

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Jason Patzfahl, on behalf of himself and those
similarly situated,

Court File No.: 2:20-cv-01202

Plaintiff,

v.

**CIVIL L. R. 7(h) EXPEDITED NON-
DISPOSITIVE MOTION TO COMPEL
DISCOVERY**

FSM ZA, LLC, d/b/a Toppers Pizza; Perfect
Timing, LLC; Garrett Burns; Doe Corporation
1-10; John Doe 1-10,

Defendants.

MOTION

NOW COMES the Defendants FSM ZA, LLC d/b/a Toppers Pizza, Perfect Timing, LLC and Garrett Burns in the above-referenced matter, and pursuant to Civil L. R. 7(h) and Rules 26 through 37 of the Federal Rules of Civil Procedure and the Court's Scheduling Order [Doc 16], respectfully move the Court for an Order as follows:

1. Compelling Opt-in Plaintiffs Allyson Hoppe, Daniel Cooper, Kevin Kirk, Matthew Alvarez, and Scott Rehard to appear for a deposition and be deposed by Defendants;
2. Compelling all Opt-in Plaintiffs to provide substantive responses to the written discovery issued by Defendants.

Material Facts

Defendants seek to depose five of the 25 delivery drivers who have conditionally opted-in to the above titled action alleging damages under the FLSA and Wisconsin state law. Plaintiffs' counsel refuses to produce any of those opt-in Plaintiffs for their properly noticed depositions. Defendants further issued written discovery to each of the Opt-in Plaintiffs in this case, Plaintiffs'

counsel has refused to provide any substantive response to those discovery requests, providing no documents in response to the requests and no substantive interrogatory responses whatsoever. Plaintiff's refusal in that regard is completely contrary to the relevant law and this Court's own Orders in this case.

Argument

The applicable law anticipates and undeniably requires that discovery be provided by opt-ins. *Aguilera v. Waukesha Memorial Hosp., Inc.*, 2015 WL 3791469, at *1 (E.D. Wis. June 18, 2015) (referencing various opt-in deposition testimony to determine whether to certify the class of plaintiffs). *Stocks v. DoAll Company*, 340 F.Supp.3d 789, 790 (E.D. Wis. 2018) (citing an opt-in plaintiff's deposition testimony regarding her completion of the opt-in form). *Weninger v. General Mills Operations, LLC*, 344 F. Supp. 3d 1005, 1007 (E.D. Wis. 2018); *Campeau v. NeuroScience, Inc.*, 86 F. Supp. 3d 912, 920 (W.D. Wis. 2015)(acknowledging that opt in plaintiffs may have to sit for a deposition and respond to discovery requests; *Austin v. CUNA Mut. Ins. Soc.*, 232 F.R.D. 601, 606 (W.D.Wis.2006) (noting that individualized inquiries necessary for determining whether certification is appropriate occurs after parties have conducted discovery); *Sharpe v. APAC Customer Services, Inc.*, 2010 WL 135168, *1 (W.D. Wis. Jan. 11, 2010); "Opt-in Plaintiffs, who affirmatively choose to participate in a collective action, have an obligation to participate in discovery." *Soderberg v. Naturescapes*, Civ. NO. 10-3429 (D. Minn. September 20, 2022) (citing *Brennan v. Qwest Commc'ns Int'l, Inc.*, Civ. NO. 07-2024 (ADM/JSM), 2009 WL 1586721, at *18). Indeed, this Court in this case recognized that considerably more discovery was likely to occur after conditional certification, noting how limited the discovery had been to this point as a reason for not applying intermediate scrutiny for conditional certification:

I will not accept Defendants' invitation to apply an intermediate level of scrutiny at this stage. There is no indication that the parties have engaged in the "substantial discovery"

that normally warrants a more rigorous standard.[citation omitted]. Over four months, Defendants only deposed Patzfahl and responded to several interrogatories and requests for production of documents. This case calls for the traditional lenient standard.

Order, [Doc. 33]

The Plaintiffs are attempting to prevent this routine discovery from occurring, discovery that is necessary before the Motion for Class Certification and Certification of the Collective.

The discovery Defendants have sought in this case, and that Plaintiffs have repeatedly indicated a blanket refusal to provide, directly relates to the issues of class and collective certification and the ultimate merit of the Plaintiffs' case. The depositions will likely take a couple of hours each and the written discovery for each opt-in can be responded to relatively quickly with little burden considering they chose to become Plaintiffs in this federal court action.

Plaintiffs' counsel in similar litigation has already failed in their attempt to prohibit the type of discovery Defendants seeks in this case. *Edwards v. PJ Ops Idaho, LLC*, No.1:17-cv-00283-DCN, 2020 WL 7502452, at * 11 (D. Idaho Dec. 21, 2020)(“Defendants are entitled to engage in discovery in order to defend against Plaintiffs' claims and in support of their argument that they can approximate Plaintiffs' expenses”); *Branning v. Romeo's Pizza, Inc.*, No.1:19-cv-2092, 2021 WL 4202571 at *2-3 (N.D. Ohio, Eastern Division Aug. 2, 2021)(compelling discovery from opt-ins in pizza delivery case also involving same Plaintiffs' counsel as in present case); See also *Blose v. Jarnic, Ltd.*, No. 1:18-Cv-02184-RM-SKC, 2020 WL 5513383 (D. Colo. Sept. 14, 2020) (holding employer was allowed to make reasonable approximation of vehicle expenses when reimbursing drivers); *Kennedy v. Mountainside Pizza, Inc.*, No. 19-cv-01199-CMA-STV, 2020 WL 5076756 (D. Colo. Aug. 26, 2020). Defendants should also be awarded their attorney's fees incurred in bringing the present Motion as a sanction against the improper refusal by Plaintiffs.

Fed. R. Civ. P. 37(d)(allowing for issuance of sanctions for failure to attend depositions or respond to discovery).

Counsel's Certification Pursuant to Civil L. R. 37

Counsel for Defendants have conferred with opposing counsel regarding the discovery dispute at issue in this litigation. Correspondence regarding those issues were exchanged on April 4, 2022, and April 12, 2022. Attorney Martin Kappenman and Attorney Riley Kane discussed the issue on April 18, 2022 at approximately 2:30 p.m. and again in greater detail during a telephone conference on April 21, 2022 at 3:15 p.m. without success.

Dated: April 22, 2022

s/ Martin D. Kappenman

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