

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’ RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION
FOR CONDITIONAL CERTIFICATION OF FLSA CLASS ACTION

In his Motion for Conditional Certification of FLSA Class Action (“Motion for Conditional Certification”), Plaintiff Samuel Peacock (“Plaintiff”), argues that conditional certification should be granted because he has met his burden to make “a modest factual showing that other delivery drivers exist who have been subjected to the same terms of employment and compensation” as himself, and that this showing is the only factor the Court should consider in determining whether to issue conditional certification [D.E. 21-1 at p.7]. However, Plaintiff fails to acknowledge or address the critical fact that Plaintiff is subject to a valid, binding mutual agreement to arbitrate (“Agreement”), which precludes his claims and those of the current opt-in plaintiff and other delivery drivers Plaintiff seeks to represent, who are also subject to binding arbitration agreements, from proceeding in this forum as a collective action

or otherwise, and runs contrary to the very relief Plaintiff is seeking in his Motion for Conditional Certification.

As discussed in Defendants' Motion to Dismiss and Compel Arbitration, it is Defendants' position that Plaintiff's claims are subject to a valid, binding arbitration agreement and the Court should dismiss Plaintiff's Complaint as a result [D.E. 19]. Although not clearly stated, Plaintiff seems to imply that the Court should not consider Plaintiff's Agreement because, at the conditional certification stage, "the Court's analysis should be limited solely to whether Plaintiff has made a 'modest factual showing' that he and other of Defendants' delivery drivers are 'similarly situated' with respect to Defendants' reimbursement policies" and "a district court does not generally consider the merits of claims, resolve factual disputes, or evaluate credibility' in considering conditional certification" [D.E. 21-1 at pp. 6-7 (quoting *Loomis v. Unum Grp. Corp.*, 338 F.R.D. 225, 231 (E.D. Tenn. 2021))]. However, the existence of Plaintiff's Agreement and Defendants' corresponding arguments for dismissal do not present any merits argument, factual dispute, or credibility determination. Rather, the fact that Plaintiff is subject to a mandatory arbitration agreement raises a threshold jurisdictional issue that must be addressed by the Court, as the Agreement deprives the Court of jurisdiction to issue conditional certification altogether.

Plaintiff has failed to provide any supporting case law for his contention that the Court should issue conditional certification without having ruled on Defendants' Motion to Dismiss and Compel Arbitration. Rather, the case law within the Sixth

Circuit and our sister circuits is clear that Defendants' Motion to Dismiss and Compel Arbitration must be resolved before the Court considers Plaintiff's Motion for Conditional Certification. See D.E 31 at pp. 3-4; see also *Doe #1 v. Deja Vu Consulting Inc.*, No. 3:17-CV-00040, 2017 WL 3837730, at *7–8 (M.D. Tenn. Sept. 1, 2017) (“[W]hen 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.”); *Cobble v. 20/20 Commc'ns, Inc.*, No. 2:17-CV-53-TAV-MCLC, 2017 WL 4544598, at *4 (E.D. Tenn. Oct. 11, 2017) (“[I]n the interest of judicial efficiency, [the Court] 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 . . .”).

Put simply, Plaintiff's filing a Motion for Conditional Certification is premature and improper, and a continuing violation of his Agreement. The Court cannot conditionally certify this action when Plaintiff's claims should be dismissed pursuant to his Agreement. Instead, Defendants' Motion to Dismiss first must be resolved by the Court before the Court can rule upon Plaintiff's Motion for Conditional Certification, which would be rendered moot should the Court conclude Plaintiff's claims are precluded by his Agreement.¹ For these reasons, and those in

¹ In the interest of judicial economy, the scope of this Response is limited to the issues of Plaintiff's Motion for Conditional Certification being premature and improper due to his inability to bring this action or represent any current or potential opt-in plaintiffs under the terms of the Agreement, the Court's lack of jurisdiction to issue conditional certification as a result thereof, and the necessity of ruling on Defendant's

Defendants' Motion to Dismiss and Compel Arbitration and Defendants' Motion to Stay Plaintiff's Motion for Conditional Certification, Plaintiff's Motion for Conditional Certification should be denied.

Respectfully submitted on this, the 10th day of August, 2022.

/s/ Courtney Leyes

Courtney Leyes (TN Bar No. 034012)

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Motion to Dismiss and Compel Arbitration prior to considering conditional certification. In the event the Court denies Defendants' Motion to Dismiss and Compel Arbitration, Defendants reserve the right to amend their Response to raise additional arguments against conditional certification and objections to Plaintiff's proposed form and manner of issuing notice, deadline for Defendants to provide information pertaining to potential opt-in plaintiffs, and opt-in period.

CERTIFICATE OF SERVICE

I, Courtney Leyes, hereby certify that on this, the 10th day of August, 2022, I electronically filed the foregoing *Defendants' Memorandum in Opposition to Plaintiff's Motion for Conditional Certification of FLSA Class Action* 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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/s/ Courtney Leyes
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