No. 21-1295

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FRANKLIN MERRILL, *et al.*,
Plaintiffs-Appellants,

v.

PATHWAY LEASING LLC, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civil Action No. 16-CV-02242, Hon. Kristen L. Mix)

REPLY BRIEF FOR APPELLANTS

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In their opening brief, the Lease Drivers established that the lower court erred by not analyzing whether Pathway and XPO were joint employers. Without that analysis, the lower court looked to an incomplete set of facts in determining whether the Lease Drivers were "employees" for purposes of the FLSA. Putting aside the threshold error, the lower court also made legal and factual errors under the six-factor test for determining whether the Lease Drivers were "employees." Thus, the Lease Drivers established that a reversal was warranted.

In response, Pathway argues two main points. Neither changes the result.

First, Pathway contends that the lower court's failure to apply *Hall-Salinas* was harmless because the court assumed that Pathway and XPO were joint employers. Not so. The lower court looked at the Lease Drivers' relationship with Pathway separate and apart from their relationship with XPO. Under a joint employment assumption, the lower court should have considered Pathway and XPO together, i.e., it should have considered the ways in which their combined influence over the Lease Drivers impacted each of these employment factors. If

Pathway and XPO had been considered joint employers, the lower court would have considered additional facts that would have changed its conclusion as to at least three of the six factors for determining whether the Lease Drivers were employees under the FLSA. Thus, the lower court's error was not harmless.

Second, Pathway argues that the lower court's analysis of the six factors is supported by the record. For one, that underscores how critical the threshold joint employer inquiry is in determining the proper facts for the court to consider when analyzing the six factors. *See Hall v. DirecTV*, 846 F.3d 757, 767 (4th Cir. 2017) (the six factors analysis "depends in large part upon the answer to" the threshold joint employer inquiry). But Pathway is also wrong: As demonstrated in the Lease Drivers' opening brief, the lower court made numerous legal and clear factual errors in assessing each of the six factors.

The lower court's decision should be reversed.

ARGUMENT

I. The lower court committed harmful error by not first deciding whether Pathway and XPO were joint employers.

In their opening brief, the Lease Drivers demonstrated that (1) the lower court correctly adopted the *Hall-Salinas* test for joint

employment, and this Court should affirm that decision, *see* Br. at 16–22;[1] (2) the lower court erred by not determining whether Pathway and XPO were joint employers before analyzing if the Lease Drivers were "employees" under the FLSA, *see id.* at 22–29; and (3) such error was not harmless, because the lower court's analysis of at least three of the six factors would have been different if it had looked at Pathway and XPO as joint employers, *see id.* at 30–33.

In response, Pathway does not dispute that the lower court properly adopted *Hall-Salinas* as the test for joint employment, and acknowledges that the court did not make explicit findings as to each joint employment factor in that test. *See* Pathway Br. at 25.[2] Pathway agrees that a remand would be necessary for the lower court to make such findings, if they were required. *Id.* at 26. Instead, Pathway argues only that the court's failure conduct the *Hall-Salinas* joint employment analysis was harmless because the court assumed Pathway and XPO were joint employers in conducting the six-factor test

[1] Citations to "Br." are to the Lease Drivers' opening brief, dated November 4, 2021.

[2] Citations to "Pathway Br." are to Pathway's response brief, dated January 14, 2022.

for employment under the FLSA. *See* Pathway Br. at 22, 25–26.

Pathway is wrong.

The lower court did not assume that Pathway and XPO were joint employers when it determined whether the Lease Drivers were employees protected by the FLSA. *See* Parts I.1–5. If it had, the lower court would have considered Pathway and XPO as putative joint employers in analyzing the six factors, and looked at the Lease Drivers' relationship as to those combined entities. *See* Br. at 30–33 (explaining how the combined influence of the putative joint employers applies to the employment factors).

But that is not what the lower court did. Rather, when analyzing the factors, the lower court looked at the relationship between the Lease Drivers and Pathway, and then separately at the relationship between the Lease Drivers and XPO, without analyzing how Pathway and XPO's combined influence over the Lease Drivers altered the outcome of each factor. Because the lower court did not consider the combined influence of Pathway and XPO on the Lease Drivers, it did not assume that they were joint employers for purposes of the FLSA factors.

As demonstrated below, this error was not harmless. By skipping

the joint employment analysis, the lower court did not consider the complete universe of facts, or "inputs," that were necessary to apply to five of the six factors in the FLSA employment test as to the joint employers (Pathway and XPO).[3] Had the lower court done so, the outcome of its employment analysis would have been different. That is harmful error.

1. The lower court did not consider Pathway and XPO's collective control over the Lease Drivers.

As demonstrated in the Lease Drivers' opening brief, the lower court never considered the combined degree of control that Pathway and XPO exerted over the Lease Drivers. *See* Br. at 30–32. (*See also* Findings of Fact, Conclusions of Law and Order of J. [hereinafter Order], Vol. 2, 1253–54).[4] If it had, the lower court would have found that Pathway and XPO together exercised a high degree of control over the Lease Drivers. *See* Br. at 30–32.

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[3] The fifth factor, the degree of skill to perform the work, pertains only to the Lease Drivers' skills. The lower court made other legal errors in analyzing that factor. *See* Part II.

[4] Indeed, the lower court clearly erred in its control analysis by considering only what the Lease Drivers could do, while ignoring what Pathway and XPO prevented the Lease Drivers from doing. *See* Part II.

Doe v. Swift Transportation Co. demonstrates how the control analysis changes when a court considers the combined effects of a truck driver's relationships with a truck leasing company, like Pathway, and a freight carrier, like XPO. 10-cv-00899, 2017 WL 67521 (D. Ariz. Jan. 6, 2017).[5] The court in *Swift* recognized that because the contracts between the long-haul truck drivers and the truck leasing company were "entwined and clearly designed to operate in conjunction with" the contracts with the freight carrier, the employment factors needed to consider the combined influence of the leasing company and the freight carrier on the drivers. *Id.* at *8. And there, as here, when the leasing company and freight carrier were considered as a combined entity, it was clear that their combined influence gave them significant control over the drivers. *Id.*

For example, the drivers in *Swift* could not, as a practical matter,

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[5] In deciding whether the plaintiffs were employees, the *Swift* court utilized the Ninth Circuit's economic realities test. *See* 2017 WL 67521, at *4 (citing *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979)). That test is functionally identical to the test in this Circuit. *See Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436 (10th Cir. 1998). And while Pathway and XPO do not have a common owner, the relationship between them parallels the relationship between the leasing company and freight carrier in *Swift*.

moonlight with other carriers because the agreements would require the driver to obscure any carrier logos or markings, remove the communications unit, and remove licenses any time they wanted to haul for another carrier. *Id.* at *13. While in theory a driver could refuse a load from the freight carrier, in practice "it was discouraged or at least not advisable to do so" because turning down loads "would lead to fewer miles" which "would have been risky because there was no way to know if doing so would result in a better or worse load to follow or when the next load would be offered." *Id.* at *12. By looking at the combined effects of the terms of the agreements between the drivers and the leasing and carrier companies, the court found it was clear that the two agreements together "essentially restricted the purported autonomy" of the drivers. *Id.* at *10.

So, too, here. Like in *Swift*, the combined effects of Pathway and XPO's agreements restricted the Lease Drivers' ability to work for other companies—a quintessential aspect of being an independent contractor. *See* Br. at 37. Pathway required that Lease Drivers seek its permission to switch carriers, and would only grant such permission if the new carrier agreed to remit payments directly to Pathway. (Trial Tr., Vol. 3,

933:10–15; *id.* at 91:24–92:7). *See also* Part II. XPO's agreements required that the Lease Drivers give ten-days notice, remove XPO decals from their trucks (among other property), and return XPO's communications equipment before the Lease Drivers could work for other carriers. (Supp. App.[6] 84). When these requirements are combined, like in *Swift*, they reveal that Pathway and XPO exerted significant influence that hindered the Lease Drivers' ability to work for anyone else. But because the lower court did not consider Pathway and XPO's combined influence as joint employers, the lower court did not consider this aspect of control, which would have weighed in favor of finding that the Lease Drivers were employees.

Pathway emphasizes that Lease Drivers had agency to make work-related decisions—such as when to refuse loads—which company drivers did not have. Pathway Br. at 31. For one, that is contradicted by the record. (*See* Trial Tr., Vol. 3, 86:8–11 (testimony that company driver maintained a right to refuse loads)). But Pathway also ignores that the Lease Drivers' ability to refuse loads was for all practical

[6] Citations to "Supp. App." are to the Supplemental Appendix filed by Pathway, Dkt. No. 35.

purposes nonexistent because of Pathway and XPO's combined influence on the Lease Drivers. *See* Br. 30–31. As Mr. Merrill testified, if he refused a load, he would be forced to sit until XPO made more available. (Trial Tr., Vol. 3, 84:5–7). Because he was locked into a carrier agreement with XPO, he had no meaningful ability to procure replacement loads from other carriers. (Trial Tr., Vol. 3, 84:11–14; *see also id.* at 650:19–25). Thus, like in *Swift*, Pathway and XPO's agreements considered together demonstrate that they exerted significant control over the Lease Drivers.[7]

* * *

[7] Pathway also argues that the control factor weighs in favor of finding that the Lease Drivers were independent contractors because of their purported ability to drive in teams or hire other drivers to assist them. Pathway Br. at 30. As discussed in Part II below, that is wrong. But it also undermines Pathway's contention that the lower court assumed Pathway and XPO were joint employers. The Lease Drivers did not have an *unrestricted* right to hire third-party assistance because XPO pre-qualified drivers that were hired by Lease Drivers, and XPO retained the right to effectively terminate any drivers that a Lease Driver might employ. (Hunt Dep., Vol. 2, 210 at 67:15–20; Hunt Dep., Vol. 2, 216 at 93:11–14). If Pathway and XPO were treated as joint employers, XPO's control over who the Lease Drivers could team up with would undermine Pathway's argument. *See Swift*, 2017 WL 67521, at *9 (when any teammates hired by long-haul truck drivers were subject to carrier pre-approval, this factor weighed in favor of finding that the truck drivers were employees).

Had the lower court considered Pathway and XPO's influence jointly, it would have found that the control factor weighed in favor of finding that the Lease Drivers were employees. *See Swift*, 2017 WL 67521, at *10–14.

2. Pathway and XPO controlled the Lease Drivers' opportunities for profit and loss.

Like the control factor, the lower court never looked to the combined influence of Pathway and XPO on the Lease Drivers' ability to profit under the second FLSA factor. Instead, the lower court looked mainly at two facts: that (1) seven of fifteen Lease Drivers eventually completed their leases, and (2) earnings could be maximized by driving more miles more efficiently. (Order, Vol. 2, 1255).

Neither fact relates to the combined influence of Pathway and XPO, demonstrating that the lower court did not assume that Pathway and XPO were joint employers. (*See id.* at 1255–56). If it had looked at the combined influence of Pathway and XPO, the lower court would have found that this factor weighs in favor of finding that the Lease Drivers were employees.

Swift is instructive here as well. *See* 2017 WL 67521. There, while the freight carrier and leasing entities argued that the long-haul

truck drivers were free to do as little or as much work as needed to make a profit, the court found that the combination of the lease agreement requiring payments for the truck, and the freight agreement tying the driver to a carrier "dictated a minimum amount of time . . . needed to drive . . . in order to pay the weekly rent for the leased truck." *Id.* at *11.[8] As a result, the two agreements combined to determine the drivers' ability to profit. *Id.*

The hauling and leasing agreements in the present case have the same effect. As noted above, the combined effect of the contracts with Pathway and XPO effectively eliminated Lease Drivers' autonomy and replaced their ability to profit and succeed with dependency on Pathway and XPO. *Supra* at I.1; *see* Br. at 44–45. Indeed, even the lower court recognized that Lease Drivers were only able to earn substantially more than their company driving peers *after* completing their leases. (Order, Vol. 2, 1255).

Taken together, like in *Swift*, the entwined Pathway and XPO contracts limited the Lease Drivers' ability to drive for other entities

[8] As discussed above, in *Swift*, as here, the combination of the two agreements made it difficult to take loads from other carriers, further limiting the drivers' ability to profit. *See Swift*, 2017 WL 67521, at *10.

besides XPO. *See* Br. at 43–48. Thus, the Lease Drivers' opportunity for profit or loss stemmed not from their business acumen, but from their dependency on their joint employers. The lower court committed harmful error by not considering the effects of the joint employers on this factor.

3. The lower court did not consider any employer in its analysis of the relative investment in the business factor.

As for the investment in the business factor, the lower court did not take into consideration facts relating to any potential employer—let alone Pathway and XPO as joint employers—in its analysis. (Order, Vol. 2, 1256). Instead, the lower court focused on the Lease Drivers' expenses without comparing the dollar amount, or the risk they took, relative to any other entity. (*See id.).* That was the wrong test to apply in analyzing the relative investment factor. *See* Br. at 48–50; *see also infra* Part II.

Pathway, departing from the lower court's analysis, argues that the correct metric is the relative risk, not the relative expense, that the Lease Drivers took with respect to Pathway and XPO. Pathway Br. at 40–41. But even using Pathway's metric—i.e., comparing the

investment risk made by each Lease Driver against the investment risks borne by Pathway and XPO—would have resulted in this factor weighing in favor of the Lease Drivers. *See* Br. at 49–50, 50 n.17 (demonstrating that Pathway and XPO's bore more risks than the lease drivers). Pathway's investment risk in hundreds of trucks dwarfs the individual risk taken on by any individual driver.

Taken together, the Lease Drivers' relative investment (or risk) in leasing a truck was insignificant compared to Pathway's and XPO's combined investment risk in owning hundreds of depreciating trucks and employing dozens of staff. *See* Br. at 48–50. The lower court committed harmful error by not comparing the investment of the Lease Drivers with the investment of its joint employers.

4. The lower court did not analyze the degree of permanence of the relationship from the perspective of the joint employers.

The lower court found that the degree of permanency of the relationship factor weighed "slightly" in favor of finding that the Lease Drivers were independent contractors because each lease with Pathway had a fixed term. (Order, Vol. 2, 1258). But had the lower court considered Pathway and XPO together, it would have found that this

factor weighed strongly in favor of finding that the Lease Drivers were employees.

For one, XPO had an employment relationship with the Lease Drivers that predated Pathway, and would often survive after Pathway's agreement with the Lease Drivers ended. Where one of the two joint employers had a preexisting relationship with the plaintiffs, and that relationship was expected to continue even in the absence of the other joint employer, this factor weighs in favor of finding that the plaintiffs were employees. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 308–09 (4th Cir. 2006). In *Schultz*, the court held that a prince and an agency (which the prince hired) that provided security guards to the prince were the joint employers of those security guards. The court found that there was a degree of permanence to the relationship between the security guards and the prince that suggested that the security guards were employees, because the security guards had begun working for the prince even before the prince had used that agency. *Id.* at 309.

Here, similar to *Schultz*, many Lease Drivers were company drivers for XPO prior to leasing a truck from Pathway. (*See, e.g.*, Trial

Tr., Vol. 3, 44:18–20 (Mr. Merrill was an XPO company driver for eleven years)). Lease Drivers could continue driving for XPO even after terminating their agreements with Pathway. (Order, Vol. 2, 1258). Yet, the lower court did not give any weight to XPO's prior and continuing relationship with the Lease Drivers. (*Id.* at 1257–58). This both was erroneous as a matter of law, *see Schultz*, 466 F.3d at 309, and made clear that the lower court did not assume Pathway and XPO were joint employers.[9] Had it analyzed Pathway and XPO together, the lower court would have found that this factor weighs strongly in favor of finding that the Lease Drivers were employees.

5. In the aggregate, the Lease Drivers were an integral part of Pathway and XPO's business.

Regarding the extent to which the work is an integral part of the

[9] XPO's periodic renewal of its agreements with the Lease Drivers would have further turned this factor in the Lease Drivers' favor. Periodic renewals indicate that the relationship is indefinite. *See, e.g.*, *Swift*, 2017 WL 67521, at *5 (term agreement that automatically renews is indicative of infinite duration); *Narayan v. EGL, Inc.*, 616 F.3d 895, 903 (9th Cir. 2010) (finding employee status in part because the plaintiffs worked for defendant for several years and their agreement automatically renewed). XPO would renew the agreements of all its Lease Drivers around the same time period, regardless of the expiration date of each individual agreement. (Hunt Dep., Vol. 2, 218, at 98:14–20).

employer's business, the lower court compared Pathway and XPO's businesses rather than considering them together. (*See* Order, Vol. 2, 1259 ("On the one hand, Defendant Pathway could not remain in business without Plaintiffs . . . On the other hand, the actual freight hauling done by Plaintiffs was performed by XPO.")). Even Pathway acknowledges that this factor would have weighed more in favor of finding that the Lease Drivers were employees if the lower court had considered Pathway and XPO together. Pathway Br., at 46. Though Pathway may disagree with the degree to which the combined influence sways this factor, it does not deny that the Lease Drivers hauled the freight that is at the core of XPO's business. *See id.* at 47.

Had the lower court aggregated its finding that the Lease Drivers were integral to Pathway's business, with the fact that Lease Drivers are a part of XPO's core business, it would have weighed this factor in favor of the Lease Drivers.

* * *

By not conducting the joint employment test first, the lower court did not use the appropriate "inputs" in its analysis of the factors for determining whether the Lease Drivers were employees under the

FLSA. As shown above, *who* the purported employer is matters—here, considering Pathway and XPO as joint employers would have changed the lower court's holding as to at least three of the six factors. Therefore, this court should (1) affirm *Hall-Salinas* as the appropriate test; and (2) remand the case to the district court with instructions to apply that test before determining whether the Lease Drivers were employees under the FLSA.

II. The lower court's decision should be reversed because Lease Drivers are employees under the FLSA.

In addition to the threshold error discussed above, the Lease Drivers established in their opening brief that the lower court erred in finding that the Lease Drivers were not employees of Pathway under the FLSA. *See* Br. at 34–61.

In response, Pathway argues that the Lease Drivers did not show how the lower court's findings on the six *Baker* factors were clearly erroneous. Pathway Br. at 27. But the Lease Drivers' opening brief is replete with arguments that the lower court made "clear factual errors." *See, e.g.*, Br. at 42 ("[T]he lower court made clear factual errors in finding that the Lease Drivers 'used their own business judgment to determine whether to decline loads.'"). The opening brief also

established the lower court's most critical factual error: it failed to consider facts related to Pathway and XPO's combined influence—facts that would have been significant to at least three of the six factors under the FLSA employment test. *See, e.g.*, Br. at 30–33.

Pathway also claims that federal courts have "consistently held" that long-haul truckers like Lease Drivers are independent contractors. Pathway Br. at 29. To the contrary, courts look at the facts of each case, and have held that long-haul truckers who lease their own trucks can be employees. *See Swift*, 2017 WL 67521, at *10 (holding that long-haul lease drivers were employees); *De La Rosa v. Swift Trans. Co. of Arizona*, 19-CV-100, 2021 WL 5155702, at *5 (S.D. Tex. Sept. 16, 2021) (same); *Soto v. Shealey*, 331 F. Supp. 3d 879 (D. Minn. 2018) (concluding that a jury could find the same).

As to each of the six factors:

1. In the opening brief the Lease Drivers established that the control factor weighs in favor of finding that the Lease Drivers were employees because Pathway controlled who the Lease Drivers could work for; what assignments they worked on; and what equipment and support they could use to get the job done. Br. at 36–41.

In response, Pathway argues that the control factor should favor independent contractor status because the Lease Drivers had discretion to set their own work hours, decide which loads to accept or reject, and choose the routes that they traveled. Pathway Br. at 31. In practice, Pathway undermined the Lease Drivers' putative control. By deducting outstanding lease payments from the Lease Drivers' XPO paychecks, Pathway exerted financial pressure such that Lease Drivers could not freely accept or reject loads. Br. at 38–39; *see also Swift*, 2017 WL 67521, at *12 (finding that drivers whose lease payments were automatically deducted from weekly paychecks could not freely accept or reject loads, and thus were under the control of the putative employers). By locking the Lease Drivers into driving exclusively for XPO, Pathway also left the Lease Drivers with little discretion in setting their work hours. Br. at 38–39; *see also Swift*, 2017 WL 67521, at *11 (finding that drivers did not control their schedule where their lease agreement limited their work to one carrier and "failure to drive for [the carrier] would be failure to pay rent"). In effect, then, Lease Drivers were subject to "forced dispatch" just like company drivers. The lower court failed to make these findings because it considered only

what the Lease Drivers could do, while ignoring what Pathway prevented the Lease Drivers from doing. The lower court, therefore, clearly erred in finding that Lease Drivers "used their own business judgment to determine whether to decline loads" despite clear evidence to the contrary. Br. at 42; *see Swift*, 2017 WL 67521, at *12 (finding that long-haul truck drivers "were unable to exercise judgment . . . to generate income" where rejecting loads was "discouraged or at least not advisable"); *see also Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (holding that the district court's findings with respect to four of the *Baker* factors were clearly erroneous).[10]

Pathway also argues that the control factor weighs in favor of finding that the Lease Drivers were independent contractors because of their purported ability to drive in teams or hire other drivers to assist them. Pathway Br. at 30. There are two sigifnicant flaws with this

[10] In its response, Pathway dismissed *Dole* as "inapplicable" because it did not involve long-haul truck drivers. *See* Pathway Br. at 46. But the opening brief cited *Dole* only for two limited rules: (1) workers who cannot work freely for other employers are more likely employees, not independent contractors, *see* Br. at 37; and (2) workers who earn more merely by working more do not exercise the kind of managerial skill that would favor independent contractor status, *id.* at 44. Those rules apply equally to long-haul truck drivers.

argument. First, contrary to Pathway's assertion, the fact that a driver is able to hire a teammate "'does not prevent a finding that [the drivers] are employees' under the FLSA." *Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 488 (N.D. Cal. 2017) (citing *Real*, 603 F.2d at 755).[11]

Second, Pathway's agreement with the Lease Drivers placed limitations on that ability, stipulating that only the Lease Driver "shall be the driver" except in certain circumstances like a disability. (Supp. App., 52, § 13(c)). To change from solo to team driving would require a new contract, because any change to the number of drivers using a particular truck was deemed a default. (*Id.* at 55, §13(d); *see* Trial Tr.,

[11] The cases Pathway cites for the contrary conclusion, *see* Pathway Br. at 39, are inapposite. *Derolf* involved drivers that could hire outside help, but the critical distinction was that the putative employer there was the carrier, not a leasing company. *See Derolf v. Risinger Bros. Transfer, Inc.*, 259 F. Supp. 3d 876, 881 (C.D. Ill. 2017) (downplaying limits placed on drivers' ability to work for other carriers because the putative employer was in competition with those other carriers). While competitive interests might excuse a carrier from controlling drivers' ability to haul for other carriers, there is no similar excuse for Pathway—a leasing company—to have limited the Lease Drivers' ability to haul for other carriers. The control factor in *Browning*, meanwhile, turned on the drivers' undisputed ability to "take[] on any other work with any other company." *See Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 603 (E.D.N.Y. 2012). Here, conversely, the Lease Drivers' ability to work with any other company was strictly limited to Pathway's discretion, not their own.

Vol. 3, 776:13). Team drivers were subject to different conditions from solo drivers, including shorter, more expensive lease terms. (Trial Tr., Vol. 3, 863:7–10). When substantial limitations such as these are placed on the Lease Drivers, "the significance of the right to hire employee drivers is greatly diminished." *Swift*, 2017 WL 67521, at *13 (citation omitted).

2. As demonstrated in the opening brief, the profit or loss factor favors employee status because the Lease Drivers' ability to profit did not depend on managerial skill. Br. at 44–45. Pathway argues that the Lease Drivers forfeited this argument, Pathway Br. at 37, but both parties preserved the issue for appeal. (*See, e.g.*, Pls.' Rev. Proposed Findings of Fact and Conclusions of Law, Vol. 2, 931 (Lease Drivers arguing their profit or loss was not dictated by "their own initiative and work ethic" but rather by factors outside of their control, including Pathway's deductions from Lease Drivers' paychecks); Defs.' Rev. Proposed Findings of Fact and Conclusions of Law, Vol. 2, 743 (arguing that to be profitable, Lease Drivers needed "managerial skills")).

Pathway suggests that focusing on managerial skill under the profit or loss factor is too narrow of an inquiry, citing *Baker* and *Dole*.

Pathway Br. at 37. Yet the factors that this Court considered in *Baker* and *Dole* spoke to the broad issue of managerial skill: whether the plaintiffs controlled "the essential determinants of profits" and whether the plaintiffs "direct[ly] share[d] in the success of the business." *See Baker*, 137 F.3d at 1441 (quoting *Dole*, 875 F.2d at 809). Here, even these profit or loss factors favor employee status. Pathway controlled the essential determinants of profits by constraining the Lease Drivers' ability to freely accept or reject the loads offered by XPO. Br. at 38–39. The Equipment Lease Agreement also prevented the Lease Drivers from taking a direct share in the success of their own business because it allowed Pathway to deduct outstanding lease payments from Lease Drivers' XPO paychecks. Br. at 8.

In its response, Pathway also argues that the profit or loss factor favors independent contractor status because Lease Drivers risked monetary loss through truck maintenance and fuel efficiency. Pathway Br. at 35. By emphasizing the importance of fuel efficiency, Pathway concedes that Lease Drivers' profits depended on circumstances from which managerial skill is absent: efficiency, or merely "being more technically proficient." Br. at 43–46.

Additionally, Pathway points to the lower court's finding that the Lease Drivers "needed business acumen and financial proficiency to make a profit"—a finding supported by the Lease Drivers' putative control over which loads to accept, which routes to take, and when to work. Pathway Br. at 38. But as the Lease Drivers have repeatedly demonstrated, that control existed in theory but not in practice, largely due to the financial pressure exerted by Pathway and the limitations placed on employment opportunities by the Equipment Lease Agreement. Br. at 36–41. In this same vein, Pathway emphasizes that the Lease Drivers controlled whether to drive solo or hire outside help. Pathway Br. at 38. But, under the profit or loss analysis, this form of control is not enough to overcome the fact that the Lease Drivers relied on others' managerial skill, not their own, to earn profit. *See Swift*, 2017 WL 67521, at *13 (truck drivers were employees, even if they could hire other drivers, because they relied on a hauling company for assignments and "the most [they] could gain from an additional driver was a cut of the [mileage] earned by that driver"). Thus, the profit or loss factor favors employee status.

3. As to the investment factor, the costs of Lease Drivers' use and

maintenance of their trucks were outweighed by Pathway's investments in its own business. Br. at 48–49. Pathway argues that the Lease Drivers forfeited this argument by not raising it below. Pathway Br. at 40. But the Lease Drivers argued below that they "were led to believe they were investing money in their own business" when, in reality, Pathway and XPO "shifted the cost of doing business"—truck maintenance—onto Lease Drivers. (Pls.' Rev. Proposed Findings of Fact and Conclusions of Law, Vol. 2 at 932). In so arguing, the Lease Drivers compared the investments made by the putative employers "in the overall operation" against the "individual investment" made by Lease Drivers. *Baker*, 137 F. 3d at 1442; *see also* Br. at 48. Thus, the Lease Drivers preserved the argument.

Pathway also asserts that the proper inquiry under the investment factor should compare the worker's investment *risk* against the employer's investment *risk*. Pathway Br. at 40. The opening brief nevertheless satisfied Pathway's novel analysis by establishing that the scale of Pathway's investment risk in an entire fleet of trucks "dwarfed" the Lease Drivers' investment risk in a single truck. Br. at 49–50. Thus, the investment factor favors employee status.

4. The Lease Drivers established in their opening brief that Pathway deducting advanced payments from their future earnings indicated a degree of permanency in the relationship. *See* Br. at 51–52 (citing *Ingram v. Passmore*, 175 F. Supp. 3d 1328, 1337 (N.D. Ala. 2016)). Pathway does not respond to, and thus tacitly concedes, this point.

Pathway's deduction of advance payments also limited the Lease Drivers' ability to take outside work from carriers other than XPO. (*See* Harris Dep., Vol. 1 at 967:1–5). Pathway retained discretion over which carrier company Lease Drivers could drive for based on whether the carrier company would disburse drivers' paychecks to Pathway for payment deductions. (Lacy Dep., Vol. 1 at 252:21–253:11; Merrill Dep., Vol. 1 at 76:14–21). Consequently, the Lease Drivers could work for only two other carrier companies, which had joint-venture agreements with Pathway like XPO. *Id.* Inability to take outside work is indicative of permanency and employee status. *Lewis v. ASAP Land Express, Inc.*, 554 F. Supp. 2d 1217, 1223 (D. Kan. 2008).

Additionally, the Lease Drivers acknowledged in their opening brief that their Lease Agreements with XPO and Pathway were for a

fixed duration. Br. at 52. In response, Pathway contends that this fixed contractual duration establishes a lack of permanence. Pathway Br. at 41–42. However, short-term contracts which can be terminable early by either party "suggest substantial permanence of a relationship" when the contracts were automatically renewed. *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1318 (11th Cir. 2013). Although the Equipment Hauling Agreement was not by its terms automatically renewed, Lease Drivers who still owed money at the end of their lease term, in effect, automatically renewed their Equipment Lease Agreement. They remained indebted to Pathway until they had sufficient funds to pay their outstanding balance. (*See* Trial Tr., Vol. 3, 545:18–546:5 (testimony that Lease Driver remained indebted to Pathway after the lease had ended)). Thus, this factor favors in finding that the Lease Drivers were employees.

5. As established in the opening brief, the skill factor favors employee status because the Lease Drivers' job—driving a truck—did not require specialized skill. Br. at 55. In response, Pathway cites to authority for the broad proposition that driving as a commercial long-

haul trucker is a specialized skill.[12] Pathway Br. at 44. Even if long-haul trucking requires specialized skills, merely possessing a specialized skill is not enough to qualify as an independent contractor. *Mikhaylov v. Y & B Transp. Co.*, 2019 U.S. Dist. LEXIS 59203, at *15 (E.D.N.Y. Mar. 31, 2019) ("Skill, however, is not in itself indicative of independent contractor status."). Instead, the proper inquiry asks whether a skilled worker uses his or skill in an "independent fashion." *See Baker*, 137 F.3d at 1443. The similarity of the day-to-day duties performed by Lease Drivers and company drivers indicates the Lease Drivers lacked independence in discharging their duties. Br. at 55–56. Pathway's control over the Lease Drivers also limited their opportunities to exercise initiative; for example, Lease Drivers felt they could not reject assigned XPO loads for fear of negative repercussions, not because they were exercising business judgment. *See* Br. at 36–42. The lower court failed to consider the Equipment Lease Agreement in light of the entire record; had it done so, the lower court would have found the skill factor favors employee status. Br. at 42–43.

[12] Pathway relies, in part, on *United States v. Berry*, 717 F.3d 823 (10th Cir. 2013), which dealt with "punish[ing] those individuals who use their special talents to commit crime." *Id.* at 834.

6. Lastly, in their Opening Brief, the Lease Drivers demonstrated that (1) their labor as haulers was integral to Pathway's truck leasing business, and (2) the lower court erred in finding that this factor of the *Baker* analysis was neutral. *See* Br. at 56–59. In response, Pathway concedes that it "could not stay in business without [Lease Drivers] performing hauling work." Pathway Br. at 46. Nevertheless, Pathway contends that it is only the Lease Drivers' fulfillment of their lease obligations, and not their actual work, that is integral to Pathway's business. *Id.* That is a distinction without a difference. If the Lease Drivers did not drive, they could not pay their leases. Pathway's own actions are telling: Pathway would recommend that XPO "give attention"—more driving assignments—to those Lease Drivers who were struggling to pay off their lease to Pathway. (*See* Trial Tr., Vol. 3, 923 ("[T]heir goals are really the same as ours in that regard.")).

Courts, too, recognize that driving is integral to the business of the truck leasing companies. *See Brant v. Schneider Nat'l, Inc.*, 20-C-1049, 2021 WL 179597, at *6 (E.D. Wis. Jan. 19, 2021). Pathway identifies neither a logical means of dissociating Lease Drivers' use of its equipment from the successful completion of leases, nor alternative

lines of work that Lease Driver could have utilized—other than driving—to complete their leases. At bottom, the Lease Drivers' hauling services are integral to Pathway's truck leasing business, and the lower court clearly erred in finding this *Baker* factor to be neutral.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court affirm that *Hall-Salinas* is the proper test for joint employer status in the Tenth Circuit, and remand for a joint employer determination; or in the alternative, reverse the lower court's decision and find that the Lease Drivers were employees of Pathway.

Respectfully submitted,

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January 28, 2022

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January 28, 2022

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January 28, 2022

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January 28, 2022