IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BOBBY PEARSON, ET AL.	§	
	§	
VS.	§	ACTION NO. 4:13-CV-281-Y
	§	
TRINITY ARMORED SECURITY, INC., ET AL.	§	

ORDER RULING ON SUMMARY-JUDGMENT MOTIONS

Pending before the Court is Defendants' Motion for Summary Judgment (doc. 29). Also pending before the Court is Plaintiffs' Motion for Partial Summary Judgment (doc. 31). After review of the motions and related briefs, the evidence they highlight, and the applicable law, the Court concludes that Plaintiffs' motion should be PARTIALLY GRANTED, and Defendants' motion should be DENIED.

I. Facts

Plaintiffs are employees of defendant Trinity Armored Security, Inc. ("Trinity"). Trinity is an armored-car services provider. It provides armored and unarmored transportation, coin sorting and wrapping, and ATM replenishment and first-line maintenance to financial institutions, retail businesses, educational entities and municipalities.

Defendant Kenneth A. West is the president, chief-executive officer, and largest shareholder of Trinity. West works at the company daily and is directly involved in Trinity's day-to-day business. West also controls Trinity's operations and compensation policies and practices.

Plaintiff Pearson is employed as Trinity's operations manager at its Fort Worth location, and plaintiff Martin is Trinity's vault-services manager. The remainder of the plaintiffs are employed either as vault attendants or drivers. Trinity does not pay any of the plaintiffs one and one-half times their regular rate of pay for hours worked in excess of forty. As a result, Plaintiffs have filed suit contending that Defendants willfully violated the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201-19. Both parties now seek a summary judgment.

II. Summary-Judgment Standard

When the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(a). "[A dispute] is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citation omitted). A fact is "material" if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To demonstrate that a particular fact cannot be genuinely in dispute, a defendant movant must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.), or (b) show either that (1) the plaintiff cannot produce admissible evidence to support that particular fact, or (2) if the plaintiff has cited any materials in response, show that those materials do

not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1). A plaintiff movant must (a) cite to particular parts of materials in the record and (b) if the defendant has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. *Id.* Although the Court is **required** to consider only the cited materials, it **may** consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and . . . articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

In evaluating whether summary judgment is appropriate, the Court "views the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor." *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) (citation omitted) (internal quotation marks omitted). "After the non-movant has been given the opportunity to raise a genuine factual [dispute], if no reasonable juror could find for the non-movant, summary judgment will be granted." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

III. Analysis

The FLSA "establishes the general rule that all employees must receive overtime compensation for hours worked in excess of forty hours during a seven-day workweek." *Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001). Specifically, the FLSA provides as follows:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C.A. § 207(a)(1) (West 1998). Defendants admit in their pleadings that Trinity is an employer as defined under the FLSA. *See id.* § 203(d). They also admit that Trinity is an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined under the FLSA. *See id.* 203(r)-(s). Thus, unless an FLSA exemption applies, Plaintiffs are entitled to overtime pay if they work longer than forty hours per week.

Defendants denied in their amended answer that West is an employer under the FLSA, and Plaintiffs have sought summary judgment on that issue. It is clear from the summary-judgment evidence that West qualifies as an employer under that statute.[1] The FLSA provides that an employer "includes any person acting directly or indirectly in the interest of an employer in relation

[1]Indeed, Defendants do not appear to dispute the point in their summary-judgment briefs.

to an employee." *Id.* § 203(d). The definition "is sufficiently broad to encompass an individual who, though lacking a possessory interest in the 'employer' corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees." *Donovan v. Sabine Irrigation Co., Inc.* 695 F.2d 190, 194-95 (5th Cir. 1983); *see also Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (noting that the statute "contemplates there being several simultaneous employers who may be responsible for compliance with the FLSA"); *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989) ("The remedial purposes of the FLSA require the courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications."); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."); *Solis v. A-1 Mortg. Corp.*, 934 F. Supp. 2d 778, 788 (W.D. Pa. 2013) ("Individuals acting in a supervisory capacity may be liable in their individual capacities as an employer under the FLSA."). As president and chief executive officer in charge of setting Trinity's compensation policy, West falls within the definition of an employer under the FLSA.[2]

[2]"The Fifth Circuit uses the 'economic reality' test to evaluate whether there is an employer/employee relationship." *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012). This test requires a court to consider "whether the alleged employer: '(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3)

Thus, the question becomes whether Plaintiffs' employment falls within an exemption to the overtime requirements of the FLSA. In light of the broad remedial goals of the FLSA, exemptions "must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *see also Brennan v. Tex. City Dike & Marina, Inc.*, 492 F.2d 1115, 1117 (5th Cir. 1974) ("The ground rules for interpreting and applying FLSA exemptions disfavor the employer."). Indeed, "exemptions from the minimum wage and overtime provisions of [the FLSA] are narrowly construed against the employer seeking to assert them and applied only to those situations 'plainly and unmistakably within [their] terms and spirit.'" *Simmons v. City of Fort Worth, Tex.*, 805 F. Supp. 419, 423 (N.D. Tex. 1992) (Means, J.) (quoting *Brennan*, 492 F.2d at 1117). As the employers, Defendants have the burden of proving that an exemption applies. *Brennan*, 492 F.2d at 1117.

A. Pearson and Martin

Defendants contend that Pearson and Martin fall within the "administrative exemption" to the overtime requirements of the FLSA.[3] The FLSA provides that "any employee employed in a bona

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determined the rate and method of payment, and (4) maintained employment records.'" *Id.* at 355 (quoting *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010)). Russ Laney, one of Trinity's vice presidents and part owners, testified that West "[p]retty much" controlled all of the decisions made at Trinity. (Pls.' App. [doc. 33] 130.) Similarly, plaintiff Pearson declared that West engaged in each of the activities relevant under this test. West failed to point the Court to any contrary evidence.

[3]Defendants failed to raise this exemption as an affirmative defense in their amended answer, and Plaintiffs have objected on those grounds. Because the Court concludes that Defendants have not raised a genuine factual dispute regarding the defense, it need not address Plaintiffs' objection to the

fide executive, administrative, or professional capacity" is exempt from its requirement of overtime pay. 29 U.S.C.A. § 213(a)(1) (West 1998). In order to qualify for this exemption, however, Defendants must present evidence demonstrating that Pearson and Martin were "[c]ompensated on a salary or fee basis at a rate of not less than $455 per week." 29 C.F.R. § 541.200 (2014). An employee is considered to be paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* § 541.602(a).

Defendants admit in their amended answer that "Plaintiffs are paid on an hourly basis." (Defs.' Am. Answer [doc. 20] 3, ¶ 20; Pls.' Am. Compl. [doc. 17] 6, ¶ 20.) In fact, the only evidence Defendants proffer suggesting that Pearson and Martin were paid a salary of at least $455 per week is the deposition testimony of West. In his deposition, West testifies as follows:

> Q. But that's the policy that they wouldn't get paid if they were out of paid time off, correct?
>
> A. That would--if--if you're hard-lining a policy, yes, that would be the policy. But we've never ran into that.
>
> Q. They could–
>
> A. We--we would not do that, because the expectation is they're going to get at least $455 a week or whatever that Department of Labor–

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timeliness of Defendants' assertion of the defense.

> Q. Are they guaranteed–
>
> A. --requirement is.
>
> Q. Are they guaranteed that they're going to get $455 a week?
>
> A. We would guarantee that, yes. Absolutely. They're a manager.

(Defs.' Ex. Vol. I [doc. 30-1] 32-33.) In addition to being contrary to the admission that Plaintiffs are paid on an hourly basis contained in Defendants' answer, West admitted in his deposition that this alleged guaranteed salary was not made explicit:

> Q. And where is that guarantee written anywhere?
>
> A. I don't know that it's written anywhere. We've never run--run across it. We've never had to–
>
> Q. They've always–
>
> A. --put that out.
>
> Q. They've always worked enough hours that they made $455 a week, correct?
>
> A. Yes, sir.
>
> Q. But if they didn't work the hours they wouldn't get paid would they?
>
> A. Sure they would. We would ensure that they got at least $455 for a week.
>
> Q. And have you communicated that to the managers?
>
> A. I don't know that I've communicated that personally, no.
>
> Q. And is that policy in writing anywhere?
>
> A. I don't know that it is, no.

Id. 33-34. Rather, West suggested that it was an arrangement he

made with Pearson and Martin when he promoted them to manager. The employees allegedly wanted to continue to be paid by the hour instead of being on salary because they were concerned they would be working well above forty hours per week, and he acquiesced to that concern:

> Q. The managers are not on a salary are they?
>
> A. Not per se. When--when both [Pearson] and [Martin] stepped into the management positions that question was raised, and I said, well, yeah, the idea is to put you on a salary. And--but as--because we continued to grow their concern was they would put in so many hours that they wouldn't get paid for. So I said, well, if you want to punch the clock to make sure that you get paid for every hour you work I'm fine with that, but you understand there is no overtime on that. That's the agreement. And they were fine with that. And that's my understanding, and that's my understanding with the Department of Labor, is it's the expectation of earning $455 a week.
>
> Q. You think they were guaranteed to be paid $455–
>
> A. They were–
>
> Q. --ever--every week that they're employed?
>
> A. Well, they were guaranteed that they were going to get--well, yeah, if--if I was going to say, okay, well, your salary is going to be--base salary is going to be $35,000 a year, and they want to--and they want to punch the clock to ensure they get paid for every hour, if it was going to run them over, you know--and that number is just an example--and if it's going to run them over that, then sure I--I–
>
> Q. What was–
>
> A. --told them I did not have a problem with that, because I wanted to ensure that they felt they were getting paid for the work they were putting in.
>
> Q. What--what is--what is Mr. Pearson's guaranteed salary?
>
> A. That's what I said. They're not on a salary. They

> chose not to do that.
>
> Q. They're paid hourly, correct?
>
> A. Uh-huh. At current time.

Id. 34-35. Indeed, West admitted that the alleged guarantee of a minimum salary of $455 per week was not even communicated to Pearson and Martin:

> Q. So did you ever come up with a figure and say that this is the amount of a salary you'll receive?
>
> A. No. We never got that far, because it was their preference to punch the clock.
>
> Q. Did you then say, okay, well, you will at least be paid $455 a week?
>
> A. I don't know that I've ever--I said that, no.
>
> Q. Did you tell them that they would be guaranteed a certain amount each week?
>
> A. I can't say that I did that either, no. The conversation was a long time ago.
>
> Q. Have you ever given any instructions to any of your payroll processing companies that Mr. Pearson and Mr. Martin are to be paid at least $455 each week?
>
> A. No. I can't say that we've done that, no.
>
> Q. Is there any documentation in any of your files that Mr. Pearson and Mr. Martin are to be paid at least $455 each week?
>
> A. I can't say that that's documented, no.

(Pls.' App. [doc. 33-2] 118-119.) Inasmuch as Defendants admit that they continue to pay Pearson and Martin on an hourly basis and that no guaranteed minimum pay was ever communicated to either these employees or anyone else, Defendants have failed to create a genuine factual dispute regarding whether these employees are paid

on a salary basis. As a result, summary-judgment is granted in Plaintiffs' favor regarding Defendants' administrative-exemption defense.

B. The Vault Employees

Defendants contend that their vault employees are exempt from the FLSA's overtime-pay requirements under the Motor Carrier Act ("MCA"). The MCA exempts from the FLSA's maximum-hour provision "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provision of section 31502 of Title 49." 29 U.S.C.A. § 213(b)(1) (West 1998). Section 31502 provides that "the Secretary of Transportation may prescribe requirements for . . . maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier." 49 U.S.C.A. § 31502(b)(1) (West 2007).

The application of the MCA exemption to an employee

> depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act . . . ; and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the [MCA].

29 C.F.R. § 782.2(a) (2014). Thus, to be entitled to the MCA exemption, Defendants must first present evidence tending to

demonstrate that Trinity is subject to the Secretary of Transportation's jurisdiction under the MCA. To be subject to such jurisdiction, "a motor carrier must be engaged in interstate commerce." *Songer v. Dillon Resources, Inc.*, 618 F.3d 467, 472 (5th Cir. 2010). But this requirement "has not been applied literally by the courts[, who] have defined it as the actual transport of goods across state lines or the intrastate transport of goods in the flow of interstate commerce." *Siller v. L&F Distribs., Ltd.*, No. 96-40549, 1997 WL 114907, at *1 (5th Cir. 1997) (per curiam)).

Defendants' evidence that Trinity is subject to the Secretary of Transportation's jurisdiction because it is either engaged in interstate commerce or the intrastate transport of goods in the flow of interstate commerce is weak. In support of their contention that Trinity's "drivers/guards are engaged in interstate commerce," Defendants allege as follows: "School route drivers transport currency and checks (App. 622-23). Likewise, the armored vehicles transport currency and checks."[4] (Defs.' Br. [doc. 30] 22.) On the cited pages of Defendants' appendix, plaintiff Stephen Marunde indicates that when on an "armored run" for Trinity, he dropped off at banks. When driving on a school route, he "picks up checks and cash." There is absolutely no evidence presented,

[4]Defendants also contend that "[t]he armored vehicles also transport gold and other precious metals." (Defs.' Br. [doc. 30] 22.) But the only evidence Defendants presented regarding these shipments was West's deposition testimony, in which he relayed what a client had told him about from where the metals originated. As a result, the Court struck that testimony as hearsay in an order entered on July 31.

however, that tends to suggest that any of these banks are engaged in interstate commerce or that the checks or cash, although transported intrastate, are in the flow of interstate commerce.

In any event, even assuming the interstate nexus is met, Defendants have not presented evidence satisfying the second prong of the test as to the vault employees. Defendants contend that the vault employees' work affects the safety of operations for two reasons: because they "acted in the capacity of loader, as well as [were] called upon to act as drivers for [Trinity] as part of their duties." (Defs.' Br. [doc. 30] 36.)

The United States Supreme Court has ruled, and federal regulations now provide, that the MCA exemption is applicable only to those employees

> whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) as that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the MCA.

29 C.F.R. 782.2(b)(2)(2014) (citing *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 706-07 (1947)). A loader is defined as

> an employee of a carrier . . . whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. A "loader" may be called by another name, such as "dockman," "stacker," or "helper," and his duties will usually also include unloading and the transfer of freight between the vehicles and the warehouse, but he engages, as a "loader," in work directly affecting "safety of operation" so long as he has responsibility when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such

> a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized.

29 C.F.R. § 782.5(a) (2014). Nevertheless, if the employee does not exercise discretion in determining how freight is loaded onto the vehicle, he is not a loader:

> an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a 'loader' merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure in place, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done.

Id. § 782.5(c).

Defendants fail to highlight any evidence tending to suggest that the vault employees acted as loaders. They contend that vault employees are loaders "because they exercised judgment and discretion in planning and building the loads." (Defs.' Br. [doc. 30] 37.) Unfortunately, however, Defendants wholly fail to append to that statement a citation to any evidence in support. Earlier in their brief, however, Defendants point to the deposition testimony of vault employee Frank Spacek as demonstrating that "vault employees engage in work which affects the safety of operations." (*Id.* 21.) But Spacek admitted in his deposition that in his capacity as a vault employee, he loads sealed bags of money or checks onto carts, which are then loaded onto the trucks by others:

> Q. What kind of carts do you load? Are they on wheels

and–

A. They're like metal carts, and they've got--when they take the money off the truck, they put them on these metal carts that are about five foot long and three foot wide. They just load it on them things.
And if we have coin, they're put on something called "steels," metal steels. So it depends on whether there's cash or coin coming in or going out.

Q. Do you need to use a forklift for the cart?

A. Sometimes, yes. I don't use them myself.

Q. Who does?

A. People loading the trucks.

Q. The drivers?

A. The drivers.

Q. The truck crews–

A. Yes.

Q. --operate the forklift?

A. Right.

Q. Do they come into the vault?

A. After they unload it.

Q. Yeah.

A. And then we have an electric cart, and they roll it into the vault.

Q. On the normal loads, do you transport it from the door to the --where it's sorted? Do you push the cart?

A. From inside the vault?

Q. Yeah.

A. Okay. From inside the vault, we give it to the--you know, after we check everything off, we give it to the route person, and they load it on the trucks. They check everything.

> Q. Yeah. But what if--but you move it from where it's stored overnight to the door, correct?
>
> A. Yes, sir. From inside the vault, we check it out in the morning and check everything and then give it to the route personnel.

(Defs.' Ex. Vol. III [doc. 30-3] 642-44.) Defendants have failed to present any evidence demonstrating that the vault employees act as loaders, as that term is defined under the MCA.

Defendants also contend that the vault employees "could have been and were called upon to act as drivers for [Trinity and] are [therefore] exempt under the [MCA]." (Defs.' Br. [doc. 30] 37.) Again, Defendants wholly fail to append a citation to any specific evidence in support of that particular statement in their brief. Earlier in their brief, however, Defendants contend that "[e]ven vault staff have been called upon to come out of the vault and drive a truck" and cite West's deposition in support of that contention. *See id.* 9 (citing to "(App. 51).")[5] But that portion of West's deposition relays a conversation West had with a Department of Labor investigator and was previously stricken as hearsay. *See* July 14, 2014 Order Granting Motion to Strike Evidence (doc. 44). Thus, Defendants have failed to present any competent, non-conclusory evidence tending to demonstrate that a vault employee has been or is expected to be used as a driver. Consequently, Defendants have failed to demonstrate the existence

[5]On page 51 of Defendants' exhibits, West testifies as follows: "[a]nd for the vault staff I told him, well, we always held that same--held them for that same reason because they could be called upon, and had been called upon, to come out of the vault and get on a truck. It has happened. And he said okay." (Defs.' Ex. Vol. I [doc. 30-1] 51.)

of a genuine dispute of fact regarding the second prong of MCA exemption, and summary judgment is therefore appropriate in Plaintiffs' favor regarding the applicability of this exemption to the vault employees.

C. The Drivers

Defendants also contend that Trinity's drivers are exempt from the FLSA's overtime-pay requirement under the MCA exemption. Plaintiffs contend that the MCA exemption does not apply to Trinity's drivers in light of the SAFETEA-LU Technical Corrections Act of 2008 ("TCA"), Pub. L. No. 110-244, 122 Stat. 1572 (2008).[6] Section 306 of the TCA provides as follows:

> (a) APPLICABILITY FOLLOWING THIS ACT.--Beginning on the date of enactment of this Act, section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) [i.e. the FLSA's maximum-hours provision] shall apply to a covered employee **notwithstanding section 13(b)(1) of that Act** (29 U.S.C. 213(b)(1)) [i.e. the MCA exemption].
>
> . . . .
>
> (c) COVERED EMPLOYEE DEFINED.--In this section, the term "covered employee" means an individual–
>
> > (1) who is employed by a motor carrier or motor private carrier (as such terms are defined by section 13102 of title 49, United States Code, as amended by section 305);
> >
> > (2) whose work, **in whole or in part**, is defined–
> >
> > > (A) as that of a driver, driver's helper, loader, or mechanic; and
> > >
> > > (B) as affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in

[6]This Act modified the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or "SAFETEA-LU," Pub. L. No. 109-59, 119 Stat. 1144 (2005).

> interstate or foreign commerce, except vehicles–
>
> > (i) designed or used to transport more than 8 passengers (including the driver) for compensation;
> >
> > (ii) designed or used to transport more than 15 passengers (including the driver) and not used to transport passengers for compensation; or
> >
> > (iii) used in transporting material found by the Secretary of Transportation to be hazardous . . . .

Id. § 306(A) & (C), 122 Stat at 1621 (emphasis added).

The parties differ on the applicability of the TCA to Trinity's drivers. Defendants contend that the TCA does not apply because Trinity has a mixed fleet of both commercial (weighing more than 10,000 pounds) and non-commercial (weighing 10,000 pounds or less) vehicles, and its drivers generally drive both types of vehicles. Plaintiffs contend that any driver "whose work, in whole or in part . . . affect[s] the safety of operation of motor vehicles weighing 10,000 pounds or less" is a covered employee under the TCA and thus subject to the FLSA's overtime provision. *Id.*

Defendants' position has support in case law:

> Courts that have considered the issue of a "mixed fleet" of both commercial and noncommercial vehicles are divided on the proper approach, but the prevailing view appears to be that when mixed activities occur, the MCA favors coverage of the employee during the course of employment, so long as the time an employee spends operating commercial motor vehicles is more than de minimus. *Avery v. Chariots For Hire*, 748 F. Supp. 2d 492, 500 (D. Md. 2010) (citing *Hernandez v. Brink's, Inc.*, 2009 WL 113406, at *6 (S.D. Fla. Jan. 15, 2009) ("[W]hen mixed activities occur, the Motor Carrier Act favors coverage of the

> employee during the course of the employment.")); *Dalton v. Sabo, Inc.*, 2010 WL 1325613, at *4 (D. Or. Apr. 1, 2010) (holding that motor-carrier exemption applied to plaintiffs that performed maintenance on a fleet that consisted of vehicles weighing both more and less than 10,000 pounds); cf., *Tews v. Renzenberger*, 592 F. Supp. 2d 1331 (D. Kan. 2009) (holding that the mere presence of a few commercial motor vehicles in a company's fleet does not render all of its driver's exempt from overtime pay). As the Seventh Circuit explained, "[d]ividing jurisdiction over the same drivers, with the result that their employer would be regulated under the [MCA] when they were driving the big trucks and under the [FLSA] when they were driving trucks that might weigh only a pound less, would require burdensome record-keeping, create confusion, and give rise to mistakes and disputes. *Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895, 901 (7th Cir. 2009).

Wells v. Fedex Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1033-34 (E.D. Mo. 2013). But this Court concludes that Defendants' position is contrary to the express language of the statute. Section 306(a) of the TCA specifically and unambiguously requires that the FLSA's overtime provision apply to covered employees "notwithstanding" the MCA exemption. Furthermore, it is clear from the "in whole or in part" language of TCA section 306(c)(2) that Congress contemplated mixed fleets and duties and nevertheless determined that drivers should receive overtime pay under the FLSA if their duties included, even in part, driving noncommercial vehicles. *See McMaster v. E. Armored Servs., Inc.,* No. 11-5100 (MAS)(TJB), 2013 WL 1288613, at *4 (D.N.J. March 26, 2013) ("It is embedded in the very definition of 'covered employees' that an employee's work need only involve the operation of non-commercial vehicles, *in part*, to be entitled to overtime."); *Bedoya v. Aventura Limousine & Transp. Serv., Inc.*, No. 11-24432, 2012 WL

3962935, at *4 (S.D. Fla. Sept. 11, 2012) ("an employee's work need only *in part* involve the operation of non-commercial vehicles to be entitled to overtime . . . . Thus, if more than a *de minimis* portion of Plaintiff's work involved driving noncommercial vehicles, he is eligible for overtime under the FLSA as a 'covered employee.'"); *Hernandez v. Alpine Logistics, LLC*, No. 08-6254, 2011 WL 380031, at *14, *17-18 (W.D.N.Y. Aug. 29, 2011) ("Section 306, clearly and unmistakably, provides that notwithstanding the existence of the Motor Carrier Exemption, employees who work . . . exclusively or in part on vehicles weighing less than 10,000 pounds are entitled to overtime compensation."); *Mayan v. Rydbom Express, Inc.*, No. 07-2658, 2009 WL 3152136, at *4 (E.D. Pa. Sept. 30, 2009) (concluding that under the TCA, an "employee may still qualify for overtime even if part of his or her duties involve commercial motor vehicles. Section 306(c) clearly states that the employee's work need only 'in whole or in part' affect the safety of operation of vehicles weighing 10,000 pounds or less. An employee working on a 10,001 pound vehicle two days a week and a 5000 pound vehicle the remaining days of the week appears to satisfy this requirement. In short, the employees must simply perform *some* work on such vehicles."); *see also Vanzzini v. Action Meat Distribs., Inc.*, No. H-11-4173, 2014 WL 426494, at *6, 8 (S.D. Tex. Jan. 31, 2014) (noting that "following SAFETEA-LU and the TCA, an employee of a motor carrier . . . who works with motor vehicles weighing less than 10,000 pounds may be entitled to overtime compensation as provided in the FLSA," and denying summary judgment to an employer

on an employee's FLSA claim where the evidence suggested that the employee "may have been given an assignment to complete a business-related task using [the employer's] personal vehicle"); U.S. Department of Labor Wage and Hour Division Field Assistance Bulletin No. 2010-2, Nov. 4, 2010 (noting that the MCA exemption "does not apply to a driver, driver's helper, loader, or mechanic in any workweek in which their work affects the safe, interstate operation of certain motor vehicles weighing 10,000 pounds or less"). (Pls.' App. [doc. 33-2] 164.) Consequently, the Court concludes that the TCA applies to Trinity's drivers, thus making the MCA exemption inapplicable to them whenever they work over forty hours per week driving, at least in part, a vehicle weighting 10,000 pounds or less. As a result, Plaintiffs are entitled to summary judgment on Defendants' MCA-exemption defense to the extent that Plaintiffs worked in excess of forty hours and drove vehicles weighing 10,000 pounds or less.[7]

IV. Conclusion

As a result, Defendants' Motion for Summary Judgment (doc. 29) is DENIED. Plaintiffs' Motion for Partial Summary Judgment (doc. 31) is PARTIALLY GRANTED, in that summary judgment is GRANTED in Plaintiffs' favor regarding Defendants' defenses that: (a) West is not an employer under the FLSA; (b) that the administrative exemption applies to plaintiffs Pearson and Martin; (c) that the

[7]The parties dispute which of Trinity's vehicles weigh over 10,000 pounds, but Defendants concede that "42.857 percent" do not exceed that threshold. (Defs.' Resp. Br. [doc. 40] 12.)

MCA exemption applies to the vault employees and (d) that the MCA exemption applies to drivers who worked in excess of forty hours during a week and drove vehicles weighing 10,000 pounds or less during that week.[8]

SIGNED September 3, 2014.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[8]Plaintiffs also sought "a No-Evidence Motion for Partial Summary Judgment . . . on the grounds that Defendants cannot produce admissible evidence to support the facts necessary to establish that . . . Defendants acted in "good faith" and had "reasonable grounds" to believe their actions complied with the FLSA so as to support a possible denial of liquidated damages." (Pls.' Br. [doc. 32] 2.) Because Plaintiffs failed to support that request with argument and citations to authorities contained in the brief in support of their motion, the Court has not addressed it. *See* N.D. TEX. L. CIV. R. 7.1(d).