**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **ISAAC HARRIS, et al.,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Case No. 17-cv-1371 (APM)** |
| **MEDICAL TRANSPORTATION MANAGEMENT, INC.,** | ) | |
| **Defendant.** | ) | |

**MEMORANDUM OPINION AND ORDER**

I.

Defendant Medical Transportation Management, Inc. ("MTM") moves to compel arbitration of "certain claims" by two of the three named Plaintiffs, Darnell Frye and Isaac Harris. *See* Mot. to Compel, ECF No. 129 [hereinafter Def.'s Mot.].[1] Plaintiffs oppose on a host of grounds but primarily assert that, by failing to timely invoke the right to arbitrate, MTM is foreclosed from doing so. *See* Pls.' Mem. in Opp'n to Def.'s Mot., ECF No. 132 [hereinafter Pls.' Opp'n]. The court agrees, finding that MTM is "in default in proceeding with [ ] arbitration." 9 U.S.C. § 3.

II.

In this Circuit, a defendant seeking to compel arbitration "under Section 3 [of the Federal Arbitration Act] who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has

[1] MTM moves only as to "certain claims" because, as the parties agree, the arbitration agreements at issue cover only a portion of the relevant period during which Plaintiffs Frye and Harris assert MTM failed to comply with federal and state wage laws.

presumptively forfeited that right." *Zuckerman Spaeder LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011). To overcome the presumption of forfeiture, MTM must show its "delay did not prejudice [its] opponent or the court." *Id.* at 923.

Here, MTM did not invoke the right to arbitrate "at the first available opportunity," as the D.C. Circuit has conceived that phrase. MTM moved to dismiss at the outset of the case on August 31, 2017, but did not advance the existence of a binding arbitration agreement as a ground for dismissal. *See generally* Def.'s Mot. to Dismiss, ECF No. 10; Tr. of Mot. Hr'g, ECF No. 40. Nor did MTM raise the right to arbitrate when it answered the Complaint on March 19, 2018. *See* Answer, ECF No. 22. Instead, MTM moved forward with extensive discovery, *see, e.g.*, Order, ECF No. 29, and involved the court in discovery disputes, evidently even after it learned of the existence of the arbitration agreements, *compare* Def.'s Reply in Support of Def.'s Mot., ECF No. 133 [hereinafter Def.'s Reply], at 4 (admitting knowledge of arbitration agreements as of at least March 5, 2019), *with* Mem. in Opp'n to Mot. for Discovery, ECF No. 120 (filed April 12, 2019) (MTM resisting production of trip logs and assignment sheets); Tr. of Status Conf. Hr'g, ECF No. 128 (resolving discovery dispute). During the discovery period, MTM (1) extensively litigated a protective order, *see* Joint Status Report, ECF No. 47; Joint Status Report, ECF No. 50; Order, ECF No. 56; Notice of Proposed Order, ECF No. 61; Order Entering Discovery Confidentiality Order, ECF No. 68; (2) responded to at least one set of interrogatories, *see* Notice, ECF No. 83; (3) responded to at least two sets of requests for production; (4) defended the deposition of a 30(b)(6) witness; and (5) deposed the three named plaintiffs, *see generally* Exhibit List to Mot. for Class Certification, ECF No. 130-2, at i–iv. MTM also filed a third-party complaint against, among other companies, Star Transportation LLC—the party with whom Plaintiffs Frye and Harris entered the arbitration agreements—and opposed Star Transportation's

motion to dismiss. *See* Third Party Compl., ECF No. 24; Mem. in Opp'n to Mot. to Dismiss Third Party Compl., ECF No. 36. And MTM filed an opposition to Plaintiffs' motion for conditional class certification that raised a multitude of supposedly individualized issues among the named Plaintiffs. *See generally* Mem. in Opp'n to Mot. to Certify Class Conditionally, ECF No. 33.

Two full years after the complaint was filed and sixteen months after filing its answer, MTM moved to compel arbitration. It therefore has presumptively forfeited its right to arbitrate. *See Zuckerman*, 646 F.3d at 922; *see also Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 253, 254 (D.D.C. 2017) (finding that the defendant had forfeited its right to move for arbitration after waiting nearly six months to move for arbitration), *aff'd* 729 Fed. App'x 4 (D.C. Cir. 2018); *Cho v. Mallon & McCool, LLC*, 263 F. Supp. 3d 226, 230 (D.D.C. 2017) (finding that the plaintiff had forfeited his right to invoke arbitration by waiting thirteen months into the litigation before requesting arbitration, "impos[ing] substantial costs on Defendants and on th[e] Court").

MTM nevertheless contends that "the circumstances of this action are far from typical," Def.'s Reply at 2, and that its motion to arbitrate is timely for two reasons. First, MTM claims that, because it was not a party to the underlying contracts between Plaintiffs and Star Transportation, which hired Plaintiffs as drivers, it did not know about the arbitration provision until later on in these proceedings. *See id.* at 3, 5 n.2. Second, MTM asserts that Plaintiffs are responsible for the delay, arguing that Plaintiffs effectively concealed the existence of the contracts with Star Transportation through misleading discovery responses. *See id.* at 3–4. These contentions are unpersuasive.

MTM, quite remarkably, never admits when it first learned of the arbitration provision in the Star Transportation contracts. This silence is curious. MTM must demonstrate that it invoked the right to arbitrate at the "first available opportunity." Yet, MTM's refusal to say when it actually

learned about the arbitration provisions prevents the court from determining how long MTM took to file its motion and thus to evaluate the motion's timeliness. It also prevents the court from measuring the costs and resources the parties and the court expended after MTM acquired knowledge of the agreements. MTM's claimed lack of knowledge thus rings hollow when it refuses to disclose when it actually learned of the arbitration agreements. MTM's silence likewise renders disingenuous its effort to blame Plaintiffs. Plaintiffs cannot be held responsible for MTM's delay when the court cannot be sure that MTM did not sit on its claimed arbitration right before raising it with Plaintiffs.

Finally, even under the known timeline, MTM was aware of the Star Transportation contracts at least as of March 5, 2019. *See* Def.'s Reply at 4 (citing Ex. 5). Yet, MTM did not seek to compel arbitration for over four months, filing its motion on July 19, 2019. *See generally* Def.'s Mot. MTM asserts that this delay was caused by Plaintiffs' counsel's denial that Plaintiffs had signed the agreements. Def.'s Reply at 2. Only after Plaintiffs themselves confirmed their signatures during their depositions, MTM insists, was it in a position to move to compel. *Id.* at 2–4. But that explanation is not convincing. After all, MTM had signed contracts in its possession as of March 5, 2019, and it easily could have put the burden on Plaintiffs to deny the validity or legal significance of their signatures by making a motion before the court. Nothing required MTM to wait until Plaintiffs confirmed their signatures under oath before seeking to compel.

III.

With default presumed due to the untimeliness of its motion, MTM nevertheless contends that it can overcome the presumption because, it says, this case would not have "proceeded differently had the motion been filed at an earlier time," and thus Plaintiffs will suffer no prejudice from compelled arbitration. Def.'s Reply at 5. MTM points out that the arbitration provision

affects only a portion of Plaintiffs' claims; therefore, unlike a case in which an early arbitration order terminates or narrows the litigation, these proceedings would have unfolded no differently and Plaintiffs could have continued as named plaintiffs. *See id.* at 5–7.

Although not without some surface appeal, MTM's argument is ultimately unconvincing. MTM bears the burden of overcoming the presumption of default. *See Zuckerman*, 646 F.3d at 923. MTM fails to show that the loss of even a portion of the claims of two of the three named Plaintiffs would not, at this advanced stage of the case, produce some setback to MTM's opponents and have a prejudicial effect. Plaintiffs maintain that,

> [h]ad MTM timely moved to compel arbitration, Plaintiffs could have altered the discovery plan to account for the risks involved with moving forward with Harris and Frye as two named Plaintiffs. Indeed, Plaintiffs could have sought to add additional class representatives from among the 152 similarly situated individuals who[] opted into the [Fair Labor Standards Act ("FLSA")] collective action.

Pls.' Opp'n at 8. Although MTM dismisses these concerns, *see* Def.'s Reply at 6 & n.3, the court is mindful of the importance of named plaintiffs to this case. To secure class certification, for instance, Plaintiffs will have to establish, among other things, that Harris's and Frye's claims are typical of the class and that both men are adequate class representatives. *See* Pls.'s Mot. for Class Certification, ECF No. 134, at 40–42. Likewise, at "stage two" of its FLSA collective action claim, Plaintiffs will have to establish that Frye and Harris are similarly situated to the other members of the collective action; "the more dissimilar plaintiffs are and the more individuated [the employer's] defenses are, the greater doubts there are about the fairness of a ruling on the merits—for either side—that is reached on the basis of purportedly representative evidence." 2 ELLEN C. KEARNS, ET AL., THE FAIR LABOR STANDARDS ACT, 17-179 (3d ed. 2015) (quoting *Johnson v. Big Lot Stores, Inc.*, 561 F. Supp 2d 567, 574 (E.D. La. 2008)). MTM, however, has offered no assurance

that the narrowing of Harris's and Frye's claims would not have an adverse impact Plaintiffs' class and collective action certification efforts.

Moreover, like in a game of chess, pieces lost late in litigation can be more consequential than those lost early on. It is not improbable to believe that, had the arbitrability of Harris's and Frye's claims become an issue sooner, Plaintiffs would have sought to add or substitute other named plaintiffs to fortify any weaknesses created by Harris's and Frye's diminished claims. MTM is asking the court to find that, after two years of vigorous litigation, this case would look no different, and Plaintiffs would be no worse off, if Harris's and Frye's claims were partially excised. MTM has not convinced the court that such a surprise turn would be inconsequential. *Cf. Ambrosio v. Cogent Comm'cns, Inc.*, Case No. 14-cv-2182, 2016 WL 4436091, at *7 (N.D. Cal. Aug. 5, 2016) (finding prejudice where the plaintiffs asserted that "they would have made different strategic decisions had [the defendant] timely evinced its intent to compel[ ]named plaintiff Joan Ambrosio and half the class to arbitration").

The court also notes that MTM seeks to compel arbitration only against named Plaintiffs Harris and Frye. That is puzzling, as presumably some of the 152 opt-in Plaintiffs now before the court also have arbitration agreements with Star Transportation or other transportation providers. Thus, this is not a case where MTM seeks only to compel arbitration of absent class members who are not yet before the court. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07–1827SI, 2011 WL 1753784, at *4 (N.D. Cal. May 9, 2011) (finding it "critically" persuasive in assessing prejudice that "defendants seek to enforce arbitration agreements only against unnamed class members" not previously before the court, "and do not seek to enforce any arbitration agreement against the named plaintiffs"). Such seemingly selective arbitration is concerning in light of the previously explained importance of the named Plaintiffs.

Finally, MTM ignores the additional costs Harris and Frye might incur were the court to order them into arbitration at this late date, even on only a portion of their claims. Although presumably some of the parties' litigation efforts would transfer over to arbitration proceedings, MTM offers no assurances that it would not seek to re-litigate issues in arbitration on which it did not succeed before this court. Courts routinely have found that the risk of re-litigation in arbitration resulting from a late-filed motion to compel to be prejudicial. *See, e.g.*, *Martin v. Yasuda*, 829 F.3d 1118, 1128 (9th Cir. 2016) (citing cases).

IV.

For the foregoing reasons, MTM's Motion to Compel Arbitration is denied.

Dated: December 5, 2019

Amit P. Mehta
United States District Judge