit or loss" factor favored employee status where workers' earnings "did not depend upon their judgment or initiative, but on the [employer's] need for their work"); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 666-67 (5th Cir. 1983) (this factor favored employee status where "any opportunity for profit was determined solely by [the employer's] need for their work (rather than, for instance, on the initiative and planning of the individual [workers].)").

A worker's ability to work more is not indicative of managerial skill. See Scantland, 721 F.3d at 1316-17 (comparing ability to complete more jobs to "an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces"); Cascom, Inc., 2011 WL 10501391, at *6 ("While [cable installers] were free to work additional hours . . . they had no decisions to make regarding routes, or acquisition of materials, or any facet normally associated with the operation of an independent business."). Similarly, Plaintiffs' abilities to accept or reject jobs and to "bail out" are not reflective of managerial skill but

simply represent routine, limited choices. See infra § C. Moreover, CTG has threatened to investigate and remove from the dispatch system drivers who frequently "bail out," further demonstrating Plaintiffs' lack of managerial authority. Pls.' CS ¶ 303, JA__; Pls.' ASF ¶¶ 28-29, JA__.

Although Plaintiffs' abilities to purchase multiple franchises, rent out their franchises, and pay others to drive their cars more closely resemble tasks involving managerial skill, the record does not contain evidence that many Plaintiffs actually do so. Of the 213 Plaintiffs, Defendants identified only six who owned or rented two to three franchises, and two who rented out their franchises to others. Defs.' SoF ¶¶ 88, 92, JA__.[1] This economic reality outweighs a theoretical ability to engage in entrepreneurial practices. See Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1312 (5th Cir. 1976) ("It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."). Moreover, even Plaintiffs who engaged in these practices had limited ability to use managerial skill. The only worker a franchisee can hire is a driver; she cannot grow her "business" any further. See Mednick, 508 F.2d at 302-

[1] Defendants also identified one individual (not a Plaintiff) who owns more than two dozen franchises. Defs.' SoF ¶ 89, JA__. While a few wealthier franchisees may be able to profit by purchasing and renting out numerous franchises, as noted above, the record does not contain evidence that many Plaintiffs have done so, and any inferences on this point must be drawn in favor of Plaintiffs at the summary judgment stage.

03 (noting that although a worker could "hire others to work in his stead," "his power to hire and fire was as a practical matter narrowly circumscribed" such that "[a]t no point did [he] have anything that could be called a business").

In sum, Plaintiffs' opportunities to affect profit or loss were constrained and had little to do with managerial skill. Rather, their earnings depended primarily on Defendants' dispatching system and client network. See Real, 603 F.2d at 755 (reversing summary judgment where "appellants' opportunity for profit or loss appear[ed] to depend more upon the managerial skills of [the appellees] in developing fruitful varieties of strawberries, in analyzing soil and pest conditions, and in marketing than it does upon the appellants' own judgment and industry in weeding, dusting, pruning and picking").[2]

The district court also mischaracterized certain expenses by Plaintiffs as "investments." While Plaintiffs incurred substantial regular expenses, such as gas, maintenance, insurance, and license fees, these are analogous to a worker's payment for tools and equipment, which are not the sorts of "investments" made only by independent businesses. See Snell, 875 F.2d at 810. Such costs neither

[2] The court also erred when it concluded that Plaintiffs' deduction of business expenses and listing themselves as self-employed on their tax returns "weigh[ed] in favor of independent contractor status." Mem. Op. at 23, JA__. First, an employee "may deduct expenses incurred in the performance of services as an employee." Feaster v. C.I.R., 100 T.C.M. (CCH) 49, at *2 (T.C. 2010). Second, a worker's description of himself as self-employed is irrelevant to the economic reality. See Robicheaux, 697 F.2d at 667.

require managerial skill nor entail risk of loss, since they will be recouped if Plaintiffs work a sufficient amount. See Pilgrim, 527 F.2d at 1313-14 (rejecting argument that laundry pickup service operators' required payment of the cleaning cost of clothing not yet picked up by customers was an "investment" where "within 6 months the total 'investment' [was] recovered" and "all investment or risk capital [was] provided by [the service]"). Similarly, the rental costs of Plaintiffs who rent their franchises are not investments but merely added fees. See id. at 1313 (requirement that operators accept responsibility for losses due to theft and bad checks "does not show independence" but "that [the defendants] chose to place this added burden on its operators").

Plaintiffs' only arguable "investments" are the franchise fee (for those who purchased franchises) and perhaps the purchase or lease of a car, although the latter cost "is somewhat diluted when one considers that [a] vehicle is also used by most drivers for personal purposes." Herman v. Express Sixty-Minutes Delivery Serv., 161 F.3d 299, 304 (5th Cir. 1998). Each driver's investments, however, should be compared with Defendants'. See, e.g., Baker v. Flint Eng'g & Const. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (welders' $35,000-$40,000 investments in trucks did not show they were independent contractors when compared to defendant's investment). CTG invested in office space, six TLC base licenses, software, IT infrastructure, and a staff of 120 employees. See Pls.' SoF ¶¶ 3-8, 13-18, 59, 63,

JA__, __. By any reasonable estimate, these investments exceed the cost of a franchise and car. See Reich v. Circle C. Investments, Inc., 998 F.2d 324, 328 (5th Cir. 1993) (nightclub's investment outweighed dancers' despite lack of "specific findings" regarding the nightclub's investment "given the obvious significant investment Circle C has in operating a nightclub" compared with a dancer's "relatively minor" investments).

C. Plaintiffs' Jobs Required No Meaningful Skills or Independent Initiative.

The district court concluded that the third factor, the "degree of skill and independent initiative required to perform the work[,]" "[did] not weigh strongly in either direction." Mem. Op. at 25-27, JA__. According to the court, although Plaintiffs' jobs required no specialized skills, they "needed to exercise a significant degree of independent initiative" because they "were required to take affirmative steps, such as booking into a zone, calling the MTA hotline, or waiting on one of the high-volume lines[.]" Id. at 26, JA__.

The court should have concluded that this factor weighed decisively in favor of employee status. Defendants' limited decisions to log into an app, wait in a line, or call a phone number hardly constitute "significant initiative in locating work opportunities." Superior Care, 840 F.2d at 1060. Rather, like the nurses in Superior Care who "depended entirely on referrals to find job assignments," id., Plaintiffs depend on Defendants for customers. And just as "Superior Care . . .

controlled the terms and conditions of the [nurses'] employment relationship," id., Defendants delineate the conditions under which Plaintiffs receive work, the fares they receive, and the clients they pick up.

Also illustrative is Pilgrim Equipment Co., where the Fifth Circuit concluded that "[r]outine work which requires industry and efficiency is not indicative of independence and nonemployee status," and that the workers at issue were employees because "[a]ll major components [of the business] open to initiative – advertising, pricing, and most importantly the choice of cleaning plants with which to deal – [were] controlled by [the defendants]." 527 F.2d at 1314. Likewise, all major components of the business here that are "open to initiative" – the dispatching system, fares, client base, and advertising, see Pls.' SoF ¶¶ 43-46, JA__ – are controlled by Defendants. As in Pilgrim, "[t]he bottom line in this enterprise is the business acumen and investment contributed by [the defendants]," not the limited choices made, and "routine work" performed, by Plaintiffs. Id. at 1314-15.

D. Plaintiffs' Working Relationship with Defendants Was Permanent and Indefinite, Like That of Employees.

The district court also erroneously concluded that the "permanence or duration of the working relationship" favored independent contractor status. Most glaringly, the court concluded that the relationship between Plaintiffs and Defendants was impermanent because the drivers could terminate their franchise

agreements at will. See Mem. Op. at 27, JA__. Although some district courts have concluded similarly, see id. at 27 (citing cases), this conclusion is incorrect because it fails to take into account the reality of the relationship. See Hopkins v. Cornerstone America, 545 F.3d 338, 347 (5th Cir. 2008) ("[T]o give more weight to contractual language than to the actual length of the working relationship . . . would be contrary to [the] general approach to the economic-realities doctrine[.]"). Moreover, because employment in the United States is at will and employees can quit jobs as they please, the district court's standard sets an impossibly high bar for permanence under which virtually no workers would be considered employees.

What is relevant is the "actual length of the working relationship." Hopkins, 545 F.3d at 347. While the lengths of time Plaintiffs drove for Defendants varied, they ranged from two to eighteen years. See supra at 4. Even the shortest of these periods is sufficient for employee status. See Superior Care, 840 F.2d at 1059 (home care workers were employees even though 78% worked 13 weeks or less for the employer). Just as importantly, the relationship between the drivers and Defendants had no defined end point. See Wells v. Fedex Ground Package Sys., 979 F. Supp. 2d 1006, 1020 (E.D. Mo. 2013) (concluding, under Missouri law, that contracts that automatically renewed favored employee status, as did "the length and indefinite nature of Plaintiffs' tenure with [Defendant]"). Plaintiffs were Defendants' regular workforce, not independent contractors who "are typically

hired by the job to complete a specific task." Id. at 1019.

Moreover, drivers who terminate their relationship with Defendants and move to another company cannot bring a client base or goodwill. They would simply depend on the new company's clients as they now depend on Defendants'. The only assets Plaintiffs can bring are themselves and their cars. See Pilgrim, 527 F.2d at 1314 (laundry pickup service operators "[had] nothing to transfer but their own labor"). Thus, the drivers' ability to switch to a new company does not indicate independence or initiative.

Finally, the court erred by finding that "'each job [i.e., each ride] was separately contracted, suggesting the existence of an independent contractor relationship.'" Mem. Op. at 27-28, JA__ (quoting Leach v. Kaykov, No. 07-CV-4060 (KAM), 2011 WL 1240022, at *21 (E.D.N.Y. Mar. 30, 2011)). Leach involved vicarious tort liability, not FLSA coverage. In another case the court cited, the workers were hired "on a project-by-project basis, with each project ranging from one week to several weeks." Gate Guard Svcs. v. Solis, No. V-10-91, 2013 WL 593418, at *10-11 (S.D. Tex. Feb. 13, 2013). Here, by contrast, Plaintiffs signed indefinite agreements that lasted for years. To suggest that they worked "on a project-by-project basis" elevates form over substance and economic reality. Moreover, even if each ride is somehow viewed as a separate job, any resulting lack of permanence would not be relevant because it would reflect not

independence but how black car drivers receive work. See Superior Care, 840 F.2d at 1060-61 ("Even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative.").

Plaintiffs did not "have fixed employment periods and transfer from place to place as particular work is offered to them," as independent contractors normally do. Snell, 875 F.2d at 811. Rather, their affiliation with Defendants was indefinite and lengthy. To the extent that they may stop working at any time and move to another company, they are no different from most at-will employees.

E. Not Only Were Plaintiffs Integral to Defendants' Business, but Defendants' Business Could Not Exist Without Them.

The district court correctly determined that since Defendants provide black car services and Plaintiffs drive the cars in which those services are provided, Plaintiffs were integral to Defendants' business. But by giving this factor virtually no weight in its overall analysis, it failed to recognize that this Court has held that this factor "weigh[s] heavily" in favor of employee status. Superior Care, 840 F.2d at 1059-60.

The Secretary, like this Court, considers this factor critical because it prevents employers from excluding their primary workforce from the FLSA's protections. Companies typically do not outsource core components of their

business. Thus, if a worker performs tasks that are an integral part of the alleged employer's business, she is likely to be dependent on the business of which her work is an integral part. See Shultz v. Hinojosa, 432 F.2d 259, 265 (5th Cir. 1970) ("If a specific individual regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business, the [FLSA] will ordinarily regard him as an employee.").

F. The Court's Conclusion Was Improper at the Summary Judgment Stage and Inconsistent with Economic Realities.

The district court's conclusion that Plaintiffs are independent contractors based on the "totality of the circumstances" referenced only a single fact – that the drivers could, and many did, perform work, albeit illegally, for other companies – and appeared to find that this compelled the conclusion that Plaintiffs were independent contractors. See Mem. Op. at 29, JA__. This conclusion minimized the numerous other facts that weigh in favor of employee status, such as Defendants' supervision and discipline of Plaintiffs, Plaintiffs' lack of managerial initiative, the extended time Plaintiffs worked for Defendants, and the integral nature of Plaintiffs to Defendants' business.

It bears noting that to reverse, this Court need not conclude that Plaintiffs are employees, but only that the district court erred in granting summary judgment. As explained above, the court failed to draw reasonable inferences in favor of Plaintiffs in light of the evidence. See St. Pierre v. Dyer, 208 F.3d 394, 404 (2d

Cir. 2000) ("In ruling on [a summary judgment] motion . . . if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.").

The court's analysis is particularly problematic in light of the FLSA's scope of coverage. The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" as "any individual employed by an employer," and "employ" to "include[] to suffer or permit to work." 29 U.S.C. 203(d), (e)(1), (g). These definitions ensure that the scope of employment relationships covered by the FLSA is as broad as possible. See United States v. Rosenwasser, 323 U.S. 360, 362-63 (1945) ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."). The "economic realities" test is consistent with this principle. See Frankel v. Bally, Inc., 987 F.2d 86, 89 (2d Cir. 1993) ("Recognizing the expansive nature of the FLSA's definitional scope and the remedial purpose underlying the legislation, courts construing this statute have adopted the 'economic realities' test, under which individuals are considered employees if 'as a matter of economic reality [they] are dependent upon the business to which they render service.'") (quoting Bartels v. Birmingham, 332 U.S. 126, 130 (1947)) (alteration in original). Thus, the court's conclusion that Plaintiffs were independent contractors based primarily on selected facts, when other facts indicate otherwise, was inappropriate,

particularly when the fact on which the court heavily relied is of minimal relevance. See Superior Care, 840 F.2d at 1060 ("[E]mployees may work for more than one employer without losing their benefits under the FLSA.").

Rather, Plaintiffs' alleged independence is illusory. Their rates of pay are negotiated by Defendants without their involvement. They are subject to Defendants' constant supervision and discipline, from the efficiency of their routes to the cleanliness of their cars. Their assignments are primarily determined by Defendants' dispatching system, which offers them work with little context or information, and penalizes them for rejecting undesirable jobs. Their "investments" are mainly regular expenses that Defendants pass on to them. The drivers work for Defendants for lengthy periods of time, serve as Defendants' regular workforce, and are legally required to affiliate with a business such as Defendants' to render services. In short, Plaintiffs' situation is similar to that of the workers described by the Fifth Circuit in Mednick:

> [T]he putative independent contractor appeared to have certain legal rights and powers that are normally incidents of independent business establishments. . . . He was given certain freedoms and liabilities, and to some degree the appearance of an independent contractor. [But a]n employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.

508 F.2d at 303. In other words, "[t]he liberties that defendants have bestowed

upon them merely mask economic reality. The totality of circumstances surrounding this employment relationship indicates only economic dependence." Priba Corp., 890 F. Supp. at 594. At minimum, a reasonable jury could so conclude.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court.

Dated: April 28, 2015

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 6,997 words, excluding exempt portions.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes.

Dated: April 28, 2015

s/ Jesse Z. Grauman
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2015, a true and correct copy of the foregoing Page Proof Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system, which will send notification of such filing to:

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