UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN SMITH; and ROSEANN MIRACOLA, SCOTTY POARCH, and MARK YOUNG, on behalf of themselves and those similarly situated, Plaintiffs, – vs. – KELLOGG COMPANY and KELLOGG SALES COMPANY, Defendants.	No. 1:18-cv-01341-PLM-RSK District Judge Paul L. Maloney Magistrate Judge Ray Kent

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STAY CONSIDERATION OF PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION TO FACILITATE A LIMITED PERIOD OF CLASS DISCOVERY

On January 16, 2019, in advance of this Court issuing any case management order or taking any other substantive action, and in sole reliance on the threadbare allegations that populate Plaintiffs' pleadings, Plaintiffs filed a Motion to Conditionally Certify a FLSA Collective Action and to Issue Notice (ECF No. 227, PageID.1715-1717) ("Plaintiffs' Motion for Conditional Certification"). Plaintiffs' Motion is premature. Just as it has done in other putative collection actions under the Fair Labor Standards Act ("FLSA"), this Court should stay consideration of the Motion and enter an initial case management order granting the parties 60 days to conduct limited discovery directed at whether members of the putative collective group are "similarly situated" for purposes of conditional certification. This limited period of discovery will permit the parties time to adduce sufficient evidence so that the Court may make an informed decision as to the appropriateness of conditional certification and whether provision of notice will impose an unjust burden and/or unnecessary expense.

I. FACTUAL BACKGROUND

1. On July 13, 2017, Plaintiff Brian Smith commenced this action by filing a complaint against Kellogg Company and Kellogg Sales Company (together, "Kellogg" or "Defendants") in the U.S. District Court for the District of Nevada. ECF No. 1, PageID.1-18. Smith sought to pursue claims on his own behalf and on behalf of other former and present Kellogg sales representatives for overtime pay that he alleged was owed.

2. Smith sued Kellogg in court even though he and Kellogg had earlier agreed to arbitrate any claims or disputes relating to his employment. Accordingly, on September 15, 2017, Kellogg filed a motion to compel arbitration. ECF No. 55, PageID.384-423. The District of Nevada granted Kellogg's motion to compel arbitration on February 15, 2018. ECF No. 121, PageID.1115-1121.

3. Plaintiffs' counsel filed the *Smith* litigation after another group of sales representatives—represented by the same counsel who represent the plaintiffs in this action—filed an action in the U.S. District Court for the Western District of Washington captioned *Thomas v. Kellogg* 3:13-cv-05136-RBL (W.D. Wash.). The plaintiffs in the *Thomas* litigation were also sales representatives (albeit under a different business model) who sought to pursue claims on behalf of many of the same putative collective members whom Plaintiffs in this action seek to represent.

4. Notice of the claims pursued by the *Thomas* plaintiffs was sent to approximately 2,572 present and former Kellogg sales representatives, of whom approximately 871 elected to opt in. The remaining 1,701 chose not to opt in.

5. More than six months after the District of Nevada compelled arbitration of Smith's claims and stayed this action pending arbitration, on August 24, 2018, Smith filed (1) a motion to amend the complaint to add new Plaintiffs Roseann Miracola, Scotty Poarch, and Mark Young,

and (2) a motion to transfer this action from the District of Nevada to this Court. ECF No. 183, PageID.1390-1436. Rather than simply file a new action in this Court, the new plaintiffs and their counsel chose instead to file the motions to amend and to transfer and to await their disposition by the District of Nevada.

6. More than three months later, on December 3, 2018, the District of Nevada granted the motions to amend and to transfer this action to this Court. ECF No. 206, PageID.1564-1566.

7. The same day, December 3, 2018, Plaintiffs filed their Amended Complaint. ECF No. 209, PageID.1644-1671 ("Plaintiffs' Complaint"). In contrast to the *Thoma*s plaintiffs, the new Plaintiffs here allege only that Kellogg violated the FLSA's overtime requirements (ignoring analogous state laws). Plaintiffs' Complaint was a model of vagueness, favoring conclusory assertions over factual allegations that might show that the putative members of the collective group were "similarly situated." *See, e.g.*, *id.*, PageID.1645-1646 ¶ 8 ("Kellogg has violated the FLSA by failing to pay its employees proper overtime compensation. These violations arose out of Kellogg's company-wide policies and pattern or practice of violating wage and hour by not paying RSRs overtime premium pay at the rate of time and one-half the regular rate.").

8. On January 10, 2019, Defendants answered Plaintiffs' Complaint, denying Plaintiffs' allegations in their entirety and asserting affirmative defenses, including that "Plaintiffs and the members of the putative collective group are not similarly-situated." Defs.' Answer and Affirmative Defenses, ECF No. 226, PageID.1710 ¶ 11.

9. On January 16, 2019, before any scheduling conference or other proceedings, Plaintiffs jumped the gun and filed their Motion for Conditional Certification, asking the Court to allow them to send notice of this action to all former and present Kellogg sales representatives in the

three-year period immediately preceding the filing of the Complaint,[1] a great many of whom already received notice in the *Thomas* litigation.

10. Faced with a paucity of "similarly situated" evidence (and, thus, denied the ability to respond meaningfully to Plaintiffs' Motion for Conditional Certification), on January 22, 2019, Defendants contacted Plaintiffs by email, seeking Plaintiffs' consent to a brief period of limited discovery targeting the issue of conditional certification. Over the next few days, the parties exchanged numerous emails on the subject, and although Kellogg advised Plaintiffs that this Court has ordered discovery in aid of ruling on a motion for conditional certification in other cases, Plaintiffs nevertheless refused to agree to any discovery or stay of consideration of the Motion for Conditional Certification, prompting the present motion from Defendants.

II. ARGUMENT

This Court should stay Plaintiffs' Motion for Conditional Certification and enter an initial case management order granting the parties 60 days to conduct discovery limited to the question of whether Plaintiffs' putative collective group members are "similarly situated" and whether conditional certification and another round of notice are appropriate.

A. The Court Should Order Limited Discovery In The Interest Of Obtaining Sufficient Information To Properly Weigh The Appropriateness of Conditional Certification.

"Federal courts typically follow a two-stage certification process for determining whether all plaintiffs are similarly situated." *Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242, 244–45 (W.D. Mich. 2011). "The purpose of the first stage, or conditional certification, is to provide notice to potential plaintiffs and to present them with an opportunity to opt in." *Id*. (internal quotations and citations

[1] Plaintiffs define the class window as three-years preceding the filing of the Complaint even though the FLSA's statute of limitations is only two years (at least without a determination that the FLSA violation in question was willful). 29 U.S.C. § 255.

omitted). "[T]o gain court approval for notice to similarly situated persons, plaintiffs must make a *modest factual showing* sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 547 (6th Cir. 2006) (internal quotations and citations omitted) (emphasis added).

The FLSA "does not indicate how or when a court should determine whether to certify a collective action or to authorize notice to potential class members." *Pacheco v. Boars Head Provisions Co., Inc.*, 671 F. Supp. 2d 957, 959 (W.D. Mich. 2009). District courts, however, "have broad discretion under the rules of civil procedure to manage the discovery process and control their dockets." *Marie v. Am. Red Cross*, 771 F.3d 344, 366 (6th Cir. 2014). As a result, this Court (and many others) has ordered pre-certification discovery to aid in the determination of whether class members are similarly situated and whether conditional certification is appropriate. *See, e.g.*, *Jesiek*, 275 F.R.D. at 243; *Lucas v. JBS Plainwell, Inc.*, No. 1:11-cv-302-PLM, 2011 WL 5408843, at *1 (W.D. Mich. Nov. 8, 2011). This only makes sense, particularly in a case where another court already afforded many of the putative claimants an opportunity to bring their claims yet they declined, because this Court is obligated to ensure that the FLSA's judicially created notice process is not transformed into a court-sponsored solicitation device. *See Hoffmann-Laroche, Inc. v. Sperling*, 493 U.S. 165, 174 (1989) ("Our decision does not imply that trial courts have unbridled discretion in managing ADEA actions. Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims.").[2]

[2] Justice Scalia was more pointed in his dissent: "Nothing in 216(b) remotely confers the extraordinary authority for a court - either directly or by lending its judicial power to the efforts of a party's counsel - to search out potential claimants, ensure that they are accurately informed of the litigation, and inquire whether they would like to bring their claims before the court." *Hoffmann-Laroche*, 493 U.S. at 181.

Here, the Court should permit pre-certification discovery, just as it has done before. *See Jesiek*, 275 F.R.D. at 243; *Lucas*, 2011 WL 5408843, at *1. Indeed, just today, the Court entered an order setting a Rule 16 scheduling conference for February 25, 2019. *See* ECF No. 241, PageID.1897-1900. The express purpose of that conference is to, among other things, establish a case management process. *Id.* The most appropriate course, then, would be to stay consideration of Plaintiffs' Motion for Conditional Certification pending the entry of a case management and discovery order following the Rule 16 scheduling conference.

In any event, Plaintiffs bear the burden of making a "modest factual showing" as to the similarly situated nature of their putative class members, and here they submitted only cookie-cutter allegations and conclusory declarations that have not been subjected to cross-examination. Kellogg should have an opportunity to test Plaintiffs' thin assertions through limited discovery. *See, e.g.*, *Green v. Harbor Freight Tools USA, Inc.*, No. 09-2380-JAR, 2010 WL 686263, at *2 (D. Kan. Feb. 23, 2010) ("[P]laintiffs have presented no persuasive authority for their assertion that discovery *must* be limited prior to certification in a way that effectively protects opt-in plaintiffs from being deposed against their will. If anything, the caselaw cited by the parties seems to support permitting defendant to engage in the requested discovery *so that it may at least test the veracity of plaintiffs' mere allegation that they are similarly situated victims of a common decision, policy, or plan*.") (emphasis added).

B. The Court Should Order Limited Discovery To Avoid The Unnecessary Burden and Expense That Results From Improper Class Notice.

Moreover, given the sizeable nature of the potential class in this case, pre-certification discovery is necessary to avoid the undue burden and expense that can result from the improper provision of notice—a second round of notice for many of the potential class members—to a large number of potential opt-ins. *See Pacheco*, 671 F. Supp. 2d at 960 ("The potential class in this case

consists of between 800 and 900 employees. The Court is mindful that it has 'a responsibility to assure that there is some factual basis for plaintiffs' claims of class-wide discrimination before judicial approval of the sending of notice is granted.' *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991); *see also Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) ('It would be a waste of the Court's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated.'). The Court accordingly opted to allow the parties to engage in two months of discovery on the certification issue before holding a hearing on the issue of certification and notice."); *accord, e.g.*, *Fenley v. Wood Group Mustang, Inc.*, 170 F. Supp. 3d 1063, 1074–75 (S.D. Ohio 2016) (declining to send out second notice to potential opt-ins and finding that, "[i]n facilitating notice, the Court must avoid communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits") (citing *Hoffmann–La Roche*, 493 U.S. at 168–69); *Hall v. U.S. Cargo and Courier Service, LLC*, 299 F. Supp. 3d 888, 900 (S.D. Ohio 2018) (rejecting request for reminder notice to potential opt-ins and finding that "[c]ourts have rejected reminder notices, recognizing the narrow line that divides advising potential opt-in plaintiffs of the existence of the lawsuit—and encouraging participation") (internal citations and quotations omitted).

In other words, the Court's conditional certification decision will have wide-reaching consequences, and, as such, it should be made with the benefit of additional information developed during a limited discovery period.

III. CONCLUSION

For the reasons articulated above, the Court should stay Plaintiffs' Motion for Conditional Certification and enter the initial case management order attached hereto as **Exhibit A**, establishing the following discovery and briefing schedule:

(d) For a period of 60 days following the entry of the Court's initial case management order, the parties **SHALL** conduct discovery as to the limited question of whether Plaintiffs' putative class members are "similarly situated" and conditional certification is appropriate;

(e) Within 21 days of the expiration of the limited discovery period, Kellogg **SHALL** file its response in opposition to the Motion for Conditional Certification; and

(f) Within 14 days of the filing of Kellogg's response, Plaintiffs **SHALL** file their reply in support of their Motion for Conditional Certification.

Respectfully submitted,

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