

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

KRISTIN HABENICHT, individually and on behalf of all other similarly situated persons,)	Case No. 1:11-CV-02619-DAP
)	
Plaintiffs,)	JUDGE DAN AARON POLSTER
)	
v.)	<u>JOINT PROPOSAL FOR STAY,</u>
)	<u>TOLLING, ABBREVIATED</u>
KEYCORP, <i>et al.</i> ,)	<u>DISCOVERY, MEDIATION AND</u>
)	<u>MISJOINED PARTIES</u>
Defendants.)	

As directed by the Court, the parties met and conferred regarding (1) the most efficient and effective process to evaluate early resolution of Plaintiff's claims and (2) the prospects for litigating the class and collective action claims in a single proceeding; and (3) the identity of Plaintiff's employer. The result of the parties' meeting and conferring is the following joint proposal:

1. Plaintiff alleges Defendants violated the Fair Labor Standards Act, 29 U.S.C. §201 (the "FLSA"), *et seq.* by failing to properly pay overtime. Plaintiff also (1) alleges Defendants violated various state overtime laws, and (2) asserts breach of contract and equitable claims. Plaintiff indicated that she intends to pursue her (1) FLSA claims as a collective action under 29 U.S.C. §216(b), and (2) state law, contract, and equitable claims as class actions under Rule 23. Although not yet pled, Plaintiff also expect to evaluate the existence of minimum wage claims that allegedly result from Plaintiff and putative plaintiffs bearing unreimbursed business expenses they contend primarily benefit the employer (*e.g.*, travel, cell phone, internet, promotional expenses, dues, etc.). Although they have not yet filed responsive pleadings, Defendants deny Plaintiff's allegations and that her claims should be certified as class and collective actions.

2. In order to evaluate early resolution of the claims, including Plaintiff's class and collective action allegations, the parties believe it would be beneficial to (1) stay the pending litigation for a three month period, (2) toll the relevant statutes of limitations applicable to Plaintiff's claims for the period in which this action is stayed,¹ (3) conduct abbreviated discovery solely for the purpose of evaluating and reaching a settlement, and (4) in good faith, mediate in an effort to reach a resolution of this matter.

3. In order to facilitate the exchange of information necessary to prepare for mediation, the parties respectfully ask the Court to stay the pending litigation through April 23, 2012.

4. During the time period when the action is stayed, and in order to gather the information necessary to settle this matter, the parties agree that, without affecting any limits in conducting discovery that the Court may subsequently impose on the parties, as follows:

(i) Defendants may propound a reasonable amount of requests for production of documents - not to include ESI - to the named Plaintiff and the individuals who have filed consents to join this action,

(ii) Plaintiff may propound a reasonable number of requests for production of documents and structured data - not to include unstructured ESI, such as e-mail, and to specifically include payroll and timekeeping records, personnel files for the named

¹ The statutes of limitations relevant to Plaintiff's class action claims were tolled for other members of the putative classes when the Plaintiff filed suit. *See Crown, Cork & Seal Company, Inc., v. Parker*, 462 U.S. 345 (1983). However, filing a putative collective action under the FLSA does not toll the FLSA's statute of limitations for individuals who later file their written consent to join the action. *See* 29 U.S.C. §256.

Plaintiff and the individuals who have filed consents to join this action, employee handbook(s) applicable to Mortgage Loan Officers from March 24, 2010 to the present, job descriptions applicable to Mortgage Loan Officers from March 24, 2010 to the present, and mass/joint communications directed to all Mortgage Loan Officers from March 24, 2010 to the present regarding job classifications and hours worked. Both parties agree that the other party will not be required to search for, or otherwise process for production, unstructured ESI.

5. The parties agree that, while this action is stayed, the statutes of limitations relevant to the claims made in Plaintiff's Class Action Complaint (Doc. 1) shall be tolled for all putative plaintiffs, including putative class members. Defendants shall provide notice to Plaintiff of any other wage and hour actions filed against either Defendant by MLO's relating to the period beginning March 24, 2010 and extending to the present and alleging any of the claims set forth in paragraph 1 of this Joint Proposal. The parties agree that Plaintiff was the first to file such claims. The parties further agree that, if additional claims of this nature are filed against either of the Defendants during the pendency of the stay, they will take whatever steps are necessary to enforce the first to file rule.

6. The parties agree that, after the abbreviated discovery process is completed, the matter may be mediated by a mutually agreeable mediator. The mediation shall take place in a mutually agreeable location. If the parties cannot agree to select a specific mediator, the parties agree to submit proposed mediators to the Court for its determination as to who will mediate the matter. If a private mediator is engaged, each party shall bear one-half of the private mediator's costs. The parties will conduct the mediation while the action is stayed.

7. If the parties settle Plaintiff's class and/or collective action claims, the parties will submit the terms and conditions of the parties' settlement to the Court for its approval and so that anyone objecting to the terms and conditions of the proposed settlement of the class action claims may be heard. The parties anticipate that, if the class and collective action claims are preliminarily settled, one or both of the parties will engage the assistance of a third party administrator to, among other things, (1) provide notice to absent and putative plaintiffs regarding of the proposed settlement and the opportunity to object, and (2) if finally approved, facilitate claims made on the settlement fund.

8. If the parties do not resolve the claims at mediation, the stay shall be lifted, and the parties shall litigate Plaintiff's claims in this Court. The parties agree that either party may move to vacate the stay at any point and that the stay shall only be lifted for good cause shown.

9. Defendants have represented to Plaintiff that KeyCorp is misjoined because it was not Plaintiff's employer. Based on Defendants' representation, Plaintiff agrees to dismiss KeyCorp pursuant to Rule 21 as a party to this action, without prejudice to refile. If the stay is lifted, Defendant KeyCorp agrees to make itself available for discovery of information relevant to its status as an employer, and otherwise in this case for information that is not otherwise available through KeyBank National Association.

10. Notwithstanding the stay, KeyBank National Association shall file an Answer to the Complaint on or before February 13, 2012. The parties agree that Rule 41(a)(i) shall not apply prior to the filing of this Answer.

Respectfully submitted,

/s/ John Gerak

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012 a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ John Gerak

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