15-88-cv

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

(*Caption continued on inside covers*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGE PROOF BRIEF OF PLAINTIFFS-APPELLANTS MAZHAR SALEEM AND JAGJIT SINGH, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED

RACHEL M. BIEN
MICHAEL N. LITROWNIK
MICHAEL J. SCIMONE
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, New York 10016
(212) 245-1000

STEPHEN H. KAHN
KAHN OPTON LLP
1 Parker Plaza
Fort Lee, New Jersey 07024
(201) 947-9200

Attorneys for Plaintiffs-Appellants

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, Alexis S. Gacia-Alberto, Muhammad I. Choudhry, Ana M. Herra, Marisol Espinal, Walid Hameho, Alexander Schwallb, Eric Jarmon, Keith Daniel, Rafael Rijo, Babab Hafeez, Norman Levine, Mario Guerrero Batanta, Liang Hua Ma, William Martinez, Mohammed A. Musa, Kerry Bobb, Harjar Rahman, Elpidio Helena, Tamer Rashdan, Mena Michael, Felix L. Caraballo, Mark Shinder, John M. Hidalgo, Odishi, Inc., Kirk Hayden, Bartolome Rosario, Luis Vasquez, Irfan Shafi, Mohammad A. Siddiqui, Wade Quashie, Jimmy Chen, Jeff M. Gravesande, Edisson Barros, Andrzej Olechnowicz, Nick Wijesinghe, (Point to Point Casr & Limo Inc.), Jack Golden, Firoz Ahmed, Paul Glibauskas, Felix A. Paulino, Juan De Los Santos, Chowdhury Anowar, Zong Rong Zhu, Mohammed Gazi Ali, Mei Yao Liu, Katelyn Santos, Jose Jaimes, Ibrahim Desooki, Dongsedg Yoo, Jorge Monaks, Malik Hussain, Marcos Mendez, Luis Aucapina, Anderson Gonzalez, Towon Stewart, Feras Issa, Lenkin Pantaleon, Edgar Aucapina, Celstino Montero, Mikhail Gerber, Zydan Elnahar, Dexter Pusey, Rangdeu Multani, Satnam Singh, Xiangbo Li, Huang Xiong Jie, Rafael A. Riso, Ismael Mejia, Kuldip Singh, Jan A. Kalda, Jeewan Sinah, Wilson A. Santos, Sohan Singh Gill, Euclides Pena, Lester C. McDonald, Norman Ho, Gennadi Petrovski, Satnam Singh, Zenxin Wang, Noble Young, Francois Fan-Fan, Muhammad I. Choudhry, Fabian Martinez, Konstantin Katz, Rafael Osoria, Nwala Gabriel, Jose M. Solorzano, Ubaldo De Los Santos, Harrikissoon Seejattan, Harjar Rahman, Adel Elkazaz, Pedro M. Piasencia, Khorshed Alam, Garnell Wrighten, Refat Bhuiyan, Leo K. Stewart, Jeff M. Gravesande, Ahmed Nisar, Danjit Singh, Humayun Kabir Hussain, Mohammed A. Musa, Harnek Singh Whar, Shashi Bhatia, Goginder Singh, Abdelilah Elkarhat, Maninder Singh, Jo Ginder-Singh, Wilman Martinez, Harvinder Khamra, David A. Sanchez, Syed Firozuddin, Dariusz Rydzewski, Yasar Kahraman, Ali Gazi Mohammed, Ahmed M. Bakier, Onris De La Rosa, Harvinder S. Bhamra, Imtiaz H. Quereshi, Damir, 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,

—against—

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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INTRODUCTION

The Plaintiffs-Appellants[1] are "black car" drivers who worked for Defendant Corporate Transportation Group, Inc. and related entities ("CTG"). CTG labels all of its drivers as "independent contractors" and does not pay them overtime compensation under the Fair Labor Standards Act ("FLSA").

CTG drivers do not use special skill when they drive customers – they just drive their cars. Their work is integral to CTG's business, which is to transport customers. Many drivers work for CTG for years. Although CTG does not dictate when its drivers work, it exerts a great deal of control over how they do their work.

These facts, and many others in the record that Plaintiffs discuss below, make CTG drivers unlike properly classified independent contractors, who typically possess specialized skills, have the power to negotiate the terms for providing services using their skills, perform discrete tasks for limited periods of time, and have discretion over the way their work is performed.

Despite this, the district court granted summary judgment to CTG, even though it acknowledged that there was evidence supporting both sides on multiple "economic reality" factors that this Court has identified for independent contractor cases. In reaching its decision, the district court refused to consider significant evidence of drivers' dependence on CTG, applying the economic reality factors

[1] In addition to the two named Plaintiffs, approximately 211 individuals have joined the case as opt-in Plaintiffs pursuant to 29 U.S.C. § 216(b).

mechanically and failing to heed this Court's instruction to consider "any relevant evidence" of dependence on the employer. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). However, even without this evidence, the record before the district court raised many genuine disputes of fact that a jury is supposed to resolve. Instead, the district court usurped the jury's role – it weighed the evidence, resolved factual disputes, and drew inferences in favor of CTG when it was the moving party.

Because a jury reasonably could resolve the factual questions in Plaintiffs' favor, CTG is not entitled to summary judgment. This Court should reverse the judgment below and remand the case for trial.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over Plaintiffs' FLSA claims under 28 U.S.C. §§ 1331 and 1337. The district court granted summary judgment to CTG on September 16, 2014, and entered judgment on September 24, 2014, which it amended on December 9, 2014. Plaintiffs timely filed a notice of appeal on January 6, 2015. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court violated this Court's precedent by rejecting evidence that is relevant to drivers' dependence on CTG, including evidence of:

(1) CTG's control over drivers' pay; (2) CTG's control over access to its customers; (3) CTG's control over the distribution of assignments; and (4) Taxi and Limousine Commission ("TLC") regulations, which CTG's franchise agreements incorporate, that limit drivers' economic opportunity.

2. Whether the district court applied the summary judgment standard incorrectly by weighing the evidence to determine the existence and degree of each economic reality factor, instead of allowing a jury to make these factual findings.

3. Whether the district court erred by concluding that CTG's evidence was sufficient to establish that Plaintiffs are independent contractors under the FLSA as a matter of law.

STATEMENT OF THE CASE

On January 14, 2014, the parties cross-moved for summary judgment under Federal Rule of Civil Procedure 56. On September 16, 2014, the Honorable Jesse M. Furman, District Court Judge for the Southern District of New York, denied Plaintiffs' motion and granted CTG's motion. *Saleem v. Corporate Transp. Grp., Ltd.*, No. 12 Civ. 8450, 2014 WL 4626075 (S.D.N.Y. Sept. 16, 2014). On October 22, 2014, Plaintiffs moved to alter or amend an aspect of the district court's order that is not at issue on this appeal, which the district court granted on December 9, 2014. On January 6, 2015, Plaintiffs timely filed a notice of appeal. Dkt. No. 544.

In granting summary judgment to CTG, the district court assumed the role of the fact finder, weighing the evidence to determine the existence and degree of each economic reality factor. At the same time, it applied the economic reality factors mechanically, refusing to consider evidence that it believed fell outside of the factors despite the relevance of the evidence to the test's "ultimate concern" – dependence. *Superior Care*, 840 F.2d at 1059.

With respect to the first economic reality factor, control, the district court found that it favored independent contractor status, "but not overwhelmingly so," *Saleem*, 2014 WL 4626075, at *10, and acknowledged that there was evidence "on the other side of the balance" that supported a finding of control. *Id*. at *11.

It held that it was "[p]articularly relevant" that drivers could set their schedules and take vacation when they wished. *Id*. at *10. It also held that "it was . . . indicative of [CTG's] limited control" that drivers "were free to—and frequently did—work for other car services and provide transportation to private customers." *Id*.

However, it also found that CTG engages in "some monitoring and discipline of drivers." *Id*. at *11. This includes using GPS data to investigate customer complaints and requiring drivers to provide periodic updates regarding the status of their assignments. *Id*. The district court also cited "genuine disputes" over whether disciplinary measures imposed on drivers by supposedly independent

driver "committees" are "free from the influence of CTG management," and "clear evidence" that CTG management, including CTG's owner, Edward Slinin, is involved in these committees' deliberations. *Id*. Finally, the district court cited evidence that CTG inspects drivers' cars and directs employees and agents to do so on his behalf. *Id*.

The district court refused to consider other evidence of CTG's control. First, it rejected evidence that CTG penalizes drivers for rejecting assignments by preventing them from booking in to its dispatch system for other assignments for up to three hours, holding that this evidence does not even "*support* a finding that Plaintiffs were subject to CTG's control." *Id*. at *10 (emphasis added). Second, it held that CTG's franchise agreements, which prohibit drivers from driving CTG customers independently, are not relevant because "the inquiry concerns [the] 'degree of control *exercised* by'" CTG, "and the [non-compete] clause was only sometimes enforced." *Id*. (quoting *Superior Care*, 840 F.2d at 1058). Third, the district court held that TLC regulations that require drivers to affiliate with just one company and prohibit them from driving customers privately are irrelevant because the control factor only considers the control exercised by the *defendant*. *Id*.

With respect to the second factor, profit, loss, and investment, after comparing drivers' investments with CTG's investments, the district court found

that "it is not obvious which party undertook more economic risk[.]" *Id*. at *13. Nonetheless, the district court drew the inference in CTG's favor and found that this factor supports independent contractor status. *See id*.

The district court also rejected evidence of drivers' lack of entrepreneurial opportunity, including that CTG does not provide key information to drivers that would allow them to evaluate driving assignments, including the rate of pay, and that CTG controls drivers' income by unilaterally negotiating pricing with customers and setting the rate at which it pays drivers. *Id*. & n.4.

With respect to the third factor, skill and initiative, the district court held that CTG drivers do not have specialized skills but do show initiative because drivers must take "affirmative steps" to get assignments from CTG, "such as booking into a zone, calling the MTA hotline, or waiting on one of the high-volume lines at points around Manhattan." *Id*. at *14. The district court concluded that this factor "does not weigh strongly in either direction." *Id*.

The district court held that the fourth factor, permanence and duration, favored independent contractor status despite the indefinite duration of drivers' franchise agreements and, without citing record evidence, because "each [driving] job [i]s separately contracted." *Id*. The district court acknowledged that "many of the drivers have been engaged in franchise relationships with Defendants for many years," *id*., but found this evidence less important.

With respect to the fifth factor, whether the workers are integral, the district court found that CTG drivers are integral to CTG's business and, in fact, that CTG "could not function without drivers." *Id*. at *15.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment below because material factual disputes regarding the "existence and degree" of the economic reality factors preclude summary judgment for CTG. *See Superior Care*, 840 F.2d at 1059 (the "existence and degree" of each economic reality factor are "question[s] of fact").

The district court erred by rejecting evidence of drivers' dependence on CTG, including: (1) CTG's control over determinants of drivers' income, including customer pricing and drivers' pay rates; (2) CTG's control over drivers' access to customers; (3) CTG's control over the distribution of assignments; and (4) TLC regulations, which CTG's franchise agreements incorporate, that require drivers to affiliate with one black car company at a time and prohibit them from driving customers independently.

The district court's cramped application of the economic reality analysis is inconsistent with this Court's precedent, which has emphasized the broad scope of the FLSA's "employee" definition, discouraged the "mechanical[]" application of the economic reality test, and instructed district courts to consider "any relevant

evidence" of dependence, even if it does not fit under one of the Court's delineated economic reality factors. *See Superior Care*, 840 F.2d at 1059.

Moreover, in evaluating the economic reality factors, the district court repeatedly assumed the fact finder's role by weighing evidence that supports CTG against evidence that supports Plaintiffs and determining the "existence and degree" of each economic reality factor. *See Superior Care*, 840 F.2d at 1059.

As the district court acknowledged at several points, there was evidence "on the other side of the balance" and "genuine disputes" concerning key issues. *See Saleem*, 2014 WL 4626075, at *11. This competing and disputed evidence should have precluded summary judgment. In fact, with respect to each of the three economic reality factors that the district court found favored independent contractor status, it identified substantial facts going both ways. *See id*. at *11, *14. The evidence was certainly not "so one-sided" that only one party should "prevail as a matter of law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52 (1986).

Rather, viewing the evidence in the light most favorable to Plaintiffs, a jury reasonably could find that each of the economic reality factors as well as the overall question of dependence support Plaintiffs.

STATEMENT OF FACTS

I. CTG Provides "Black Car" Transportation Services to Customers in New York City.

CTG provides "black car" transportation services to customers in the New York City area.[2] CTG's drivers are integral to its business. Without them, it could not function.[3]

CTG is comprised of nine related companies that operate as a single integrated enterprise.[4] Six of the companies ("Franchisor Companies") own and operate "base licenses," which are licenses that the TLC issues for a fee that grant CTG the right to dispatch black car drivers.[5]

CTG services mostly corporate customers.[6] It sets up accounts and negotiates the rates that customers are charged.[7] CTG manages all customer contact through its customer relations department.[8] It prohibits drivers from

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[2] Civello Tr. [MJS Ex. A] 27:3-11, JA__; Slinin Tr. [MJS Ex. C] 303:13-15, JA__.

[3] *Saleem*, 2014 WL 4626075, at *15.

[4] Defs.' Resp. to Pls.' Requests for Admissions ("RFAs") [MJS Ex. B] ¶ 3, JA__.

[5] Pls.' Statement of Material Facts ("Pls.' SOF") [ECF No. 480] ¶¶ 3-8, JA__; Defs.' Counter-Statement of Material Facts ("Defs.' CS") [ECF No. 503] ¶¶ 3-8, JA__.

[6] Slinin Tr. [MJS Ex. C] 23:23-24:6, JA__.

[7] Defs.' Resp. to Pls.' RFAs [MJS Ex. B] ¶ 38, JA__; Ex. A (Civello Tr.) 38:13-15, 66:21-67:18, JA__.

[8] Pls.' SOF [ECF No. 480] ¶ 71, 91, JA__; Defs.' CS [ECF No. 503] ¶ 71, 91 JA__.

contacting customers directly and negotiating fares with them,[9] and decides whether to settle disputes with customers that stem from drivers' conduct.[10]

CTG invests significantly in its business. It owns an approximately 20,000 square foot office space in Brooklyn and employs over 120 workers in its dispatch, billing, sales, customer service, and driver relations departments.[11] It has a fleet of hundreds of black car drivers.[12]

CTG operates a proprietary computerized dispatch system that includes multiple networked computers, an internal cellular network, and database management software to distribute driving assignments to handheld devices that it provides to its drivers.[13] CTG extensively markets and advertises its driving services and its dispatch software.[14] CTG prohibits its drivers from advertising their services to CTG customers.[15]

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[9] Pls.' SOF [ECF No. 480] ¶¶ 47-49, 51-53, 165, 208-09, JA__; Defs.' CS [ECF No. 503] ¶¶ 47-49, 51-53, 165, 208-09, JA__.

[10] Pls.' SOF [ECF No. 480] ¶¶ 91-92, JA__; Defs.' CS [ECF No. 503] ¶¶ 91-92, JA__.

[11] Pls.' SOF [ECF No. 480] ¶¶ 13-18, JA__; Defs.' CS [ECF No. 503] ¶¶ 13-18, JA__.

[12] Pls.' Mot. for Class Certification, ECF. No. 161 at 2.

[13] Defs.' Resp. to Pls.' RFAs [MJS Ex. B] ¶ 36, JA__; Civello Tr. [MJS Ex. A] 163:15-164:7, JA__; Pls.' SOF [ECF No. 480] ¶¶ 57-59, JA__; Defs.' CS [ECF No. 503] ¶¶ 57-59, JA__.

[14] Pls.' SOF [ECF No. 480] ¶¶ 44-46, 61-62, JA__; Defs.' CS [ECF No. 503] ¶¶ 44-46, 61-62, JA__.

[15] Pls.' SOF [ECF No. 480] ¶ 43, JA__; Defs.' CS [ECF No. 503] ¶ 43, JA__.

II. CTG Controls All Significant Aspects of its Black Car Business.

A. CTG Enters into Non-Negotiable Franchise Agreements with Its Drivers.

CTG requires its drivers to purchase or rent a "franchise" to drive its customers.[16] CTG sets the price it charges for franchises.[17] Plaintiff Mazhar Saleem paid $3,000 to purchase his franchise, and Plaintiff Jagjit Singh rented his franchise for $75 a week.[18] Franchises currently range from $20,000 to $60,000, except for Hybrid Limo Express franchises, which have no fee.[19] CTG requires its drivers to pay it a "transfer fee" of 25% of the value of any assignment, transfer, or sale of a CTG franchise to another driver,[20] and requires drivers to obtain its approval for all transfers.[21]

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[16] Pls.' SOF [ECF No. 480] ¶ 23, JA__; Defs.' CS [ECF No. 503] ¶ 23, JA__.

[17] Defs.' Statement of Material Facts ("Defs.' SOF") [ECF No. 479] ¶ 45, JA__; Pls.' Counter-Statement of Material Facts ("Pls.' CS") [ECF No. 502] ¶ 45, JA__.

[18] Saleem Tr. [MJS Ex. XXX] 56:4-13; J. Singh Tr. [MJS Ex. III] 50:23-51:18, JA__.

[19] Defs.' SOF [ECF No. 479] ¶ 45; Pls.' CS [ECF No. 502] ¶ 45; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶ 1.

[20] Civello Tr. [MJS Ex. A] 228:1-11, JA__; Slinin Tr. [MJS Ex. C] 189:7-16, JA__; Pls.' SOF [ECF No. 480] ¶ 31, JA__; Defs.' CS [ECF No. 503] ¶ 31, JA__; NYC 2 Way Franchise Agreement [MJS Ex. U] ¶ 21, JA__; Aristacar Franchise Agreement [MJS Ex. V] ¶ 21, JA__; TWR Franchise Agreement [MJS Ex. U] ¶ 21, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶ 21, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 11] ¶ 21, JA__; Allstate Franchise Agreement [MJS Opp. Ex. 18] ¶ 21, JA__. Allstate franchises were not transferrable prior to 2011. *See* Allstate Franchise Agreement [MJS Opp. Ex. 15] ¶ 24, JA__. Unless otherwise indicated, where franchise agreements from

CTG drafts the franchise agreements, which it presents to drivers on a take it or leave it basis.[22] Among other things, the agreements dictate the way in which CTG pays its drivers. Customers pay CTG directly through their accounts with the company. CTG then issues drivers paychecks consisting of the fare minus CTG's commission, which is 15% to 33% of the fare, and certain mandatory fees.[23]

The agreements contain a non-compete clause that prohibits drivers from driving CTG's customers for another black car service or privately.[24] CTG

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different years contain the same provisions, all citations are to the most recent version of the franchise agreement.

[21] Pls.' SOF [ECF No. 480] ¶ 32, JA__; Defs.' CS [ECF No. 503] ¶ 32, JA__.

[22] Kumar Tr. [MJS Ex. E] 31:19-32:9, JA__.

[23] Civello Tr. [MJS Ex. A] 260:3-261:6, 308:25-309:20, JA__; Slinin Tr. [MJS Ex. C] 59:7-18, JA__; Defs.' Resp. to Pls. RFA [MJS Ex. B] ¶ 21, JA__; NYC 2 Way Franchise Agreement [MJS Ex. U] ¶¶ 3.1, 37, 37.4, JA__; NYC 2 Way Franchise Agreement [MJS Ex. G] ¶¶ 3.1, 37, JA__; Aristacar Franchise Agreement [MJS Ex. V] ¶¶ 3.1, 37, 37.4, JA__; Aristacar Franchise Agreement [MJS Ex. L] ¶¶ 3.1, 37, JA__; TWR Franchise Agreement [MJS Ex. U] ¶¶ 3.1, 37, 37.4, JA__; TWR Franchise Agreement [MJS Ex. T] ¶¶ 3.1, 36, 36.3, JA__; TWR Franchise Agreement [MJS Ex. Q] ¶¶ 3.1, 37, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶¶ 3.1, 37, 37.4, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 5] ¶¶ 3.1, 36, 36.3, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 4] ¶¶ 3.1, 37, 37.3, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 11] ¶¶ 3.1, 37, 37.4, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 10] ¶¶ 3.1, 37, 37.3, JA__; Allstate Franchise Agreement [MJS Opp. Ex. 18] ¶¶ 3.1, 37, 37.4, JA__.

[24] Pls.' SOF [ECF No. 480] ¶ 34, JA__; Defs.' CS [ECF No. 503] ¶ 34, JA__.

enforces this provision. For example, it sued opt-in Plaintiff Malook Singh for allegedly driving CTG customers independently.[25]

The agreements also require drivers to adhere to detailed "Rulebooks,"[26] which, as discussed below, set forth rules that apply to drivers and the penalties for violating the rules.[27] They also incorporate TLC regulations that apply to black car drivers and require drivers to abide by them.[28]

The agreements allow CTG to terminate drivers for myriad reasons, including "implying" that they are not independent contractors; violating any provision of the Rulebooks; allowing someone else to use their franchise without

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[25] Slinin Tr. [MJS Ex. C] 72:23-76:5, JA__; Defs.' Resp. to Pls.' RFAs [MJS Ex. B] ¶ 46, JA__; Complaint in *NYC 2 Way International, Ltd. v. Malook Singh* [MJS Ex. X], JA__; M. Singh Tr. [MJS Ex. RRR] 12:15-13:8, JA__.

[26] Pls.' Additional Statement of Material Facts ("Pls.' AS") [ECF No. 502] ¶ 15, JA__.

[27] NYC 2 Way Rulebook [MJS Ex. Y], JA__; Aristacar Rulebook [MJS Ex. Z], JA__; TWR Rulebook [MJS Ex. AA], JA__; Excelsior Rulebook [MCT Ex. 20], JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21], JA__.

[28] *See* NYC 2 Way Franchise Agreement [MJS Ex. U] ¶ 21, JA__ ("This Agreement and the services to be performed hereunder are subject to the rules and regulations of the New York City Taxi and Limousine Commission …."); *see also* Aristacar Franchise Agreement [MJS Ex. V] ¶ 52, JA__; TWR Franchise Agreement [MJS Ex. U] ¶ 52, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶ 52, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 11] ¶ 52, JA__; Allstate Franchise Agreement [MJS Opp. Ex. 18] ¶ 52, JA__.

the prior written consent of CTG; and taking or failing to take any action which is not in the best interest of CTG.[29] Other grounds for termination include:

- Failing to pay any payment or fee as it becomes due;
- Overcharging a passenger,
- Doing anything to the detriment of any CTG customer;
- Attempting to disrupt CTG's business or operations;
- Threatening, harassing, disturbing, or annoying anyone connected with CTG on or near CTG's premises;
- Attempting to disrupt CTG's business in any manner not previously specified;
- Attempting to disrupt or interfere with other drivers; and
- Attempting to solicit any CTG account or customer.[30]

During the period covered by this lawsuit, the franchise agreements ran for three- or seven-year terms, renewable for $1, or were of indefinite duration.[31] Drivers typically work for CTG for many years.[32] Plaintiff Mazhar Saleem drove

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[29] NYC 2 Way Franchise Agreement [MJS Ex. U] ¶ 45, JA__; Aristacar Franchise Agreement [MJS Ex. V] ¶ 45, JA__; TWR Franchise Agreement [MJS Ex. U] ¶ 45, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶ 45, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 11] ¶ 45, JA__; Allstate Franchise Agreement [MJS Opp. Ex. 18] ¶ 45, JA__.

[30] *Id*.

[31] Pls.' SOF [ECF No. 480] ¶¶ 26-27, JA__; Defs.' CS [ECF No. 503] ¶¶ 26-27, JA__; Hybrid Limo Express Franchise Prospectus [MJS Opp. Ex. 6] p. 25, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 5] ¶ 72, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 2] ¶ 73, JA__; Excelsior Car & Limo Franchise Prospectus [MJS Opp. Ex. 11] p. 25, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 10] ¶ 73, JA__; Allstate Franchise Prospectus [MJS Opp. Ex. 18] p. 21, JA__.

[32] *See, e.g.*, Pls.' SOF [ECF No. 480] ¶¶ 219, 225, 230, 232, 236, 242, 251, 255, 259, 261, 264, 266, JA__; Defs.' CS [ECF No. 503] ¶¶ 219, 225, 230, 232, 236, 242, 251, 255, 259, 261, 264, 266, JA__.

for CTG from 1998 through 2000 and from 2006 through 2012.[33] Plaintiff Jagjit Singh drove for CTG from 2008 through approximately February 2013.[34]

B. The Franchise Agreements Require Drivers to Comply with Detailed "Rulebooks."

The franchise agreements require drivers to adhere to Rulebooks that govern all aspects of drivers' work, including how they dress, the cleanliness of their cars, and their interactions with customers.[35]

For example, male drivers must wear:

- Dress Slacks (black, navy blue, charcoal gray, dark brown);
- Dress shoes and socks;
- Solid white button-down shirt with collar;
- Sport or suit jacket (black, navy blue, charcoal gray, dark brown, solid or tweed);
- Overcoat or trench coat (black, blue, brown, gray, tan);
- Pullover V-neck sweater or vest (black, navy blue, charcoal gray, dark brown). Sweater or vest can be worn under a spoil or suit jacket accompanied with a white shirt;
- Tie (must be worn properly at all times —no string ties).[36]

Each violation of the dress code can result in a fine of $50.[37]

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[33] Pls.' SOF [ECF No. 480] ¶ 215, JA__; Defs.' CS [ECF No. 503] ¶ 215, JA__.

[34] J. Singh Tr., Confidential Portion [MJS Ex. III] 69:4-21, JA__.

[35] *Saleem*, 2014 WL 4626075, at *4. Pls.' AS [ECF No. 502] ¶ 15, JA__.

[36] NYC 2 Way Rulebook [MJS Ex. Y] at 6-7, JA__; Aristacar Rulebook [MJS Ex. Z] at 6-7, JA__; TWR Rulebook [MJS Ex. AA] at 6-7, JA__; Excelsior Rulebook [MCT Ex. 20] at 6-7, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 6-7, JA__.

[37] NYC 2 Way Rulebook [MJS Ex. Y] at 6, JA__; Aristacar Rulebook [MJS Ex. Z] at 6, JA__; TWR Rulebook [MJS Ex. AA] at 6, JA__; Excelsior Rulebook

The Rulebooks require drivers to follow a "Car Code," under which they must maintain their vehicles "in a clean, professional appearance and in good operation" and ensure that their vehicles are "simonized" (polished) or "waxed at all times."[38] Each violation of the Car Code can result in a $50 fine.[39]

The Rulebooks dictate what drivers can say to customers and how they must treat customers. For example, drivers who argue with customers or are rude are subject to a $1,500-$3,000 fine and a 25 to 100-day suspension.[40] Drivers who order customers to exit their cars are subject to a $500-$3,000 fine and 50-day

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[MCT Ex. 20] at 6, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 6, JA__.

[38] NYC 2 Way Rulebook [MJS Ex. Y] at 7, JA__; Aristacar Rulebook [MJS Ex. Z] at 7, JA__; TWR Rulebook [MJS Ex. AA] at 7, JA__; Excelsior Rulebook [MCT Ex. 20] at 7, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 7, JA__.

[39] NYC 2 Way Rulebook [MJS Ex. Y] at 7, JA__; Aristacar Rulebook [MJS Ex. Z] at 7, JA__; TWR Rulebook [MJS Ex. AA] at 7, JA__; Excelsior Rulebook [MCT Ex. 20] at 7, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 7, JA__.

[40] NYC 2 Way Rulebook [MJS Ex. Y] at 10, JA__; Aristacar Rulebook [MJS Ex. Z] at 10, JA__; TWR Rulebook [MJS Ex. AA] at 10, JA__; Excelsior Rulebook [MCT Ex. 20] at 10, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 10, JA__.

suspension.[41] Drivers who fail to follow the specific route that a customer requests are subject to a $100-$400 fine and a 10-day suspension.[42]

Drivers can be fined $100-$400 and suspended for 10 days for waiting at the wrong pick-up address; they can be fined $50 and suspended for 3 days for arriving more than three minutes late; and fined $100-$800 and suspended for 10 days for arriving more than 10 minutes late.[43] These are just a few examples of many.[44]

C. CTG Enforces the Rulebooks and Disciplines Drivers.

As the district court found, the parties "dispute" the extent to which CTG controls driver "committees" that are nominally tasked with enforcing the Rulebooks.[45] Although CTG claims that the committees function independently

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41 NYC 2 Way Rulebook [MJS Ex. Y] at 11, JA__; Aristacar Rulebook [MJS Ex. Z] at 11, JA__; TWR Rulebook [MJS Ex. AA] at 10, JA__; Excelsior Rulebook [MCT Ex. 20] at 11, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 10, JA__.

42 NYC 2 Way Rulebook [MJS Ex. Y] at 11, JA__; Aristacar Rulebook [MJS Ex. Z] at 12, JA__; TWR Rulebook [MJS Ex. AA] at 11, JA__; Excelsior Rulebook [MCT Ex. 20] at 12, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 11, JA__.

43 NYC 2 Way Rulebook [MJS Ex. Y] at 12-13, JA__; Aristacar Rulebook [MJS Ex. Z] at 12-13, JA__; TWR Rulebook [MJS Ex. AA] at 12, JA__; Excelsior Rulebook [MCT Ex. 20] at 12-13, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 12, JA__.

44 NYC 2 Way Rulebook [MJS Ex. Y] at 8-17, JA__; Aristacar Rulebook [MJS Ex. Z] at 8-17, JA__; TWR Rulebook [MJS Ex. AA] at 8-17, JA__; Excelsior Rulebook [MCT Ex. 20] at 8-17, JA__; Allstate Private Car & Limousine Rulebook [MCT Ex. 21] at 8-17, JA__.

45 *Saleem*, 2014 WL 4626075, at *4.

from it, there is evidence that CTG influences or overrides the committees and determines how violations of the rules are resolved.[46]

CTG's owner, Eduard Slinin, and CTG management must approve changes to the Rulebooks.[47] Slinin exercises control over committee membership, including by suspending members and adding members.[48] For instance, after Plaintiff Saleem was elected as chairman of one of the committees, CTG accused him of operating a car without a valid TLC license and cancelled his CTG franchise agreement.[49] Saleem presented evidence rebutting the accusation to the committee, which found no violation.[50] Despite this, Slinin refused to reinstate Saleem's franchise unless he resigned his chairmanship.[51] Saleem agreed to resign because he needed to work to support his young children.[52]

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46 *See id*. at *4-5, JA__.

47 *See* Choudhary Tr. [MJS Ex. MMM] 25:4-26:18, JA__ ("When I became the communications chairman, they gave [the rulebook] to me . . . . I tried to make changes, but [CTG's manager] did not let me do it . . . .").

48 *See* Saleem Tr. [MJS Ex. HHH] 74:11-78:8, 85:3-22, JA__ (CTG suspended driver until he relinquished chairmanship of Communications Committee); Siddiqui Tr. [MJS Ex. PPP] 277:16-24, JA__ (Slinin unilaterally installed two members of the committee); Bhatti Tr. [MJS Ex. LLL] 200:14-201:9, JA__ (Slinin instructed chairman of committee to place two unelected drivers on the committee).

49 Saleem Tr. [MJS Ex. HHH] 71:23-77:11; 134:13-136:25, JA__.

50 *Id*. 76:17-77:16, JA__.

51 *Id*. 76:20-77:25, JA__.

52 *Id*. 77:14-78:8, JA__.

Slinin and CTG managers also bring suspected rule violations to the committees' attention by issuing written "10/5" forms.[53] They follow up to ensure the committees address violations and recommend fines and other disciplinary action that they want the committees to take, or not take, against drivers.[54]

Slinin also overrules the committees as to whether certain drivers should be fined.[55] CTG can terminate a driver's franchise agreement for failing to abide by "each and every rule and procedure" in the current version of the Rulebook.[56]

CTG also inspects and disciplines drivers.[57] For example, CTG hired two "consultants" to respond to customer complaints, inspect drivers' vehicles, and

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[53] Pls.' SOF [ECF No. 480] ¶¶ 104-06, JA__; Defs.' CS [ECF No. 503] ¶¶ 104-06, JA__.

[54] Slinin Tr. [MJS Ex. C] 143:18-144:6, 165:24-166:11, 187:16-188:9, JA__; Email, dated Sep. 29, 2010 [MJS Ex. GGG], JA__.

[55] Slinin Tr. [MJS Ex. C] 187:16-188:9, JA__; Siddiqui Tr. Day 2 [MJS Ex. HHHH] 282:10-283:5, JA__.

[56] NYC 2 Way Franchise Agreement [MJS Ex. U] ¶ 46, JA__; Aristacar Franchise Agreement [MJS Ex. V] ¶ 45, JA__; TWR Franchise Agreement [MJS Ex. U] ¶ 45, JA__; Hybrid Limo Express Franchise Agreement [MJS Opp. Ex. 6] ¶ 45, JA__; Excelsior Car & Limo Franchise Agreement [MJS Opp. Ex. 11] ¶ 45, JA__; Allstate Franchise Agreement [MJS Opp. Ex. 18] ¶ 45, JA__.

[57] Chowdhury Tr. [MJS Ex. NNN] 112:15-118:20, JA__ (describing incident in which Slinin personally fined him $5,000 because of a customer complaint); Saleem Tr., Confidential Portion [MJS Ex. HHH] 142:10-20; 151:11-152:5, JA__; Siddiqui Tr. Day 2 [MJS Ex. HHHH] 282:18-283:5, JA__; Ali Tr. [MJS Ex. JJJ] 43:20-44:8, 186:15-187:19, JA__; Bhatti Tr. Day 1 [MJS Ex. LLL] 109:15-21, 214:7-216:14, JA__; Mastrangelo Tr. [MJS Ex. HH] 207:7-19, 210:21-25, JA__; Email, dated Dec. 24, 2012 [MJS Ex. XX], JA__; Email, dated Jun. 20, 2012 [MJS Ex. SS], JA__.

report the results to CTG.[58] These consultants also monitor drivers' adherence to the Car Code and dress code, and fine drivers who are not compliant.[59] A spreadsheet that one consultant used to report his activities to CTG shows several instances on which Slinin or another CTG manager fined or disciplined drivers without going through the committee.[60]

The consultants communicate directly with CTG, not with the committees. For example, one of the consultants, Joseph Maydwell, emailed CTG more than 37 times about his efforts to ensure drivers' compliance with the Rulebooks.[61] He did not copy the committees on his correspondence.[62] The only committee member Maydwell could identify by name, Mohammad Siddiqui (an opt-in Plaintiff), testified that he never asked Maydwell to investigate rule violations, and that Maydwell was "imposed" on the drivers.[63]

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58 Pls.' SOF [ECF No. 480] ¶¶ 77-78, 93-96, 101, 245-47, JA__; Defs.' CS [ECF No. 503] ¶¶ 77-78, 93-96, 101, 245-47, JA__; Maydwell Tr. [MJS Ex. KK] 44:6-47:3, 67:18-79:10, 88:9-91:24, JA__; Email, dated May 14, 2012 [MJS Ex. YY], JA__; Email, dated Jul. 23, 2012 [MJS Ex. TT], JA__; Email, dated Jul. 25, 2012 [MJS Ex. ZZ], JA__.

59 Pls.' SOF [ECF No. 480] ¶¶ 77-83, JA__; Defs.' CS [ECF No. 503] ¶¶ 77-83, JA__.

60 Pls.' SOF [ECF No. 480] ¶ 101, JA__; Defs.' CS [ECF No. 503] ¶ 101, JA__; Complaint Spreadsheet [MJS Ex. JJ] at cells K31, M31 (driver removed from account by head of Driver Relations), K41, M41, J103, M103, J113, M113 (drivers disciplined by Slinin), K308, M308 (driver fined $2,000 by Slinin), JA__.

61 Maydwell Tr. [MJS Ex. KK] 237:8-242:22, JA__.

62 *Id.*

63 *Id*. 117:11-118:25; Siddiqui Tr. [MJS Ex. HHHH] 337:7-25, JA__; Siddiqui Decl. [MJS Opp. Ex. 29] ¶¶ 23-25, JA__.

CTG also penalizes drivers by removing them from customer accounts and by shutting off drivers' dispatch devices – preventing them from working – until they appear at the base in person to address customer issues.[64]

D. CTG Assigns Work to Drivers Through Its Proprietary Dispatch System.

CTG's two-way dispatch system allows it to monitor drivers' whereabouts, instruct drivers where to go, notify drivers of customers' transportation requests, and warn drivers not to violate dispatch system rules.[65]

CTG provides drivers with a handheld device containing its proprietary dispatch software.[66] CTG's system divides New York City into "zones," into which drivers must "book" to be eligible for assignments.[67] Once drivers book in,

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64 Mastrangelo Tr. [MJS Ex. HH] 59:4-20, 137:5-21, 241:9-242:8, JA__; Complaint Spreadsheet [MJS Ex. JJ] at cells K31, K67, K98, J40, J41, and J47, JA__; Slinin Tr. [MJS Ex. C] 156:5-15, JA__; Email, dated Aug. 21, 2012 [MJS Ex. RR], JA__.

65 Pls.' SOF [ECF No. 480] ¶¶ 64-70, JA__; Defs.' CS [ECF No. 503] ¶¶ 64-70, JA__; Toska Tr. [MJS Ex. EE] 74:9-75:9, 79:20-81:3, JA__; List of Canned Messages [MJS Ex. GG], JA__.

66 Defs.' Resp. to Pls.' RFAs [MJS Ex. B] ¶ 36, JA__; Civello Tr. [MJS Ex. A] 163:15-164:7, JA__; Pls.' SOF [ECF No. 480] ¶ 58, JA__' Defs.' CS [ECF No. 503] ¶ 58, JA__.

67 Pls.' SOF [ECF No. 480] ¶¶ 113-15, JA__; Defs.' CS [ECF No. 503] ¶¶ 113-15, JA__.

they are put on a queue.[68] CTG does not offer assignments to drivers until they reach the top of the queue, which can take from 30 minutes to two hours.[69]

Drivers who reach the top of the queue and receive an assignment have 45 seconds to accept it before it is offered to the next driver.[70] CTG withholds key information about potential assignments, including the price, destination, and who the customer is, until they accept them.[71] Drivers who do not accept an assignment during the 45-second window or who reject it must book out for 5 minutes and are forced to the bottom of the queue when they book in again.[72]

Drivers who accept an assignment face additional consequences if they refuse to follow through on the assignment, or "bail out."[73] When a driver bails out, CTG prevents him from booking in to any zone for three hours, unless he has what CTG believes is a valid excuse, in which case, CTG still prevents him from

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68 Civello Tr. [MJS Ex. A] 178:16-21, JA__.

69 Pls.' SOF [ECF No. 480] ¶ 118, JA__' Defs.' CS [ECF No. 503] ¶ 118, JA__; J. Singh Tr. Confidential Portion [MJS Ex. III] 137:6-10, JA__.

70 Pls.' SOF [ECF No. 480] ¶ 126, JA__; Defs.' CS [ECF No. 503] ¶ 126, JA__.

71 Pls.' SOF [ECF No. 480] ¶ 125, JA__; Defs.' CS [ECF No. 503] ¶ 125, JA__; Civello Tr. [MJS Ex. A] 184:4-13, JA__.

72 Pls.' SOF [ECF No. 480] ¶¶ 126-27, JA__' Defs.' CS [ECF No. 503] ¶¶ 126-27, JA__.

73 Civello Tr. [MJS Ex. A] 199:13-201:5, JA__.

booking in for one hour.[74] Bail out penalties cause drivers to lose the opportunity to earn income from dispatched assignments for a significant portion of the day.[75]

Drivers who accept assignments must report their estimated pick up time to the dispatcher.[76] If the dispatcher does not approve the estimated pick-up time, the job will be reassigned to another driver.[77] Drivers also must report to CTG when they drop off a customer.[78] Drivers must wait until CTG "releases" them before they can book back in to become eligible for another assignment.[79]

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[74] Pls.' SOF [ECF No. 480] ¶¶ 130-132, JA__' Defs.' CS [ECF No. 503] ¶¶ 130-132, JA__.

[75] J. Singh Tr. [MJS Ex. III] 88:14-89:5, JA__ (testifying that he pleaded with the dispatcher not to require him to bail out when he had a flat tire and could not accept an assignment); Ali Tr. [MJS Ex. JJJ] 83:19-84:15, JA__ (testifying that a bail out during the evening shift cost him the entire night's income). Although CTG drivers are permitted to line up at one of the car service lines outside of CTG's customers' offices when they are bailed out, Defs.' SOF [ECF No. 479] ¶¶ 159-60, JA__; Pls.' CS [ECF No. 502] ¶¶ 159-60, JA__, the inability to obtain assignments through CTG's dispatch system sharply limits drivers' access to work because the majority of the work is distributed through the dispatch system. Pls.' SOF [ECF No. 480] ¶ 113; Defs.' CS [ECF No. 503] ¶ 113. *See Saleem*, 2014 WL 4626075, at *6 (noting that "the dispatch system is the most typical channel through which drivers obtain assignments").

[76] Civello Tr. [MJS Ex. A] 87:25-88:14, JA__.

[77] Pls.' SOF [ECF No. 480] ¶¶ 64-65, JA__; Defs.' CS [ECF No. 503] ¶¶ 64-65, JA__.

[78] CTG Dispatch Manual [MJS Ex. UUU], JA__; Civello Tr. [MJS Ex. A] 193:8-14, JA__.

[79] Pls.' SOF [ECF No. 480] ¶¶ 128-29, JA__; Defs.' CS [ECF No. 503] ¶¶ 128-29, JA__.

III. CTG Drivers Operate in an Environment Tightly Regulated by Both the TLC and CTG.

The TLC is the public agency responsible for licensing and regulating New York City's for-hire vehicles, including black cars.[80]

In order to drive for CTG, a driver must first obtain a TLC license.[81] Drivers must have a regular driver's license, complete a New York State DMV Certified Defensive Driving Class, and pay a fee to obtain a TLC license.[82] CTG does not require drivers to have any additional licenses or skills to drive for it.[83]

The TLC regulates black cars by granting base licenses and driver's licenses, and through the use of penalties, including monetary fines, and the denial, suspension, and revocation of licenses.[84] A driver who loses her license loses the ability to drive for money.[85] TLC regulations, which CTG's franchise agreements incorporate,[86] require drivers to "affiliate" with a licensed black car base.[87]

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80 *See* http://www.nyc.gov/html/tlc/html/about/about.shtml (last visited April 21, 2015).

81 *See* New York City, N.Y., Rules, Tit. 35, § 59A-02(a).

82 New York City, N.Y., Rules, Tit. 35, § 59A-02(a).

83 Pls.' SOF [ECF No. 480] ¶ 39, JA__; Defs.' CS [ECF No. 503] ¶ 39, JA__.

84 *See, e.g.*, New York City, N.Y., Rules, Tit. 35, § 59A-13, 14.

85 *See* New York City, N.Y., Rules, Tit. 35, § 59A-02(a).

86 *See supra* note 28.

87 *See* New York City, N.Y., Rules, Tit. 35, § 59A-04(h)-(i).

Drivers may only pick up passengers that are dispatched from a base.[88] Drivers may only affiliate with one base at a time.[89]

The TLC and CTG prohibit drivers from picking up "street hails" and passengers from taxi stands, and penalize them for doing so.[90] The TLC is authorized to enforce its rules,[91] and exercises its authority, including by issuing tickets.[92]

IV. Drivers Work Long Hours to Make a Living and to Meet CTG's Customer Demand.

CTG drivers work long hours to make ends meet and to meet the demands of CTG's customers. Drivers testified that they typically work from eight to eighteen hours a day, usually six or seven days a week.[93] Their hours match the demands of

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[88] New York City, N.Y., Rules, Tit. 35, § 59A-11(e); Pls.' SOF [ECF No. 480] ¶ 19, JA__; Defs.' CS [ECF No. 503] ¶ 19, JA__.

[89] *See* New York City, N.Y., Rules, Tit. 35, § 59A-04(i); Pls.' SOF [ECF No. 480] ¶ 25, JA__; Defs.' CS [ECF No. 503] ¶ 25, JA__.

[90] New York City, N.Y., Rules, Tit. 35, § 59A-11(e); Pls.' SOF [ECF No. 480] ¶¶ 20, 22, JA__; Defs.' CS [ECF No. 503] ¶¶ 20, 22, JA__; Doetsch Tr. [MJS Ex. D] 256:7-15, 266:7-20, JA__.

[91] *See* New York City, N.Y., Rules, Tit. 35, § 52-04(2) (TLC has authority to "[s]et and enforce standards and conditions of service").

[92] *See* Ali Tr. [MJS Ex. JJJ] 90:22-92:2, JA__ (TLC issued ticket for picking up "street hails"); Bautista Tr. [MJS Ex. KKK] 53:8-18, JA__ (TLC issued ticket to enforce "no standing" rule); J. Singh Tr., Confidential Portion [MJS Ex. III] 15:4-9, JA__ (TLC issued ticket for making a wrong left turn); Saleem Tr., Confidential Portion [MJS Ex. HHH] 154:6-23, JA__ (TLC issued ticket for picking up a "street hail").

[93] J. Singh Tr., Confidential Portion [MJS Ex. III] 58:22-59:2, 129:18-24, JA__; Ali Tr. [MJS Ex. JJJ] 27:18-28:4, 105:9-15, JA__; Bautista Tr. [MJS Ex.

CTG's customers – drivers often begin their days in the early morning hours and end them late at night.[94]

STANDARD OF REVIEW

The Court reviews *de novo* a district court's order granting summary judgment. *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 27 (2d Cir. 2012).[95] Because CTG's motion is the one "under consideration" on this appeal, "all reasonable inferences [must be] drawn against" it even though both parties moved for summary judgment. *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011).

KKK] 15:21-16:3, 86:21-87:3, JA__; Choudhary Tr. [MJS Ex. MMM] 56:4-57:7, JA__.

[94] *See* Ali Tr. [MJS Ex. JJJ] 27:18-28:4, 92:21-93:10, JA__ (testifying that he mostly worked the evening shift because that is when "most of the corporate accounts use [CTG's] service"); Bautista Tr. [MJS Ex. KKK] 91:6-16, 106:9-107:24, JA__ (testifying that he drove from around 7 a.m. and until 11 p.m. or midnight because there were more jobs after 7 a.m. and before 1 a.m.); J. Choudhary Tr. [MJS Ex. MMM] 56:11-57:23, JA__ (testifying that he drove from around 4 p.m. to 2 a.m. because "[CTG has] work during these hours"); A. Chowdhury Tr. [MJS Ex. NNN] 13:8-14:14, JA__ (testifying that he worked from 2 p.m. to 2 a.m. because he was told by CTG management that this was the "busy time" and CTG needed drivers to "cover the jobs"); Koura Tr. [MJS Ex. OOO] 72:24-73:12, JA__ (testifying that he worked from 10 a.m. to 10 p.m. or midnight because that is when there was work); Saleem Tr., Non-confidential Portion [MJS Ex. XXX] 60:12-62:8, JA__ (testifying that he typically worked from around 2 p.m. to midnight or later because "the jobs started coming" starting in the afternoon); Siddiqui Tr. [MJS Ex. PPP] 174:5-175:6, JA__ (testifying that he worked from 4 p.m. because the "corporate accounts" start at night and "that's when the work starts").

[95] Because the motion was decided on summary judgment, the district court's determinations with respect to the economic reality factors must be reviewed *de novo* and are not entitled to the "clearly erroneous" standard that applies to findings entered after a bench trial. *See Superior Care*, 840 F.2d at 1057, 1059.

Summary judgment is improper if Plaintiffs produced evidence "such that a reasonable jury could return a verdict" in their favor. *Anderson*, 477 U.S. at 248. The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 243. "[I]n ruling on a motion for summary judgment, [t]he evidence of the non-movant is to be believed . . . ." *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (quoting *Anderson*, 477 U.S. at 255) (internal quotation marks omitted).

ARGUMENT

The Court should reverse the district court's order because the district court rejected evidence that is critical to the "economic reality" of drivers' relationships with CTG, assumed the role of the factfinder, and overlooked material factual disputes.

First, the district court failed to consider evidence of drivers' dependence on CTG that is not only relevant to several economic reality factors, but answers the test's ultimate question: "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." *Superior Care*, 840 F.2d at 1059. This evidence – alone or together with other evidence discussed in Parts II-V – raises a material question of fact regarding the degree of drivers' dependence on CTG that a jury, not a

judge, must answer. *See Keller v. Miri Microsystems LLC*, No. 14 Civ. 1430, 2015 WL 1344617, at *1 (6th Cir. Mar. 26, 2015) (reversing grant of summary judgment to employer and holding that "it is the task of the trier of fact to review the evidence and weigh the [economic reality] factors to decide whether the plaintiff-worker is economically dependent upon the defendant-company").

Second, the district court incorrectly applied the summary judgment standard by failing to identify factual disputes, weighing the evidence, and drawing inferences in favor of CTG with respect to four of the five economic reality factors. "[A] judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan*, 134 S. Ct. at 1866 (quoting *Anderson*, 477 U.S. at 249) (internal quotation marks omitted). Yet, time and again, the district court impermissibly determined the "existence and degree of each factor," which are "question[s] of fact." *Superior Care*, 840 F.2d at 1059; *see Baker v. Flint Eng'g & Constr. Co*., 137 F.3d 1436, 1440 (10th Cir. 1998) (the factfinder makes "findings of historical facts surrounding the individual's work" and "draw[s] inferences" from them in order to "make factual findings with respect to" each economic reality factor).

This case is not one of the "rare[]" instances where a "determination[] made as a matter of law on an award of summary judgment" is appropriate. *Barfield v. N.Y.C. Health and Hosps. Corp*., 537 F.3d 132, 144 (2d Cir. 2008); *see also Real v.*

Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 753 (9th Cir. 1979) (in applying economic reality test, "summary judgment is an extreme remedy" that is inappropriate unless there is "no room for controversy" and "the other party is not entitled to recover under any discernable circumstances") (quoting *Weber v. Towner Cnty*., 565 F.2d 1001, 1005 (8th Cir. 1977)) (internal quotation marks omitted). To the contrary, there are fact issues relevant to four of the five factors, "matters of some dispute," *Saleem*, 2014 WL 4626075, at *4, which Federal Rule of Civil Procedure 56 and this Court's precedent require a jury to resolve.

I. The District Court Rejected Evidence of Drivers' Dependence on CTG.

The district court disregarded evidence of drivers' dependence on CTG, erroneously concluding that it was not relevant to the economic reality test or was outweighed by evidence that favored CTG. Not only does most of the evidence bear directly on one or more of the economic reality factors, it is relevant to the test's "ultimate concern" – economic dependence. *Superior Care*, 840 F.2d at 1059.

This Court has repeatedly affirmed that the five factors are not "exclusive" and that district courts should consider "any relevant evidence" – even if it does not fall under any factor – because "the test concerns the totality of the circumstances." *Id.* This Court has also cautioned district courts not to apply the factors mechanically. *Id*. "Rather, they must always be aimed at an assessment of

the economic dependence of the putative employees, the touchstone for th[e] totality of the circumstances test." *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987) (internal quotation marks omitted). The factors' "collective answers" should not "produce a resolution which submerges the dominant factor – economic dependence" – because "it is *dependence* that indicates employee status." *Id*. at 1044 (quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976)) (internal quotation marks omitted).

Here, the district court rejected evidence relating to: (1) CTG's control over key determinants of drivers' pay; (2) CTG's control over drivers' access to customers; (3) CTG's control over the distribution of assignments; and (4) TLC regulations, which CTG's franchise agreements incorporate, that limit drivers to one black car company and prohibit them from driving customers independently.

A. The District Court Failed to Consider Evidence of CTG's Control over Major Determinants of Driver Pay.

The district court failed to consider undisputed evidence that CTG unilaterally negotiates pricing with customers and fixes the percentage of each fare that drivers are paid. Although the district court acknowledged that evidence that "a party controls all of the determinants of its workers' income" does "bear on" the economic reality test's "ultimate concern," it did not consider it, mechanically holding that it was not relevant to a particular factor. *See Saleem*, 2014 WL 4626075, at *13 n.4.

Evidence that a putative employer controls major determinants of workers' pay, however, supports a finding that the workers are employees. *See Superior Care*, 840 F.2d at 1060 (fact that company "unilaterally dictated the nurses' hourly wage" supported finding of control). For example, in *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013), the Eleventh Circuit reversed summary judgment to the employer based in part on evidence that the workers "could not bid for jobs or negotiate the prices for jobs" and that the company set the "billing codes" that it used to pay the workers. *Id*. at 1317.

Similarly, in *Mr. W Fireworks*, the Fifth Circuit reversed summary judgment to the employer and entered judgment in favor of the workers based on evidence that the employer set the workers' "rate and means of compensation," and the prices at which they sold their products. 814 F.2d at 1050. *See also Pilgrim Equip.*, 527 F.2d at 1313 (entering judgment for workers who were paid on a percentage basis where company controlled the "major determinants of [workers'] profit" – "price, location, and advertising"); *O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826, 2015 WL 1069092, at *7 (N.D. Cal. Mar. 11, 2015) (fact questions precluded summary judgment where car service company "set[] the fares it charge[d] rides unilaterally"); *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 32 (1961) (homeworkers were unlike independent businesspeople because they were

"regimented under one organization, manufacturing what the organization desire[d] and receiving the compensation the organization dictate[d]").

B. The District Court Failed to Consider Evidence that CTG Controls Drivers' Access to Customers and Requires Them to Sign Non-Competes.

The district court also rejected undisputed evidence that CTG controls drivers' access to its customers by assigning customers through its dispatch system and by requiring drivers to sign franchise agreements containing non-compete clauses. The facts here are similar to those in *Superior Care* where "[p]atients contract[ed] directly with Superior Care, not with the nurses, and the nurses [we]re prohibited from entering into private pay arrangements with the patients." 840 F.2d at 1057.

In failing to consider this evidence, the district committed several errors. First, it gave more weight to competing evidence (that Plaintiffs dispute, *see* Part I.D., *infra*) that drivers may work for other black car companies. *See Saleem*, 2014 WL 4626075, at *10. However, CTG controls drivers' relationships with *CTG's* customers by dispatching assignments on its own terms and forbidding drivers from driving its customers independently. In *Superior Care*, although the nurses "typically work[ed] for several employers," this Court affirmed the district court's determination that they were employees based in part on the fact that, at Superior Care, "they depended entirely on referrals to find job assignments, and Superior

Care in turn controlled the terms and conditions of the employment relationship." 840 F.2d at 1060.

Second, the district court usurped the role of the factfinder by discounting evidence that Plaintiffs depend on CTG to access and drive customers, and again emphasizing (disputed) evidence that drivers have the right to work for others. *See Saleem*, 2014 WL 4626075, at *10. This was improper because the district court's function is "not to weigh the evidence and determine the truth of the matter," but instead to identify the factual disputes and leave it to a jury to decide. *Tolan*, 134 S. Ct. at 1866 (quoting *Anderson*, 477 U.S. at 249) (internal quotation marks omitted). Viewing the evidence in the light most favorable to Plaintiffs, a jury reasonably could conclude that drivers are economically dependent on CTG because CTG controls the allocation of job assignments, the terms of those assignments, and customer relationships. *See Superior Care*, 840 F.2d at 1060.

Finally, the district court incorrectly held that the non-compete clause was irrelevant because what matters is the "degree of control *exercised* by" CTG – not its *power* to control the drivers. *See Saleem*, 2014 WL 4626075, at *10. This was an error. It is well established that the "power to control" is more than just relevant; it is the "overarching concern" of the control factor.[96] *See Irizarry v.*

[96] Even the common law agency test, which the Supreme Court held is too narrow for the FLSA's broad coverage, looks to the putative employer's "power of

Catsimatidis, 722 F.3d 99, 105, 114 (2d Cir. 2013) (affirming grant of summary judgment to employees despite that individual employer "possesse[d], but rarely exercise[d], the power to hire or fire" employees).

Here, there is evidence that CTG has the right to control drivers' ability to work independently and that it exercises this right. The district court found that the non-compete clause was "sometimes enforced," *see Saleem*, 2014 WL 4626075, at *10, and CTG's owner admitted that he sues drivers for allegedly breaching it. *See* SOF, at 12-13. This is significant evidence of control that the district court should have considered. *See Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (Control may be "exercised only occasionally, without removing the employment relationship from the protections of the FLSA") (quoting *Donovan v. Janitorial Servs., Inc.*, 672 F.2d 528, 531 (5th Cir. 1982)) (internal quotation marks omitted); *Superior Care*, 840 F.2d at 1060 (although supervision was only occasional, "Superior Care unequivocally expressed the right to supervise the nurses' work").

C. The District Court Rejected Undisputed Evidence that CTG Controls Information about Assignments and Penalizes Drivers for Rejecting Assignments.

The district court also improperly downplayed evidence that "drivers receive[] limited information before deciding whether to accept a job – most

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control, *whether exercised or not*, over the manner of performing service to the industry." *U.S. v. Silk*, 331 U.S. 704, 713 (1947) (emphasis added).

significantly, the information did not include the rate of pay," and emphasized evidence of other "economic choices" they make, including whether "to book into the dispatch system in the first instance." *Saleem*, 2014 WL 4626075, at *13. While a jury may ultimately reach this conclusion, it was not appropriate for the district court to make the decision for them. *See Keller*, 2015 WL 1344617, at *10 (fact that worker is "free to reject an assignment" is "not sufficient to negate control") (quoting *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992)) (internal quotation marks omitted); *Superior Care*, 840 F.2d at 1057 (fact that nurses were "free to decline a proposed referral" did not make them independent contractors).

The district court also erroneously held that "bail out" penalties that CTG imposes on drivers who reject assignments "do[] not support a finding that Plaintiffs were subject to Defendants' control." *Saleem*, 2014 WL 4626075, at *10. Drivers who reject jobs after accepting them (after CTG tells them the rate of pay and other important information about the job) are prevented from "booking in" for other jobs for one or three hours (depending on whether CTG decides they have a valid excuse), costing them the fare they reject *and* the ability to replace it with other work. This makes CTG drivers unlike typical independent contractors for whom "the only real consequence" of declining work is the loss of income for

the particular assignment. *See Arena v. Delux Transp. Servs., Inc.*, 3 F. Supp. 3d 1, 11 (E.D.N.Y. 2014).

Contrary to the district court's conclusion, the fact that CTG sets the terms under which drivers may reject assignments certainly *supports* a finding that Plaintiffs were subject to CTG's control, even if it does not *establish* CTG's control as a matter of law. A reasonable jury could conclude that drivers are not actually free to reject jobs because of the economic hardship that results from CTG's bail out policy. *See* SOF, at 22-23. *See Scantland*, 721 F.3d at 1313 (holding that, although workers could "decline any work assignments," material dispute of fact existed because plaintiffs "could not reject a route or a work order . . . without threat of termination or being refused work in the following days"); *O'Connor*, 2015 WL 1069092, at *13 (fact dispute precluded summary judgment where company claimed that drivers never can turn down rides but Uber handbook stated that company "will follow-up with all drivers that are rejecting trips") (internal quotation marks omitted).

The cases on which the district court relied are distinguishable. In *Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012), drivers who rejected assignments were not prevented from getting work and there was little evidence that there were any consequences for refusing a job at all. *Id*. at 601. Similarly, in *Arena*, although the plaintiff "claim[ed] he did not feel he could turn down a

dispatched call, or had to drive a particular route, . . . there [wa]s no evidence that he was ever penalized by Delux for not complying." 3 F. Supp. 3d at 11.

D. The District Court Failed to Consider Evidence of TLC Regulations that Limit Drivers' Independence.

The district court failed to consider the context in which black car drivers operate in New York City, including the ways in which TLC regulations tie them to one company at a time and prohibit drivers from driving customers under private arrangements. *See* SOF, at 24-25. The district court erroneously held that these regulations were irrelevant because the control factor only focuses on the "control exercised by *Defendants*" – not by others. *Saleem*, 2014 WL 4626075, at *10. However, this Court frequently considers the way the relevant industry operates to understand the economic reality of the relationship between the workers and the alleged employer. For example, in *Superior Care*, this Court considered the "operational characteristics intrinsic to the [nursing] industry" to analyze the permanence and initiative factors. 840 F.2d at 1060-61. After considering this context, the Court concluded that "the fact that the[] nurses are a transient work force reflect[ed] the nature of their profession and not their success in marketing their skills independently." *Id.* at 1061. *See also Mr. W Fireworks*, 814 F.2d at 1054 ("[C]ourts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ").

Here, the TLC regulations are part of the "totality of the circumstances" that help to answer the ultimate legal question – whether drivers depend on CTG for the opportunity to render service. *See Superior Care*, 840 F.2d at 1059-60. A jury could reasonably conclude that drivers are dependent on CTG because the regulatory body that licenses them requires them to affiliate with a black car company, like CTG, to be allowed to drive customers for money, and prohibits them from driving customers independently. SOF, at 24-25.

Moreover, CTG expressly incorporates the TLC regulations into its mandatory franchise agreements, which makes the regulations undisputedly relevant to the economic reality of CTG's relationships with drivers. *See id*. at 13.

II. Plaintiffs Raised Material Factual Disputes Regarding CTG's Control over Drivers.

Plaintiffs' evidence raises material factual disputes with respect to the degree of control that CTG exercises over its drivers. *See Superior Care*, 840 F.2d at 1058-60. The facts, viewed in the light most favorable to the Plaintiffs, show that CTG "exercise[s] significant control over [drivers] such that they d[o] not stand as 'separate economic entities' who [a]re 'in business for themselves.'" *See Scantland*, 721 F.3d at 1313 (quoting *Pilgrim Equip.*, 527 F.2d at 1312-13).

A. CTG Exercises Economic Control over Drivers.

CTG exerts economic control over drivers by unilaterally negotiating prices with customers and unilaterally setting the percentage of each fare that drivers are paid. SOF, at 12. *See Superior Care,* 840 F.2d at 1060; *Ruiz v. Affinity Logistics Corp*., 754 F.3d 1093, 1101 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 877 (2014) ("Affinity set the drivers' flat 'per stop' rate; the drivers could not negotiate for higher rates, as independent contractors commonly can."); *O'Connor*, 2015 WL 1069092, at *7 (Uber "exercises significant control over the amount of any revenue it earns: Uber sets the fares it charges rides unilaterally").

CTG also prevents drivers from forming private relationships with customers through its non-compete clauses and exercises this authority. SOF, at 12-13. *See Superior Care*, 840 F.2d at 1057 ("Patients contract directly with Superior Care, not with the nurses, and the nurses are prohibited from entering into private pay arrangements with the patients.") CTG controls the information that it discloses to drivers about potential assignments, including the rate of pay; assigns work to drivers in one of three ways, but primarily through its dispatch system; and punishes drivers who reject assignments by preventing them from driving its customers for up to three hours. SOF, at 22-23.

CTG requires drivers to purchase or rent franchises in exchange for the right to receive assignments through its dispatch system, and its franchise agreements

prohibit drivers from selling or renting their franchises to others without paying CTG a fee and obtaining CTG's approval. SOF, at 11. *Cf. Slayman v. FedEx Ground Package Sys., Inc*., 765 F.3d 1033, 1045-46 (9th Cir. 2014) (applying Oregon's right-to-control test and holding that "entrepreneurial opportunities do not undermine a finding of employee status when a company must consent to its workers' exercise of those opportunities" and that "[w]hether FedEx ever exercises its right of refusal is irrelevant" because "what matters is that the right exists"). CTG's franchise agreements incorporate TLC regulations that require drivers to affiliate with one company at a time and prohibit drivers from having private customers. SOF, at 13, 24-25. Drivers can lose their licenses if they fail to abide by the TLC regulations. *Id*.

B. CTG Exercises Control over the Way in Which Drivers Perform Their Duties.

CTG controls the manner in which drivers perform their duties. Pursuant to its franchise agreements, CTG requires drivers to abide by the Rulebook of their franchisor. SOF, at 15. *Saleem*, 2014 WL 4626075, at *3. The Rulebooks govern "the way drivers dress, maintain their cars, communicate with their franchisors, and interact with customers." *Saleem*, 2014 WL 4626075, at *4. Violations of the Rulebooks carry penalties. SOF, at 16-17. CTG enforces the Rulebooks. *Id.* at 17-21. This evidence supports a finding of control. *See Reich v. Circle C Invs., Inc*., 998 F.2d 324, 327 (5th Cir. 1993) (promulgation of "rules concerning the

dancers' behavior" and enforcement through fines supported finding of control); *cf. Slayman*, 765 F.3d at 1044 (applying Oregon right-to-control test and holding that "no reasonable jury could find that the result sought by FedEx includes every exquisite detail of the delivery driver's fashion choices and grooming").

Although, as the district court acknowledged, the parties "dispute" CTG's role in enforcing the Rulebooks, *see Saleem*, 2014 WL 4626075, at *4, there is evidence from which a jury reasonably could conclude that CTG exerts substantial influence over the committees charged with the Rulebooks' enforcement. *Id*. at *5. SOF, at 17-19. There is also evidence from which a jury reasonably could find that CTG enforces the Rulebooks directly, including by inspecting drivers' cars and fining drivers for violations. *Saleem*, 2014 WL 4626075, at *5. SOF, at 19-21.

C. CTG Monitors Drivers as They Perform Their Duties.

CTG supervises drivers by monitoring them via GPS in order to investigate customer complaints and by requiring drivers to make periodic updates regarding the status of their assignments, including when they pick up customers and when they reach their destination. SOF, at 21. In *Superior Care*, this Court held that even "infrequent" supervision of the nurses' work (i.e., "once or twice a month") could support a finding of control because "Superior Care 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." *Id.*

840 F.2d at 1060. *See also Collinge v. IntelliQuick Delivery, Inc.*, No. 12 Civ. 824, 2015 WL 1299369, at *3 (D. Ariz. Mar. 23, 2015) (fact that employer closely monitored delivery drivers through dispatching system supported control factor).

D. The District Court Improperly Weighed the Evidence and Ignored Material Factual Disputes.

The district court improperly weighed Plaintiffs' evidence against CTG's (disputed) evidence that drivers can decide whether to accept or reject driving jobs and are free to set their own schedule and decide when to take vacations, and erroneously concluded that CTG's evidence is more significant. *See Saleem*, 2014 WL 4626075, at *10. As an initial matter, the district court should not have engaged in any weighing of the evidence. This job belongs to the jury because the "judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan*, 134 S. Ct. at 1866 (quoting *Anderson*, 477 U.S. at 249) (internal quotation marks omitted). Here, the evidence on both sides produced a genuine issue for trial regarding the "degree of control exercised by" CTG that the district court should have identified but not resolved. *See Superior Care*, 840 F.2d at 1059.

Moreover, the evidence supporting CTG is not so substantial as to preclude a jury from finding in Plaintiffs' favor. As discussed above, a question of fact exists regarding whether drivers are actually free to reject assignments because of the hardships resulting from CTG's bail out policy. *See* Part I.C.

Similarly, even if drivers were free to set their schedules and take vacations, this does not preclude a finding that Plaintiffs are employees. The Supreme Court has held that homeworkers who are free to set their hours can be employees under the FLSA. *Whitaker House Co-op.*, 366 U.S. at 32. Courts have given little weight to these facts because "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) (citing *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984)) ("A relatively flexible work schedule alone . . . does not make an individual an independent contractor rather than an employee."); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143-44 (5th Cir. 1981) (fact that worker's "work patterns were unstructured" and that "he could work eighty hours one week and none the next" was not sufficient to make him an independent contractor); *Pilgrim Equip.*, 527 F.2d at 1312 (fact that workers possessed the "right to set [their own] hours" did not render them independent contractors in light of the "total context of the relationship").

Moreover, "[t]he more relevant inquiry is how much control [CTG] has over its drivers *while they are on duty* for [CTG]." *O'Connor*, 2015 WL 1069092, at *14 (emphasis added). The fact that drivers can decide when to appear for work "says little about the level of control [CTG] can exercise over them when they *do* report to work." *Id.*; *see also Collinge*, 2015 WL 1299369, at *4 (fact that drivers

were free to do as they pleased between jobs "merely show[s] that IntelliQuick is unable to control its drivers when they are not working, an irrelevant point").

In any event, a jury reasonably could conclude that the hours that drivers work are driven not by their own "whims," but by the "demands of the business." *Snell*, 875 F.2d at 806. Drivers testified that they worked based on the hours when CTG's customers needed car service. *See* SOF, at 25-26. *See Snell*, 875 F.2d at 806 (giving little weight to fact that cake decorators did not have set schedules because their hours depended more on the demands of the business than on their own "whims or choices"); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726 (1947) (noting that the alleged employer "never attempted to control the hours of the boners," but because the boners had to "keep the work current[,] . . . the hours they work[ed] depend[ed] in large measure upon the number of cattle slaughtered").

III. Plaintiffs Raised Material Factual Disputes Regarding Their Opportunity for Profit or Loss and Investment in the Business.

A. Drivers Have Little Opportunity for Profit or Loss Because CTG Controls the Key Determinants of Their Income.

Plaintiffs raised a material factual dispute regarding drivers' opportunity for profit or loss because the record shows that CTG controls the major determinants of their income. *Pilgrim Equip.*, 527 F.2d at 1313 (profit or loss factor favored employee status where "[t]he major determinants of . . . profit . . . were directly controlled by" the employer, including "price, location, and advertising"); *Hart v.*

Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 919-20 (S.D.N.Y. 2013), *reconsideration denied* (Nov. 18, 2013) ("Given [the employer's] control over most critical determinants of" dancers' pay, it "exercised a high degree of control over [their] opportunity for profit"). An employer's control over "the [workers'] rate and means of compensation[,]" the "prices at which [they] sold" their services, and customer advertising "points to economic dependence." *Mr. W Fireworks*, 814 F.2d at 1050-51.

It is undisputed that CTG: (1) controls customer advertising; (2) negotiates the prices that its customers are charged for car service and forbids drivers from negotiating with customers; (3) sets the rates at which drivers are paid; (4) requires drivers to purchase or rent franchises in order to work; and (5) requires drivers who wish to rent or sell their franchises to obtain its approval first and pay it a transfer fee. *See* SOF, at 9-12. These decisions, which CTG makes unilaterally, play a far greater role in determining drivers' individual "profit" than any choices that drivers make.

The district court ignored this evidence and incorrectly held that CTG established the profit or loss factor based on a few narrow areas that CTG claims are left to drivers' discretion: "whether to rent or buy a franchise, how many assignments to take, whether to work for other car service companies, whether to

solicit private clients, and whether to hire other drivers." *Saleem*, 2014 WL 4626075, at *12.

First, even if all of these facts are true (which, as discussed below, some are disputed), they do not negate Plaintiffs' evidence, which demonstrates drivers' economic dependence. Viewed as a whole, the record evidence raises a material question of fact regarding the degree to which drivers have opportunities for profit or loss and whether they are "more closely akin to wage earners toiling for a living" than independent businesspeople. *Mr. W Fireworks*, 814 F.2d at 1051. This is a jury question. *See Keller*, 2015 WL 1344617, at *1.

Second, the facts on which the district court relied are marginal. Deciding how many assignments to take and whether to work for other car services are decisions that employees frequently make and do not strongly favor independent contractor status. *See Superior Care*, 840 F.2d at 1057-60 (nurses were employees despite that they were "free to decline a proposed referral for any reason" and "work[ed] for several employers" because "employees may work for more than one employer without losing their benefits under the FLSA"); *Snell*, 875 F.2d at 804 (cake decorators who were "generally free to choose the cakes they wish to decorate" and could "work for other employers" were employees).

Even if drivers can earn more money by accepting more assignments, "toiling for money on a piecework basis is more like wages than an opportunity for

profit." *Snell*, 875 F.2d at 809 (internal quotation marks omitted); *see also Rutherford Food*, 331 U.S. at 730 (a job whose profits are based on efficiency is "more like piecework than an enterprise that actually depend[s] for success upon the initiative, judgment or foresight of the typical independent contractor"); *Scantland*, 721 F.3d at 1316-17 (the ability to take on more jobs "is analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces" and "is unrelated to an individual's ability to earn or lose profit via his managerial skill"); *Collinge*, 2015 WL 1299369, at *5 ("[A] worker's ability to simply work more is irrelevant. More work may lead to more revenue, but not necessarily more profit."); *Solis v. Kansas City Transp. Grp.*, No. 10 Civ. 0887, 2012 WL 3753736, at *9 (W.D. Mo. Aug. 28, 2012) (taxi "driver's ability to make more money by driving additional routes is akin to a waiter making more money by taking another shift").

The other facts on which the Court relied are disputed or are not in the record at all. As discussed above, drivers are not actually free to solicit private clients. CTG prohibits drivers from soliciting its customers, and TLC regulations, which CTG expressly incorporates into its franchise agreements, bar drivers from driving anyone for compensation except through a base with which they are affiliated. *See* SOF, at 12-13, 24-25. Although a few drivers may have violated

this regulation, a jury reasonably could conclude that such violations are not "opportunities" for profit.

There is no evidence that whether a driver "rent[s] or buy[s] a franchise" makes a difference in terms of his opportunities for profit or loss, or that drivers "hire other drivers." *Saleem*, 2014 WL 4626075, at *12. Drivers can rent their franchise to another driver, but obtaining a fixed amount in rent is not the same thing as using managerial skill to generate a profit. For example, in *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985), the Fifth Circuit held that a labor recruiter who supplied laborers to a farm owner, but did not manage the crew or direct its work, did not have an opportunity for profit because the farm owner "controlled the important details of [the laborers'] performance." *Id.* at 1328. Like the farm owner, CTG controls the "important details of [franchise renters'] performance" because renters must abide by the Rulebooks, the franchise agreements, and are at the whim of the dispatch system. *See id.*; *Scantland*, 721 F.3d at 1317 ("though the parties' contract provided that technicians could hire helpers, this authority was illusory" because "[a]ny helpers were required to be contracted with [the employer] as technicians, thus precluding the exercise of any real managerial skill over such helpers"); *cf. Ruiz*, 754 F.3d at 1103 (fact that drivers could hire helpers warranted little weight because helpers "were subject to the same degree of control exerted by [employer] over the drivers generally").

Finally, the district court relied heavily on the fact that CTG's franchise agreements do not guarantee a certain amount of work. *Saleem*, 2014 WL 4626075, at *12. However, this favors *employee* status. Contracts that specify the amount of work to be performed are typical of an independent contractor relationship. *See Cotter v. Lyft, Inc.*, No. 13 Civ. 4065, 2015 WL 1062407, at *1 (N.D. Cal. Mar. 11, 2015) ("[T]he traditional notion [of] an independent contractor [is] someone hired to achieve a specific result that is attainable within a finite period of time, such as plumbing work, tax service, or the creation of a work of art of a building's lobby.") (citation and internal quotation marks omitted).

B. The Parties' Relative Investments Present a Jury Question.

Although this Court has not addressed the issue, most Circuit Courts analyze the investment factor by comparing the "worker's individual investment to the employer's investment in the overall operation." *Keller*, 2015 WL 1344617, at *6 (internal citation omitted); *see, e.g.*, *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344 (5th Cir. 2008) ("In applying the relative-investment factor, we compare each worker's *individual* investment to that of the alleged employer.") (emphasis in original); *Real*, 603 F.2d at 755 (workers' "investment in light equipment . . . is minimal in comparison with the total investment in land, heavy machinery and supplies necessary for growing the strawberries"); *Snell*, 875 F.2d at 810 ("The relative investment of the decorators in their own tools compared with the

investment of the Snells simply does not qualify as an investment in this business."); *Scantland*, 721 F.3d at 1317-18 (comparing employer's investment in equipment to workers' investment and concluding that workers' expenditures "detract little from the worker's economic dependence on Knight"). "[T]he investment which must be considered . . . is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself." *Snell*, 875 F.2d at 810 (internal quotation marks omitted). Where a worker has a "disproportionately small stake in the [overall] operation[,]" this "is an indication that their work is not independent of the defendants." *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987).

Although the district court purported to analyze the parties' relative investments, it only considered Plaintiffs' investments. *See Saleem*, 2014 WL 4626075, at *13. It failed to consider CTG's substantial investments in its proprietary dispatch system, handheld dispatch devices, a 20,000 square foot office space, six TLC base licenses, advertising, and managerial, dispatch, customer service, and sales employees. SOF, at 10. A jury reasonably could conclude that Plaintiffs' one-time investment in their franchises and their ongoing investments in their cars, gasoline, and insurance were "disproportionately small" in comparison to CTG's "stake" in the operation overall. *Lauritzen*, 835 F.2d at 1537; *see Schultz v. Mistletoe Exp. Serv., Inc.*, 434 F.2d 1267, 1270-71 (10th Cir. 1970) (workers

were employees even though they furnished their own trucks because employer owned and supplied the shipping terminals); *Kansas City Transp. Grp.*, 2012 WL 3753736, at *9 (cost of a car, while significant, was "disproportionately small when compared to Defendant's investments in a fleet of vehicles, land to run the operation, personnel to run the operation, and other overhead expenses"); *Campos v. Zopounidis*, No. 09 Civ. 1138, 2011 WL 2971298, at *6-7 (D. Conn. July 20, 2011) (delivery driver supplied his own vehicle, but was an employee because he depended on his employer's investments in restaurant premises, supplies, payroll service, utilities, and other operating expenses); *Sakacsi v. Quicksilver Delivery Sys., Inc.*, No. 06 Civ. 1297, 2007 WL 4218984, at *6-7 (M.D. Fla. Nov. 28, 2007) (employer's investments in an office, computer system, devices, and account managers' pay outweighed drivers' investments in cars, gas, and maintenance).

In fact, although the district court acknowledged that "it is not obvious which party undertook more economic risk," *Saleem*, 2014 WL 4626075, at *13, it drew the inference in CTG's favor. This was an error of law. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 123 (2d Cir. 2013) (courts must "resolve all ambiguities and draw all reasonable inferences in the light most favorable to the nonmoving party").

IV. Plaintiffs' Jobs Do Not Require Skill or Independent Initiative.

The district court correctly held that no particular skill is necessary for CTG drivers to perform their jobs. *Saleem*, 2014 WL 4626075, at *14. Nonetheless, the district court found that the job does require "a significant degree of independent initiative" because drivers have to "take affirmative steps" to get assignments. *Id*.

The "steps" the district court identified – "booking into a zone, calling the MTA hotline, or waiting on one of the high-volume lines at points around Manhattan" – are no different than steps many employees take. For example, in *Superior Care*, the nurses had to be interviewed and placed on a roster to obtain referrals. 840 F.2d at 1057. Such steps do not entail the "business-like initiative" that this factor requires. *Id*. at 1060 (internal quotation marks and citation omitted). CTG drivers do not require initiative because, like the Superior Care nurses, they "depend[] entirely on referrals [from their employer] to find job assignments," and lack the power to negotiate the terms of those assignments. *Id*.

By contrast, courts have found initiative to be required where the workers make decisions with respect to "major components of a business," such as "advertising . . . , the methods of marketing and sales, [or] the choice of other products to sell." *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) (applying economic reality test in age discrimination case to hold that sales agent for gas grill manufacturer was an independent contractor); *see Pilgrim Equip.*, 527

F.2d at 1314 (workers did not require "initiative" where "[a]ll major components open to initiative – advertising, pricing, and most importantly the choice of cleaning plants with which to deal – are controlled by" employer).

In this case, CTG exercises all of the initiative, and does not provide drivers with the information they need to make "business-like" decisions about the assignments they take. *See* Part I.C.

A jury reasonably could conclude that the "steps" that CTG drivers take to obtain assignments do not amount to the "initiative, judgment[,] or foresight of the typical independent contractor[,]" but are "more like" the efforts of "piecework[ers]." *Rutherford Food*, 331 U.S. at 730; *see Mr. W. Fireworks*, 814 F.2d at 1053 ("[R]outine work which requires industry and efficiency is not indicative of independence and nonemployee status.") (quoting *Pilgrim Equip.*, 527 F.2d at 1314) (internal quotation marks omitted).

V. Plaintiffs' Long-Term Relationships with CTG Favor Employee Status.

The district court rejected important evidence that favors employee status under the permanency factor – Plaintiffs worked for CTG for long durations and signed indefinite or long-term franchise agreements. *See* SOF, at 14-15. *See Scantland*, 721 F.3d at 1318 (contracts for one-year terms that were regularly renewed demonstrated "substantial permanence"). Although it acknowledged this evidence, the district court again usurped the jury's role and held that the fact that

drivers' relationship with CTG is "at will" mattered more. *Saleem*, 2014 WL 4626075, at *14.

This Court has not addressed the significance of an "at will" relationship to the permanency factor. Other courts have held that its significance is limited because most employees are "at will," or because other evidence, including the workers' long tenures, is equally (or more) indicative of their dependence. *See, e.g.*, *Hopkins*, 545 F.3d at 345-46 (although workers were "at will," permanency factor favored employee status because the reality was that the workers worked for the company for many years); *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (fact that employer "retained the power to fire plaintiffs at will" supported their employee status). However, even if drivers' "at will" status is relevant, Plaintiffs' evidence is also relevant (and arguably, more so). Together, the evidence raises a question of fact regarding the permanence of drivers' relationship with CTG that a jury must resolve. *See Scantland*, 721 F.3d at 1318-19 (where workers worked long durations under indefinite contracts, fact questions precluded summary judgment for employer on permanency factor).

No record evidence supports the district court's finding that "each job" that CTG assigns its drivers is "separately contracted." *Saleem*, 2014 WL 4626075, at *14. Drivers sign franchise agreements with CTG that set forth their working relationship. These agreements are long-term – not job-by-job – and most drivers

work for CTG for long periods. *Leach v. Kaykov*, No. 07 Civ. 4060, 2011 WL 1240022 (E.D.N.Y. Mar. 30, 2011), on which the district court relied, is a negligence case that did not interpret the FLSA's definition of employee. *See id*. at *1. However, to the extent that it held that the drivers in that case contracted separately for each job, the record in this case does not support the same conclusion.

VI. A Reasonable Jury Could Find that Plaintiffs Are Employees.

Considering the totality of the circumstances and viewing the evidence in the light most favorable to the Plaintiffs, "there are many genuine disputes of fact and reasonable inferences from which a jury could find that" Plaintiffs are employees. *See Keller*, 2015 WL 1344617, at *12; *Scantland*, 721 F.3d at 1319 ("Because there are genuine issues of material fact, and because plaintiffs were employees if . . . reasonable factual inferences are found in plaintiff's favor, the district court erred in granting summary judgment . . . .") (internal quotation marks omitted). With respect to the first, second, third, and fourth economic reality factors, material factual disputes regarding the existence and degree of each factor preclude summary judgment for CTG. With respect to the fifth factor, there is no dispute that drivers are integral to CTG's business. As the district court correctly held, "[i]ndisputably, [CTG's] business could not function without drivers, and [CTG] wisely do[es] not argue to the contrary." *Saleem*, 2014 WL 4626075, at *15.

Because a jury could reasonably find that Plaintiffs are employees, CTG "is not entitled to summary judgment as a matter of law." *See Keller*, 2015 WL 1344617, at *12.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the district court's grant of summary judgment with respect to the FLSA claims and remand the case for trial.

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Respectfully submitted,

/s/ Rachel Bien

Rachel Bien
Michael J. Scimone
Michael N. Litrownik
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: 212-245-1000

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,861 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Respectfully submitted,

/s/ Rachel Bien
Rachel Bien