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 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO STAY PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

Defendant Papa John's International, Inc. ("PJI" or "Defendant") respectfully moves this Court to Strike or Stay Plaintiff's Motion for Conditional Certification (ECF No. 24) until after the Court rules on Defendant's Motion to Dismiss, Transfer the Case to the Southern District of New York, or Stay the Case ("First-To-File Motion") (ECF Nos. 10-12). 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 (the "Franchisee Defendants") consent to this motion.

I. BACKGROUND

As explained in PJI's First-To-File Motion (ECF No. 10), PJI has been defending a case in the Southern District of New York captioned *Durling et al. v. Papa John's International, Inc.*, No. 7:16-CV-03592 (S.D.N.Y.) ("*Durling*"), since May 2016. The plaintiffs in *Durling* are attempting to bring a nationwide FLSA collective action on behalf of individuals who are employed as delivery drivers in corporate and franchise-owned Papa John's restaurants. The plaintiffs in *Durling* claim that PJI is responsible for alleged violations of the FLSA as the joint employer of its franchisee's employees. The *Durling* plaintiffs' first motion for conditional certification was denied. Their renewed motion for conditional certification is pending with the court.

Just as in *Durling*, Plaintiff in this case alleges that PJI "maintained a policy and practice of failing to reimburse delivery drivers for costs and expenses…causing Plaintiff's and similarly situated delivery drivers' wages to fall below minimum wage." (Compl. 7). Accordingly, pursuant to the first-to-file rule, PJI filed a motion to dismiss, transfer, or stay the case, which Plaintiff opposed. (ECF No. 19). Three days after briefing was completed, Plaintiff filed a Motion for Conditional Certification. (ECF No. 24).

ARGUMENT

I. DEFENDANTS SHOULD NOT BE REQUIRED TO BRIEF PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION UNTIL AFTER THE COURT DECIDES WHETHER THIS CASE SHOULD BE DISMISSED, TRANSFERRED, OR STAYED UNDER THE FIRST-TO-FILE RULE

As explained in detail in PJI's First-To-File Motion, 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*. Notably, this action will require the resolution of the same key legal and factual issues as *Durling*. The most important of those issues is whether PJI can be held liable as a joint employer along with hundreds of independently owned and operated franchisees across the country. The parties in the *Durling* action have almost completed fact discovery, and the judge overseeing that matter has already issued key decisions on the substance of the *Durling* plaintiffs' claims and essential case management issues.

Plaintiff's Motion for Conditional Certification must be stayed while the Court decides whether this action should be dismissed, transferred, or stayed pursuant to the first-to-file rule. Plaintiff's counsel is attempting to thrust PJI into full-bore litigation of a critical issue – conditional certification of a collective consisting of hundreds of potential putative collective members – while PJI is simultaneously litigating the same issue in a separate forum. If this Court were to consider Plaintiff's Motion for Conditional Certification, there is a significant risk of conflicting decisions. As discussed in PJI's First-To-File Motion, well-established case law strongly supports dismissal, transfer or a stay in this situation.

In addition to protecting against conflicting judgments, the first-to-file rule also promotes efficiency for courts and litigants. This purpose would be undermined if PJI were forced to

respond to Plaintiff's Motion for Conditional Certification prior to a ruling on PJI's First-To-File Motion. Of course, if this Court grants PJI's First-To-File Motion, Plaintiff's Motion for Conditional Certification will be moot.

Courts have routinely stayed motions for conditional certification until motions to transfer or motions to dismiss have been decided. For example, in *Esperson v. Trugreen Ltd. P'ship*, No. 10-CV-2130, 2010 WL 4362794, at *1 n.1 (W.D. Tenn. Oct. 5, 2010), the court stated that it would "not issue a ruling on Plaintiff's motion for conditional certification with Defendants' motion for transfer still pending because such action could lead to inconsistent rulings if the case is ultimately transferred." Similarly, in *Smith v. United States*, No. 13-CV-161, 2013 WL 5315694, at *2 (Ct. Fed. Cl. Sept. 20, 2013), the court found "good cause for the government's request to stay briefing on the motion for conditional class certification" because "[a]ny ruling on the issue of conditional certification would be rendered a nullity were the case subsequently transferred to a district court." In *Beery v. Quest Diagnostics, Inc.*, No. 12-CV-00231, 2013 WL 3441792 (D.N.J. July 8, 2013), at *1, the court administratively terminated a motion for conditional certification because it "deemed it prudent" to address motions to dismiss before deciding the conditional certification issue. Finally, the court in *Darrow v. WKRP Management, LLC*, No. 09-CV-1613, 2011 WL 1666817, at *2 (D. Colo. May 2, 2011), stayed a motion for conditional certification pending a decision on a motion to dismiss, stating that deciding the conditional certification issue before a decision on the motion to dismiss would be unnecessarily burdensome, "would not benefit the court's case coordination[,] and could unnecessarily expand and complicate the case."

As in these cases, the Court should stay Plaintiff's Motion for Conditional Certification until after the court rules on PJI's First-To-File Motion.

II. THE RULE 23 STATE LAWS CLAIMS OF ABSENT PUTATIVE CLASS MEMBERS ARE TOLLED AND THE COURT DOES NOT HAVE JURISDICTION TO TOLL THE FLSA CLAIMS OF ABSENT PUTATIVE COLLECTIVE ACTION MEMBERS

Plaintiff seems to concede that it is appropriate for the Court to decide PJI's First-To-File Motion before deciding Plaintiff's Motion for Conditional Certification but argues that the statute of limitations applicable to the claims of putative class and collective action members should be tolled. Plaintiff's concerns regarding tolling are misplaced.

First, Plaintiff's state law claims brought pursuant to Rule 23 (Counts 2-4) have automatically tolled the statute of limitations for absent class members as to those claims. This is a matter of black letter law as explained by the Supreme Court in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974) which upheld tolling for absent class members because under the amended Rule 23, "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. Accordingly, there is no concern regarding tolling as to the Rule 23 state law claims of absent class members.

Second, in contrast, the FLSA necessitates the "filing of repetitious papers," demanding individual participation. 29 U.S.C. § 256 (requiring each individual claimant to file a "written consent" to join the action). As the court explained in *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1136-37 (D. Nev. 1999):

> [T]he concerns which led the Supreme Court to suspend the statute of limitations in a Rule 23 class action do not apply to a § 216(b) action . . . . While Rule 23 was designed to avoid 'unnecessary filing of repetitious papers and motions,'… § 216(b) affirmatively *requires* repetitious filings. Because all potential plaintiffs to § 216(b) actions *must* file their consent to the suit to toll the statute of limitations, there is no time or resource saving concerns [sic] which would justify tolling the statute of limitations from the time the Complaint is filed in a § 216(b) action until some formal 'certification' decision is made.

see also Muhammad v. GBJ, Inc., 2011 WL 863785, at *2 (S.D. Tex. Mar. 9, 2011) ("The statute is tolled for Rule 23 cases because otherwise parties would file protective filings to join or intervene in the suit, precisely the multiplicity of activity which Rule 23 was designed to avoid. In FLSA collective actions, by contrast, § 216(b) affirmatively requires repetitious filings"). For these reasons, *American Pipe* simply does not and cannot be applied to collective actions under the FLSA.

Nonetheless, this Court *cannot* toll the FLSA claims of hypothetical opt-in putative collective action members (even if for notice purposes only), because such an order would constitute an impermissible advisory opinion. In *Atkinson v. TeleTech Holdings, Inc.*, No. 3:14-CV-253, 2015 WL 853234, at *8 (S.D. Ohio Feb. 26, 2015), for example, the court noted that "[i]n contrast to a class action lawsuit brought under Federal Rule of Civil Procedure 23, the named plaintiffs in an FLSA collective action do not represent anyone other than themselves" and, therefore, "have no authority to move to equitably toll the claims of the potential opt-in plaintiffs" and further finding that, "because the potential opt-in plaintiffs do not become parties to the lawsuit until they file their consent forms with the court, the court lacks jurisdiction to grant them equitable relief." Courts across the country have reached the same conclusion.[1]

[1] *See, e.g.*, *Ruder v. CWL Investments LLC*, No. 16-CV-04460, 2017 U.S. Dist. LEXIS 117584, at *5-6 (D. Ariz. July 27, 2017) (analyzing a request for equitable tolling for putative opt-in plaintiffs in a FLSA collective action who had yet to opt-in to the case, concluding that it lacked jurisdiction to grant such a request, and declining to render an advisory opinion purporting to determine the contours of claims possessed by individuals not yet before the court and noting that every court to consider this jurisdictional question has "found a lack of jurisdiction"); *Roberts v. TJX Cos., Inc.*, No. 13-CV-13142, 2017 WL 1217114, at *7-8 (D. Mass. Mar. 31, 2017) (denying motion for equitable tolling without prejudice where the court was "reluctant to toll the limitations period for thousands of putative collective action members, particularly where it is possible that no putative plaintiffs whose claims are time-barred ultimately elect to opt-in"); *Soto v. Wings 'R US Romeoville, Inc.*, No. 15-CV-10127, 2016 WL 4701444, at *9-12 (N.D. Ill. Sept. 8, 2016) (denying plaintiff's motion to equitably toll the statute of limitations for absent class members "without prejudice to the claim of any individual plaintiff who may seek to invoke equitable tolling based on his or her own particular circumstances"); *Miller-Basinger v. Magnolia Health Sys., Inc.*, No. 2:15-CV-00089, 2016 WL 773191, at *2-3 (S.D. Ind. Feb. 22, 2016) (denying plaintiff's request that the court equitably toll the statute of limitations to all putative FLSA collective action members because "[i]t is premature for this Court to toll the statute of limitations for potential plaintiffs because doing so would require the Court to issue an advisory opinion, which would impermissibly 'address[] the rights of parties not before the Court'") (quoting *Weil v. Metal*

Accordingly, this Court does not have the jurisdiction to equitably toll the FLSA claims of absent putative collective members and the statute of limitations will continue to run if and until such absent putative collective members file consent forms. Of course, nothing is preventing absent putative collective members from joining this litigation and tolling the statute of limitations as to their individual FLSA claims because they can file a consent to join at any time, and need not wait until a collective action is conditionally certified. *See Myers v. Hertz Corp*., 624 F.3d 537, 555 n.10 (2d Cir. 2010) (noting that "Section 216(b) does not by its terms require [certification], and nothing in the text of the statute prevents plaintiffs from opting in to the action by filing consents with the district court, even when the notice . . . has not been sent, so long as such plaintiffs are 'similarly situated' to the named individual plaintiff who brought the action"); *see also Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422 (M.D. Ala. 1991) (holding that plaintiffs may gather consents to join before case is certified as collective action); *Kuhn v. Phila. Co.*, 475 F. Supp. 324, 327 (E.D. Pa. 1979) (holding that even consents that were filed before the complaint was filed are valid), *aff'd* 745 F.2d 47 (3rd Cir. 1984).

Tech., Inc., No. 2:15-CV-00016, 2015 WL 5827594, at *2 (S.D. Ind. Oct. 6, 2015) (denying for the same reasons motion to equitably toll the statute of limitations for putative FLSA collective action members); *Volz v. Provider Plus, Inc.*, No. 4:15-CV-0256, 2015 WL 4255614, *1 n.4 (E.D. Mo. July 14, 2015) ("Any ruling on equitable tolling at this time would be, as Defendants contend, an improper advisory opinion based on a controversy that does not yet exist.") (internal quotation marks and citations omitted); *Sylvester v. Wintrust Fin. Corp.*, No. 12-CV-01899, 2014 WL 10416989, at *1 (N.D. Ill. Sept. 26, 2014) (noting that, in a previous order, the court denied plaintiffs' request to extend the equitable tolling of the statute of limitations for putative collective action members who had not yet received notice of the action and an opportunity to opt-in, because, relying on *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), the court "conclude[d] that it could not equitably toll the running of a statute of limitations as to individuals who were not yet parties to the case"); *In Re Amazon.com, Inc., Fulfillment Ctr. Fair Labor Standards Act & Wage & Hour Litig.*, MDL No. 2504, 2014 WL 3695750, at *3-4 (W.D. Ky. July 24, 2014) ("It appears premature to grant blanket equitable tolling for plaintiffs who are currently hypothetical and have not yet come before this court. This is particularly true because 29 U.S.C. § 216(b) states that no employee other than the plaintiff 'shall be a party plaintiff to [a FLSA collective] 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.' Further, a plaintiff's diligence is relevant to this analysis. But: the Court does not yet possess knowledge sufficient to establish the diligence of all opt-in plaintiffs.") (citations omitted), *aff'd* 852 F.3d 601 (6th Cir. 2017); *Puffer v. Allstate Ins. Co.*, 614 F. Supp. 2d 905, 915-17 (N.D. Ill. 2009) (in an Equal Pay Act case, the court denied the plaintiff's request to toll the statute of limitations for all absent class members because "it lacks personal jurisdiction over the putative class members" and, therefore, "lack[s] the authority to issue a blanket order staying the statute of limitations for all putative class members"), *aff'd*, 675 F.3d 709 (7th Cir. 2012).

In sum, Plaintiff's argument that the court should toll the limitations period while their Motion for Conditional Certification is pending is without merit and should be rejected by the Court.

CONCLUSION

For the reasons set forth above, PJI requests that the Court grant PJI's Motion and Strike or Stay Plaintiff's Motion for Conditional Certification.

DATED: November 3, 2017

Respectfully submitted,

PAPA JOHN'S INTERNATIONAL, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2017, I electronically filed the foregoing **PAPA JOHN'S INTERNATIONAL, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO STAY PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION** 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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