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

SAMUEL PEACOCK, *on behalf of himself and those similarly situated,*	)	
Plaintiff,	)	
v.	)	**Case No.: 2:22-cv-02315-SHM-tmp**
FIRST ORDER PIZZA, LLC, TY TURNER, JAMES HOLMES, DOE CORPORATION 1-10, and JOHN DOE 1-10,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

Defendants' Motion to Stay and Motion to Dismiss and Compel Arbitration presents a threshold jurisdictional issue: Plaintiff has no right to bring this action or represent any current opt-in plaintiffs because he is bound by a mandatory arbitration agreement and, thus, the Court lacks jurisdiction to issue conditional certification. *See White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 878 (6th Cir. 2012) ("[W]ithout a viable claim, [the plaintiff] cannot represent others whom she alleged were similarly situated." (internal quotations omitted)).

In his Opposition to Defendant's Motion to Stay Plaintiff's Motion for Conditional Certification, the crux of Plaintiff's argument is that "courts have consistently held that the existence of arbitration agreements is irrelevant to collective action approval because it raises a merits-based determination," citing to a

number of cases that are inapposite to the issue here [D.E. 27]. Unlike the jurisdictional threshold issue presented by Defendants, the issue before the courts in all but a few of the cases Plaintiff relies on was whether conditional certification should be issued where potential opt-in plaintiffs were subject to mandatory arbitration agreements and the representative plaintiff was not. *See, e.g., Taylor v. Pilot Corp.*, No. 14-CV-2294-SHL-TMP, 2016 WL 4524310, at *3 (W.D. Tenn. Mar. 3, 2016), *aff'd*, 697 F. App'x 854 (6th Cir. 2017) (denying the defendants' request to reconsider the already-issued conditional certification to exclude potential class members who were subject to arbitration agreements because, prior to the certification of the class, "there were no plaintiffs who could have been compelled to arbitrate" and neither the named plaintiff nor any of the current opt-in plaintiffs had signed arbitration agreements).

The cases cited by Plaintiff do not support Plaintiff's contention that it is improper to stay conditional certification pending resolution of a motion to dismiss and/or compel arbitration where the representative plaintiff is subject to mandatory arbitration.[1] Rather, the case law in the Sixth Circuit and our sister circuits is clear that Defendants' Motion to Dismiss and Compel Arbitration must be resolved *before*

[1] Defendants could have spent more time distinguishing the cases cited and misrepresented by Plaintiff in his brief but is bound by the page limits of this Court's Local Rules, and Defendants' desire to put forth a cogent argument before this Court. In short, Plaintiff relies on cases where (1) potential opt-ins were subject to arbitration agreements, but not the named plaintiff; (2) the defendant did not move to compel arbitration; (3) a motion to compel arbitration was not at issue; and (4) there was at least one representative plaintiff who was not subject to arbitration. None of these situations are applicable here.

considering Plaintiff's Motion for Conditional Certification. The Middle District of Tennessee addressed this distinction clearly in *Doe #1 v. Deja Vu Consulting Inc.*:

> The cases to which the plaintiff cites, however, are inapposite, as they all involve situations in which the named plaintiff in a collective action is not alleged to have signed an arbitration agreement or in which the defendant, in responding to a motion for conditional certification, alludes to the existence of an arbitration agreement but has not actually filed a motion to compel arbitration. Conversely, although the issue has not been frequently litigated, it appears that, when a motion for conditional certification and a motion to compel arbitration are both pending before a district court, courts generally consider the motion to compel arbitration first and, then, if the motion to compel is denied, whether conditional certification is appropriate.

No. 3:17-CV-00040, 2017 WL 3837730, at *7–8 (M.D. Tenn. Sept. 1, 2017) (emphasis added) (internal citations omitted). In another case from within the Sixth Circuit, *Cobble v. 20/20 Commc'ns, Inc.*, the Court agreed with the *Doe* court that "most courts faced with this issue have elected to address arbitration motions before conditional certification motions" and held that "in the interest of judicial efficiency, it must defer consideration of plaintiff's conditional certification motion until it has ruled on defendant's motions to dismiss," as "a finding of arbitrability would be dispositive of the case" whereas "a ruling on plaintiff's conditional certification motion would, one way or the other, permit these proceedings to continue." No. 2:17-CV-53-TAV-MCLC, 2017 WL 4544598, at *4 (E.D. Tenn. Oct. 11, 2017) (emphasis added); *see also Myers v. TRG Customer Sols., Inc.*, No. 1:17-CV-00052, 2017 WL 5478398, at *1 (M.D. Tenn. Nov. 15, 2017) (deferring ruling on conditional certification pending ruling on motion to compel arbitration and to dismiss, and denying request for

conditional certification as moot); *Green v. U.S. Xpress Enterprises, Inc.*, 434 F. Supp. 3d 633, 644 (E.D. Tenn. 2020) (ruling on pending motion to dismiss or compel arbitration prior to ruling on motion for conditional certification); *Redmond v. NPC Int'l, Inc.*, No. 13-1037, 2016 WL 3636050, at *2 (W.D. Tenn. June 29, 2016) (same).

Although the Sixth Circuit has not expressly ruled on this issue, the Fifth Circuit has. In *Reyna v. Int'l Bank of Commerce*, the Fifth Circuit held that district court must address a motion to compel arbitration against named plaintiff prior to the motion to conditionally certify. 839 F.3d 373, 377–78 (5th Cir. 2016). The Sixth Circuit, in affirming *Taylor*, suggested that if the plaintiff or "those who ha[d] joined her thus far ha[d] agreed to arbitrate," it would "change things" and the reasoning in *Reyna* would apply and the defendant could have sought to compel arbitration. *Taylor v. Pilot Corp.*, 697 F. App'x 854, 861 n.3 (6th Cir. 2017); s*ee also Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293, 296 (6th Cir. 2018) (noting that although § 216(b) gives employees "the option to bring their claims together," the presence of arbitration agreements may limit those options: "employees who do not sign individual arbitration agreements are free to sue collectively, and those who do sign individual arbitration agreements are not"). That is precisely the situation presented to the Court here.

The few cases cited by Plaintiff where a named plaintiff was subject to an arbitration agreement actually support Defendants' position. In *Tate v. Bimbo Bakeries USA, Inc.*, the Court granted conditional certification despite the named plaintiffs signing arbitration agreements. No. 218CV02315MSNTMP, 2019 WL 13156689 (W.D. Tenn. June 24, 2019). However, prior to doing so, the court made the

determination that the defendants had failed to show the arbitration agreements were valid and enforceable, as defendants had done nothing more than produce two of the arbitration agreements and had not filed a motion to dismiss. Here, in contrast, Defendants have filed a motion to dismiss, in which they have met their burden to show Plaintiff's arbitration agreement is valid and enforceable.

Similarly, in *D'Antuono v. C & G of Groton, Inc.*, two of the three representative plaintiffs had signed arbitration agreements. No. 3:11CV33 MRK, 2011 WL 5878045, at *2 (D. Conn. Nov. 23, 2011). The court administratively closed their claims pending arbitration and allowed the case to continue because the other representative plaintiff had not signed an arbitration agreement and could, therefore, represent the class. *Id.* At the conditional certification stage, the only issue was whether the opt-in plaintiffs who signed arbitration agreements were similarly situated to the representative plaintiff who had not. Here, Plaintiff is the only representative plaintiff in this lawsuit and he is subject to a mandatory arbitration agreement. Should the court compel Plaintiff to proceed to arbitration and dismiss Plaintiff's complaint, there is no other remaining class representative.

Plaintiff argues postponing conditional certification would delay these proceedings and somehow deprive potential opt-ins of their rights under the FLSA. Again, Plaintiff's arguments are undermined by the case law. The only party causing unreasonable delay in these proceedings is Plaintiff, by refusing to dismiss this action and comply with the terms of the arbitration agreement he voluntarily agreed to. His willful refusal to dismiss this case has now required Defendants to file its Motion to

Dismiss and Compel Arbitration, in addition to the needless pleadings that have followed, directly stemming from Plaintiff's willful refusal to comply with the terms of his arbitration agreement. Contrary to Plaintiff's claim, the case law is clear that failing to rule on Defendants' Motion to Dismiss first would actually cause the most substantial delay and injure judicial economy. Rather, Defendants seek only to "enforce the parties' clear and unmistakable agreement" to arbitrate Plaintiff's claims. *Williams v. Omainsky*, No: 15-0123-WS-N, 2016 WL 297718, at *7 (S.D. Ala. Jan. 21, 2016). For these reasons and those in Defendants' Motion to Dismiss and Compel Arbitration, Defendants' Motion to Stay of Plaintiff's Motion for Conditional Certification should be granted.

Respectfully submitted on this, the 25th day of July, 2022.

/s/ Courtney Leyes
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CERTIFICATE OF SERVICE

I, Courtney Leyes, hereby certify that on this, the 25th day of July, 2022, I electronically filed the foregoing ***Defendants' Reply in Support of Motion to Stay Plaintiff's Motion for Conditional Certification*** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following counsel of record:

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