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.; 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

PAPA JOHN'S INTERNATIONAL, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, TRANSFER THE CASE TO THE SOUTHERN DISTRICT OF NEW YORK, OR STAY THE CASE

I. INTRODUCTION

This action should be dismissed, transferred to the Southern District of New York, or stayed pending the outcome of *Durling*. The first-to-file rule compels this result because this action purports to bring an identical FLSA claim, based on the same theory (that delivery drivers were improperly reimbursed), with nearly identical joint-employer allegations directed against PJI, and seeks relief for putative members of an overlapping putative collective action sought in *Durling*. This case is tailor made for application of the first-to-file rule to preserve comity among federal courts, and Plaintiff's Response[1] does not set forth any valid reason to disregard the first-to-file rule in this case. Plaintiff's arguments should be rejected because:

- The first-to-file rule is not only applicable in circumstances involving later-filed and overlapping FLSA collective actions, but also is "particularly appropriate" here.
- The first-to-file rule does not require that parties, claims, and issues all be exactly identical, and Plaintiff's assertions to the contrary are inconsistent with settled law.
- Plaintiff is incorrect about the collective action definition in *Durling* – Plaintiff Thomas and those he seeks to represent are encompassed in the putative collective action *Durling*.
- Plaintiff's Response completely ignores the purpose of the first-to-file rule, which is to preserve comity among federal district courts.
- Plaintiff's Response asks this Court to impose severe prejudice on PJI, by forcing it to litigate whether delivery drivers were properly reimbursed and whether PJI is a joint-employer for purposes of FLSA liability – on behalf of members of overlapping putative collective actions – in two different forums.
- Plaintiff's arguments that application of the first-to-file rule would prejudice Plaintiff consist of nothing more than baseless speculation or, alternatively, are the byproduct of Plaintiff's counsel's own litigation strategy – neither of which constitute compelling circumstances warranting departure from the first-to-file rule.

Notably, Plaintiff claims to need immediate collective action certification to protect the claims of putative FLSA collective members, which Plaintiff argues would be prejudiced by any

[1] The "Response" refers to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, Transfer, or Stay (ECF No. 19).

litigation delay. While such a plea is not relevant to the issue before the Court in PJI's Motion, any purported delay is a direct result of Plaintiff's litigation tactic to sue PJI under a joint-employer theory, rather than to proceed solely against Plaintiff's actual franchisee employers. It certainly does not warrant departure from the first-to-file rule. This is because this *exact* theory is being asserted in *Durling*. Plaintiff's cries of delay and prejudice ring hollow where, in a nearly identical copy-cat case filed in the U.S. District Court of Idaho, Plaintiff's counsel chose to voluntarily dismiss PJI and to proceed only against plaintiff's franchisee employers, rather than having the case transferred and consolidated with *Durling*. *See Edwards*, *et al. v. Papa John's International, et al.*, No. 17-CV-283 (D. Idaho) (ECF No. 24). The court in *Edwards* subsequently dismissed plaintiff's claims against PJI without prejudice. (*Id.*, ECF No. 28.) In fact, plaintiff in *Edwards* recently filed a motion for conditional certification and is proceeding with the case independently from *Durling* because the case no longer alleges a joint-employer theory of liability against PJI as a defendant. (*Id.*, ECF No. 29).

Unlike in *Edwards*, Plaintiff here has made the strategic decision to assert and pursue a joint-employer theory against PJI, the same theory which is already being pursued on behalf of Plaintiff – and all other delivery drivers nationwide – in *Durling*. The first-to-file rule exists specifically to prohibit such gamesmanship by Plaintiff's counsel, which would require PJI to litigate identical issues in a piecemeal fashion in multiple lawsuits across the country. Allowing this case to proceed separately from *Durling* also would waste significant judicial resources and create a substantial risk of inconsistent rulings – especially in light of the current procedural posture of the *Durling* case. Accordingly, this case should be dismissed, transferred to the Southern District of New York, or stayed pending the outcome of *Durling*.

II. THE FIRST-TO-FILE RULE IS NOT ONLY APPLICABLE, BUT "PARTICULARLY APPROPRIATE," IN LATER-FILED FLSA COLLECTIVE ACTIONS

First, Plaintiff's primary argument that the FLSA contains a "prohibition against the first-to-file doctrine," ECF No. 19 at 6, is wrong as a matter of law and should be swiftly disregarded by the Court. Notably, Plaintiff's argument ignores the mountain of precedent *directly* to the contrary cited in PJI's Motion that "the first-to-file rule is particularly appropriate in the context of later-filed FLSA collective actions, which threaten to present overlapping classes, multiple attempts at certification in different courts, and complicated settlement negotiations."[2] (ECF No. 10 at 10-13) (citing cases where federal courts applied the first-to-file rule to overlapping wage and hour collective actions). It is unclear how Plaintiff can make this argument in good-faith where PJI's Motion contains voluminous precedent, including precedent in the Sixth Circuit and the Southern District of Ohio, applying the first-to-file rule in cases involving overlapping FLSA collective actions. *See, e.g.*, *Cook v. E.I. DuPont de Nemours & Co*., No. 3:17-CV-909, 2017 WL 3315637, at *2 (M.D. Tenn. Aug. 3, 2017) (applying first-to-file rule to FLSA collective action and acknowledging that "numerous courts have recognized that, in the FLSA collective action context, the first-to-file rule is often applied and is particularly appropriate.") (internal quotations and citations omitted); *Watson v. Jimmy John's LLC*, No. 2:15-CV-768, 2015 WL 4132553 (S.D. Ohio July 8, 2015) (applying first-to-file rule to later filed FLSA collective action).

Second, Plaintiff's argument that the first-to-file rule is inapplicable in FLSA cases because the FLSA does not prohibit employees from bringing more than one collective action

[2] Plaintiff's argument is particularly curious considering that Plaintiff's Response cites *Ortiz v. Panera Bread Co*., No. 10-cv-1424, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011), which contains this exact quote and also noted that is therefore "not surprising that federal courts consistently apply the first-to-file rule to overlapping wage and hour collective actions."

based on the same alleged violations is nothing more than a red herring. The point is not the filing of the lawsuit, but where it should be litigated and under what circumstances. While the FLSA does not expressly prohibit multiple overlapping or duplicative FLSA collective actions from being filed, the first-to-file rule is particularly appropriate in FLSA collective actions for precisely this reason – to promote judicial efficiency and avoid the possibility of competing judgments. Indeed, the very case cited by Plaintiff for the proposition that "[n]othing precludes multiple FLSA collective actions that overlap," ECF No. 19 at 5, denied defendant's motion to dismiss under the first-to-file rule not because the rule is inapplicable, but because the earlier-filed FLSA collective action ***was no longer pending***. *See Akins v. Worley Catastrophe Response, LLC*, 921 F. Supp. 2d 593, 598-99 (E.D. La. 2013) (noting that "it is true that courts commonly dismiss a later filed case in favor of an earlier filed one based on the same factual claims, but usually when two such actions are pending *at the same time*" and denying motion to dismiss because "no other *pending* collective action suggests that the first-filed rule should be invoked.")[3] Unlike in *Akins*, the first-filed case here is pending and therefore, the stated purposes of the first-to-file rule, including "'principles of comity and sound judicial administration'" and '[t]he concern . . . to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that

[3] Plaintiff's citation to *Yates v. Wal-Mart Stores, Inc.*, 58 F. Supp. 2d 1217, 1218 (D. Colo. 1999), is equally inapposite. In *Yates*, the court declined to dismiss a later-filed FLSA collective action where a separate collective action with identical issues was already before the same court, and the plaintiffs in the newly-filed action were given an opportunity to opt-in to the case but chose not to do so. Accordingly, *Yates* merely stands for the uncontroversial proposition that nothing bars a plaintiff from *filing* a subsequent FLSA collective action despite the fact that an overlapping collective action is already pending – and not that the first-to-file rule is inapplicable in FLSA collective actions as Plaintiff suggests. In fact, the *Yates* court acknowledged that because a plaintiff could file his or her own suit under the FLSA in such circumstances, "judicial efficiency demands that, *if possible, these individual suits be consolidated*" and "[t]he opposite conclusion could lead to a party having to defend itself in not two, but potentially hundreds of identical lawsuits." *Id.* (emphasis added). Accordingly, if anything, Plaintiff's citation to *Yates* supports application of the first-to-file rule here.

call for a uniform result" still very much exist. *Id.* (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999)).

Third, despite spending the first five pages of his Response arguing that the first-to-file rule "fits the FLSA like a square peg fits in a round hole" and is somehow inapplicable, Plaintiff nonetheless concedes – as he must – that "courts have applied the first-to-file rule in FLSA cases" but, according to Plaintiff, "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." (ECF No. 19 at 7.) Again, Plaintiff's argument misses the mark. Application of the first-to-file rule in FLSA collective actions is not limited in the manner that Plaintiff suggests.

For example, in support of this argument (and buried in a string cite), Plaintiff cites Judge Frost's recent decision in *Watson v. Jimmy John's LLC*, No. 2:15-CV-768, 2015 WL 4132553 (S.D. Ohio July 8, 2015), which transferred a later-filed and overlapping FLSA collective action alleging wage and hour violations against Jimmy John's pursuant to a joint-employer theory to the Northern District of Illinois based on the first-to-file rule. As noted in PJI's Motion, *Watson* is directly on point, and Plaintiff makes little or no effort to distinguish it. In fact, contrary to Plaintiff's citation to the contrary, the court in *Watson* specifically recognized that cases do not need to assert "truly duplicative claims against the same defendant or defendants," ECF No. 19 at 7, in order for the first-to-file rule to apply. *Id.* at *3-4 (applying the first-to-file rule "[d]espite the claims that differ between the two suits" where "the core claim is the same – an unpaid overtime FLSA action brought individually by plaintiffs on behalf of a nationwide class.")[4]

[4] The additional cases cited by Plaintiff for the proposition that in order for the first-to-file rule to apply, cases must assert "truly duplicative claims against the same defendant or defendants, and judicial economy can be allegedly

Finally, Plaintiff's argument that deference to a litigant's choice of counsel makes the first-to-file rule inapplicable in FLSA collective actions is unsupported and wholly speculative. Plaintiff argues that if this case is consolidated with *Durling*, Plaintiff supposedly "will likely lose his chosen counsel, or Plaintiff Thomas' counsel will lose the ability to control prosecuting Plaintiff's case." However, transfer and consolidation of this action with *Durling* will not have any impact on Plaintiff's choice of counsel or the claims he chooses to pursue, nor does Plaintiff's counsel cite any authority to the contrary.

Indeed, in practice, the exact opposite is true in FLSA collective actions transferred and consolidated under the first-to-file rule. For example, *In Re Jimmy John's Overtime Litigation* consists of three consolidated collective actions against Jimmy John's, including the transferred and consolidated *Watson* case. The various plaintiffs' counsel from each of the consolidated cases continue to represent their respective clients and pursue their respective clients' additional

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accomplished without any prejudice to the plaintiffs," ECF No. 19 at 7-8, actually stand for the *exact opposite* – the claims, issues, and parties in overlapping FLSA cases *do not* need to be identical. *See Abushalieh v. Am. Eagle Exp*., 716 F. Supp. 2d 361, 365 (D.N.J. 2010) (applying first-to-file rule where the earlier filed case "seeks additional relief under state statutes"); *Siegfried v. Takeda Pharms. N. Am. Inc*., No. 10-CV-2713, 2011 WL 1430333, at *6 (N.D. Ohio Apr. 14, 2011) (applying first-to-file rule to transfer case to court with first-filed case that included additional claims, noting "these additional claims and requests for relief fail to defeat the substantial overlap between the issues involved in both cases"); *Ortiz v. Panera Bread Co*., No. 10-cv-1424, 2011 WL 3353432, at *2 (E.D. Va. Aug. 2, 2011) ("The first-to-file rule is particularly appropriate in the context of competing FLSA collective actions, which threaten to present overlapping classes, multiple attempts at certification in two different courts, and complicated settlement negotiations. It is not surprising that federal courts consistently apply the first-to-file rule to overlapping wage and hour collective actions."); *Castillo v. Taco Bell of Am., LLC*, 960 F. Supp. 2d 401, 404 (E.D.N.Y. 2013) ("The lawsuits need not be identical, but the claims and rights raised in the two actions must not differ substantially."); *Fuller v. Abercrombie & Fitch Stores, Inc*., 370 F. Supp. 2d 686, 688 (E.D. Tenn. 2005) (noting that for the first-to-file rule to apply "[i]mportantly, the parties and issues need not be identical" and applying first to file rule to FLSA collective action despite the fact that the later-filed action alleged a claim not alleged in the first-filed action, the plaintiffs were not identical, and the collectives would include different individuals); *Sims v. Time Warner Cable Inc*., No. 5:17-CV-947, 2017 WL 3047932, at *3 (N.D. Ohio July 19, 2017) (applying first-to-file rule despite differences in the cases where the court was "concerned that defendants not be subjected to possible conflicting rulings and, equally important, that they not be required to defend identical claims in different jurisdictions."); *White v. Peco Foods, Inc*., 546 F. Supp. 2d 339, 343 (S.D. Miss. 2008) ("To properly apply the first-to-file rule, the district court need only find that substantial overlap is likely between its case and a pending case in another federal court that was filed previously."); *Goldsby v. Ash*, No. 2:09-CV-975, 2010 WL 1658703, at *2 (M.D. Ala. Apr. 22, 2010) ("It is important to note that the parties and issues need not be identical, but rather the parties and issues should substantially overlap.").

claims in the consolidated litigation.[5] Plaintiff's counsel offers no support for the fanciful notion that his client would lose his chosen counsel if this case was transferred and consolidated. Accordingly, Plaintiff's speculative fear that he will not have his choice of counsel in the event that this case is transferred and consolidated is just that – unsupported speculation which does not provide any reason for the Court to depart from the first-to-file rule.[6]

III. PLAINTIFF HAS NOT ESTABLISHED ANY REASON TO DEPART FROM THE WELL-ESTABLISHED FIRST-TO-FILE RULE

A. The First-To-File Rule Does Not Require That The Parties, Claims, And Issues Be Identical

As noted by Judge Frost in *Watson*, "although there may be differences between the two actions, the Court cannot ignore the substantial overlap." *Watson*, 2015 WL 4132553, at *4. A decision to the contrary "would not only tend to frustrate the legitimate aim of preserving judicial economy, as substantially the same evidence would be presented in both actions . . . but also poses the possibility of inconsistent opinions." *Id.* (citing *Buffalo Wild Wings, Inc. v. BW Rings, LLC*, No. 2:10-CV-335, 2010 WL 4919759, at *3 (S.D. Ohio Nov. 29, 2010)); *see also Fuller*, 370 F. Supp. 2d at 690 ("Fuller's arguments – that the plaintiffs are not identical, that the collective classes will include different individuals, and that he alleges a claim not included in the Mitchell action – are correct. However, the Court finds that these differences are not sufficient to overcome the substantial similarities between the actions."). In other words, differences between the cases alone do not preclude application of the first-to-file rule, and this Court "has a duty to avoid a ruling that would entrench upon or inconsistently decide overlapping issues being addressed by another federal court." *Watson*, 2015 WL 4132553, at *4

[5] Counsel for PJI also represented Jimmy John's, LLC in the *Watson* litigation and represents Jimmy John's in *In Re Jimmy John's Overtime Litig*., No. 14-CV-05509 (N.D. Ill.), which includes the consolidated *Watson* action.

[6] Of course, if Plaintiff Thomas wanted to completely ensure that he would not have to "defer to counsel [he] never picked and may not want," ECF No. 19 at 6, he could voluntarily dismiss PJI and pursue his claims solely against his franchisee employers in this jurisdiction, as Plaintiffs' counsel has chosen to do in the *Edwards* case.

(internal quotations and citations omitted). Here, "judicial consistency, economy, and comity support the transfer," where the parties and issues in this action substantially overlap with the parties and issues in *Durling*. Plaintiff has not provided any viable arguments to the contrary.

First, Plaintiff does not dispute that the primary issue in both actions is whether PJI is liable as a joint-employer. Nonetheless, Plaintiff attempts to characterize the joint-employer theory in *Durling* as "far more ambitious" and based on "divergent theories." (ECF No. 19 at 9.) However, like in *Watson*, "the core issue in determining [PJI's] liability for all claims in both cases will be whether Defendants are joint employers." *Watson*, 2015 WL 4132553, at *4. While Plaintiff clearly believes that it would be easier to meet his burden on conditional certification in this action by seeking to certify a narrower collective action,[7] Plaintiff is nonetheless requesting that the same issue be litigated and resolved concurrently, in two different federal courts, subjecting PJI to added costs and a risk of inconsistent rulings – the precise result that the first-to-file rule exists to avoid.

As much as Plaintiff and Plaintiff's counsel may wish for a "do-over" on the nationwide joint-employer theory being pursued in a different forum in *Durling*, comity obliges this Court to respect the rulings of its sister court, and equity disfavors forcing PJI to litigate the same claims and issues in two different forums. Similarly, the Court need not engage in Plaintiff's invitation to analyze the merits of Plaintiff's chances of conditional certification or claims in this action as compared to *Durling*. *See, e.g.*, *Siegfried*, 2011 WL 1430333, at *5 (declining "to hypothesize about the ability of various sub-groups of class members to succeed on their claim" and noting

[7] In support of this argument, Plaintiff makes a handful of speculative (albeit irrelevant) statements concerning the merits of conditional certification, including that "Plaintiff Thomas' proposed class [sic] can be conditionally certified based on evidence of the compensation practices at the 'It's Only' franchise" and "[i]t 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 nationwide joint employer theory." (ECF No. 19 at 11-12.) PJI disputes these assertions. However, Plaintiff's musings regarding the likelihood of success of his conditional certification theories (and mixing inapplicable Rule 23 concepts into his explanation) are wholly irrelevant for purposes of PJI's Motion.

that to find that a sub-group of collective members encompassed by a broader FLSA collective action were not similar "would require this Court to draw distinctions among various subgroups of class members").

Second, contrary to Plaintiff's assertion, it is irrelevant that this action brings claims against Plaintiff Thomas' franchisee employers while *Durling* involves only claims against PJI. *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) (in order for the first-to-file rule to apply, "[t]he parties and claims in the two actions need not be identical."); *Watson*, 2015 WL 4132553, at *3 (granting motion to transfer under first-to-file rule where one case named franchisee employers as defendants and the other did not because the parties were "substantially similar"). The fact that both actions allege FLSA claims against PJI under an identical case theory is sufficient, and Plaintiff's Response provides no authority to the contrary.

Third, Plaintiff's argument that the first-to-file doctrine does not apply because he has pled additional claims along with his FLSA claim, ECF No. 19 at 13-14, is unavailing. Courts have consistently held that allowing a plaintiff to avoid the consequences of the first-to-file rule by adding additional claims would defeat the very purpose of the first-to-file rule in promoting judicial efficiency and avoiding the possibility of competing judgments. *See, e.g., Watson*, 2015 WL 4132553, at *4 ("Despite the claims that differ between the two suits, the core claim is the same — an unpaid overtime FLSA action brought individually by plaintiffs").[8] Indeed, if

[8] *See also IMG Worldwide, Inc. v. Matthew Baldwin*, No. 10-CV-794, 2010 WL 3211686, at *4 (N.D. Ohio Aug. 11, 2010) (applying first-to-file rule even where second-filed case includes additional claims for spoliation of evidence, breach of contract, and violation of trade secrets since both disputes "stem from the same underlying set of facts" and "the issues involved in both cases substantially overlap"); *Siegfried*, 2011 WL 1430333, at *6 (applying first-to-file rule to transfer case to court with first-filed case that included additional claims, noting "these additional claims and requests for relief fail to defeat the substantial overlap between the issues involved in both cases"); *Mitsubishi Caterpillar Forklift Am. Inc. v. Minnesota Supply Co.*, No. 10-CV-2696, 2011 WL 711564, at *4 (N.D. Ohio Feb. 22, 2011) ("conclud[ing] that the issues involved in both cases substantially overlap and that the distinctions

Plaintiff's argument that his additional claims prohibits application of the first-to-file rule were correct, "in a class action situation such as this . . . [t]here would be nothing to stop plaintiffs in all 50 states from filing separate nationwide class actions based upon their own state's law." *Catanese v. Unilever*, 774 F. Supp. 2d 684, 689 (D.N.J. 2011); *see also Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.,* 679 F. Supp. 2d 1287, 1297 (D. Kan. 2010) ("It serves no valid judicial interest to maintain two substantially identical claims by two plaintiff classes in separate courts, merely because some additional claims have been added to the second-filed case."). Thus, the fact that additional claims exist in this action is insufficient to avoid application of the first-to-file rule.[9]

B. The Collective Action In *Durling* Does Not Exclude Plaintiff Thomas And Those He Seeks To Represent

Plaintiff's argument that "the *Durling* proposed class [sic] excludes members of any *pending* cases, like *Thomas*," ECF No. 19 at 12 (emphasis added), completely ignores the key words "pending" and "members" (and again imports a Rule 23 concept into a collective action context). As conceded by Plaintiff, plaintiffs in *Durling* seek conditional certification of the following collective action defined as:

> 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.**

(ECF No. 19 at 12.)

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between the cases with respect to the claims asserted are not sufficient to remove this case from the 'first-to-file' framework").

[9] Moreover, Plaintiff's state law claims arise out of the same allegations as his FLSA claim. Discovery is ongoing in the *Durling* action, and the litigation is proceeding to resolution of the key factual and legal issues affecting those precise allegations. If it becomes necessary to do so, the court in *Durling* is perfectly capable of applying Ohio law to Plaintiff's state wage law claims. *See, e.g., Carte v. Loft Painting Co., Inc.*, 09-CV-178, 2010 WL 4105536, at *3 (S.D. Ohio Oct. 18, 2010) (applying Pennsylvania law to fraud claim); *Harris v. TMNG Techs. Inc.*, No. 04-CV-574, 2006 WL 39261, at *2 (S.D. Ohio Jan. 6, 2006) (applying Maryland law to breach of contract claim).

Clearly, this action, filed on June 16, 2017, was not "pending" on May 13, 2016, when the *Durling* action was filed,[10] nor does Plaintiff Thomas allege that he is, or was, a member of a different pending class action or collective action relating to the under-reimbursement of driving expenses at that time.

Rather, it is clear that Plaintiff seeks to represent members of a proposed collective action of delivery drivers which is wholly subsumed by the proposed collective action in *Durling*. While the named plaintiffs differ, the first-to-file rule requires the court in a class action suit to compare the proposed classes, not their representatives. *See Watson*, 2015 WL 4132553, at *3 ("although the named plaintiffs in each case differ, the first-to-file rule in a class action suit only requires that the Court compare the proposed classes, not the named plaintiffs."). Here, it is evident that the proposed collective action in this case is wholly encompassed by the proposed collective action in *Durling* and therefore, application of the first-to-file rule is appropriate. The fact that Plaintiff seeks to certify a *narrower* collective action of drivers is of no consequence. Courts routinely hold that it is sufficient for purposes of the first-to-file rule if a narrower collective action is encompassed by a broader collective action. *See, e.g.*, *Siegfried*, 2011 WL 1430333, at *5 ("Although not identical, the parties involved in the *Jones* case represent a larger collection of both plaintiffs and defendants broad enough to cover the parties involved in the instant action and are therefore similar for purposes of the first-to-file rule."); *Cook*, 2017 WL 3315637, at *4 ("Moreover, it is clear that the Cook plaintiffs are incorporated within the definition of the Texas Action's proposed collective and that [plaintiff] would be included in the

[10] The initial complaint in *Durling*, filed on May 13, 2016, defined the FLSA collective action as "[a]ll persons Defendant employed (either directly or through its franchisees) as a delivery driver during any workweek in the maximum limitations period. Excluded from the class are any delivery drivers who worked for franchisees other than PJPA *that are currently involved in class or collective litigation relating to delivery driver under-reimbursement*." *Durling et al. v. Papa John's International, et al.*, No. 16 Civ. 3592 (S.D.N.Y.) (ECF No. 1, ¶ 52) (emphasis added).

Cook plaintiffs' proposed collective."); *Steavens v. Electronic Data Sys. Corp.*, No. 07–14536, 2008 WL 5062847, at *2 (E.D. Mich. Nov. 25, 2008) ("the broader *Cunningham* class, which includes all of Defendant's employees claiming overtime wages subsumes this putative class . . . as such, the Court is satisfied that the first-to-file rule applies.").

If both actions were to proceed independently "the same individuals could receive two opt-in notices for the same claim but in different courts." *Fuller*, 370 F. Supp. 2d at 690. Courts have held that this is a "confusing result," which "evidences that the collective classes are substantially similar" and favors application of the first-to-file rule. *Id.*

C. Allowing Plaintiff To Proceed In This Forum Would Prejudice PJI Because It Would Be Forced To Litigate Critical Issues In Two Different Forums

Plaintiff's suggestion that application of the first-to-file rule here "at best, lessens the burden on PJI of having to litigate two cases that involve a similar theory against them," ECF No. 19 at 15, crystalizes Plaintiff's fundamental misunderstanding of the first-to-file rule. In fact, protecting defendants from the burden of litigating duplicative and overlapping actions in multiple forums is "*perhaps the most important purpose*" of the first-to-file rule. As explained by the Sixth Circuit:

> Litigating a class action requires both the parties and the court to expend substantial resources. Perhaps the most important purpose of the first-to-file rule is to conserve these resources by limiting duplicative cases. To serve this purpose, we must evaluate the identity of the parties by looking at overlap with the putative class. Furthermore, if duplicative class actions were allowed to proceed unabated, the class members could be subject to inconsistent rulings.

Baatz v. Columbia Gas Transmission, LLC, 814 F.3d 785, 791 (6th Cir. 2016) (internal quotations and citations omitted).

Having two federal courts decide the same ultimate issues in both cases – whether delivery drivers were properly reimbursed and whether PJI is a joint-employer for purposes of FLSA liability – on behalf of members of overlapping collective actions would be a waste of

judicial resources, and create the possibility of conflicting judgments. Application of the first-to-file rule avoids these risks.

D. Any Purported Delay Or Prejudice To Plaintiff Is Fictional Or The Result Of Plaintiff's Own Litigation Strategy

Plaintiff does not argue that any of the factors courts consider in weighing whether equitable concerns weigh against application of the first-to-file rule are present here. *Baatz*, 814 F.3d at 792 (noting that generally, the factors to be considered include "extraordinary circumstances, inequitable conduct, bad faith or forum shopping" and that "deviations from the rule should be the exception, rather than the norm."). Rather, Plaintiff's arguments that application of the first-to-file rule would prejudice Plaintiff consist of nothing more than baseless speculation or, alternatively, are the byproduct of Plaintiff's counsel's own litigation strategy – neither of which constitutes compelling circumstances warranting departure from the first-to-file rule.

First, Plaintiff argues that an exception to the first-to-file rule is warranted because he will be supposedly "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." (ECF No. 19 at 15.) As an initial matter, none of these propositions are true. As recognized by Plaintiff, in the event that a collective action is conditionally certified in *Durling*, he will have the opportunity to decide whether to opt-in – Plaintiff Thomas will not be "forced" to do anything. In addition, Plaintiff's speculation that he will be forced to proceed with other counsel in the event that this case is transferred and consolidated or that he "will be required to abandon claims" is baseless, and Plaintiff fails to explain how or why he would be forced to abandon either his counsel or any of his claims in the event that this action is transferred and consolidated

with *Durling*.[11] These arguments consist of nothing more than speculation, and Plaintiff provides no authority that such circumstances, even if present, would justify an exception to the first-to-file rule.

Second, Plaintiff's argument that he and the members of the putative collective action he seeks to represent will be prejudiced if he "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," ECF No. 19 at 16, is also without merit, and Plaintiff provides no authority that such circumstances warrant departure from the first-to-file rule. Similarly, any litigation delay associated with filing a motion for conditional certification as to claims against Plaintiff's franchisee employer is a byproduct of Plaintiff's own case theory and does not constitute compelling circumstances that warrant departure from the first-to-file rule. By continuing to pursue a joint-employer theory against PJI, Plaintiff's counsel, faced with the choice of asserting claims against PJI based on an identical joint-employer theory as in *Durling*, made the strategic decision to subject this action to potential dismissal or transfer based on the first-to-file rule. Plaintiff's counsel here made the exact opposite decision in the *Edwards* case, and has already filed a motion for conditional certification there. Accordingly, Plaintiff and Plaintiff's counsel were well aware that by asserting claims against PJI based on a joint-employer theory, they would be requesting that this Court decide the same issues at stake in *Durling*. They cannot now claim prejudice as a result of that decision.

[11] As discussed above, in FLSA collective actions transferred and consolidated under the first-to-file rule, a plaintiff can retain their chosen counsel if they so desire, and are free to pursue any additional claims – such as state law wage and hour claims – that they wish. If anything, this argument appears to be driven by the desire of Plaintiff's counsel to control the litigation and obtain a greater share of attorneys' fees despite filing a copy-cat collective action approximately 16 months after *Durling* was filed. Clearly, the desire of Plaintiff's counsel to have a larger role or greater fee does not warrant departure from the first-to-file rule, nor does Plaintiff's counsel provide any authority to the contrary.

Finally, despite being directly on point *in support of PJI's Motion*, Plaintiff cites Judge Frost's decision in *Watson* as "a good example of why transfer is not the appropriate remedy at the present time" because following transfer "the cases *still* proceeded on two separate tracks because the cases, like the present case, had divergent legal theories and procedural postures." (ECF No. 19 at 17.) However, Plaintiff's argument is based on an outright factual inaccuracy.[12] The *Watson* action, along with another putative collective action and the first-filed action, were consolidated and re-named "*In Re Jimmy John's Overtime Litigation*."[13] Thereafter, Plaintiffs filed their First Amended Consolidated Class Action Complaint asserting claims contained in all three separate actions. Thereafter, the case has since proceeded on a single track and been overseen by the discovery orders of a single federal court to ensure judicial economy and comity, and thus fulfilling the purpose of the first-to-file rule. Contrary to providing an example of why transfer here is not appropriate, *Watson* serves as a perfect example of why and how application of the first-to-file rule is particularly appropriate here where, as in *Watson*, "the core issue in determining Defendant's liability for all claims in both cases will be whether Defendants are joint employers." *Watson*, 2015 WL 4132553, at *4.

Application of the first-to-file rule "will allow the first-filed court to decide how to best proceed with both cases, and the parties will be free to file any requests for consolidation or a stay" in the *Durling* litigation. *Steavens*, 2008 WL 5062847, at *3. As noted by Judge Frost in *Watson*, the arguments Plaintiff makes in an attempt to avoid the application of the first-to-file doctrine, such as considerations regarding conditional certification, should be determined by the court in the first-filed action. *Watson*, 2015 WL 4132553, at *4.

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[12] Plaintiff even seems to acknowledge this inaccuracy in a footnote noting that "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." (ECF No. 19 at 17, n. 5.)

[13] *In Re Jimmy John's Overtime Litigation*, No. 14-CV-5509 (N.D. Ill.) (ECF No. 252).

IV. PLAINTIFF'S PROPOSED "ALTERNATIVE COURSE" UNDERSCORES WHY APPLICATION OF THE FIRST-TO-FILE RULE IS APPROPRIATE

Plaintiff's proposed "alternative course" to dismissal or transfer – a circular and confusing "choose your own adventure" in which this Court would defer a decision on PJI's Motion, craft alternative discovery orders, and adopt different rulings based on a variety of different outcomes in *Durling* – underscores *precisely* why dismissal and transfer of this case is appropriate. Such an approach would clearly result in significant inefficiencies, duplicative discovery, a risk of inconsistent rulings, undermine the Court's case management orders in *Durling*, and require that PJI defend essentially the same case in two different forums.

PJI respectfully submits that the first-to-file rule saves this Court from following Plaintiff down this rabbit hole, because this case purports to bring an identical FLSA claim, based on the same theory (that delivery drivers were improperly reimbursed), with nearly identical joint-employer allegations directed against PJI, and seeks relief for members of an overlapping collective action sought in *Durling*. Application of the first-to-file rule is even more appropriate here, because the court in *Durling* is well on its way to resolving the key legal issues that will determine whether plaintiffs in *either* action can maintain their lawsuit against PJI.

Nonetheless, in the event that the Court is inclined to simply grant a stay of this case instead of dismissal or transfer, PJI respectfully submits that the case should be stayed in its entirety pending the outcome of *Durling* to avoid the risk of inconsistent rulings on core issues common to both actions (*i.e,,* PJI's liability as a joint-employer and conditional certification).

V. CONCLUSION

PJI respectfully requests that the Court fulfill its duty to "avoid a ruling that would entrench upon or inconsistently decide overlapping issues being addressed in another federal

court" and grant PJI's motion to dismiss, transfer, or stay this action under the first-to-file rule. *Watson*, 2015 WL 4132553, at *4 (internal citations and quotations omitted).

DATED: October 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2017, I electronically filed the foregoing Papa John's International, Inc.'s Reply in Support of Its Motion to Dismiss, Transfer the Case to the Southern District of New York, or Stay the Case and Memorandum of Law in Support of Motion with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record, including the following:

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