IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Samuel Peacock,	
On behalf of himself and those similarly situated,	Case No. 2:22-cv-02315
Plaintiff,	Judge Samuel H. Mays, Jr.
v.	
First Order Pizza, LLC, *et al.*;	JURY DEMAND
Defendants.	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION (DOC. 22)

Defendants want the Court to delay ruling on the Motion for Conditional Certification due to the arbitration dispute, but there is no reason to do so. Rather, "courts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination.'" *Taylor v. Pilot Corp.*, No. 14-cv-2294, 2016 U.S. Dist. LEXIS 191726, at *12 (W.D. Tenn. Mar. 3, 2016).

"[T]he relevant question before the Court is this: do the arbitration agreements have any bearing on whether the current Plaintiffs and 'potential plaintiffs together were victims of a common policy or plan that violated the law'?" *Id.* (citing *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d at 547 (6th Cir. 2006)).

"The answer is no." *Id.*

Plaintiff will be disputing the validity and enforceability of Defendants' arbitration agreement, but that inquiry does not negate the Court's ability to conditionally certify an FLSA collective and send notice to Plaintiff's fellow pizza delivery drivers. The Court can and should promptly rule on Plaintiff's Motion for Conditional Certification. The Motion to Dismiss and the Motion for Conditional Certification are separate and involve different standards, policies, and implementing procedures.

On one hand, Plaintiff's Motion for Conditional Certification is pursuant to the Fair Labor Standards Act. The FLSA is a remedial statute aimed at protecting workers and "correct[ing] and as rapidly as practicable to eliminate" labor conditions that are detrimental to the "health, efficiency, and general well-being of workers." 29 U.S.C. 202. To accomplish these purposes, when an employee alleges that he and similarly situated employees are victims of an FLSA-violation policy, "the FLSA requires that putative collective members be provided with notice of this lawsuit and apprised of their rights." *Crosby v. Stage Stores, Inc.*, 348 F. Supp. 3d 742, 752 (M.D. Tenn. 2018). Thus, FLSA enforcement "depend[s] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989).

Courts implement the FLSA's statutory framework and the Supreme Court's instructions by using a two-step *ad hoc* methodology to determine whether members of an FLSA collective are similarly situated. *See White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012). "The first stage occurs early" in the lawsuit, where the court determines whether plaintiff and the proposed FLSA collective are "similarly situated," in which case, the Court will conditionally certify the collective. *See Lindberg v. UHS of Lakeside, LLC*, 761 F. Supp. 2d 752, 757 (W.D. Tenn.

2011). "Plaintiff['s] burden at this conditional certification stage is 'fairly lenient' and requires only 'a modest factual showing' that they are similarly situated to the other employees they seek to notify." *Id.* at 758 (citing *Comer*, 454 F.3d at 547). Conditional certification is assessed early and under a light burden because "the filing of [an FLSA collective action] complaint does not stop the statute of limitations from running for individuals other than the complainant(s); instead, the statute of limitations will continue to run as to other potential opt-in plaintiffs unless or until he or she files written consent to opt into the collective action." *Kutzback v. LMS Intellibound, LLC*, 233 F. Supp. 3d 623, 628 (W.D. Tenn. 2017).

Neither the FLSA nor the Sixth Circuit have defined "similarly situated," but "it is clear that plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 585 (6th Cir. 2009).

On the other hand, Defendants' Motion to Compel Arbitration (Doc. 19), is pursuant to the Federal Arbitration Act. Unlike the FLSA, there are no special timing concerns under the FAA (*i.e.*, no one loses their rights if the question is not resolved promptly). Indeed, the FAA allows for a full trial on some issues (9 U.S.C. § 4)[1] and, even if no trial takes place, an immediate appeal if a motion to compel arbitration is denied (9 U.S.C. § 16) or possible appeal if a motion to compel arbitration is granted. If the Court were to link conditional certification to a motion to compel arbitration, as Defendants suggest, it would result in substantial delay. During that time, workers' FLSA claims will expire, contrary to the Supreme Court's instructions in *Hoffman-La Roche* and the FLSA's remedial purpose.

[1] This would also allow for pre-trial discovery like any other triable issue.

Conditional certification is granted in pizza delivery driver under-reimbursement cases. *See* Doc. 21-1 at PageID 150–51 (citing cases). Thus, the Court can easily decide this issue. The arbitration question, however, is thornier and subject to potential appeals.

As stated above, courts consistently hold that the existence of arbitration agreements is irrelevant to collective action conditional certification because it raises merits questions. *Taylor*, 2016 U.S. Dist. LEXIS 191726, at *12; *see also Tate v. Bimbo Bakeries USA, Inc.*, No. 2:18-cv-02315, 2019 U.S. Dist. LEXIS 241871, at *23–24 (W.D. Tenn. June 24, 2019) ("After, and if, additional plaintiffs are added to this matter, the Court will address the arbitration agreement issue as to all plaintiffs who possibly have such agreements, including those currently named…."); *Crosby*, 348 F. Supp. 3d at 752; *Bradford v. Team Pizza, Inc.*, No. 1:20-cv-60, 2020 U.S. Dist. LEXIS 113681, at *14 (S.D. Ohio June 29, 2020), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 188404, at *11 (Oct. 9, 2020); *Parker v. Battle Creek Pizza*, No. 1:20-cv-277, 2020 U.S. Dist. LEXIS 136902, at *6 (W.D. Mich. July 24, 2020); *Thomas v. Papa John's Int'l, Inc.*, No. 1:17cv411, 2019 U.S. Dist. LEXIS 171728, at *9 (S.D. Ohio Sep. 29, 2019); *Clark v. Pizza Baker, Inc.*, No. 2:18-cv-157, 2019 U.S. Dist. LEXIS 161623, at *20 (S.D. Ohio Sep. 23, 2019) *Williams v. Omainsky*, CIVIL ACTION 15-0123-WS-N, 2016 U.S. Dist. LEXIS 7419, 2016 WL 297718, at *7 (S.D. Ala. Jan. 21, 2016); *Romero v. La Revise Assocs., LLC*, 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013); *D'Antuono v. C&G of Groton, Inc.*, No. 3:11cv33, 2011 U.S. Dist. LEXIS 135402, at *12 (D. Conn. Nov. 23, 2011); *Villatoro v. Kim Son Rest., LP*, 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003).

Sending notice to employees with valid arbitration agreements may result in those individuals opting into the lawsuit. *Hafley v. Amtel*, 2022 U.S. Dist. LEXIS 48252, at *17–19 (S.D.

Ohio Mar. 18, 2022). If this happens, Defendants will then have an opportunity to present each such individual's alleged arbitration agreement to the Court and ask that they be compelled to arbitration. In other words, Defendants will not be deprived of the benefits of a valid and enforceable arbitration agreement. As a court in the Southern District of Ohio recently held, "the alternative is worse. If [an employer] could simply exempt employees from FLSA notice based on its own documentation of an arbitration agreement, [the employer] would essentially act as its own judge and jury as to the validity of those arbitration agreements." *Id.* These same principles apply when an employer alleges that a named plaintiff should be forced to arbitrate.

The Supreme Court recently held that federal courts should not "invent special, arbitration-preferring procedural rules." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). That, however, is what Defendants request. Defendants ask the Court to delay briefing Plaintiff's Motion for Conditional Certification, and thereby delay providing timely notice of this action, until the Court rules on Defendants' Motion to Compel Arbitration (and, presumably, all appeals have resolved). Under *Morgan*, such a preference for arbitration is improper.

Doing as Defendants request would treat Defendants' Motion to Compel Arbitration in a more favorable way, "tilt[ing] the playing field" in favor of arbitration. *Morgan*, 142 S. Ct. at 1714. Rather, the Court should "apply the usual federal procedural rules." *Id.* This means that, consistent with the FLSA, *Hoffman-La Roche*, and consistent precedent, Plaintiff's Motion for Conditional Certification should be promptly adjudicated and notice of this lawsuit sent to interested parties.

Plaintiff respectfully asks that the Court deny Defendants' Motion to Stay (Doc. 22). In the alterative, Plaintiff asks the Court to equitably toll the statute of limitations for all similarly

situated employees, so that they are not prejudiced by the delay that will result from not sending notice before deciding the arbitration question.

Respectfully submitted,

/s/ Riley Kane
Andrew R. Biller (Ohio Bar No. 0081452)
Andrew P. Kimble (Ohio Bar No. 0093172)
Riley E. Kane (Ohio bar No. 0100141)
BILLER & KIMBLE, LLC
8044 Montgomery Rd., Suite 515
Cincinnati, OH 45236
Telephone: (513) 202-0710
Facsimile: (614) 340-4620
abiller@billerkimble.com
akimble@billerkimble.com
rkane@billerkimble.com

www.billerkimble.com

and

David W. Garrison (TN Bar No. 024968)
Joshua A. Frank (TN Bar No. 033294)
BARRETT JOHNSTON MARTIN & GARRISON, LLC
Phillips Plaza 414 Union Street, Suite 900
Nashville, TN 37219
Telephone:(615) 244-2202
Facsimile: (615) 252-3798
dgarrison@barrettjohnston.com
jfrank@barrettjohnston.com

Counsel for Plaintiff

Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically on July 19, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ *Riley Kane*
Riley E. Kane