IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF PENNSYLVANIA

JOHN LAYER, on behalf of himself and similarly situated employees, **Plaintiff,** **V.** **TRINITY HEALTH CORPORATION; MERCY HEALTH SYSTEM; and LOURDES HEALTH SYSTEM,** **Defendants.**	**No. 2:18-cv-02358**

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Trinity Health Corporation, Mercy Health System of Southeastern Pennsylvania, incorrectly identified in the Complaint as "Mercy Health System," and Our Lady of Lourdes Health Care Services, Inc., incorrectly identified in the Complaint as "Lourdes Health System," hereby move to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. In support, Defendants rely upon the accompanying Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, Defendants respectfully request that this Court dismiss Plaintiff's Complaint with prejudice.

POST & SCHELL, P.C.

Dated: August 17, 2018

By: */s/ Andrea M. Kirshenbaum*

Andrea M. Kirshenbaum
akirshenbaum@postschell.com
David E. Renner
drenner@postschell.com
Four Penn Center
1600 John F. Kennedy Blvd., 14th Fl.
Philadelphia, PA 19103
Phone: (215) 587-1000
Facsimile: (215) 587-1444

Counsel to Defendants

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

POST & SCHELL, P.C.

Andrea M. Kirshenbaum
akirshenbaum@postschell.com
David E. Renner
drenner@postschell.com
Four Penn Center
1600 John F. Kennedy Blvd., 14th Fl.
Philadelphia, PA 19103
Phone: (215) 587-1000
Facsimile: (215) 587-1444

Counsel to Defendants

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I. INTRODUCTION

Plaintiff John Layer ("Plaintiff") has brought this wage and hour putative class and collective action under the Fair Labor Standards Act ("FLSA") and the Pennsylvania Minimum Wage Act ("PMWA") against Defendants Trinity Health Corporation ("Trinity"), Mercy Health System of Southeastern Pennsylvania, incorrectly identified in the Complaint as "Mercy Health System," ("Mercy"), and Our Lady of Lourdes Health Care Services, Inc., incorrectly identified in the Complaint as "Lourdes Health System" ("Lourdes") (collectively, "Defendants").

Plaintiff's Complaint fails plausibly to allege that Trinity is an employer (or joint employer) of Plaintiff or any of the alleged class members – that is, that Trinity exercises significant control over Plaintiff or the class members. As such, the Court should dismiss the Complaint against Trinity for failure plausibly to allege an employment relationship between Trinity and Plaintiff.

The Complaint also fails plausibly to allege that Mercy and Lourdes are joint employers. Plaintiff's Complaint is devoid of any alleged facts to even suggest that Mercy exercises significant control over the working conditions of Plaintiff or any of the class members while those employees are working at Lourdes (or any other facility) and vice versa. Accordingly, and because the entirety of Plaintiff's claims rest exclusively on the alleged joint employment relationship among Defendants, this Court should dismiss the Complaint against Mercy and Lourdes as

well. For these reasons, as well as those set forth in detail below, Defendants respectfully request that this Court dismiss Plaintiff's Complaint in its entirety, and with prejudice.

II. ALLEGED FACTS (AS OPPOSED TO LEGAL CONCLUSIONS)[1]

Plaintiff works as a Medical Lab Technician at Mercy, and also works (at times during the same week) as a Medical Lab Technician at Lourdes. Compl. ¶¶ 4, 21-22, 24. Plaintiff alleges that "Defendants violated the FLSA and PMWA by failing to pay adequate overtime compensation to Plaintiff and other employees during weeks . . . in which (i) they worked for two or more health care facilities owned or operated by Trinity or its subsidiaries and (ii) their *combined* work hours exceeded the 40-hour overtime threshold." *Id.* at ¶ 24 (emphasis in original).

To support these claims, the Complaint makes varied allegations with respect to Trinity's relationship with Mercy and Lourdes:

- "Trinity 'controls one of the largest health care systems in the United States,'" "comprising 'a comprehensive integrated network of health services.'" *Id.* at ¶ 10.
- Mercy and Lourdes are both "wholly-owned subsidiar[ies] of Trinity" and are members of Trinity's "comprehensive integrated network of health services." *Id.* at ¶¶ 6-7, 10-12.[2]

[1] The following facts are taken as true for the purpose of the instant motion only. *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). Any "bald assertions" contained in Plaintiff's Complaint shorn of a factual basis therefore cannot be taken as true and should not be credited by this Court. *Anspach v. City of Phila.*, 503 F.3d 256, 260-61 (3d Cir. 2007).

[2] Plaintiff's Complaint also alleges that Trinity's "'comprehensive integrated

- "Trinity purports to 'employ[] more than 133,000 colleagues,'" and "paid its employees $7,056,453,000 in '[s]alaries and wages'" and "$1,457,253,000 in '[e]mployee benefits'" "during fiscal year ending June 30, 2016." *Id.* at ¶¶ 14-16.
- "Trinity 'operates a wholly owned insurance company' and, as a result, 'is self-insured for certain levels of general and professional liability, workers' compensation and certain other claims.'" *Id.* at ¶ 17.
- "Trinity 'sponsors defined contribution pension plans covering substantially all of its employees.'" *Id.* at ¶ 18.
- "Trinity has implemented and maintains a set of workplace Policies and Procedures that 'have been adopted by the Board and/or Executive Leadership Team for system-wide application,'" and "[t]hese Policies and Procedures apply to Plaintiff, other individuals working for [Mercy] and Lourdes [], and other individuals working for Network Locations." *Id.* at ¶ 19.
- "Trinity has implemented and maintains a centralized payroll system that it uses to determine the compensation owed to Plaintiff, other individuals working for [Mercy] and Lourdes [], and other individuals working for Network Locations." *Id.* at ¶ 20.

Plaintiff's Complaint also alleges that "Plaintiff is jointly employed by Defendants as a Medical Lab Technician . . . , paid an hourly wage, and classified as non-exempt from federal and state overtime laws." *Id.* at ¶ 21. Other than these generalized allegations, the Complaint does not allege facts as to ***how***, and in what manner, Trinity purportedly exercises significant control over the working conditions of Plaintiff in order to sufficiently allege joint employment under the FLSA. Likewise, the Complaint does not set forth any facts as to how, and in what manner, Mercy exercises significant control over the working conditions of

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network' includes other healthcare systems, hospitals, and facilities operating in 21 states," defined by Plaintiff as "Network Locations." Compl. ¶ 13.

Plaintiff (or any other employee) during those periods of time when he is working at Lourdes, and vice versa.

Pursuant to the alleged "joint employment relationship" among Defendants, Plaintiff claims that Defendants are all jointly liable to Plaintiff (and other "similarly situated employees") for alleged unpaid "overtime [pay] based on the combined hours that Plaintiff and other employees spent working at both Mercy and Lourdes" during the same workweek. *Id.* at ¶ 38. Plaintiff appears to base this claim on his generalized allegations that "Defendants are not 'acting entirely independently of each other' and are not 'completely disassociated with respect to the employment of [Plaintiff and similar employees],'" because they purportedly "combine revenues, profits, and expenses in a consolidated financial statement, present themselves to consumers as having the resources and sophistication of a national healthcare conglomerate, . . . and achieve economies of scale by centralizing and consolidating human resource functions, payroll, employee benefit plans, and insurance coverage." *Id.* at ¶ 26.

Plaintiff seeks to advance his claims as an FLSA/PMWA collective and class action on behalf of all non-exempt employees who worked for two or more of Trinity's Network Locations and who were not paid overtime premium pay based on the total combined hours worked at all Trinity Network Locations. *Id.* at ¶¶ 28, 30.

III. ARGUMENT

A. Standard Of Review

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." To state a viable claim and survive a motion to dismiss, Plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation," or accept as true unsupported conclusions and unwarranted inferences. *Twombly*, 550 U.S. at 555 (citation omitted). Accordingly, courts in the Third Circuit engage in a three-step analysis at the motion to dismiss stage:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Iqbal*, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are not more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.*

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (alterations in original; footnote omitted). Because the allegations in the Complaint fail to satisfy this standard, this Court should dismiss Plaintiff's Complaint in its entirety.

B. All Of Plaintiff's Claims Are Contingent Upon Defendants Being Joint Employers.

All of Plaintiff's claims[3] are contingent on Plaintiff's allegation that Defendants are joint employers. Plaintiff's Complaint does not allege that Plaintiff (or any other employee) worked more than 40 hours per week at either Mercy or Lourdes individually and was not paid by Mercy or Lourdes at an overtime premium rate for hours worked over 40 in a work week. Plaintiff instead asserts that "Defendants violated the FLSA by failing to pay overtime based on the combined hours that Plaintiff and other employees spent working at both Mercy and Lourdes [] facilities." Compl. ¶ 38; *see also id.* at ¶¶ 24 (alleging that Defendants failed to "pay adequate overtime compensation to Plaintiff and other employees during weeks . . . in which (i) they worked for two or more health care facilities owned or operated by Trinity or its subsidiaries and (ii) their combined work hours exceeded the 40-hour overtime threshold . . . "); 41 ("Defendants violated the PMWA by failing to pay overtime based on the combined hours that Plaintiff and other employees spent working for (i) Mercy [] or the Saint Mary Medical Center and (ii) Lourdes [] or any other healthcare

[3] "The courts have held that [the PMWA is] to be interpreted in the same fashion as the FLSA inasmuch as the state and federal acts have 'identity of purpose' and 'the state statute substantially parallels the federal.'" *Levitt v. Tech. Educ. Servs.*, No. 10-6823, 2012 U.S. Dist. LEXIS 111195, at *8 (E.D. Pa. Aug. 7, 2012). As such, Defendants' arguments with respect to Plaintiff's FLSA claims apply with equal force to Plaintiff's PMWA claims.

system, hospital, or facility owned or operated by Trinity or its subsidiaries"). As described below, Plaintiff has failed to allege sufficient facts to state this claim.

C. All Of Plaintiff's Claims Should Be Dismissed Because Plaintiff Has Not Pled Sufficient Facts To Plausibly Allege That Defendants Are Joint Employers.

Pursuant to the FLSA's regulations "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions, with respect to the entire employment for the particular workweek." 29 C.F.R. § 791.2(a). However, if two employers are independent and "completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the [FLSA]." *Id.*

There are two ways in which two or more employers can be found to be "joint employers" under the FLSA: "vertical joint employment" (*e.g.*, where a parent corporation and its subsidiary are found to be joint employers because the economic realities demonstrate that the parent corporation controls its subsidiary) and "horizontal joint employment" (*e.g.*, where two "sister corporations" are deemed to be joint employers under the FLSA because they each separately employ an employee and are sufficiently associated with, or related to, each other

with respect to the employee). *See Murphy v. HeartShare Human Servs. of N.Y.*, 254 F. Supp. 3d 392, 396 (E.D.N.Y. 2017). The vertical joint employment analysis examines the economic realities of the relationships to determine whether the employees are economically dependent on those potential joint employers and are thus their joint employees. *See, e.g., Coldwell v. RiteCorp Envtl. Prop. Sols.*, No. 16-1998, 2017 U.S. Dist. LEXIS 68252, at *11 (D. Colo. May 4, 2017).

To determine whether two employers constitute "horizontal joint employers" under the FLSA, courts apply the standards set forth in 29 C.F.R. § 791.2(b),[4] which provides that:

> [w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> > (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
> >
> > (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
> >
> > (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is

[4] Defendants' comprehensive review of Third Circuit case law did not locate any case in the Third Circuit where a court has been presented with a potential "horizontal joint employment" relationship (nor did Defendants' review locate any Third Circuit case law analyzing whether two "sister corporations" could be joint employers). As such, for the purposes of this Motion, Defendants evaluate Plaintiff's Complaint under the standards set forth in the FLSA's regulations and the well-developed case law from other circuit and district courts.

under common control with the other employer.

Within the Third Circuit, whether two employers are "vertical joint employers" is governed by the Third Circuit's holding in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012) (citations omitted) ("*Enterprise*"). The Third Circuit has adopted four key factors (the "*Enterprise* factors") to determine whether a defendant exercises sufficient control to qualify as a joint employer. They require the Court to consider whether the employer in question has:

> 1) authority to hire and fire the relevant employees;
>
> 2) authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment;
>
> 3) involvement in day-to-day employee supervision, including employee discipline; and
>
> 4) control of employee records, such as payroll, insurance, or taxes.

Id. at 469.

It appears that Plaintiff is attempting to claim that Trinity is a "vertical joint employer" over Mercy and Lourdes and that Mercy and Lourdes are "horizontal joint employers." *See generally* Compl. However, as described below, Plaintiff has failed to allege sufficient facts in his Complaint that Defendants all qualify as Plaintiff's employers.

1. Plaintiff Has Not Pled Sufficient Facts To Show That Trinity Was A Vertical Joint Employer With Mercy And/Or Lourdes.

Plaintiff alleges that Trinity is a joint employer with Mercy and Lourdes; however, Trinity cannot qualify as a "vertical joint employer" of Plaintiff as a matter of law where his Complaint fails to allege that Trinity exercised "significant control" over the employment of Plaintiff pursuant to the *Enterprise* factors. *Enterprise*, 683 F.3d at 468.

As an initial matter, merely because Trinity is the parent corporation of Mercy and Lourdes does not make it a joint employer under the FLSA. *See Davis v. Abington Mem'l Hosp.*, No. 09-5520, 2012 U.S. Dist. LEXIS 111160, at *23 (E.D. Pa. Aug. 7, 2012) ("These Defendants cannot be held liable merely because they have common ownership or are otherwise part of a common enterprise wherein some entities are employers of the named Plaintiffs"), *aff'd*, 765 F.3d 236 (3d Cir. 2014); *Paz v. Piedra*, No. 09-3977, 2012 U.S. Dist. LEXIS 4034, at *24 (S.D.N.Y. Jan. 12, 2012) ("The mere fact that each Corporate Defendant is owned in whole or major part by the same persons simply does not permit this Court to disregard their distinct legal statuses"); *Lopez v. Acme Am. Envtl. Co.*, No. 12-511, 2012 U.S. Dist. LEXIS 173290, at *11 (S.D.N.Y. Dec. 6, 2012) ("Allegations of common ownership and common purpose, without more, do not answer the fundamental question of whether each corporate entity controlled Plaintiffs as

employees"); *Gadson v. Supershuttle Int'l*, No. 10-1057, 2011 U.S. Dist. LEXIS 33824, at *29-31 (D. Md. Mar. 30, 2011) (dismissing FLSA collective action complaint, holding that a parent-subsidiary relationship between two entities is insufficient to plead joint employer liability under the FLSA, rather, the plaintiffs have to "allege[] sufficient facts to demonstrate that [the corporate parent] had any influence over [p]laintiffs' employment with [the subsidiary corporation]").

Likewise, to the extent Plaintiff's Complaint purports to claim that Trinity can be found to be a joint employer with Mercy or Lourdes based on Trinity marketing its "comprehensive integrated network" of health systems, which includes Mercy, Lourdes, and other Network Locations, such reliance is misplaced as a company being "portrayed as a single brand to the public . . . does not demonstrate the necessary control by defendant parent over the subsidiaries." *Enterprise*, 735 F. Supp. 2d 277, 323 (W.D. Pa. 2010), *aff'd*, 683 F.3d 462.

Courts in this District have dismissed FLSA putative collective action claims where the complaint failed to allege sufficient factual content to satisfy the *Enterprise* factors. *See, e.g.*, *Nerviano v. Contract Analysis Sys., LLC*, No. 17-4907, 2018 U.S. Dist. LEXIS 82253 (E.D. Pa. May 16, 2018); *Katz v. DNC Servs. Corp.*, No. 16-5800, 2018 U.S. Dist. LEXIS 17002 (E.D. Pa. Feb. 1, 2018); *Garcia v. Nunn*, No. 13-6316, 2015 U.S. Dist. LEXIS 127318, at *17-18 (E.D. Pa. Sep. 23, 2015); *Richardson v. Bezar*, No. 15-772, 2015 U.S. Dist. LEXIS 135294 (E.D. Pa.

Oct. 5, 2015); *see also Attanasio v. Cmty. Health Sys., Inc.*, 863 F. Supp. 2d 417, 425-26 (M.D. Pa. 2012). For instance, in *Katz*, 2018 U.S. Dist. LEXIS 17002, at *7-10, the Court dismissed an alleged parent corporation from a putative FLSA collective action where the complaint failed to allege sufficient facts to satisfy the *Enterprise* factors. Specifically, in dismissing the Democratic National Committee ("DNC") the Court found that while

> Plaintiffs allege that Defendant DNC "directed" the state democratic parties to hire and retain field organizers, but allege no actual involvement by DNC in the interviewing, hiring, or onboarding process. There are no facts to suggest that Defendant DNC reviewed potential hires' applications, attended interviews with prospective employees, or placed DNC hires in employment positions within the state democratic parties. Without more, that individual state parties independently recruited and hired Plaintiffs at Defendant DNC's behest is insufficient to demonstrate authority to hire or fire.

Id. (citations omitted). The *Katz* Court also was unpersuaded by the plaintiffs' allegations purportedly supporting the second *Enterprise* factor despite plaintiffs contending that the "DNC directed the state parties as to the job qualifications and duties of organizer-employees and directed the state parties to classify the organizers as over-time exempt." *Id.* In fact, the *Katz* Court specifically explained that because the plaintiffs did not allege that "DNC was involved in determining Plaintiffs' hourly compensation rate, benefit package, or work schedule," and that "DNC authored and distributed employee handbooks or manuals," their claims of joint employment must fail. *Id.* The Court suggested that, even if such facts were pled, it would still have dismissed the complaint for failing to sufficiently allege

facts to support a finding of joint employment under *Enterprise*. *Id.* (explaining that the *Enterprise* Court affirmed the district court's finding of no joint employment even though there was evidence that the defendant "supplied administrative services to its subsidiary, including employee benefit packages" and "provided training materials and performance review guidelines to its subsidiaries").[5]

Here, similar to *Katz* (although with significantly fewer facts to support its claims of joint employment), the Complaint similarly fails to allege facts sufficient to support a finding that Trinity was a joint employer with either Mercy or Lourdes; indeed, it fails entirely to allege that Trinity exercised any control over Plaintiff, let alone the "significant control" required under the *Enterprise* factors.

i. The Complaint does not allege that Trinity had the authority to hire and fire Plaintiff.

The Complaint is devoid of any allegations that could satisfy the first *Enterprise* factor, which asks whether the alleged employer has "authority to hire and fire employees." *Enterprise*, 683 F.3d at 468. Plaintiff does not aver that Trinity had the authority to hire or fire Plaintiff (or any other employee) on behalf of Mercy or Lourdes. *See, e.g.*, *Garcia*, 2015 U.S. Dist. LEXIS 127318, at *17-18 (finding allegations of joint employer status as to defendant Weis Markets

[5] The *Katz* Court also found, in dismissing DNC as a joint employer, that the complaint contained "absolutely no evidence in support of the third or fourth *Enterprise* factors." 2018 U.S. Dist. LEXIS 17002, at *10.

insufficient, reasoning in part that there was "no mention in the amended complaint that Defendant had the authority to hire and fire the plaintiff employees").

ii. The Complaint contains no plausible allegations that Trinity had the authority to promulgate work rules and assignments and to set conditions of employment.

The Complaint also fails sufficiently to allege facts to support the second *Enterprise* factor, which considers whether the alleged employer has "authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment[.]" *Enterprise*, 683 F.3d at 468. The Complaint avers that Trinity "is self-insured for certain levels of general and professional liability, workers' compensation and certain other claims," "sponsors defined contribution pension plans covering substantially all of its employees," and "has implemented and maintains a set of workplace Policies and Procedures that 'have been adopted by the Board and/or Executive Leadership Team for system-wide application.'" Compl. ¶¶ 17-19. These allegations, however, fall far short of plausibly alleging facts to support the second *Enterprise* factor. *Enterprise*, 683 F.3d at 466, 468, 470 (finding no joint employment relationship existed even though the defendant indirectly supplied administrative services to its subsidiary, including employee benefit packages and the defendant's human resources department provided training materials and performance review guidelines to its subsidiaries). Plaintiff

does not allege that Trinity assigns him work, sets his rate of compensation, provides his benefits (other than the pension plan), sets his work schedule, or determines his rate or method of payment. *See, e.g.*, *Katz*, 2018 U.S. Dist. LEXIS 17002, at *8 (dismissing alleged joint employer where "Plaintiffs d[id] not allege, . . . that Defendant DNC was involved in determining Plaintiffs' hourly compensation rate, benefit package, or work schedule").

iii. The Complaint does not allege that Trinity participated in day-to-day employee supervision.

Plaintiff's Complaint fails to make any allegations that could satisfy the third *Enterprise* factor, that is, whether the alleged employer was involved in the "day-to-day supervision of the employee, including employee discipline." *Enterprise*, 683 F.3d at 468. The Complaint contains no allegations that Trinity was involved in the day-to-day supervision of the employees of Mercy or Lourdes or took disciplinary action against any employees at Mercy, Lourdes, or any other Network Location. *See Katz*, 2018 U.S. Dist. LEXIS 17002, at *8 ("There are no facts that would suggest any interaction between Defendant DNC and the plaintiff-organizers, let alone significant control by Defendant DNC over Plaintiffs' day-to-day employment experience"); *Attanasio*, 863 F. Supp. 2d at 425 (granting 12(b)(6) motion to dismiss on claim of joint employer status and finding it "notable that no daily control is alleged").

iv. The Complaint fails plausibly to allege that Trinity had control of employee records.

The final *Enterprise* factor examines whether the alleged employer has "control of employee records, such as payroll, insurance, or taxes." *Enterprise*, 683 F.3d at 468. The only fact alleged in the Complaint to support this fourth factor is Plaintiff's claim that "Trinity has implemented and maintains a centralized payroll system that it uses to determine the compensation owed to Plaintiff, other individuals working for [Mercy] and Lourdes [], and other individuals working for Network Locations." Compl. ¶ 20. This fact alone certainly is insufficient to demonstrate that Trinity is a joint employer with Mercy and/or Lourdes. *See, e.g.*, *Enterprise*, 683 F.3d at 470 (no joint employment liability even though the district court concluded that certain of its subsidiaries utilized the parent corporation's payroll services); *Moldenhauer v. Tazewell Pekin Consol. Communs. Ctr.*, 536 F.3d 640, 644-45 (7th Cir. 2008) (the court determined that there was no joint employment relationship, although the plaintiff was considered an employee of the purported joint employer for purposes of payroll, worker's compensation, retirement benefits, and was listed as such on her W-2 forms); *Spears v. Choctaw Cty. Comm'n*, No. 07-275, 2009 U.S. Dist. LEXIS 66037, at *33 (S.D. Ala. July 30, 2009) (finding no joint employment relationship under the FLSA even though purported joint employer was involved in setting salary classifications and handling benefits and payroll); *Maddock v. KB Homes, Inc.*, 631 F. Supp. 2d 1226,

1232-34 (C.D. Cal. 2007) (no finding of a joint employment even though parent corporation maintained a database of information regarding all employees of the subsidiaries and the subsidiaries used parent's shared payroll services, reasoning that "these facts alone are as a matter of law insufficient to establish that [the parent] was plaintiff's employer under the economic reality test").

It is well established that maintaining some employee records is insufficient to create an employer/employee relationship. *See Nerviano*, 2018 U.S. Dist. LEXIS 82253, at *10 (granting motion to dismiss holding that "[a]bsent allegations that ADP had some ability to dictate [plaintiff's] working conditions or played some role in the decision to terminate her, the Court concludes that ADP should not be a part of this case under a joint employer theory" because the plaintiff alleged it handled employee record keeping for plaintiff's actual employer, appeared on the plaintiff's W-2 as "an employer," and it "'was informed of Plaintiff's termination and assented to the termination'"); *Nardi v. ALG Worldwide Logistics*, 130 F. Supp. 3d 1238, 1248-49 (N.D. Ill. 2015) (concluding that company that provided human resources and record keeping services, including payroll services, was not an employer under Title VII because that company did not control her work, issue discipline, or decide to fire the plaintiff); *Braden v. Cty. of Wash.*, No. 08-574, 2010 U.S. Dist. LEXIS 40084, at *26-27 (W.D. Pa. Apr. 23, 2010) ("providing human resource support is akin to an administrative function,

and is not an exercise of the requisite control); *Horan v. Sears Roebuck & Co.*, No. 07-1582, 2009 U.S. Dist. LEXIS 90924, at *12 (D. Conn. Sep. 28, 2009) (same); *Woldu v. Hotel Equities, Inc.*, No. 09-685, 2009 U.S. Dist. LEXIS 135733, at *38 (N.D. Ga. Sept. 18, 2009) (granting motion to dismiss against company that performed human resources services because the plaintiff failed to allege facts that showed the company controlled the employees, such as allegations that the company "set her pay; established her days and hours of work; advised her on how to do her job; or required her to report to it").

Viewing all of the *Enterprise* factors as a whole, Plaintiff's Complaint fails plausibly to allege facts that, if established, would support a joint employer finding with respect to Trinity. And while the Third Circuit has recognized that the *Enterprise* factors are not exhaustive and the Court must consider the entire employment situation and economic realities of the employment relationship, Plaintiff does not otherwise aver any other indicia of joint employment with respect to Trinity. Because Plaintiff has not sufficiently alleged that Trinity is an employer of Plaintiff (or any other employee of Mercy or Lourdes), his claims against Trinity should be dismissed. *See, e.g.*, *Katz*, 2018 U.S. Dist. LEXIS 17002, at *10 ("The *Enterprise* court . . . instructed a thorough consideration of 'all relevant evidence.' Even looking beyond the allegations specifically related to the delineated factors, this Court finds nothing in the record that supports finding an

employment relationship between Defendant DNC and the plaintiff-organizers" (citations omitted)).

2. The Complaint Fails To Allege That Mercy And Lourdes Are Horizontal Joint Employers.

In order for Plaintiff's claims against Mercy and Lourdes to be viable, he must allege sufficient facts to show that they are joint employers under the FLSA. However, much like his allegations that Trinity is a vertical joint employer of Mercy and Lourdes, the Complaint fails to allege that Mercy and Lourdes are horizontal joint employers with respect to Plaintiff (or any employee). *See Kaminski v. BWW Sugar Land Partners*, No. 10-551, 2010 U.S. Dist. LEXIS 123114, at *7-8 (S.D. Tex. Nov. 19, 2010) (dismissing the plaintiffs' FLSA claims against alleged horizontal joint employers, noting that where a complaint seeks to hold more than one employer liable under the FLSA, at least some facts of the employment relationship must be set forth in order to make out a facially plausible claim of multiple employer liability under the FLSA).

Here, it appears that the only allegations that Mercy and Lourdes are somehow related with respect to Plaintiff are that they both happen to employ Plaintiff. Compl. ¶ 24. Of course that is insufficient to support an inference of joint employment between Mercy and Lourdes. There are no factual allegations in the Complaint that Mercy and Lourdes had an arrangement to share Plaintiff's (or any other employee's) services, that Mercy was acting directly or indirectly in the

interest of Lourdes (or vice versa), that Mercy and Lourdes in any respect share control of Layer (or any other employee), or that there is any agreement to share control of employees. *See* 29 C.F.R. § 791.2(b).

Courts have identified various factors that are relevant when analyzing the degree of association between, and sharing of control by, potential horizontal joint employers, including:

- who owns the potential joint employers (*i.e.*, does one employer own part or all of the other or do they have any common owners);
- do the potential joint employers have any overlapping officers, directors, executives, or managers;
- do the potential joint employers share control over operations (*e.g.*, hiring, firing, payroll, advertising, overhead costs);
- are the potential joint employers' operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- does one potential joint employer supervise the work of the other;
- do the potential joint employers share supervisory authority for the employee;
- do the potential joint employers treat the employees as a pool of employees available to both of them;
- do the potential joint employers share clients or customers; and
- are there any agreements between the potential joint employers.

Murphy v. HeartShare Human Servs. of N.Y., 254 F. Supp. 3d 392, 398-99 (E.D.N.Y. 2017) (citations omitted).

When evaluating each of the above factors, it is clear that the Complaint

does not contain sufficient facts to maintain a claim of horizontal joint employment with respect to Mercy and Lourdes. Specifically, while the Complaint alleges that both Mercy and Lourdes are within the Trinity "comprehensive integrated network," there is nothing in the Complaint to suggest that Plaintiff's (or any other employees') employment with Mercy is in any manner related to his employment with Lourdes (or vice versa). It is not sufficient that Plaintiff alleges common ownership (or even common purpose) between Mercy and Lourdes to plead his claims that Mercy and Lourdes are joint employers. *See, e.g., See Davis v. Abington Mem'l Hosp.*, 2012 U.S. Dist. LEXIS 111160, at *23; *Paz*, 2012 U.S. Dist. LEXIS 4034, at *24; *Lopez*, 2012 U.S. Dist. LEXIS 173290, at *11; *Gadson*, 2011 U.S. Dist. LEXIS 33824, at *29-31.

There are no allegations in the Complaint that Mercy and Lourdes have any overlapping officers, directors, executives, or managers, or that they share control over operations, such as hiring, firing, payroll, advertising, or overhead costs. Additionally, other than alleging that "***Trinity*** 'sponsors defined contribution pension plans'" that "cover[]" employees working at Mercy and Lourdes, and an alleged "centralized payroll system" maintained by Trinity allegedly "use[d] to determine the compensation owed to" their employees, Compl. ¶¶ 18, 20 (emphasis added), the Complaint is devoid of any facts to suggest that the operations of ***Mercy and Lourdes*** are in any respect intermingled (such as Mercy

and Lourdes teaming together, outside of Trinity, to form their own benefit plan or payroll system).[6] There is nothing in the Complaint to suggest that Mercy and Lourdes jointly schedule Plaintiff (or any other employee), that the two entities maintain a single administrative operation, or that Mercy and Lourdes treat Plaintiff and other employees as a pool of employees available to both of them.

The Complaint is devoid of allegations that Mercy oversees the operations of Lourdes (and vice versa), or that Plaintiff's (or any other employees') supervisors are the same at each entity. There is likewise no allegation that Mercy and Lourdes share patients (or even treat the same patients). The Complaint also does not allege that Plaintiff's work at Mercy simultaneously benefits Lourdes in any manner (and vice versa). *See, e.g.*, *Paz*, 2012 U.S. Dist. LEXIS 4034, at *23 (no finding of horizontal joint employment where there was "no evidence that the work [the plaintiffs'] performed at one restaurant also benefitted a Corporate Defendant that did not own that restaurant").

Because the Complaint contains insufficient facts to allege a horizontal joint employment relationship between them, Plaintiff's claims of horizontal joint employment between Mercy and Lourdes must fail, and the Complaint should be dismissed. *See, e.g.*, *Joaquin v. Coliseum Inc.*, No. 15-787, 2016 U.S. Dist. LEXIS

[6] As explained in Section III.C.1.iii., *supra*., allegations that one employer handles certain record keeping, payroll, benefits, insurance, and human resources functions of an alleged co-employer is insufficient to support a claim of joint employment.

91265, at *24 (W.D. Tex. July 13, 2016) (dismissing plaintiffs' complaint alleging joint employment finding "[p]laintiffs in this case fail to plead any facts regarding their individual employment relationships with each [d]efendant employer sufficient to withstand a motion to dismiss"), *adopted by*, 2016 U.S. Dist. LEXIS 181550 (W.D. Tex. Aug. 2, 2016); *Berrocal v. Moody Petroleum*, Inc., No. 07-22549, 2010 U.S. Dist. LEXIS 40867, at *26-27 n.13 (no finding of horizontal joint employment where two separate employers did not (1) jointly service the public (2) "closely coordinate[]" their operations, (3) permit their employees to supervise the work of employees at the other, (4) "share[] office space, merge[] operations, transfer[] or share[] employees, use[] common funds, order[] merchandise in tandem, utilize[] the same procedures," or (5) share supervisors across entities).[7]

[7] Moreover, given the Third Circuit has not explicitly recognized the horizontal joint employment test (and Defendants' comprehensive review of the case law in this Circuit reveals that no court in the Third Circuit has analyzed this issue), if this Court determines that the *Enterprise* factors should apply to determine whether Mercy and Lourdes are joint employers with respect to Plaintiff, the Complaint still must be dismissed because the Complaint is wholly devoid of any alleged facts to support a finding of joint employment between Mercy and Lourdes under the *Enterprise* factors. In fact, there is not a single allegation that Mercy controls (or has the ability to control) Lourdes or any employee of Lourdes while he or she is working at Lourdes (and vice versa). The Complaint does not contain a single allegation that Mercy has the authority to hire or fire Lourdes' employees (or vice versa). Plaintiff does not allege that either Mercy or Lourdes has the authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours with respect to those employees working at the other entity. There also is no allegation

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's Complaint with prejudice.

POST & SCHELL, P.C.

Dated: August 17, 2018

By: */s/ Andrea M. Kirshenbaum*

Andrea M. Kirshenbaum
akirshenbaum@postschell.com
David E. Renner
drenner@postschell.com
Four Penn Center
1600 John F. Kennedy Blvd., 14th Fl.
Philadelphia, PA 19103
Phone: (215) 587-1000
Facsimile: (215) 587-1444

Counsel to Defendants

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that Mercy or Lourdes exercises (or can exercise) day-to-day supervision, including employee discipline over the employees working for the other health system. Finally, Plaintiff does not allege that Mercy controls any of the employment records for Lourdes' employees, or that Lourdes controls any of the employment records for any of Mercy's employees. Accordingly, under the *Enterprise* factors, Plaintiff's claims of joint employment between Mercy and Lourdes fail.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss with accompanying Memorandum of Law has been electronically filed with the Court and is available for viewing and downloading from the ECF System and thereby has been served upon the following counsel of record, electronically:

Peter Winebrake, Esquire
R. Andrew Santillo, Esquire
Mark J. Gottesfeld, Esquire
WINEBRAKE & SANTILLO, LLC
715 Twining Road, Suite 211
Dresher, PA 19025

Counsel to Plaintiff

POST & SCHELL, P.C.

Dated: August 17, 2018

By: */s/ Andrea M. Kirshenbaum*

Andrea M. Kirshenbaum
akirshenbaum@postschell.com
David E. Renner
drenner@postschell.com
Four Penn Center
1600 John F. Kennedy Blvd., 14th Fl.
Philadelphia, PA 19103
Phone: (215) 587-1000
Facsimile: (215) 587-1444

Counsel to Defendants