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

Derrick Thomas, *on behalf of himself and those similarly situated*, Plaintiff, v. Papa John's International, Inc., *et al*, Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS, TRANSFER, OR STAY (DOCS. 10 & 12)

1. Introduction

Defendant Papa John's International, Inc. ("PJI") asks this Court to step aside in favor of another pending pizza delivery driver wage and hour case on the basis of the "first-to-file" rule. The first-to-file rule, however, was never meant for FLSA cases such as this, and, in fact, runs contrary to the FLSA's written consent requirement. *See infra* §3; *and see* 29 U.S.C. 216(b).

If first-to-file *can* sometimes apply to FLSA cases, it should not apply to this case because *Durling* is different than this case in nearly every respect. *See infra* §4. Even the "central issue" that PJI asserts to be the same—joint employer liability—is substantially different between the cases. *Id.* Moreover, applying the first-to-file rule here would seriously prejudice Plaintiff Thomas

and the delivery drivers at the "It's Only" franchise[1] he seeks to represent while providing little benefit to the Court or parties. *See infra* § 5.

There may, however, be another course that will accomplish PJI's stated goal of judicial efficiency without prejudicing Plaintiff and the delivery drivers he seeks to represent. This option is discussed below. *See infra* §6.

2. The First-to-File Rule Generally

The first-to-file rule is the concept that "'when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment.'" *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789 (6th Cir. 2016), *quoting Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.,* 511 F.3d 535, 551 (6th Cir.2007). The rule "encourages comity among federal courts of equal rank." *Id*., *quoting Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Associates, Inc*., 16 Fed.App. 433, 437 (6th Cir. 2001). "It also conserves judicial resources by minimizing duplicative or piecemeal litigation, and protects the parties and the courts from the possibility of conflicting results." *Id*.

Although the first-to-file concept is generally labeled a "rule," it is not a rule. "Courts have repeatedly warned that the first-to-file rule is not a mandate directing wooden application of the rule without regard to extraordinary circumstances, inequitable conduct, bad faith, or forum shopping." *Id*. at 792.

[1] Defendants 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 are referred to collectively herein as the "It's Only" franchise. Plaintiff seeks to represent only delivery drivers who work for the "It's Only" franchise.

3. Applying the first-to-file rule to Fair Labor Standards Act cases is contrary to the rule's history and purpose and the FLSA's written consent requirement.

The first-to-file rule developed to avoid truly duplicative lawsuits—scenarios where a single litigation was necessary to determine the outcome of a singular dispute between the same parties, often over a single piece of property. As described more fully below, *Thomas* and *Durling* are very different cases. *See infra* §4. But, even if the cases were nearly the same, the first-to-file rule's history and purpose indicate that it should not be applied to Fair Labor Standards Act cases involving different named plaintiffs.

3.1. History of the First-to-File Rule

In 1935, the Supreme Court wrote one of the earliest analyses of the modern first-to-file concept. *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189, 191-92 (1935). From the beginning, practical concerns and the interests of the parties have dominated the first-to-file inquiry.

In *Penn General*, a state and federal court each were asked to liquidate the assets of an insurance company in receivership. *Id.* The Pennsylvania Supreme Court held that the state court, adjudicating the later-filed case, held jurisdiction over the dispute. *Id.* On appeal, the U.S. Supreme Court explained that when a judgment is sought *in personam*—*i.e.*, for the recovery of money or for an injunction compelling or restraining action by the defendant—both a state court and a federal court "may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other." *Id.* at 194. In contrast, for *in rem* or *quasi in rem* suits, "requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must necessarily yield to that of the other." *Id.* at 195.

The Court concluded that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." *Id*. But, the Court strongly suggested that the district court might well cede jurisdiction to the state court in the interest of efficiency and judicial economy. *Id*. at 197.

During the second half of the 20th century, the first-to-file rule was used in truly duplicative suits involving the same parties, most often involving patent and other intellectual property disputes, where one party filed an infringement action and the other filed a declaratory judgment action. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co*., 342 U.S. 180 (1952); *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F.2d 774 (6th Cir. 1957) (applying first-to-file rule to patent infringement and declaratory judgment actions involving same parties and issues); *Greene v. Ab Coaster Holdings, Inc*., Nos. 2:10-CV-38 & 2:10-CV-234, 2010 WL 3119399, *3 (S.D. Ohio Aug. 6, 2010) (first-filed rule applied to trademark infringement/declaratory judgment controversy); *SPEC Int'l, Inc. v. Patent Rights Protection Group, LLC*, No. 08-CV-662, 2009 WL 736826, at *3 (W.D. Mich. Jan. 9, 2009) (first-filed rule applied where both suits considered the validity of the same patent); *see also Carter v. Bank One*, 179 Fed.Appx. 338 (6th Cir. 2006) (assets frozen and second action was filed to determine whether certain assets were covered by the freeze order). Even in these zero-sum contests, courts have declined to apply the first-to-file rule where the cases involved different issues or parties. *Great Northern Railway Company v. National Railroad Adjustment Board*, 422 F.2d 1187, 1193 (7th Cir. 1970) ("Technically, the concept of comity has no application in cases like the instant one in which the two pending suits involve different parties, different causes of action, and different issues."); *see also Certified Restoration,* 511 F.3d at 55; *Zide Sport Shop*, 16 Fed.App. at 438.

The first-to-file rule is best (or perhaps only) suited to situations involving the same parties and the same piece of unique property. To use it otherwise extends it beyond its intended purpose.

3.2. Application to the FLSA

In light of the first-to-file rule's origins—same parties, same claims, same disputed property—it fits the FLSA like a square peg fits a round hole. Unlike the first-to-file rule's usual applications, FLSA suits do not entail competing claims to a piece of unique property. Instead, the suits are generally for money damages.

More importantly, the FLSA itself counsels against applying a first-to-file rule. Under the FLSA, one employee's lawsuit has no bearing on any other employee unless and until the other employee consents, in writing, to join the first employee's lawsuit. *See* 29 U.S.C § 216(b) ("no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Employees are free to join an action that is pending but are also free to pursue their claims elsewhere. *Id.* This statutory right should not be abridged by a procedural mechanism like the first-to-file rule.

Nothing precludes multiple FLSA collective actions that overlap completely, let alone actions—like *Thomas* and *Durling*—who's Venn Diagram hardly touches. As the Eastern District of Louisiana explained:

> The plain language of Section 216(b) does not prohibit employees from bringing more than one collective action based on the same alleged violations. *Yates v. Wal–Mart Stores,* 58 F.Supp.2d 1217, 1218 (D.Colo.1999). I find nothing in the phrase "an *action* to recover" or elsewhere in the statute that limits to one the number of collective actions that "may be maintained against any employer." Section 216(b) allows "*any one or more employees* for and in behalf of himself or themselves and

> other employees similarly situated" to bring an action. 29 U.S.C. § 216(b) (emphasis added). Contrary to defendant's restrictive reading, this language can be read to permit more than one collective action by any one, or more than one, employee or group of employees. Had Congress wished to limit the number of collective actions that could be brought against an employer, it could have said that only "one action to recover" may be maintained on behalf of a group of employees. It did not do so.

Akins v. Worley Catastrophe Response, LLC, 921 F.Supp.2d 593, 598 (E.D. La. Feb. 4, 2013); *see also, e.g.*, *Yates v. Wal-Mart Stores, Inc.*, 58 F. Supp. 2d 1217, 1218 (D. Colo. 1999) ("After examining the statute, there is no indication that a second collective action was intended to be barred. Unlike Rule 23, the opt-in provision of section 213 provides for no legal effect on those parties who choose not to participate.").

Putting aside the FLSA's prohibition against the first-to-file doctrine, deference to a litigant's choice of counsel makes first-to-file inappropriate to collective actions. *See Lackie v. U.S. Well Serv., LLC.*, No. 2:15-cv-3078, 2017 WL 395735, at *3 (S.D. Ohio Jan. 30, 2017); *quoting Ganci v. MBF Inspection Servs., Inc.*, No. 2:15-cv-2959, 2016 WL 5104891, at *4 (S.D. Ohio Sept. 20, 2016) ("'This Court has previously held that '[i]nforming potential plaintiffs [in a collective action] of their right to choose their own counsel is an appropriate element in a notice.'"). If the Court follows the route Defendants chart—transfer followed by consolidation—Plaintiff Thomas will likely lose his chosen counsel, or Plaintiff Thomas' counsel will lose the ability to control prosecuting Plaintiff's case, which is effectively the same thing. The deference to an FLSA plaintiff's choice of counsel is important in collective actions because, unlike Rule 23 class actions, there are no strictly-applied judicial safeguards for adequacy of representation. Without those safeguards, courts should not force employees to defer to counsel they never picked and may not want.

This concern is heightened because FLSA cases are also prosecuted by the Department of Labor. Employees may have very good reasons for choosing either private or DOL representation. Applying first-to-file to FLSA cases would undercut those considerations and potentially hamstring the DOL's prosecution of FLSA cases by forcing the DOL to take a back seat to private lawyers of varying levels of expertise.

In spite of the inappropriateness of first-to-file in the FLSA context, some courts have applied the first-to-file rule in FLSA cases, but only when (1) the cases assert truly duplicative claims against the same defendant or defendants, and judicial economy can be allegedly accomplished without any prejudice to the plaintiffs, or (2) where plaintiffs sought to circumvent orders in other courts. *See, e.g.*, *Abushalieh v. Am. Eagle Exp.*, 716 F. Supp. 2d 361, 366 (D.N.J. 2010) ("The *Abushalieh* case is 'truly duplicative' of the *Spellman* FLSA claim, in that both raise identical issues and seek identical relief on behalf of an identical group of proposed plaintiffs against the identical defendant, AEX."); *Siegfried v. Takeda Pharm. North America, Inc.,* No. 10-cv-02713, 2011 WL 1430333, at *5 (N.D. Ohio Apr. 14, 2011) (first-filed rule applied where two nationwide collective actions were filed against the same company on behalf of salaried sales representatives based on misclassification); *Watson v. Jimmy John's LLC*, No. 2:15-CV-768, 2015 WL 4132553 (S.D. Ohio July 8, 2015) (nationwide class of salaried assistant managers at franchise and corporate stores); *Ortiz v. Panera Bread Co.*, No. 10-cv-1424, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011) (nationwide classes of salaried assistant managers); *Castillo v. Taco Bell of Am., LLC*, 960 F. Supp. 2d 401, 405 (E.D.N.Y. 2013) (same); *In Re Enterprise Rent-ACar Wage & Hour*, 626 F. Supp. 2d 1325, 1326 (U.S. Jud. Pan. Mult. Lit. 2009) (same); *Fuller v. Abercrombie & Fitch Stores, Inc.,* 370 F. Supp. 2d 686, 690 (E.D. Tenn. 2005) (same); *Sims v. Time Warner*

Cable Inc., No. 5:17-cv-947, 2017 WL 3047932 (N.D. Ohio Jul. 19, 2017) (applying first-filed rule where court was "particularly troubled by the appearance of both forum-shopping and an intent to avoid earlier rulings by another court"); *White v. Peco Foods, Inc.*, 546 F. Supp. 2d 339, 342-43 (S.D. Miss. 2008) (transferring case back to district where conditional certification was originally heard and denied after plaintiffs re-filed in second district); *Goldsby v. Ash*, No. 09-cv-975, 2010 WL 1658703, at *4 (M.D. Ala. Apr. 22, 2010) (transferring case after same plaintiff filed duplicative FLSA actions—one against the corporate-entity-employer, the other against managers at the same employer regarding the same allegations).

The first-to-file rule was not created for FLSA cases seeking money damages and with different named plaintiffs. Because of the FLSA's unique "opt-in" provision, no lawsuit has any effect on any other employee unless and until that person affirmatively consents to join a specific lawsuit. For this reason alone, the Court should deny PJI's Motion and hold that first-to-file is not suited to FLSA actions.

4. Even if the first-to-file rule can apply to FLSA cases, it is inapplicable to this case.

Even if the first-to-file rule can be applied to some FLSA actions, it does not apply in this case because the case involves substantially different parties, proposed classes, and legal issues. "In order for suits filed in different districts to be duplicative, they must involve 'nearly identical parties and issues." *Baatz*, 814 F.3d at 789. To make this determination, courts generally consider three factors: (1) the chronology of events, (2) the similarity of the parties involved, and (3) the similarity of the issues or claims at stake. *Id.*

4.1. *Thomas* and *Durling* are substantially different cases with respect to both the parties and issues involved.

PJI, perhaps understandably, views both *Thomas* and *Durling* as revolving around the issue of whether PJI, as a "joint employer," is liable for under-reimbursing delivery drivers who work for their franchise locations. *See* Opposition, Doc. 10, PageID 106. For them, this is the "central issue." *Id.* at PageID 110. However, a close review of the two matters shows that they have far more differences than similarities, even with respect to the "central issue."[2]

PJI's "central issue" and primary basis for PJI's Motion is that both *Thomas* and *Durling* raise the issue of whether PJI is a joint employer responsible for under-reimbursement of expenses. Though the legal theory is nominally similar, the issues are vastly different between *Thomas* and *Durling*.

Durling seeks to hold PJI liable as a joint employer—*i.e.*, that PJI exercises control, directly or indirectly, over delivery drivers (*see* 29 C.F.R. § 791.2)—alongside all 786 Papa John's franchises in the United States. *See* Doc. 10-2, PageID 124. The *Durling* plaintiffs set out to prove their allegations through evidence that PJI created and disseminated a uniform compensation policy to all of its franchises. *See* Doc. 10-2, PageID 125. This is a far more ambitious argument than Plaintiff Thomas', who seeks to hold PJI to be a joint employer with one, specific franchise. *See* Complaint, Doc. 1, ¶¶ 209, 220. These divergent theories result in a number of practical differences between the cases.

The first practical difference is at the conditional certification stage. As Judge Seibel noted, the *Durling* plaintiffs meet their burden at this stage "by demonstrating either that the defendant dictated a payment policy for delivery drivers employed by corporate and franchisee

[2] A chart highlighting some of the differences between *Thomas* and *Durling* is attached as Exhibit A.

locations, or apart from that, there is a common policy that exists class-wide." *See* Doc. 10-2, PageID 144. On their first attempt, the *Durling* plaintiffs were unable to meet this burden because evidence of violations at two franchises and corporate stores was insufficient to infer a nationwide policy at all 786 franchises. As Judge Seibel explained:

> Plaintiffs have shown that there is a policy governing payment of delivery drivers at corporate-owned stores at a rate that results in the drivers receiving less than minimum wage, or at least has made a modest showing to that effect; and that the same is true as to two franchisees, specifically, the franchisees that employed Durling and PJPA, the franchisees that employed Wolff and Morris, but such evidence is insufficient to infer a nationwide policy. *See* Doc. 10-2, PageID 145-46.
> ***
> …all the plaintiffs here have shown is an arguably inadequate corporate policy and an arguably inadequate policy of two franchisees. *Id*. at PageID 146.
> ***
> The amended complaint and the declarations offered by plaintiffs showing the practices of the corporate-owned stores and two franchisees are not enough for me to infer that the other 780-something franchisees have the same common payment policy with respect to delivery drivers. *Id*.
> ***
> Plaintiffs claim in a conclusory fashion that other franchisees had the same policy but have shown no basis of knowledge of anything occurring beyond their own stores or franchisee. *Id*.
> ***
> I don't mean to suggest that there's any magic formula of the number of franchisees that have to follow a similar policy. All I'm saying now is that two out of 786 isn't going to fly.

Id. at PageID 151-52. As Judge Seibel's opinion makes clear, while the *Durling* plaintiffs do *not* need to prove at this stage that PJI is a joint employer—"Whether the defendant is a joint employer or a parent/agent of its franchisees is a merits issue that I will not evaluate at this stage." (PageID 143-44)—in order to make a showing for conditional certification, they *do* need to present some evidence of a nationwide policy or at least practice resulting in underpayment.

On the other hand, instead of seeking to certify a class of delivery drivers at 786 franchises based on evidence from 2 franchises, Plaintiff Thomas will seek to certify a class of delivery drivers at one franchise based on evidence from that one franchise. Judge Seibel's decision suggests that she would have certified the proposed class in *Thomas* without any showing relating to PJI. *See* Doc. 10-2, PageID 145-46. Indeed, with the exception of *Durling*, motions to conditionally certify collective actions have been unanimously granted in pizza delivery driver cases around the country. *See, e.g., Brandenburg v. Cousin Vinny's Pizza, LLC,* No. 3:16-cv-516, 2017 WL 3500411 (S.D. Ohio Aug. 15, 2017); *Meetz v. Wis. Hospitality Grp. LLC,* No. 16-cv-1313, 2017 WL 3736776, *5 (E.D. Wisc. Aug. 29, 2017); *Redus v. CSPH, Inc.,* No. 3:15-cv-2364, 2017 WL 2079807 (N.D. Tex. May 17, 2017); *Sullivan v. PJ United, et al.,* No. 7:13-cv-01275, Doc. 80 (N.D. Ala. Mar. 13, 2017); *Drollinger v. Network Global Logistics, Inc.,* No. 16-cv-00304, Doc. 76 (D. Colo. Jan. 18, 2017); *Tegtmeier v. PJ Iowa, LC,* 208 F.Supp.3d 1012, at *3-21 (S.D. Iowa Sept. 21, 2016); *Perrin v. Papa John's Int'l, Inc.*, No. 4:09-cv-1335, 2011 WL 4089251 (E.D. Mo. Sept. 14, 2011).[3]

Plaintiff Thomas' proposed class can be conditionally certified based on evidence of the compensation practices at the "It's Only" franchise. Whether PJI dictated those policies is a question that can be saved for a different day. Even when the courts get to the joint employer issue, however, they will be faced with different questions, different theories, and different facts to analyze. It is entirely plausible that Plaintiff Thomas can prove a joint employer relationship between "It's Only" franchise and PJI, whereas the plaintiffs in *Durling* cannot prove a

[3] Every contested class certification of a similar claim has also been granted under the more-stringent Rule 23 standard. *See Bass v. PJ COMN Acq. Corp.,* No. 09-cv-01614, 2011 WL 2149873 (D. Colo. Jun. 1, 2011); *Perrin v. Papa John's Int'l, Inc.* ("*Perrin II*"), 2013 WL 6885334 (E.D. Mo. Dec. 31, 2013); *Oregal v. PacPizza, LLC,* Case No. C12-01454 (Sup. Ct. of Contra Costa Cnty. May 8, 2014).

nationwide joint employer theory. They are two different animals. Because *Thomas* begins with a more modest goal, Plaintiff Thomas will use different evidence to prove his claims—evidence specific to "It's Only"—and a much reduced legal standard—proving PJI is a joint employer with a single franchise is a far different goal than proving PJI is a joint employer with all franchises.

Nearly every other aspect of the cases differs as well.

First, the named parties in each case are almost entirely different. Of the 12 unique parties named in *Durling* and *Thomas*, only PJI is named in both cases. The *Durling* case does not assert claims against Plaintiff Thomas' direct employers, the "It's Only" franchise and its owner. Instead, *Durling* puts all of its eggs in the PJI basket. Conversely, *Thomas* asserts claims against both PJI and the "It's Only" franchise (and its owner). Obviously, the named plaintiffs are not the same.

Second, the proposed classes are different. According to PJI, *Durling* seeks to represent a nationwide collective of all Papa John's delivery drivers in the United States, including those working at both corporate and 786 different franchises. However, in reality, the *Durling* proposed class excludes members of any pending cases, like *Thomas*:

> …a class of all Papa John's delivery drivers (at corporate and franchisee-owned stores) who are reimbursed on a per-delivery basis **and are not members of a pending class or collective action relating to the under-reimbursement of driving expenses**.

See Durling, No. 7:16-cv-3592, Doc. 161, Plaintiffs' Renewed Motion for Collective Action, p. 7 (attached as Exhibit B) (emphasis added). Because *Durling* carves out pending cases like *Thomas*, PJI's Motion should be denied on that basis alone.

Even under PJI's understanding of the proposed *Durling* class, the proposed classes in *Thomas* would still be very different. *Thomas* involves allegations on behalf of the delivery drivers at the 27 "It's Only" franchise locations in the Cincinnati, Ohio area only. Plaintiff Thomas does not seek to represent delivery drivers who work or worked at corporate stores or at any other franchise besides the "It's Only" franchise. *See* Complaint, Doc. 1, ¶¶ 209, 220. Further, both cases involve different Rule 23 class claims under state law. *Durling* asserts class claims under New York, New Jersey, Pennsylvania, and Delaware laws. *See* Doc. 10-3, *Durling* Complaint. Plaintiff Thomas asserts Ohio state law claims under the Ohio Constitution, the Ohio Minimum Fair Wage Standards Act, and the Ohio Prompt Pay Act. *See* Complaint, Doc. 1.

Moreover, even if PJI's understanding of the proposed *Durling* class was correct *and* the *Durling* court certified that class, the FLSA's written consent requirement makes it a legal irrelevancy. 29 U.S.C. § 216(b). No employee will be affected by *Durling* unless and until that particular employee consents, in writing, to join the *Durling* case. *Id.* True overlap would only occur if an employee attempted to join both cases. This rare situation can be addressed if it ever actually happens and at the notice stage.

Third, the claims asserted and relief sought are different. *Durling* alleges claims for relief based only on alleged under-reimbursement for delivery-related expenses. *See* PJI's Motion, Doc. 10, PageID 102-03. In contrast, Plaintiff Thomas also asserts claims for (1) failure to properly claim a tip credit from delivery drivers' wages, (2) claims for other unlawful "kickbacks" (namely, for "uniform" and "insurance" deductions taken from his paycheck), and (3) claims for off-the-clock work. *See* Complaint, Doc. 1, ¶¶ 9, 90, 92, 102, 119, 127, 240-41, 250-51. These are not minor, ancillary claims bootstrapped to Plaintiff's claim for under-reimbursement.

For example, if Plaintiff Thomas prevails in proving that Defendants failed to properly avail themselves of the tip credit, he and the class he seeks to represent will be entitled to the "tip credit differential," *i.e.*, the difference between the wage rate they were paid and full minimum wage for all hours worked within the last three years. *See, e.g.*, 29 U.S.C. § 203(m); *Solis v. Min Fang Yang,* 345 Fed.Appx. 35, 38 (6th Cir. 2009). The other kickback claims, the off-the-clock claims, Section 34a, and the Prompt Pay Act liquidated damages also afford Plaintiff Thomas and his proposed class the possibility for additional damages that are not sought in *Durling*. *See* Ohio Const. Art. II, Sec. 34a; 29 U.S.C. 201, et seq.; O.R.C. 2113.15.[4] Conversely, the only *Durling* claims that would apply to Plaintiff Thomas and the "It's Only" delivery drivers would be the FLSA under-reimbursement claim. *See* Doc. 10-3, *Durling* Complaint.

In light of the substantial differences between the cases, PJI's Motion transfer based on first-to-file should be denied.

4.2. The "chronology of events" does not favor application of the first-to-file rule.

Plaintiff does not dispute that the *Durling* lawsuit was filed before the *Thomas* lawsuit, or that *Durling* was first to assert claims relating to under-reimbursement of delivery-related expenses against PJI as a joint employer. However, the *Durling* plaintiffs expressly exclude Plaintiff Thomas and his proposed class from the class they seek to represent, rendering the chronology question a nullity. *See* Ex. B, p. 7.

Even if chronology is to be considered, all of the other claims, issues, and parties relevant to the *Thomas* case were first raised in *Thomas*, and have only been raised there. *Thomas* was the

[4] Section 34a of the Ohio Constitution carries a three year statute of limitations and allows for an additional two times unpaid wages when a violation is found. The Ohio Prompt Pay Act allows for liquidated damages of $200 for each violation that takes place. *See* Complaint, Doc. 1.

first to (1) raise claims against the "It's Only" franchise, (2) raise claims on behalf of "It's Only" delivery drivers, (3) raise Rule 23 class action claims arising under the Ohio Constitution and other Ohio laws, (4) allege that delivery drivers at the "It's Only" locations have not received proper notice of the tip credit provisions of the FLSA pursuant to Section 203(m), (5) allege that drivers were required to pay unlawful "kickbacks" to their employers for paycheck deductions for "uniforms" and "insurance," and (6) assert an off-the-clock claim based on their employer clocking him and other drivers onto his "on the road" pay rate before he departed the store for a delivery. *Compare* Complaint, Doc. 1, to *Durling* Complaint, Doc. 10-3. In other words, *Thomas* was the "first to file" the vast majority of the issues that will dominate the litigation. The Court should reject PJI's attempt to pick a single, similar, though substantially different, legal issue to justify a transfer under first-to-file.

5. Application of the first-to-file rule would be inequitable under the circumstances.

Even if the above three factors favored application of the first-to-file rule, which they do not, the Court should still exercise its discretion to decline to apply the first-to-file rule. *Zide Sport Shop*, 16 Fed.App. at 437 (after the first three factors, courts must also make equitable considerations, such as evidence of inequitable conduct, bad faith, anticipatory suits, or forum shopping). Defendants three proposed remedies—dismissal, transfer, or stay—would cause serious prejudice to Plaintiff Thomas and his co-workers. Meanwhile, PJI's Motion, at best, lessens the burden on PJI of having to litigate two cases that involve a similar theory against them.

With respect to dismissal, Plaintiff Thomas and his proposed class would be forced to join a different class that asserts fewer claims in protection of their rights, in a distant forum, with other counsel, and whose chances of being certified are dubious. This is serious prejudice that

weighs against dismissal under the first-to-file rule. *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d at 793-94.

A stay is also prejudicial. Plaintiff has asserted claims against the "It's Only" franchise that he has a right to pursue regardless of the outcome in *Durling*. Moreover, even if *Durling* ultimately determines that PJI is not a joint employer with every U.S. franchise, it does not mean that the *Durling* court, this Court or any other court would not find PJI to be a joint employer with "It's Only." The delay in having to wait for an irrelevant result is obviously prejudicial to Plaintiff Thomas and the delivery drivers he seeks to represent. Moreover, the proposed class will be prejudiced if Plaintiff Thomas is not permitted to pursue conditional certification as soon as possible because, in light of the FLSA's opt-in requirement, their statute of limitations continues to run until they opt in. *See* 29 U.S.C. § 216(b).

Transfer of this case to the Southern District of New York would be likewise prejudicial. In the name of preserving resources PJI will not likely have to spend in this case until the issues in *Durling* are decided, PJI asks the Court to force Plaintiff Thomas, a former pizza delivery driver from Ohio, to litigate in White Plains, New York, and, most likely, wait for a result in *Durling* anyway, while FLSA class members' statute of limitations ticks away and the "It's Only" franchise escapes liability. Perhaps more importantly, Plaintiff Thomas will be required to abandon claims that rest on solid footing in order to join a fight he never signed up for. Such a result benefits no one but PJI to the grave detriment of Plaintiff and his proposed class.

In fact, based on the *Durling* court's decision attached to PJI's Motion, it would seem PJI agrees with Plaintiff that the Southern District of Ohio would be a more convenient venue for the "joint employer" dispute than is the Southern District of New York. *See* Doc. 10-2, PageID 132-

33 (explaining that, in support of their motion to transfer *Durling* to W.D. Ky., PJI argued that the individuals responsible for maintaining the relevant records and with knowledge about data were in W.D. Ky., most of PJI's executives reside within 100 miles of W.D. Ky., and the relevant documents, policies, and standards are created and disseminated from PJI's Louisville headquarters). Litigating close to home is a far bigger concern to delivery drivers than a large, multinational corporation.

The *Jimmy John's* case, cited throughout PJI's Motion, is a good example of why transfer is not the appropriate remedy at the present time. In that case, multiple nationwide class and collective actions had been filed against Jimmy John's alleging a corporate policy of misclassifying assistant store managers as exempt from overtime, and alleging that Jimmy John's had also disseminated this policy to its franchisees. *Jimmy John's*, 2015 WL 4132553. Even after the Southern District of Ohio granted transfer to the Northern District of Illinois, where the earlier-filed case was pending, the cases *still* proceeded on two separate tracks because the cases, like the present case, had divergent legal theories and procedural postures. *See* Ex. C, Briefing and Order on Jimmy John's Motion to Consolidate *Watson* and *Brunner*.[5] If this case were transferred to the Southern District of New York, PJI would then seek to consolidate the action with *Durling*—consolidation would not take place automatically. *Id.* As in *Jimmy John's*, Plaintiff Thomas will argue that he will be prejudiced by being consolidated with *Durling*, for all the reasons stated herein. *Id.* If Plaintiff Thomas prevails in avoiding consolidation, he will then be left to litigate a

[5] The cases were eventually consolidated for notice purposes after classes were conditionally certified in both cases and Jimmy John's twice-renewed motion to consolidate was granted. *See Brunner v. Jimmy John's*, No. 1:14-cv-5509, Doc. 222 (attached as Exhibit D). As discussed herein, PJI's requested relief would be more appropriate if the *Durling* motion for conditional certification is granted.

case whose epicenter is Cincinnati, Ohio, in White Plains, New York. The "It's Only" franchise and PJI will be similarly burdened, as all parties are truly Ohio Valley neighbors.

When considering the prejudice to the parties, the substantial inequality of resources and position is important here. On one hand, PJI is a multinational corporation with global system-wide sales of $3.7 billion in 2016. *See* Complaint, Doc. 1, ¶ 133. PJI seeks to avoid the cost of litigating a particular issue in two courts. On the other hand, Plaintiff Thomas and the employees he seeks to represent are pizza delivery drivers seeking unpaid minimum wages. The substantial delay and burden Defendants' proposed transfer would impose on Plaintiff is far more damaging than the cost to PJI in having to defend a somewhat similar legal issue in two lawsuits.

6. A temporary, limited stay of some discovery may achieve PJI's stated goal of economy.

If the Court ultimately decides that *Durling* could have some bearing on this lawsuit, then Plaintiff suggests taking a more measured action than an immediate transfer. The Court could simply defer the question of a transfer until after the *Durling* court decides the renewed conditional certification motion. This will allow the Court to see what actually happens in *Durling* rather than transferring this case based solely on PJI's speculation that the *Durling* court might certify a collective action that *could* include the "It's Only" franchise; a situation that Defendants are vigorously fighting to avoid. *See* Doc. 10-2, PageID 110 ("PJI categorically denies that these issues can be decided uniformly for any of the plaintiffs in either action because the plaintiffs worked at different franchise locations, for different employers, under different working conditions and circumstances—much less for a nationwide collective of all delivery drivers…").

During the time prior to the *Durling* decision, the Court could stay discovery on the joint employer issue. After all, before the Court can determine whether PJI is a joint employer in this

case, there are a number of questions that must be answered—*e.g.*, is Plaintiff Thomas similarly situated to the other drivers at the "It's Only" franchise? Has there been an underpayment in violation of the FLSA and Ohio law? *See, e.g.*, Doc. 10-2, PageID 143-44 (explaining that the joint employer question is a merits question to be determined after conditional certification). As such, even if the Court orders that Plaintiff cannot yet inquire into the joint employer issue in discovery until the *Durling* motion is resolved, the parties in *Thomas* can still address issues that will have to be addressed eventually and will not be addressed in *Durling*.

This approach allows PJI to avoid what is essentially the sole source of prejudice they point to—the time and expense of engaging in discovery in the present case at the present time on the issue of joint employer status. At the same time, the approach would allow Plaintiff Thomas to pursue his claims without further delay on behalf of himself and the workers whose statute of limitations continues to run until they opt in to the case. *See* 29 U.S.C. § 216(b).

If the *Durling* court ultimately certifies an FLSA collective that includes the "It's Only" franchise, then the Court and parties can revisit a limited transfer. Under that scenario, the Court can bifurcate this case into the collective action under-reimbursement claim against PJI, and everything else. The vast majority of this case, *i.e.*, "everything else," can and should remain in this Court for adjudication because it is not even arguably related to the *Durling* case. The Court can then consider, with far more information, whether the collective action under-reimbursement claim against PJI should be transferred or consolidated in some way.

On the other hand, if the *Durling* court denies the plaintiffs' renewed motion for conditional certification, or if it is granted in part but does not include the "It's Only" franchise,[6]

[6] In her decision on plaintiffs' first motion, Judge Seibel suggested she was inclined to grant the motion for

then the prohibition against joint employer discovery would be lifted in this case, and the case would go forward without restriction. After all, if the *Durling* conditional certification motion is not granted, the *Durling* court will not be addressing the question of whether PJI jointly employs delivery drivers at the "It's Only" franchise and will have no link whatsoever to this case.

7. Conclusion

Based on the foregoing, Plaintiff Derrick Thomas asks that the Court deny PJI's Motion to Dismiss, Transfer, or Stay; or, if the Court decides some action is necessary, Plaintiff asks the Court to stay discovery into the joint employer issue in *Thomas* pending the outcome of the motion for conditional certification in *Durling*.

Respectfully submitted,

/s/ Andrew Biller

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conditional certification with respect to only the corporate stores and franchise stores where the named plaintiffs worked. *See* Doc. 10-2, PageID 145-46.

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Defendants through the Court's ECF system.

/s/ Andrew Biller
Andrew Biller