IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Derrick Thomas,

On behalf of himself and those similarly situated,

Plaintiff,

v.

Papa John's International, Inc.; It's Only Downtown Pizza, Inc.; It's Only Pizza, Inc.; It's Only Downtown Pizza II Inc.; It's Only Papa's Pizza LLC; and Michael Hutmier,

Defendants.

Case No. 1:17-CV-411

Judge Michael R. Barrett

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

I. INTRODUCTION

This discovery dispute concerns Plaintiff Derrick Thomas's attempt to force Defendants to produce years of payroll records for many hundreds of delivery drivers at all of Defendants' nine pizza stores, including drivers who did not work at the store where he worked, drivers who specifically chose not to opt-in to this lawsuit, and drivers who signed agreements to arbitrate any legal claims they may have. Plaintiff has already received forty-five thousand pages of discovery from defendants in this action, and the motion for class certification was filed more than a year ago. As explained below, the parties should wait for class certification to be decided before incurring the time and expense of class-wide discovery.

II. THE DISCOVERY DISPUTE

Plaintiff worked at only one of Defendants' nine stores (the Norwood store). (Thomas Declaration, Doc. 24-1, PageID 359). He worked there part-time for roughly three months. *Id*. Plaintiff already has his own payroll records – he filed them with this Court more than four years ago. (Doc. 24-2, PageID 364-365). If he believes there is something incomplete with his personal records, counsel for the Defendants will gladly meet and confer with Plaintiff's counsel to make sure that Plaintiff has the records of his own wages for the couple of months that he worked for Defendants.

What Defendants have declined to do is to provide Plaintiff with the private payroll records for many hundreds of employees, including those drivers who specifically chose not to opt-in to this case, and those who agreed to arbitrate any legal claims they may have. Defendants have declined to do this for many reasons, including:

(i) because Plaintiff himself refuses to participate in the discovery process;

(ii) because the burden of production of these records is substantial;

(iii) because the records contain confidential information of non-parties;

(iv) because this case has not been certified as a class action under Fed. R. Civ. P. 23 and there is no harm in waiting to see if a class is certified before proceeding with such voluminous discovery; and

(v) because the Plaintiff's motion for class certification has long been fully briefed and this is an attempt by Plaintiff to re-open that briefing.

Each of these reasons is addressed below.

III. THE DEFENDANTS' POSITION ON THIS DISCOVERY DISPUTE

1. Discovery is not a unilateral process.

Reciprocity and reasonableness are at the core of the discovery process. Courts have long recognized that "discovery is a two-way street." *E.g.*, *Powell v. Cherokee Ins. Co.*, 2011 WL 2160856 at n. 7 (W.D. Ky. 2011). As such, this motion requires some context as to the direction in which discovery has flowed in this case.

The local defendants have already produced more than eight thousand pages of document discovery to Plaintiff. They sat for depositions. Before its dismissal in this action, Papa John's International, Inc. produced more than thirty-seven thousand pages of document discovery to Plaintiff. That document production included detailed spreadsheets on each pizza delivery during the time period requested.

In stark contrast, Plaintiff Derrick Thomas has produced three (3) pages of discovery documents to the Defendants. No opt-in plaintiff has produced anything. Defendants reached out to Plaintiff concerning the need to obtain discovery from Plaintiff and the opt-in plaintiffs. To that end, Defendants proposed an efficient way to minimize the discovery burden on the opt-in plaintiffs. Specifically, Defendants proposed the use of a user-friendly questionnaire that has been used in other pizza delivery-driver cases rather than requiring each opt-in plaintiff to respond to formal requests for production of documents and interrogatories. Plaintiff flatly refused, which required Defendants to file a motion to compel (Doc. 85) that has been pending since November 2020. As a result of Plaintiff's failure to produce discovery, Defendants were forced to brief their opposition to class certification (Doc. 131) without the benefit of receiving discovery from any of the putative class members.

As the undersigned explained during the status conference with the Court concerning this discovery dispute, discovery should be a two-way street. The most efficient approach is to wait for the Court to decide the class certification motion, and then for both sides to see what additional

discovery, if any, is needed from both sides. The alternative is for ***both sides*** to be ordered to produce expensive and voluminous discovery while the class certification remains pending. But what should not be permitted is for the Plaintiff to continue his demands for discovery from the Defendants while he and the opt-in plaintiffs simultaneously refuse to produce any discovery themselves.

2. The burden of this discovery is substantial.

The Defendants are a small family business that operates nine pizza stores. They do not have a large "back office" staff. They contract their payroll services to a third party. The third party has informed Defendants that the production of all of the records that Plaintiffs request – from all of the nine stores, for years, for even drivers who chose not to opt-in to this lawsuit – would be a difficult and time-consuming task. It is not as easy as clicking on one Excel spreadsheet and pressing "print" as the Plaintiff suggests.

For this reason, Defendants proposed to Plaintiff that they produce a reasonable sampling of the payroll records. Plaintiff has refused to consider sampling and has instead insisted on receiving "all" of the payroll records, without limitation. Given this failure to negotiate, and this insistence on demanding everything, it is only reasonable to wait for the Court's decision on class certification to determine whether the records for the hundreds of other drivers will be relevant to any of the claims and defenses in this case.

3. The records contain confidential information of non-parties.

Plaintiff claims that he is entitled to the wage and earning information for hundreds of delivery drivers that he never worked with or met. Given that there were hundreds of delivery drivers who chose not to opt-in to this lawsuit, it is reasonable to wait for the Court's ruling on

class certification before ordering the production of sensitive earnings information of people who are presently non-parties.

4. There is no harm in waiting for the Court to rule on class certification before beginning with class discovery.

It is no secret that discovery is an expensive and time-consuming process. Once the time, effort, and expense of discovery is incurred, it cannot be undone or reclaimed. As such, defense counsel posed the question to Plaintiff's counsel: "what is the harm in waiting for the Court to decide whether this case will be certified as a class before we start sifting through records of hundreds of other individuals?" (Email, Doc. 149-3, PageID 2712). The ***only*** response Plaintiff can offer is that, more than a year after filing his motion for class certification, and having already amended his motion for class certification once before (*See* Order Granting Motion to Amend Motion for Class Certification, Doc. 126), Plaintiff now wants to conduct additional discovery to have a third bite at the class certification apple. As explained below, this should not be permitted. The parties should wait for the Court to resolve the pending Amended Motion for Class Certification (Doc. 127) before embarking on this class-wide discovery.

5. Plaintiff should not be permitted yet another attempt to amend his motion for class certification.

While this motion is styled as a motion to compel, it is truly about Plaintiff's desire to amend his motion for class certification yet again. (*See* Email from Plaintiff's Counsel, Doc. 149-3, PageID 2710) ("We intend to supplement our motion with your clients' records."). The Court should not permit this to happen.

Plaintiff filed his motion for class certification (Doc. 108) on February 15, 2021. The motion contained undisclosed expert opinions. (*See* Motion to Strike, Doc. 116). After the Defendants caught the Plaintiff attempting to obtain class certification through undisclosed expert

testimony, Plaintiff sought leave to amend his motion for class certification to remove that impermissible and undisclosed evidence. Defendants did not oppose that request, and Plaintiff filed an Amended Motion for Class Certification (Doc. 126) on March 30, 2021. That amended motion for class certification has been fully and exhaustively briefed.

Then, on March 3, 2022 – nearly a year after the amended motion for class certification was filed – Plaintiff filed a motion to compel because of his stated goal of trying "to supplement our motion [for class certification] with your clients' records.") (Doc. 149-3, PageID 2710). Doing so would likely delay the resolution of class certification in this case by another year. Enough is enough.

Plaintiff says it needs the records to respond to an argument that Defendants made in their opposition to class certification. It is true that Defendants wrote in their opposition to class certification:

> "First, Plaintiff has not established that he has any injury. There is no evidence in the record concerning the miles driven by Plaintiff Derrick Thomas during his short stint of part-time work as a pizza delivery driver, nor is there any evidence concerning what he was paid in any given workweek. As a result, there is nothing in the record to suggest that Plaintiff's wages ever fell below the FLSA minimum. Because he has not established that he has any injury, Plaintiff cannot represent the class he seeks to certify."

(Opposition to Class Certification, Doc. 131, PageID 2464). But Plaintiff already had an opportunity to respond to that argument. He filed a 22-page reply to Defendants' Memorandum in Opposition to Class Certification (*See* Reply, Doc. 134), and Plaintiff simply ignored this crucial argument. Plaintiff has apparently realized his error now a year later. But his tactical decision to ignore that argument was of his own doing. Defendants had produced to him all of the mileage data he requested. And, as stated earlier, Plaintiff filed his own pay records with this Court more than four years ago (Doc. 24-2). His decision to ignore that data when briefing class certification,

and his failure to prove in his motion for class certification that he has suffered any alleged injury, was entirely of Plaintiff's own doing. He has not shown any good cause for embarking on this voluminous discovery or re-opening the class certification briefing to allow him a third bite at the class certification apple.

IV. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion to Compel (Doc. 149). In the alternative, if the Court believes the Defendants should produce the requested discovery before the Court resolves the pending motion for class certification, the Plaintiff and the opt-in Plaintiffs should similarly be compelled to produce discovery themselves. (*See* Defendants' Motion to Compel, Doc. 85).

Respectfully submitted,

/s/ Brian P. O'Connor
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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2022, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Brian P. O'Connor
Brian P. O'Connor

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