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

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| ISAAC HARRIS, et al.<br>Plaintiffs,<br><br>v.<br><br>MEDICAL TRANSPORTATION MANAGEMENT, INC.,<br><br>Defendant. | ) ) ) ) ) ) ) ) ) ) | Civil Action No. 1:17-cv-01371 |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' CONDITIONAL MOTION TO TOLL LIMITATIONS PERIOD FOR PUTATIVE COLLECTIVE MEMBERS**

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## I. INTRODUCTION

Plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin (collectively, Plaintiffs) have sought an order conditionally certifying a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C.§ 201 *et seq.*, and providing notice to the following collective:

> All individuals who worked under the non-emergency medical transportation (NEMT) contract between Medical Transportation Management, Inc. and the District of Columbia at any time during the period from July 13, 2014 to the present who performed driving services under the contract.

Dkt. 14; 29 U.S.C. § 216(b).[1] On August 31, 2017, before Plaintiffs' request for conditional certification was filed, Defendant Medical Transportation Management, Inc. (MTM) filed a Motion to Dismiss contesting its status as Plaintiffs' employer. *See* Dkt. 10.

This Court does not need to adjudicate MTM's joint-employer status at the conditional certification stage; instead, joint-employer issues generally should be reserved for later merits stages, as part of summary judgment proceedings on a full record.[2] *See Rivera v. Power Design, Inc.*, 172 F. Supp. 3d 321, 327 (D.D.C. 2016) (determining that joint-employer issues are properly reserved for merits decisions later in the proceedings). For further arguments, please see Plaintiffs' Motion for Conditional Certification, Dkt. 14. Plaintiffs therefore urge this Court to adjudicate their Motion for Conditional Certification without delay.

However, Plaintiffs have filed this conditional motion in the event that the Court prefers to adjudicate MTM's Motion to Dismiss, which challenges the sufficiency of the allegations in the complaint, first or simultaneously with Plaintiffs' conditional certification motion. In that

[1] For additional facts and information about their conditional certification request, Plaintiffs incorporate by reference their Motion for Conditional Certification, Dkt. 14.

[2] This timing also avoids potential one-way-intervention problems if a defendant's joint employer status is determined after class certification. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974).

case, Plaintiffs respectfully request that this Court toll the running of the limitations period for all individuals who may become part of Plaintiffs' requested collective. Tolling is critical in FLSA collective actions because the limitations period for each putative collective member continues to run—and their claim continues to diminish or even become obsolete—until they file a consent form opting in to the lawsuit. *See* 29 U.S.C. § 256(b). Therefore, putative collective members face a situation in which they would be prejudiced even though they had acted with all available diligence. Plaintiffs therefore request that the Court toll the limitations period for each putative collective member from the date this Motion is filed until 90 days after Notice has issued.

## II. LEGAL STANDARD

Equitable tolling applies to claims brought under the FLSA, a remedial statute. *See Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 118 (D.D.C. 2012); *cf. Byrd v. Dist. of Columbia*, 807 F. Supp. 2d 37, 59 (D.D.C. 2011) (explaining that, in a Title VII case, the remedial purpose of the statute permitted equitable tolling). The remedial benefits inherent in the FLSA cannot be realized if the employees who suffered unlawful activity do not receive timely notice of the collective action and of their opportunity to opt-in. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Courts therefore apply the doctrine of equitable tolling "as necessary to avoid inequitable circumstances" and "to prevent unfairness to a plaintiff who is not at fault for her lateness in filing"; this is particularly true in cases where absent collective members may face injustice before they have an opportunity to join the case, such as where their claim expires or substantially diminishes before the collective has been conditionally certified. *See, e.g.*, *Iavorski v. U.S. Immigration & Naturalization Serv.*, 232 F.3d 124, 129 (2d Cir. 2000); *Vetri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996); 29 U.S.C. § 256(b). Equitable tolling should be granted "to avoid prejudice to actual or potential opt-in plaintiffs that can arise from the unique procedural posture

of collective actions." *Antonio-Morales v. Bimbo's Best Produce, Inc.*, No. CIV.A.8:5105, 2009 WL 1591172, at *1 (E.D. La. Apr. 20, 2009) (collecting cases).

To access this doctrine, Plaintiffs must show that they "diligently" pursued their rights and that "extraordinary circumstances" exist to support the request for tolling. *See Dyson v. Dist. of Columbia*, 710 F.3d 415, 421-22 (D.C. Cir. 2013).

## III. ARGUMENT

### A. Plaintiffs have been Diligent in Pursuing the Rights of Putative Collective Members

"The diligence required for equitable tolling purposes is reasonable diligence, . . . not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (internal citations and quotation marks omitted). "[T]he diligence prong . . . covers those affairs within the litigant's control." *See Menominee Indian Tribe of Wis. v. United States*, --- U.S. ---, 136 S. Ct. 750, 756 (2016). It is a fact-specific inquiry. *United States v. BCCI Holding (Luxembourg), S.A.*, 916 F. Supp. 1276, 1284-85 (D.D.C. 1996) (noting that "extremely cautious measures" such as "fil[ing] protective claims as a precautionary measure" are not necessary to demonstrate diligence). Tolling has been denied where, for example, a plaintiff fails to investigate the facts or statute of limitations applicable to his claim or otherwise commits excusable neglect. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (denying tolling for "garden variety claim of excusable neglect"); *Norman v. United States*, 377 F. Supp. 2d 96, 101 (D.D.C. 2005) (denying tolling for failure to investigate).

Plaintiffs—some of whom are current employees of MTM subject to the illegal practices at issue in this lawsuit—have acted with reasonable diligence in filing their lawsuit and seeking conditional certification of the collective action claims within 90 days of filing the complaint. *See* Dkt. 1 & 14. Plaintiffs first became aware of the potential for delay in the resolution of their

conditional certification request when MTM filed its Motion to Dismiss. *See* Dkt. 10. Because of the potential overlap between the Motions to Dismiss and for Conditional Certification, Plaintiffs filed the present motion within one month of the Motion to Dismiss and after MTM declined to concur in the request sought herein. This conditional present motion is intended to protect the rights of the putative collective members, who are without ability to protect their own rights within this litigation until a collective has been conditionally certified. There has been no delay in any of Plaintiffs' actions basing this equitable tolling request.

Therefore, the Court should find that Plaintiffs have been diligent in protecting their own and the putative collective's rights such that they may be entitled to equitable tolling of the collective action claims under the FLSA.

B. Extraordinary Circumstances Support Equitable Tolling

Courts routinely find that delays occurring through no fault of the party present a sufficient basis for equitable tolling, particularly where such tolling will avoid extinguishing class members' claims before they receive the "accurate and timely notice" required by the Supreme Court. *See Hoffmann-La Roche Inc.*, 493 U.S. at 170. This is especially true in the context of delays associated with motion practice: "[t]he delay caused by the time required for a court to rule on a motion . . . may be deemed an extraordinary circumstance justifying application of the equitable tolling doctrine." *Yahraes v. Rest. Assocs. Events Corp.*, No. 10-CV-935 (SLT), 2011 WL 844963, at *2 (E.D.N.Y. Mar. 8, 2011) (collecting cases); *see also Kellgren v. Petco Animal Supplies, Inc.*, No. 13cv644-L (KSC), 2014 WL 2558688, at *4-5 (S.D. Cal. June 6, 2014) (equitably tolling statute of limitations where delay caused by the defendants' motion to dismiss would unfairly prejudice potential collective members); *Ruffin v. Entm't of the E. Panhandle*, No. 3:11-CV-19, 2012 WL 28192, at *2-3 (N.D. W. Va. Jan. 5, 2012) (equitably

tolling in light of delays due to motion practice).[3] The D.C. Circuit specifically follows Supreme Court case law that allows tolling "where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon." *Latson v. Sessions*, --- F. Supp. 3d ---, 2017 WL 2729071, at *4 (D.D.C. June 23, 2017).

In *Lee v. ABC Carpet & Home*, the court specifically explained that extensive motion practice can serve as "exceptional circumstances" supporting equitable tolling and that tolling is in the "interest of fairness" to potential collective members who had not yet been afforded an opportunity to opt into the action. 236 F.R.D. 193, 200 (S.D.N.Y. 2006) (tolling granted where court had ordered parties to put their collective action motion "on hold" pending resolution of summary judgment motion, which thus delayed ruling on notice for several years). Similarly, in *Yahraes*, the court determined that tolling would be fair to absent collective members and not prejudicial to defendants, who were put on notice in the initial complaint of the potential collective action claims and their limitations periods. *See* 2011 WL 844963, at *2-3.

This is precisely the situation here: delays engendered by the adjudication of pending motions have the potential to injure absent putative collective members, through no fault of their own. In the interests of fairness, this Court should toll the limitations period to protect these individuals and to provide the Court sufficient space to rule on the pending motions. These fairness concerns carry extra weight here, because the doctrine of equitable tolling honors "the remedial purpose of the legislation as a whole." *Webb v. United States*, 66 F.3d 691, 696 (4th Cir. 1995) (citing *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982)).

Tolling will not unduly prejudice MTM. MTM has been aware of the collective action

[3] Courts also grant equitable tolling for other situations involving similar administrative delay. *See, e.g.*, *Weaver v. Bratt*, 421 F. Supp. 2d 25, 38 (D.D.C. 2006) (noting that the D.C. Circuit allows tolling for "delay caused by a court's administrative procedures").

allegations—and their limitations periods—since Plaintiffs filed their initial complaint on July 13, 2017. *See* Dkt. 1. Tolling the statute of limitations will not alter MTM's exposure or unfairly surprise it with new claims; instead, it will only preserve the existing claims while allowing MTM to adequately protect its own interests and contest the sufficiency of Plaintiffs' current claims against it. Tolling is therefore the fairest outcome for both parties. Permitting the limitations period for putative collective members to continue running because of a pending motion to dismiss would allow defendants to have improper control over the viability of putative collective members' claims: they could diminish these collective claims—and their own liability—by engaging in motion practice, whether proper or improper. Equitable tolling will ensure protection of the putative class members' significant interest in preserving their claims and will impose no surprise or undue prejudice on MTM.

The only prejudice here would be suffered by the putative collective members, who may not be aware of their opportunity to participate in this case until they receive a future notice. These workers' claims are diminishing with every passing day as the statute of limitations continues to run, and their claims may soon be lost altogether due to factors out of their control. For these reasons, the putative collective members' FLSA claims should be tolled from the filing of this Motion until such time as the Court issues an opinion on Plaintiffs' Motion for Conditional Certification.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Toll the Limitations Period for Putative Collective Members should be granted, and the limitations period should be tolled from the date this Motion is filed until 90 days after Notice has issued.

Dated: October 2, 2017

Respectfully submitted,

*/s/ Miriam R. Nemeth*

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