IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al. Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	Civil Action No. 1:17-cv-01371 (APM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION

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Over two years into litigation and on the eve of Plaintiffs' filing of their Motion for Class Certification, Defendant Medical Transportation Management, Inc. (MTM) moved the Court to compel arbitration of portions of certain claims made by two of the three named Plaintiffs—Isaac Harris and Darnell Frye. MTM, however, was not a party to the agreements it seeks to enforce and, in any event, has forfeited and/or waived any right to compel arbitration. Moreover, Harris and Frye dispute that they entered into these agreements, creating issues of fact as to whether an enforceable agreement to arbitrate exists at all. Thus, the Court should deny MTM's motion.

BACKGROUND

On July 13, 2017, plaintiffs Isaac Harris, Darnell Frye, and Leo Franklin filed this action, on behalf of themselves and others similarly situated, against MTM bringing claims under the Fair Labor Standards Act (FLSA), the D.C. Minimum Wage Act, the D.C. Living Wage Act, and the D.C. Wage Payment and Collection Law, as well as breach of contract claims as third-party beneficiaries. *See* Compl. (Doc. 1). As relevant here, Harris alleged that he was jointly employed by MTM and Star Transportation from approximately March 11, 2016, through approximately September 24, 2016, and jointly employed by MTM and MBI Logistics LLC from approximately November 2016 through the date of the filing of the complaint. *Id.* ¶ 49. Frye alleged that he was jointly employed by MTM and Star Transportation from approximately October 2015 through approximately June 2016. *Id*. ¶ 67. On August 31, 2017, MTM moved to dismiss all of Plaintiffs' claims with prejudice under Rule 12(b)(6). *See* Mot. to Dismiss (Doc. 10). On March 5, 2018, the Court denied MTM's motion to dismiss as to Plaintiffs' statutory claims and granted MTM's motion to dismiss as to Plaintiffs' breach of contract claims. *See* Mem. Op. (Doc. 21).

While MTM's motion to dismiss was pending, Plaintiffs moved for conditional certification of a collective action under the FLSA, *see* Pls. Mot. for Conditional Certification

(Doc. 14), which MTM opposed primarily by arguing that the putative collective members were not "similarly situated," Def. Opp'n to Mot. for Conditional Certification (Doc. 33). On July 17, 2018, the Court granted Plaintiffs' motion, conditionally certifying the collective action and ordering that notice be issued to putative members of the collective action. *See* Order of July 17, 2018 (Doc. 48); *see also* Collective Action Notice (Doc. 73). Following the certification of the collective, 152 plaintiffs have opted in to the collective action. *See* Pls. Mem. in Supp. of Mot. for Class Certification 18 n.15 (Doc. 130-2).

MTM filed an answer on March 19, 2018. *See* Answer (Doc. 22). On April 18, 2018, the parties filed a largely agreed-upon discovery plan, which provided for approximately six months of class certification discovery. *See* Joint Rule 26(f) Plan (Doc. 28). The parties thereafter engaged in extensive discovery under the Court's supervision and also jointly requested extensions of the class-certification discovery deadline. *See, e.g.*, Joint Status Report of Oct. 26, 2018 (Doc. 84).

On March 5, 2019, counsel for MTM—for the first time—requested that counsel for Plaintiffs dismiss portions of the claims of Isaac Harris and Darnell Frye in light of arbitration agreements that MTM contended applied to those claims. Llewellyn Decl. ¶ 2. Specifically, counsel for MTM stated that Harris and Frye had entered into independent contractor agreements with Star Transportation that contained arbitration provisions and that MTM sought to enforce those arbitration agreements as to Harris's and Frye's respective claims concerning their work at Star Transportation. *Id.* ¶ 2. On March 8, 2019, counsel for Plaintiffs responded by email, stating that they would not agree to dismiss the claims. *Id.* ¶ 3.

ARGUMENT

I. MTM has forfeited any right to compel arbitration.

As this Court recently explained, "[a] defendant 'who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing [its] first responsive pleading or motion to dismiss, has presumptively forfeited that right.'" *Kelleher v. Dream Catcher, LLC*, No. 1:16-cv-02092 (APM), 2017 WL 4712082, at *1 (D.D.C. June 2, 2017) (quoting *Zuckerman Spaeder LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011)), *aff'd on recons.*, 263 F. Supp. 3d 253, *aff'd*, 729 F. App'x 4 (D.C. Cir. 2018) (per curiam). Although the defendant can "overcome the presumption of forfeiture if it shows that its delay 'imposed no or little cost upon opposing counsel and the courts,'" the defendant will not meet this standard where the plaintiff expends resources engaging in litigation and discovery that it would not have "had Defendant invoked its right to arbitrate at the outset." *Id.* at *1–2 (quoting *Zuckerman*, 646 F.3d at 923).

This case is on all fours with *Kelleher*. Here, MTM filed both a pre-answer motion to dismiss and an answer, neither of which invoked a purported right to arbitrate. *See* Mot. to Dismiss; Answer. Thus, MTM failed to "assert its right to arbitrate at the first available opportunity." *Id.* at *1; *see Kelleher*, 729 F. App'x at 6. In fact, nearly two years elapsed between MTM's "first available opportunity" to invoke arbitration and its actual invocation of arbitration—more than four times *longer* than the five-month delay found to be untimely in *Kelleher*.[1] *See* 2017 WL 4712082, at *1; *see also EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, No. 16-cv-00333

[1] Counsel for MTM raised arbitration with counsel for Plaintiffs slightly earlier, on March 5, 2019. Llewellyn Decl. ¶ 2. Eighteen months, however, is likewise well after MTM's "first available opportunity" to invoke arbitration. Moreover, communications between counsel do not constitute an "invocation" of a right to arbitrate. *See Kelleher*, 263 F. Supp. 3d at 256 (holding letter between counsel insufficient invocation of right to arbitrate and that such must be "assert[ed] … as an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure or as the basis for a motion to dismiss under Rule 12").

(APM), 2019 WL 3430558, at *1 & n.1 (D.D.C. July 30, 2019) (explaining "four months of silence" between asserting right to arbitrate as affirmative defense in answer and filing motion to compel arbitration "is not the type of 'invocation' 'at the first opportunity' that the [D.C.] Circuit had in mind in *Zuckerman*"). Moreover, the parties were actively engaged in litigating this matter during that period, expending considerable resources and time on the prosecution and defense of this case in this forum. After MTM responded to the complaint with its motion to dismiss, the parties (1) litigated MTM's motion to dismiss, (2) litigated the Plaintiffs' motion for conditional certification of their FLSA claims, (3) exchanged Rule 26 initial disclosures, (4) began and completed discovery related to class certification, and (5) engaged the Court in several discovery disputes.[2] All of this litigation activity occurred before the pending motion was filed. Further, MTM has brought third-party claims against Star Transportation related to Plaintiffs' claims against MTM, *see* Third-Party Compl. (Doc. 24), and the Court was required to adjudicate a motion to dismiss those claims filed by Star Transportation, *see* Mot. to Adopt MBI Logistics, LLC's Pleadings (Doc. 46); July 17, 2018 Order (Doc. 49). Because the significant litigation that has ensued in this forum prior to MTM invoking arbitration "imposed substantial costs on Plaintiff[s] and required the attention of the Court," MTM cannot "overcome the presumption that it forfeited its right to arbitrate after failing to invoke that right at the earliest opportunity." *Kelleher*, 2017 WL 4712082, at *2 (citing *Zuckerman*, 646 F.3d at 923–24); *accord Kelleher*, 729 F. App'x at 6–7.

Nor can the timing of when MTM first learned of the existence of these arbitration agreement excuse its forfeiture. MTM does not state when it identified the arbitration agreements

[2] Pursuant to an agreement between the parties, Plaintiffs do not rely on any cost related to MTM's depositions of Harris or Frye as evidence of forfeiture.

that it seeks to enforce, instead *implying* that it learned of the existence of the agreements when it obtained them from Star Transportation at some unidentified point during this litigation. *See* MTM Mot. to Compel 2–4. As this Court concluded in *Kelleher*, however, "it does not matter … that [MTM]'s counsel did not learn of the arbitration clause until … after suit was filed. All that matters is *when* [MTM] first invoked the right to arbitrate." 263 F. Supp. 3d at 255. Additionally, as the Court has already ruled, MTM's agreement with Star Transportation permitted it to obtain evidence of any arbitration agreements at any time and certainly at the outset of this litigation, rather than nearly two years after it was commenced. *See* Order of Aug. 28, 2018 (Doc. 69) ("[T]he unmistakable picture that emerges from the Services Agreement, when viewed in its entirety, is that MTM enjoys broad authority to access transportation's providers' records to ensure compliance with laws, standards, and MTM's policies.").

Accordingly, because MTM failed to invoke any right to arbitrate at the first available opportunity and cannot overcome presumptive forfeiture, MTM's motion to compel arbitration should be denied.

II. MTM has waived any right to compel arbitration.

The D.C. Circuit has firmly established that "a party may waive its right to arbitration by acting 'inconsistently with the arbitration right.'" *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008) (quoting *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987)). To determine whether "the defaulting party has acted inconsistently with the arbitration right," the court applies a totality of the circumstances test. *Id.* (quoting *Nat'l Found. for Cancer Research*, 821 F.2d at 774). "[A]ctive participation in a lawsuit" is "[o]ne example" of conduct inconsistent with the right to arbitrate. *Id.* (quoting *Nat'l Found. For Cancer Research*, 821 F.2d at 775). Further, the court can "consider prejudice to the objecting

party" as part of its analysis, but "a finding of prejudice is not necessary" to a finding of waiver. *Id.* (quoting *Nat'l Found. for Cancer Research*, 821 F.2d at 777).

As the Court has previously explained, forfeiture is the proper analysis where the party invoking a right to arbitration fails to make a "timely assertion" of that right. *Kelleher*, 263 F. Supp. 3d at 255 (quoting *Zuckerman*, 646 F.3d at 922). To the extent the Court determines the waiver analysis is pertinent, however, MTM's actions also constitute a waiver of any right to arbitrate.

A. MTM has acted inconsistently with the right to arbitrate.

Over the course of two years of hotly contested litigation, MTM has taken several actions that independently and cumulatively are inconsistent with any right to arbitrate. First, MTM sought judicial resolution on the merits of the claims—an action that is clearly inconsistent with a right to arbitrate. *See Khan*, 521 F.3d at 427 (filing motion "for dismissal of the complaint, or, in the alternative, for summary judgment" that incorporated matters outside the pleadings sought ruling on "merits issues" that constituted waiver); *accord Newirth ex rel. Newirth v. Aegis Senior Communities, LLC*, --- F.3d ----, No. 17-17227, 2019 WL 3311329, at *3–4 & n.10 (9th Cir. July 24, 2019) (explaining that the court has repeatedly found filing of motion to dismiss claims with prejudice is inconsistent with right to arbitrate); *Forby v. One Techs., L.P.*, 909 F.3d 780, 784 (5th Cir. 2018) (holding that seeking "full dismissal on the merits" under Rule 12(b)(6) supports finding of waiver); *Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 501 (7th Cir. 2018) (holding motion to dismiss "seeking a determination that the plaintiff's legal theory does not state a claim is evidence of waiver because success by the defendant ends the case just as surely as a judgment entered after a trial"); *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922 (8th Cir. 2009) (holding that motion to dismiss seeking "decision on the merits" of arbitrable claims was

inconsistent with right to arbitration). Specifically, at the start of this litigation, MTM filed a motion to dismiss all claims that explicitly sought a ruling on the merits of Harris's and Frye's claims, requesting that the Court "dismiss, with prejudice, all counts set forth in Plaintiffs' Complaint." Mem. in Supp. of Def. Mot. to Dismiss 22 (Doc. 10) (Def. MTD Mem.); *see Havens v. Mabus*, 759 F.3d 91, 98 (D.C. Cir. 2014) (explaining that "dismissal with prejudice" is an "adjudication upon the merits" (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001))). Indeed, MTM's motion sought, among other things, rulings that (1) MTM was not liable as a joint employer under federal or D.C. law, Def. MTD Mem. 9–16; (2) MTM was not liable as a general contractor under D.C. Law, *id.* at 16–18; (3) the D.C. Living Wage Act did not apply to Plaintiffs' work for MTM, *id.* at 19–20; and (4) Plaintiffs could not enforce MTM's contractual obligations as third-party beneficiaries, *id.* at 20–22.[3] MTM's motion to dismiss was plainly not limited to "dismissal of a frivolous claim," *Khan*, 521 F.3d at 427—nor could it be described as "perfunctory," *In re Mirant Corp.*, 613 F.3d 584, 589 (5th Cir. 2010), seeking "clarification," *Hooper*, 589 F.3d at 922, or limited to jurisdictional or procedural arguments, *Smith*, 907 F.3d at 501; *Newirth*, 2019 WL 3311329, at *4 n.10. And it sought merits determinations of Harris's and Frye's claims. Such action was plainly inconsistent with a right to arbitrate.

After the Court largely denied MTM's motion to dismiss, MTM continued to engage the judicial process. MTM filed an answer to the complaint raising several affirmative defenses, *see* Answer at 16–17, but did not invoke any right to arbitration. *Cf. Partridge v. Am. Hosp. Mgmt. Co.*, 289 F. Supp. 3d 1, 17 (D.D.C. 2017) ("[C]ourts in this jurisdiction do not fault parties for

[3] MTM in fact succeeded in obtaining a merits ruling on Plaintiffs' third-party beneficiary claim. Mem. Op. 28–29.

seeking to compel arbitration *in an answer* that also asserts counterclaims and defenses." (emphasis added)). MTM and Plaintiffs have engaged in extensive discovery, on several occasions enlisting the Court's involvement to mediate or resolve disputes about the scope of discovery.[4] *See Khan*, 521 F.3d at 425–26 (noting that "extensive pretrial discovery" supports finding of waiver).

Viewed in totality, MTM's actions can only be described as inconsistent with the right to arbitrate. MTM has sought merits rulings from the Court on Plaintiffs' claims and benefitted from extensive pretrial discovery, only to attempt to swap forums immediately prior to briefing on the issue of class certification.

B. Plaintiffs would be prejudiced if arbitration were compelled at this late date.

As explained above, MTM's actions in this case caused Plaintiffs to expend considerable time and incur expenses related to the claims that MTM now seeks to have arbitrated. Plaintiffs have responded to MTM's motion to dismiss, met and conferred with MTM regarding a discovery plan, prepared and exchanged initial disclosures, and propounded and responded to written discovery. *See supra* Part I.A. Moreover, Plaintiffs are further prejudiced by MTM's timing in moving to arbitrate significant portions of two of the three named Plaintiffs' claims, as the motion appears timed to subvert Plaintiffs' ability to obtain class certification by picking off—through arbitration—some of the claims of two of the three named Plaintiffs. Had 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 whom opted into the FLSA collective action. That MTM waited to seek to compel arbitration can

[4] Pursuant to an agreement between the parties, Plaintiffs do not rely on MTM's depositions of Harris and Frye as evidence of waiver.

only be interpreted as a tactic to thwart class certification. The substantial prejudice that would fall upon Plaintiffs further confirms that the totality of the circumstances supports a finding of waiver.

C. MTM's delay in seeking arbitration is not justified.

The Court should reject any attempt by MTM to justify its delay in moving to compel arbitration based on the timing of its receipt of the arbitration agreements from its subcontractor. First, although MTM does not identify when it first became aware of these arbitration agreements, it knew before March 5—the date counsel for MTM first raised the issue with counsel for Plaintiffs. Even if it first learned about the agreements shortly before that date, MTM waited more than four months to move to compel, permitting the case to proceed on the agreed-upon schedule for discovery on class certification and, only after discovery ended, attempting to undo two years of litigation at the last possible moment. This delay alone is both inconsistent with a right to arbitrate and prejudicial to Plaintiffs.

Second, MTM seeks to rely on "agency principles" to enforce the arbitration agreements to which it is not a party, apparently arguing that Star Transportation was MTM's agent for purposes of employing Harris and Frye, such that MTM can enforce the arbitration agreements. *See* Mot. to Compel 9 ("The Complaint alleges not only Star was a subcontractor to MTM [sic], but also that MTM was Plaintiffs' employer or joint employer. Accordingly, Plaintiffs' own allegations establish the necessary agency relationship.").[5] If Star Transportation is MTM's agent, knowledge of the arbitration agreements, dated 2016, must be imputed to MTM. *See Sears,*

[5] MTM cites *Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.*, 957 F. Supp. 839 (S.D. Miss. 1997), as support but without explanation. That case discusses the ability of a non-signatory to enforce an arbitration agreement where "the non-signatory is alleged to be the agent of a signatory." *Id.* at 841. Here, however, none of Plaintiffs' allegations can be fairly read as establishing that MTM was an agent of Star Transportation. Rather, Star Transportation was a subcontractor of MTM, and Star and MTM jointly employed Harris and Frye. *See* Compl.

Roebuck & Co. v. U.S. Postal Serv., 134 F. Supp. 3d 365, 380 (D.D.C. 2015) (explaining that "principal[] is charged with its agent's knowledge"), *rev'd in part on other grounds*, 844 F.3d 260 (D.C. Cir. 2016); *Nat'l R.R. Passenger Corp. v. Notter*, 677 F. Supp. 1, 6 (D.D.C. 1987) ("Under principles of agency law, a principal is charged with knowledge of facts known to his agent which the agent had a responsibility to bring to the attention of the principal." (citing *McHugh v. Duane*, 53 A.2d 282, 285 (D.C. 1947)). Thus, if MTM were correctly relying on agency principles as a basis to compel arbitration, there would be no question that MTM made a deliberate choice to engage in this judicial forum, inconsistent with any right to arbitrate.

III. MTM cannot enforce the arbitration agreements.

The arbitration agreements that Harris and Frye purportedly agreed to with Star Transportation are one provision of a multi-provision "Independent Contractor Agreement" and provide that "[a]ny controversies arising out of the terms of this Agreement or its interpretation shall be settled in arbitration …." Gelgelu Decl. Ex. A ¶ 11 (Doc. 129-2); Gelgelu Decl. Ex. B ¶ 15 (Doc. 129-3). As a nonsignatory to those agreements, MTM seeks to enforce the arbitration agreements on two bases: First, MTM argues "the issues in dispute are intertwined with the agreement[s]." Mot. to Compel 5. Second, MTM asserts "these Plaintiffs are bound to arbitrate their claims under the principles of agency." *Id.* at 9. Neither provides a basis for MTM to enforce these arbitration agreements.

A. "Under the doctrine of estoppel, a signatory to an arbitration agreement may be compelled to arbitrate with a non-signatory when the non-signatory is seeking to resolve issues that are intertwined with an agreement that the signatory has signed." *Fox v. Computer World Servs. Corp.*, 920 F. Supp. 2d 90, 103 (D.D.C. 2013). But the arbitration agreement itself is limited to controversies that "aris[e] out of" either the terms of the independent contractor agreements or

the interpretation of the terms of those agreements. Harris's and Frye's respective statutory claims under the FLSA and D.C. wage laws do not "arise out of" the terms of those agreements nor rely on any interpretation of those agreements. Indeed, Plaintiffs have consistently maintained—and the law is clear—that statutory wage requirements apply regardless of the language of any contract between an employee and employer. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("[P]utting on an 'independent contractor' label does not take the worker from the protection of the [FLSA]."); Mem. Op. 8–9 (explaining that coverage under the FLSA "turns on the 'economic reality' of the employment arrangement rather than 'technical concepts'" (quoting *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001)); D.C. Code § 32-1305(a) ("Except as herein provided, no provision of this chapter may be contravened or set aside by private agreement."). Accordingly, although MTM is correct that Plaintiffs' claims "center[] around the services [Plaintiffs provided] and the compensation for those services that they received," it does not follow that "their claims arise out of their [independent contractor] Agreements." Mot. to Compel 8. Rather, regardless of what these agreements say about Harris's and Frye's respective duties and compensation, what matters for purposes of their claims is the work they actually performed and the wages they were actually paid. *See Morrison*, 253 F.3d at 11 ("Facile labels and subjective factors … are only relevant to the extent they mirror 'economic reality.'" (internal brackets omitted)). Because Harris and Frye have not brought any claims against Star Transportation in this litigation, and none of Harris's and Frye's respective claims "arise out of" these independent contractor agreements, their statutory wage claims against MTM are not intertwined with those agreements.

The case law cited by MTM does not require a different outcome. *Sakyi v. Estee Lauder Cos.*, 308 F. Supp. 3d 366 (D.D.C. 2018), involved a far broader arbitration provision than the

ones at issue here. In that case, the arbitration provision was not limited claims "arising out of" the agreement but, instead, covered "[a]ny dispute … against [the signatory] or any of its parents, subsidiaries, officers, directors, or employees, without limitation, or which [the signatory] may bring against me, no matter how characterized, pleaded or styled." 308 F. Supp. 3d at 371. Because the plaintiff had sued both the signatory and two non-signatories "assert[ing] the exact same claims, based on the same operative set of facts" and the arbitration provision covered the claim against the signatory, the court held the non-signatories could also compel arbitration of the claims brought against them. *Id.* at 385–86.

Similarly, in *Fox*, 920 F. Supp. 2d 90, the arbitration provision covered "all claims, disputes or controversies … whether or not arising out of [the employee's] employment, or its termination," including those against the signatory's "respective officers, directors, employees or agents," and further specified that the agreement covered "[c]laims for wages or other compensation due" and "[c]laims for violation of any federal, state, or other government law, statute, regulation, [or] ordinance." *Id.* at 94. Again, because the plaintiff had sued both the signatory and a non-signatory asserting "identical" claims and the arbitration provision covered the claims against the signatory, the court held the non-signatory could also compel arbitration of the claims brought against it. *Id.* at 103–04.

Here, Harris and Frye have *not* sued the signatory—Star Transportation—and, as explained above, the arbitration provision is much narrower. Far from covering the statutory wage claims Plaintiffs brought against MTM as a joint employer with Star Transportation, the arbitration provision at issue is limited to claims "arising out of" the independent contractor agreements or their terms. Gelgelu Decl. Ex. A ¶ 11; Gelgelu Decl. Ex. B ¶ 15.

Likewise, the arbitration provision in *Riley v. BMO Harris Bank, N.A.*, 61 F. Supp. 3d 92 (D.D.C. 2014), was far broader and, additionally, involved claims that explicitly relied on the agreement at issue. Indeed, the arbitration provision there explicitly covered not only "any and all claims, disputes or controversies" between the signatories but also all claims "arising or relating to" the underlying loan agreement and "[a]ll disputes including any Representative Claims against [the signatory] *and/or related third parties*." *Id.* at 96. Moreover, the court concluded the plaintiff's claims "rely on the specific terms of the underlying loan agreements"; in fact, the plaintiff's claims were predicated on "the illegality of the terms in the loan agreements, and Defendants' knowledge of it," such that the claims against the non-signatories were clearly "intertwined with" the agreements. *Id.* at 99–101. Again, the arbitration provisions at issue here are much narrower, and none of Harris's or Frye's claims depend on any term in the independent contractor agreements.

Finally, *Johansson v. Central Properties, LLC*, 320 F. Supp. 3d 218 (D.D.C. 2018), principally involved a signatory employer moving to compel arbitration, and the employee contending that the independent contractor agreement containing the arbitration provision applied to one position he held but not a separate position for which he sought unpaid wages. *Id.* at 223–24. The court rejected the employee's position, explaining that discovery showed he had held only one position—the one admittedly covered by the arbitration provision. *Id.* at 224. ("[T]he independent contractor agreement … was intended to cover the one and only employment relationship Johansson and Central Properties entered into. This dispute—which centers on Johansson's compensation for services rendered under that relationship—clearly 'arises out of' that agreement."). The court then went on to hold that the plaintiff's claims against the *owner* of the signatory employer were sufficiently intertwined with his claims against the company itself to allow the owner to compel arbitration of the claims as well. *Id.* at 225. Harris's and Frye's claims

do not rely on any hairsplitting between positions they held, nor have they brought claims against Star Transportation or its owner, Tsegaye Gelgelu.

In short, the arbitration provisions in the Star Transportation agreements are narrow and do not apply to the statutory wage claims raised by Harris and Frye. Moreover, MTM—as a non-signatory—cannot enforce these arbitration provisions on estoppel grounds as the independent contractor agreements containing the arbitration provision neither "need to be relied upon [n]or are integral to establishing the violation[s]" alleged by Harris and Frye. *Riley*, 61 F. Supp. 3d at 100 (internal quotation marks omitted).

B. MTM's motion is unclear as to precisely what "principles of agency" it is relying on to enforce the arbitration provisions in Star Transportation's agreements. Mot. to Compel 9. As previously explained, MTM appears to contend that it can enforce the arbitration provisions contained in agreements entered into by its agent, Star Transportation. *See supra* Part II.C. But MTM cannot declare that Star Transportation is its agent for purposes of enforcing these arbitration provisions and simultaneously deny that Star Transportation is its agent for purposes of joint employer liability. The common-law understanding of employment, which is narrower than the operative definition in FLSA and D.C. wage laws, relies on "traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Thus, if MTM concedes that Star Transportation is its agent with respect to these agreements, MTM necessarily is a joint employer of the drivers under the far broader definition of employment applicable here. *See also* 29 U.S.C. § 203(d) (defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee"). Yet MTM has repeatedly disputed that it is a joint employer of the drivers. *See, e.g.*, MTD Mem. 9–16. MTM cannot reasonably claim its subcontractor as an

agent to derive a benefit, while it continues to disclaim the joint employer finding that would necessarily follow.

IV. Disputes of fact preclude compelling arbitration.

"[W]hether any agreement to arbitrate exists … 'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 87 (D.D.C. 2016) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Further, in determining whether an agreement to arbitrate exists, the Court applies "ordinary state-law principles that govern the formation of contracts." *Id.* (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Here, to the extent any agreement exists, it would have been formed in D.C., with D.C. residents Harris and Frye, and would have been performed in and applied to conduct in D.C. Therefore, D.C. law applies. *See id.* (citing *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997)).[6]

Under D.C. law, "an enforceable contract does not exist unless there has been a 'meeting of the minds' as to all material terms. In other words, a contract is not formed unless the parties reach an accord on all material terms and indicate an intention to be bound." *Id.* (quoting *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 746 (D.C. Cir. 2000)). Accordingly, "any apparent contract is void if the minds of the parties do not meet honestly and fairly and without mistake or mutual misunderstanding upon all the issues involved." *Id.* (quoting *Estate of Taylor v. Lilienfield*, 744 A.2d 1032, 1035 (D.C. 2000)). Moreover, "the party asserting the existence of a contract bears the

[6] The agreements also provide that D.C. law applies. Gelgelu Decl. Ex. A ¶ 10; Gelgelu Decl. Ex. B ¶ 14. However, because these provisions appear on pages that Plaintiffs contend were not part of any agreement between the parties, Plaintiffs do not rely on these provisions for purposes of determining the applicable state law.

burden of proving that there has been a 'meeting of the minds,' or mutual assent, as to all material terms." *Id.* (quoting *Am. Prop. Const. Co. v. Sprenger Lang Found.*, 768 F. Supp. 2d 198, 202 (D.D.C. 2011)).

Here, MTM has not met its burden of proving that there was a "meeting of the minds" as to the existence of the agreements at issue, or at least as to any agreement to arbitrate. Harris, as MTM agrees, testified that the "agreement" he was given consisted of only one page—the signature page. *See* Harris Dep. 126:4–132:4 (Doc. 129-5). More specifically, Harris testified he was given the signature page and told only that he needed to sign "to verify the fact that [he] had [his] credentials in order" to drive for MTM. *Id.* at 127:2–3. Harris further testified that he was never given a copy. *Id.* at 127:22–128:4. As such, there was plainly no "meeting of the minds" as to the arbitration provision because it was not contained on the signature page—the only page ever shown to Harris as constituting any "agreement" between himself and Star Transportation.

MTM relies on the declaration of Tsegaye Gelgelu and Harris's signature on the one page he was shown, but neither is sufficient to carry its burden. As to Gelgelu's declaration that Harris was given a "complete cop[y]" and "had the opportunity to review [it]," Decl. of Tsegaye Gelgelu ¶ 8 (Doc. 129-1), such conflicting testimony shows only that there is a genuine issue of material fact, meaning that MTM's motion to compel must be denied. *See Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865 (D.C. Cir. 2008) (explaining that motion to compel arbitration is properly viewed as motion for summary judgment on "the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate"); *McMullen,* 164 F. Supp. 3d at 89 (explaining that standard for establishing an enforceable arbitration agreement "echoes the applicable Rule 56 standard: if Plaintiff raises a genuine issue of material fact as to the making of the agreement to arbitrate, courts will not compel arbitration"). Harris's signature, considered in

light of his testimony, shows only that he agreed to the provisions appearing on the one page he was given—which does not include an arbitration provision. *See* Gelgelu Decl. Ex. B at 4.

As reflected in the case law cited by MTM, under D.C. law, a person's signature on a contract generally establishes "mutuality of assent" binding the party to the contract, unless there are "special circumstances" present that prevent enforcement of the contract. *Emeronye v. CACI Int'l, Inc.*, 141 F. Supp. 2d 82, 85–86 (D.D.C. 2001); *see also Brown v. Dorsey & Whitney, LLP*, 267 F. Supp. 2d 61, 80–82 (D.D.C. 2003); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 50–51 (D.D.C. 2001). The cases cited by MTM involved plaintiffs who either did not recall signing the agreement, *Emeronye*, 141 F. Supp. 2d at 85, did not read the arbitration provision when provided the opportunity to do so, *Brown*, 267 F. Supp. 2d at 81, or did not understand the "implications" of the arbitration provision, *Nur*, 142 F. Supp. 2d at 51. In contrast, Harris specifically testified he was given only one page, told his signature was only to verify his credentials, and was never given a copy. Harris. Dep. 126:4–132:4. As *Brown* specifically notes, "intentionally withholding" material terms of an agreement—such as the precise arbitration provision attempting to be enforced—would be a "special circumstance" invalidating a signature on a contract. 267 F. Supp. 2d at 82.

In any event, whether considered a "special circumstance" or as evidence that there was no "meeting of the minds," Harris's testimony makes clear that he did not agree to the arbitration provision. Accordingly, there is a genuine issue of material fact as to whether Harris agreed to arbitrate that must be resolved by a jury, such that MTM's motion to compel must be denied. *See Jin v. Parsons Corp.*, 366 F. Supp. 3d 104, 109 (D.D.C. 2019) (explaining in case where parties disputed whether employee assented to arbitration agreement that "[a] jury may credit [the

employer's] evidence and discredit [the employee's] sworn declaration, but for now there is a genuine factual dispute" as to whether agreement to arbitrate existed).

As to Frye, while ordinarily the inability to recall signing an agreement containing an arbitration provision may be insufficient to challenge its enforceability, Harris's testimony is sufficient to establish a genuine issue of material fact as to Frye's agreement as well because Harris's testimony directly contradicts Gelgelu's testimony and, thus, draws Gelgelu's credibility into question. To determine whether a valid arbitration agreement exists between Harris and Star Transportation, a jury would be required to assess the credibility of the respective testimony. If the jury concludes that Harris is truthful, that will necessarily require concluding that Gelgelu has mispresented the facts concerning Harris's signing of any agreement. Such a finding would likewise be probative and relevant to determining whether Gelgelu similarly misrepresented the circumstances surrounding Frye's alleged signing of any agreement, particularly in light of the fact that Frye does not recall signing the agreement and the arbitration provision does not appear on any page bearing a signature. *See* Frye Dep. 75:1–8, 75:20–76:14 (Doc. 129-4); Gelgelu Decl. Ex. A at 2.

Because there exist genuine issues of material fact as to whether Harris and Frye agreed to the arbitration provisions at issue, MTM's motion to compel must be denied.

V. The arbitration provisions apply to only a portion of Harris's and Frye's work with Star Transportation.

Finally, both Harris and Frye alleged that they worked for MTM through Star Transportation prior to the dates on the agreements at issue. *Compare* Compl. ¶¶ 49, 67 *with* Gelgelu Decl. Ex. A at 1 *and* Gelgelu Decl. Ex. B at 1. Because the arbitration provisions are limited to "[a]ny controversies arising out of the terms of this Agreement or its interpretation," Gelgelu Decl. Ex. A ¶ 11; Gelgelu Decl. Ex. B ¶ 15, they do not apply to work occurring prior to

the existence of these agreements. Accordingly, if the Court grants MTM's motion to compel, the order should be limited to compelling arbitration of (1) Harris's claims concerning his work with Star Transportation occurring on or after June 20, 2016, and (2) Frye's claims concerning his work with Star Transportation occurring on or after January 8, 2016.

CONCLUSION

For the foregoing reasons, MTM's motion to compel arbitration should be denied.

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Respectfully submitted,

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