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 persons, **Plaintiffs,** **v.** **KELLOGG COMPANY and KELLOGG SALES COMPANY,** **Defendants.**	**1:18-cv-01341-PLM-RSK** **District Judge Paul L. Maloney** **Magistrate Judge Ray Kent**

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

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INTRODUCTION

The Court should deny Kellogg's Motion to Stay Consideration of Plaintiffs' Motion for Conditional Certification to Facilitate a Limited Period of Class Discovery ("Motion to Stay") for several reasons. As an initial matter, Kellogg has failed to identify with any specificity the discovery it claims it needs to oppose Plaintiffs' Motion for Certification. Kellogg broadly asserts that it needs discovery to determine whether Plaintiff Service Reps[1] are similarly situated despite the fact that in prior litigation on behalf of a class of Service Reps, *Thomas v. Kellogg*, 1) the district court conditionally certified a collective action; 2) the parties then engaged in extensive merits discovery; and 3) the district court denied Kellogg's subsequent motion to decertify. Second, discovery is unnecessary because Kellogg already took extensive discovery in *Thomas*, is engaging in discovery in the individual arbitration, and thus it already knows that it classified Service Reps as exempt, that it did not pay Service Reps overtime, and that Service Reps worked over 40 hours in a week. In other words, it already knows that Plaintiffs are similarly situated. Lastly, Plaintiffs would be unfairly prejudiced by a stay because it would unnecessarily delay putative class members receiving notice of and joining this lawsuit, which would cause them to weekly lose claims to the statute of limitations. Accordingly, the Court should deny Kellogg's Motion to Stay.

LITIGATION HISTORY

I. Thomas v. Kellogg Co.

This is the second federal court case against Kellogg on behalf of Service Reps who were denied overtime wages. In the first case, *Thomas v. Kellogg Co.*, the district court conditionally

[1] As set forth in the Amended Complaint, Plaintiffs were employed as Retail Sales Representatives ("RSRs"), Territory Managers ("TMs"), Retail Sales Managers ("RSMs"), and Kellogg Sales Representatives ("KSRs"), among other titles and are together referred to in this litigation as "RSRs". *See* Dkt. 209 at ¶ 1.

certified a collective action, even after Kellogg took discovery. *See Thomas v. Kellogg Co.*, 13 Civ. 5136 RBL, 2014 WL 716152, at *2 (W.D. Wash. Jan. 9, 2014). The court also authorized Plaintiffs' Counsel to send notice to workers. *Id.* at *3 (W.D. Wash. Jan. 9, 2014). Notice was issued on February 4, 2014. The parties subsequently engaged in extensive discovery including on "the primary issues involved with a motion to decertify: (1) what are the Plaintiffs' primary job duties; (2) what hours did Plaintiffs work; and (3) how much were Plaintiffs paid." *Thomas v. Kellogg Co.*, 13 Civ. 5136 RBL, 2014 WL 4748144, at *3 (W.D. Wash. Sept. 24, 2014). After the parties completed discovery, Kellogg moved to decertify, but the district court denied Kellogg's motion, holding that "Plaintiffs have presented substantial evidence that they do the same or similar jobs under similar circumstances and the Court is satisfied the case can be adjudicated on a collective basis." *See Thomas v. Kellogg Co.*, 13 Civ. 5136RBL, 2016 WL 7057218, at *1 (W.D. Wash. Dec. 5, 2016). In the Court's order denying Kellogg's motion to decertify, the Court made several findings of fact, including that Kellogg classified Service Reps as exempt from overtime based on "a set of common job duties" and that "Kellogg's studies show that [Service Reps'] job duties are uniform." *Id.* at *2. The parties then resolved the case on the eve of trial. And last spring the Court approved the parties' settlement agreement on behalf of 750 Service Reps. *Thomas v. Kellogg Co.*, 13 Civ. 5136RBL, Dkt. 560 (W.D. Wash. May 18, 2018).

II. *Smith et al v. Kellogg Co.* and the 23 individual arbitrations

This second case concerns Service Reps who did participate in the first case. They may not have participated for numerous reasons, including because they may not have worked for Kellogg at the time, did not receive the Court approved Notice because they were not on the notice list or they moved, they may have been afraid of Kellogg retaliating against them, they may have forgotten about the notice, or they may have misplaced the documents. Currently, there are 75 opt-ins.

Plaintiffs moved early in the case for FLSA conditional certification. However, in order to prevent the case from proceeding on a collective basis Kellogg moved to compel the named plaintiff — Brian Smith — to arbitration. Dkt. 55. While that motion was pending Plaintiffs moved for FLSA conditional certification. Dkt. 115. Five days after Plaintiffs filed their motion Kellogg filed an emergency motion to stay any briefing or to extend the time to respond. Dkt. 116 (Feb. 7, 2018). The same day the Court granted Kellogg's motion to stay, subsequently ordered the Named Plaintiff to arbitration to determine the arbitrability of the claims, and then denied Plaintiffs' conditional certification motion without prejudice. Dkt. 116 (Feb. 7, 2018) (staying response to Plaintiffs' motion); Dkt. 121 (Feb. 15, 2018) (ordering arbitration); Dkt. 122 (Feb. 16, 2018) (denying Plaintiffs' motion). At this time there were dozens of opt-ins but not a named plaintiff who could act on their behalf. Thus, Plaintiffs moved to amend the complaint and requested a transfer to Michigan.[2] Dkts. 183, 185. In another attempt to prevent this case from moving forward, Kellogg asked the Court to strike plaintiffs' motion. Dkt. 187. The district court denied Kellogg's request and later granted Plaintiffs motion to amend the complaint and transferred the case. Dkt. 206.

Currently, in addition to the Named Plaintiffs, there are 75 opt-ins in the case. There were more opt-ins but many of them signed arbitration agreements. Twenty-three Service Reps brought individual arbitrations to recover unpaid overtime wages. While most of these Service Reps attempted to join this litigation, due to Kellogg's motion to compel arbitration based on an arbitration provision in a Continued Employment Agreement with Kellogg, the workers withdrew from this litigation and filed individual arbitrations. Kellogg has since brought retaliatory and baseless counterclaims against these workers in the arbitrations, claiming they violated the

[2] Plaintiffs asked for the transfer in order to avoid Kellogg's jurisdictional argument against conditional certification. *See* Dkts 183, 185.

arbitration provision of the Continued Employment agreement by filing consents to sue in this case. Dkt. 192. The parties have already engaged in some discovery in several of these arbitrations.

Here in order to expedite the notice process in order to permit potential plaintiffs to preserve their FLSA claims, Plaintiffs promptly moved for FLSA conditional certification. Because Plaintiffs' motion did not fall into one of the categories of dispositive motions, Plaintiffs understand that the motion is governed by Local Rule 7.3. Instead of opposing Plaintiffs' motion, Kellogg filed its motion to take pre-conditional certification discovery.[3]

ARGUMENT

I. The Court Should Deny Kellogg's Motion for a Stay Because It Will Unnecessarily Delay The Case.

Because Kellogg does not detail what discovery it claims to need, the court should not permit the case to be further delayed. *See, e.g., Sellers v. Sage Software, Inc.*, 1:17 Civ. 03614-ELR, 2018 WL 5631101, at *2 (N.D. Ga. Jan. 9, 2018) ("Defendants argue that discovery is necessary because 'Defendants should be able to test Plaintiffs' assertion that they are similarly situated through a common policy or practice.' However, Defendants do not offer any suggestion as to why Plaintiffs might not be similarly situated. As such, the Court does not see a reason to address this general argument during the first step of the process."). Even if Kellogg had identified specific discovery it alleges it needs, the Court should still deny Kellogg's Motion for a Stay because any discovery at this stage is unnecessary and wastes time. As explained in Plaintiffs' Motion for Certification, and as acknowledged by Kellogg, at the first-stage of conditional certification, Plaintiffs only need to make a "modest factual showing" sufficient to demonstrate that they and

[3] Defendants have failed to timely oppose Plaintiffs' Motion for Conditional Certification and have now untimely moved for an extension to file an opposition. *See* Dkt. 245, et seq.

potential plaintiffs together were victims of a common policy or plan that violated the law.[4] They have done so. Consequently, any discovery that Kellogg might identify is unnecessary at this first stage.

Contrary to Kellogg's assertions, most courts recognize that first-stage conditional certification occurs without any discovery, particularly when, as here, a defendant does not provide a basis for it. *See, e.g., Hall v. U.S. Cargo & Courier Serv.*, LLC, 299 F. Supp. 3d 888, 894 (S.D. Ohio 2018) (the first stage "generally takes place prior to or at the beginning of discovery"); *Sellers*, 2018 WL 5631101 at *2 (precertification discovery "is not the norm, and Defendants have offered no reason why the Court should allow it here"); *Wallace v. S. Cable Sys. LLC*, 3:16 Civ. 209-RV/CJK, 2017 WL 6994565, at *1 (N.D. Fla. May 8, 2017) ("The first stage (known as the 'notice stage') comes before the plaintiff had the chance for discovery, and the court must decide—based on the pleadings and affidavits that were filed—if notice of the lawsuit should be given to potential class members."); *Noel v. Metro. Gov't of Nashville & Davidson Cty.*, Tenn., 3:11 Civ. 519, 2015 WL 3650376, at *3 (M.D. Tenn. June 11, 2015) ("The first stage occurs early in the litigation,

[4] Notably, there is no requirement that Plaintiffs show that there are putative class members interested in joining the case. *See, e.g., Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242, 247 (W.D. Mich. 2011) ("Plaintiffs' failure to provide evidence that potential opt-in plaintiffs ... desire to opt-in is not fatal to their motion."); *Martin v. Psalms, Inc.*, 2:10 Civ. 02532–STA–dkv, 2011 WL 2882387, at *8 (W.D. Tenn. July 15, 2011) ("From this court's review of Sixth Circuit precedent, the Court finds that the Sixth Circuit has neither required [a showing of sufficient interest], nor held that such a showing is not required."). In any case, if there was such a requirement, Plaintiffs have met it, as 75 Service Reps have already opted in to this case. *See Martin*, 2011 WL 2882387, at *8 ("The fact that one other employee of [the d]efendant has opted-into this collective action, is enough, at this stage in the litigation, for this [c]ourt to find that there is sufficient interest to conditionally certify a class and permit court-supervised notice."). Further, there are many reasons why workers may not have joined the previous *Thomas* case and now want to join this case. For example, they may have still been employed by Kellogg at the time of the *Thomas* case and feared retaliation. *See Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 244 (2d Cir. 2011) ("[A]n employee fearful of retaliation or of being 'blackballed' in his or her industry may choose not to assert his or her FLSA rights."). These employees should be given a chance to assert any claims they may have against Kellogg.

typically before the commencement of formal discovery…"): *Triggs v. Lowe's Home Centers, Inc.*, 1:13 Civ. 1897, 2014 WL 4162203, at *2 (N.D. Ohio Aug. 19, 2014) ("During the first stage which typically takes place before discovery, the standard for conditional certification is 'fairly lenient.'"); *Dorsey v. TGT Consulting, LLC*, 888 F. Supp. 2d 670, 686 (D. Md. 2012) ("The first stage, called the 'notice stage,' generally occurs before much, if any, discovery has taken place."); *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 632 fn 3 (S.D.N.Y. 2007) (recognizing that courts may rely exclusively on pleadings and affidavits for first-stage analysis, because it is often completed before the beginning of discovery).

Indeed, numerous courts have allowed employees to move for conditional certification even prior to the Rule 26(f) conference or the Court issuing a case management order. *See, e.g., Brittmon v. Upreach, LLC*, 285 F. Supp. 3d 1033, 1043 (S.D. Ohio 2018) (allowing and ruling on motion for conditional certification prior to Rule 26(f) conference). Here, it makes sense for the Court to promptly rule on Plaintiffs' motion because whether this case proceeds as a collective action will have an impact on the scope and timing of discovery. *See* Fed. R. Civ. P. 26(f)(2) ("In conferring, the parties must consider the nature and basis of their claims and defenses…"). Once the Court determines whether the case will proceed collectively, the parties can efficiently and effectively take discovery.

Because at this stage courts apply a lenient standard which typically results in conditional certification of a collective class, courts routinely deny motions for pre-certification discovery. *See, e.g., Caceres v. Custom Drywall & Painting LLC*, 17 Civ. 6949, 2018 WL 1705575, at *5 (E.D. La. Apr. 9, 2018) ("Defendants have failed to demonstrate why discovery is necessary at this early stage… such discovery is not necessary at this stage, given that Plaintiffs have provided 'substantial allegations' 'of a single decision, policy, or plan' affecting 'similarly situated' individuals."); *Hose*

v. Henry Indus., Inc., 13 Civ. 2490-JTM, 2014 WL 2604104, at *2 (D. Kan. June 11, 2014) ("Again, the conditional certification stage applies a lenient assessment of the evidence. This 'low threshold' is typically made on the basis of affidavits or declarations. Accordingly, the discovery sought by defendant is hereby denied.") (citation omitted); *Stelmachers v. Maxim Healthcare Servs., Inc.*, No. 1:13 Civ. 1062-RLV, 2013 WL 12251304, at *1 (N.D. Ga. June 5, 2013) ("Additionally, the court concludes that allowing the defendant to engage in extensive discovery prior to reviewing the plaintiff's motion for conditional certification of the plaintiff's collective action would undermine the remedial purposes of FLSA."); *Brasfield v. Source Broadband Servs., LLC*, 2:08 Civ. 2092-JPM/DKV, 2008 WL 2697261, at *2 (W.D. Tenn. June 3, 2008) ("The leniency of Plaintiffs' burden at this first procedural stage renders even initial discovery unnecessary.").

II. Pre-Conditional Certification Discovery Is Unnecessary Because Kellogg Is In Possession of All of the Discovery it Needs.

Kellogg does not need discovery because it has knowledge of the facts showing that Plaintiffs are similarly situated. As Plaintiffs' employer, Kellogg knows, among other things: 1) that Service Reps performed similar job duties because it assigned them their daily tasks; 2) Kellogg knows the job duties Service Reps performed because it documented their work in various industrial studies; 2) that it classified Service Reps as exempt from the overtime provisions of the FLSA; 3) that Service Reps worked over 40 hours per week; and 4) that it paid Service Reps a salary, bonuses, and no overtime wages. In other words, Kellogg knows that Service Reps together were victims of Kellogg's common policy of misclassifying Service Reps as exempt and not paying them overtime for hours worked over 40 in a work week.

Pre-conditional certification discovery is unnecessary because the parties took extensive discovery in the *Thomas v. Kellogg* case on many of the same issues, including the job duties of its Service Reps. In *Thomas,* Kellogg's discovery of plaintiffs included: Kellogg deposed 11 Named

plaintiffs and 27 opt-in Plaintiffs[5]; Kellogg served interrogatory and documents demands on all of the plaintiffs[6]; and the 750 settlement plaintiffs produced documents and/or responded to Kellogg's interrogatories. Plaintiffs' discovery included: Plaintiffs deposed 16 witnesses including a 2-day Rule 30(b)(6) deposition of Kellogg, a District Manager (a direct supervisor to Service Reps), a Senior Retail Manager (District Manager's supervisor), an Account Executive (corporate sales employees), a Continuous improvement project manager (the Kellogg employee who conducted industrial studies regarding hours worked and job duties performed by Service Reps), a Productivity Manager (employee who helped to assign the workload for Service Reps and hourly paid workers); the owner of Motus (the GPS system Kellogg used to reimburse workers for their business mileage); Kellogg's expert; a 30(b)(6) witness concerning Kellogg's ESI; and a pre-conditional certification Rule 30(b)(6) deposition of Kellogg. In addition, Kellogg produced over 331,000 page of documents and over 1,000,000 plaintiff and management emails covering issues such as Kellogg's corporate sales process and agreements, labor studies, Service Reps' job duties, hours worked, and plaintiffs' pay information, and pay data for workers who performed many of the same job duties. Kellogg also responded to numerous interrogatories.

It also learned these facts through the discovery that has occurred in several of the 23 individual arbitrations that are currently pending between Service Reps and Kellogg. In each case workers submitted a specification of claims that provides a general factual explanation of their unpaid overtime claims. Exhibit 3 (Specification of Claims). In each case Kellogg will take discovery and many workers already produced discovery. Just last week Kellogg deposed the first claimant — Brian Smith — as part of discovery. Further, Kellogg has produced discovery,

[5] Attached as Exhibit 1 lists the dates of the depositions and the geographic location where the Service Reps worked.
[6] Attached as Exhibit 2 is an example of Kellogg's form discovery requests.

including training documents, pay records, performance reviews, emails, industrial studies, and wage records of hourly paid workers, completed questionnaires of Service Reps' self-reported in-store hours worked the tasks performed. Kellogg's documents show that workers were paid the same way, performed the same duties, worked overtime hours, and were not paid overtime wages. Thus, pre-conditional certification discovery is not necessary for this motion.

III. The Court Should Deny Kellogg's Motion for a Stay Because a Stay Would Unfairly Prejudice Plaintiffs.

The Court should also deny Kellogg's motion for a stay because a stay would severely prejudice Plaintiffs. Unlike a Rule 23 class action, the statute of limitations is not tolled for putative FLSA class members *until they affirmatively opt into the action*. 29 U.S.C. § 216(b). Thus, it is critical that notice of the right to opt-in issue promptly after the filing of the case if there is a colorable belief that class members may be similarly situated. *See Roberts v. Corr. Corp. of Am.*, 2015 WL 3905088, at *15 (M.D. Tenn. June 25, 2015) (citing *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The statute of limitations is not tolled for any individual class member until that individual has filed a written consent to join form with the court. 29 C.F.R. § 790.21(b)(2)."); *Gaffers v. Kelly Servs., Inc.*, 2016 WL 8919156, at *2 (E.D. Mich. Oct. 13, 2016) ("[P]otential opt-in plaintiffs will be irreparably harmed if . . . notice is not sent promptly to them, because the limitations period on their claims was not tolled by either the filing of the complaint or the conditional certification of the collective litigation." (citations omitted)). Kellogg does not mention tolling putative class members' claims for the duration of the stay. This means that putative class members would lose claims with each week that passed during the stay. The harm to putative class members is compounded when one considers that it is completely unnecessary.[7]

[7] In the event the Court grants Kellogg's motion for a stay, Plaintiffs' respectfully request that the Court toll the statute of limitations to mitigate the harm from the stay. Plaintiffs request that the

This case has already been delayed significantly. An unnecessary stay of two months would delay it even more. Plaintiffs previously filed a motion for conditional certification in this case over one year ago. Kellogg moved to stay briefing and adjudication of that motion until the Court issued a decision on Kellogg's motion to compel arbitration of the named plaintiff. Then when Plaintiffs moved to amend the complaint to substitute opt-ins who had not signed arbitration agreements as new named plaintiffs, Kellogg moved to strike Plaintiffs' motion to amend. It then sought an extension of time to answer Plaintiffs' amended complaint. Kellogg should not be permitted to delay this litigation any longer, particularly when such delay would be to permit discovery that is completely unnecessary.

CONCLUSION

The Court should deny Kellogg's Motion to Stay. First, Kellogg has failed to identify with any specificity the discovery it claims it needs to oppose Plaintiffs' Motion for Certification. Second, any discovery is unnecessary at this stage because Kellogg already took extensive discovery in *Thomas* and the individual arbitrations, and therefore already knows that Plaintiffs were victims of Kellogg's common policy of misclassifying RSRs as exempt from overtime and failing to pay them overtime. Finally, Plaintiffs would be severely prejudiced by a stay because it would unnecessarily delay putative class members receiving notice of and joining this lawsuit, causing them to weekly lose claims to the statute of limitations. For these reasons, the Court should deny Kellogg's Motion to Stay in its entirety.

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statute of limitations be tolled from the date of the filing of Plaintiffs' motion for conditional certification through the date the opt-in period ends, or, in the event the Court denies Plaintiffs' motion for conditional certification, through the date of such denial.

Dated: February 13, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.3(b)(ii), I certify that the preceding brief contains 3,405 words including headings, footnotes, citations and quotations. The word processing software used to perform the word count is Microsoft Word 2013.

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