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

ARVION TAYLOR, on her own behalf and others similarly situated, Plaintiffs, v. PILOT CORPORATION, a Tennessee corporation; PILOT TRAVEL CENTERS, LLC, a Delaware limited liability company; and XYZ ENTITIES 1-10 (fictitious names of unknown liable entities), Defendants.	)	No. 14-cv-2294-SHL-tmp

ORDER DENYING RECONSIDERATION OF CONDITIONAL CLASS CERTIFICATION AND PROVIDING NOTICE SPECIFICATIONS

Before the Court is Defendants' Motion on Arbitration and Notice Issues, filed on November 25, 2015. (ECF No. 84.) Defendants' Motion asks the Court to modify its Order Granting Plaintiffs' Motion for Conditional Certification of Nationwide FLSA Collective Action ("Conditional Certification"), entered on June 16, 2015. (ECF No. 71.) Specifically, Defendants seek to exclude from the conditional class those putative class members who signed arbitration agreements. Plaintiffs filed a response in opposition on December 23, 2015, arguing that Defendants waived their right to enforce arbitration, and that the arbitration agreements are unconscionable and should not be enforced. (ECF No. 86.) The parties also differ as to the content and manner of the notice to the putative class.

The Court finds that Defendants did not waive their right to compel arbitration. However, the existence of signed arbitration agreements does not alter the potential class

encompassed by the Conditional Certification. Therefore, Defendants' motion to reconsider the Conditional Certification is **DENIED**.

Notice, as submitted by Plaintiffs in their motion for conditional certification, shall be sent via U.S. Mail to all potential plaintiffs, regardless of whether they signed an arbitration agreement. Those plaintiffs who would like to opt-in[1] may do so on a website, via e-signature or scanned document. The website may contain both the notice and the consent forms. The effect of the arbitration agreements will be addressed at the final certification stage.

BACKGROUND

This is a Fair Labor Standards Act ("FLSA") case in which named Plaintiff Arvion Taylor and the opt-in Plaintiffs allege that Defendants failed to pay them the required overtime wages in violation of the FLSA. The Court described the details of Plaintiffs' allegations in its Conditional Certification (ECF No. 71), and need not repeat them here. In the previous Order, the Court found the potential claims of current or former hourly cashiers, team leaders and shift leaders who worked within the class period to be similarly situated enough to constitute a conditional class for the purposes of the FLSA. (Id.)

Defendants previously raised the possibility that many of the potential plaintiffs would be subject to arbitration agreements that would preclude them from participating in the class action. Defendants have now produced the arbitration agreements that arguably bind certain potential plaintiffs. The first arbitration agreement is what Defendants call the "National Agreement." (ECF No. 84-2.) According to Defendants, since the beginning of the class period on June 15, 2012, all new employees outside of Texas have been required to sign the National Agreement as

[1] Fair Labor Standards Act collective actions are "opt-in," as distinguished from the "opt-out" approach used in Fed. R. Civ. P. 23 class actions. Comer v. Walmart Stores, 454 F.3d 544, 546 (6th Cir. 2009).

a condition of their employment. (ECF No. 84-15 at 5.) The National Agreement is a contract between Defendant entity Pilot Travel Centers LLC d/b/a Pilot Flying J ("PFJ") and the employee, and applies to affiliated entities as well. (ECF No. 84-2.) The National Agreement requires that both the employee and PFJ arbitrate "all claims or controversies . . . whether arising out of, relating to or associated with Employee's employment with PFJ, that Employee may have against PFJ or that the PFJ may have against Employee." (Id. at ¶ 2.)

All new hires between June 15, 2012 and July 31, 2014, at Defendants' Texas locations also signed the National Agreement. (ECF No. 84-15 at 6.) However, beginning on August 1, 2014, all of Defendants' Texas employees, regardless of when they were hired, were required to sign a different arbitration agreement, hereinafter known as the "Texas Agreement." (Id.) The Texas Agreement is also a contract between the employee and "the Company."[2] (ECF No. 84-3.) It also requires both the company and the employee to "submit any legally recognized claim to arbitration, rather than to litigation . . . ." (Id. at ¶ 1.05.) The Agreement's definition of "claim" includes any action that could normally be brought in federal court. (Id. at ¶ 1.04.)

ANALYSIS

Defendants assert that a sizeable number of putative class members signed agreements that compel arbitration as to any FLSA claims they may have, removing them from this Court's jurisdiction. They aver that the agreements are valid and enforceable, and that they have not waived their right to enforce the agreements – pointing to numerous times in which they have

[2] "The Company" is not specifically defined as Defendant Pilot Travel Centers, LLC, but the first page of the Texas Agreement contains the Pilot Travel Centers, LLC logo. The Agreement defines "Company" as: "the employer and any, present or former, officer, director, shareholder, co-worker, attorney, agent or client of the Company." The definition also includes "any parent company, holding company, subsidiary or any other entity which has or had an economic interest in the Company." (ECF No. 84-3 at ¶ 1.03.)

reserved arbitration as a defense. In contrast, Plaintiffs argue that Defendants only raised the issue of arbitration after the Court issued its Conditional Certification. Before then, Plaintiffs contend, Defendants were silent on the issue of arbitration, refusing discovery requests and failing to move to compel arbitration before November 10, 2014, the deadline for the motion to compel arbitration set by this Court. Plaintiffs further argue that the arbitration agreements signed by putative class members are unconscionable, and thus unenforceable under Tennessee law. The parties also disagree about both the content of the notice to the class, as well as the manner of its delivery.

The Court finds that Defendants have not waived their right to assert arbitration as a defense in this action. However, it is premature to consider the issue of arbitration at this stage, and thus the putative class, as currently defined, still meets the requirements of conditional certification. Therefore, the Court need not reconsider its conditional certification.

The Court also finds that delivery of notice via U.S. Mail will sufficiently apprise the potential plaintiffs of their rights in this action. At this stage, Plaintiffs need not be provided with potential plaintiffs' email addresses, phone numbers or social security numbers. Additionally, the Court finds that a case website containing the notice to the class, consent forms and the ability to submit consents via electronic signature will efficiently allow potential plaintiffs to opt into the lawsuit. Finally, none of Defendants' proposed additions to the content of the notice will be helpful in apprising potential plaintiffs of their rights. The notice as proposed by Plaintiffs is sufficient.

I. Waiver

Defendants have not waived their right to assert arbitration because their actions have not been "completely inconsistent" with an intention to rely on the arbitration agreements at issue.

While a party may waive their right to arbitrate, the judicial presumption in favor of arbitration necessarily disfavors a finding of waiver. See O.J. Distributing, Inc. v. Hornell Brewing Co., Inc., 340 F.3d 345, 356 (6th Cir. 2003). A party only waives its right to arbitrate by "(1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice." Hurley v. Deutsche Bank Trust Co. Am., 610 F.3d 334, 338 (6th Cir. 2010) (internal quotations omitted). To establish waiver, the party seeking to defeat arbitration must show that both prongs of the above-mentioned test are satisfied.

Here, Plaintiffs cannot establish that Defendants' actions were "completely inconsistent" with asserting their right to arbitrate. Plaintiffs argue that Defendants waited 19 months before seeking to compel arbitration, and, therefore, Defendants acted inconsistently with their right to seek arbitration. However, before this Court conditionally certified the FLSA class in June of 2015, there were no plaintiffs who could have been compelled to arbitrate. Both parties agree that the named Plaintiff and current opt-in Plaintiffs did not sign arbitration agreements, and putative class members are not parties to the case prior to class certification. Currithers v. FedEx Ground Package System, Inc., No. 04-10055, 2012 WL 458466, at *8 (E.D. Mich, Feb. 13, 2012); Barnes v. First Am. Title Co., 473 F. Supp. 2d 798, 802 (N.D. Ohio 2007); see also Zepeda v. U.S. Immigration & Naturalization Serv., 753 F.2d 719, 727 (9th Cir. 1983) (ruling that a court could not issue an injunction concerning putative class members before class certification, as those putative class members were not parties before the court). Defendants would have been unable to compel putative class members' claims to arbitration before the Court issued the Conditional Certification, as this Court would not have had jurisdiction to determine the rights of parties not before it. See Zepeda, 753 F.2d at 727; In re TFT-LCD (Flat Panel)

Antitrust Litig., No. M 07–1827 SI, 2011 WL 1753784, at *4 (N.D. Cal., May 9, 2011) (holding that defendant did not waive right to arbitrate because it could not have compelled putative class plaintiffs to arbitration before the class was certified). Therefore, because Defendants moved to compel arbitration at their first available opportunity,[3] Plaintiffs have failed to show that Defendants waived their right to seek arbitration.

II. Reconsidering Conditional Certification

Although Defendants have not waived their right to assert arbitration in this case, the possibility that many opt-in plaintiffs may be subject to arbitration agreements does not alter the Court's decision as to whether the putative class, as currently constituted, meets the requirements of conditional certification. Defendants argue that the existence of arbitration agreements covering many putative plaintiffs is new information that renders some potential plaintiffs to be dissimilar to other potential plaintiffs. According to Defendants, the Court should thus reconsider the Conditional Certification to exclude any potential plaintiff covered by an arbitration agreement. Plaintiffs contend that the class should remain as is, and notice should be sent to potential plaintiffs, regardless of whether or not they are covered by arbitration agreements. Plaintiffs are correct. Even if the arbitration agreements constitute new information, which they do not, the question of whether the arbitration agreements render certain potential plaintiffs to be too dissimilar to remain part of the class is one more properly resolved later in the case. As such, Defendants' request to reconsider the Conditional Certification is **DENIED**.

[3] Defendants also raised the issue of arbitration a number of times in the filings to date, expressly reserving the right to file a motion to compel arbitration should an arbitration agreement cover any putative class plaintiff. (ECF Nos. 39 at 6, 56-9 at 20, n. 24.)

Conditional certification is only the first step in defining a class under 29 U.S.C. § 216(b). This step typically occurs at the beginning of discovery, and the plaintiff must show only that "his position is similar, not identical, to the positions held by the putative class members." Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546–47 (6th Cir. 2006) (internal quotations omitted). A named plaintiff at this stage need only "'make a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" Id. at 547 (quoting Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 238 (N.D.N.Y. 2002)). It is only at the end of discovery that courts engage in a stricter analysis of whether the plaintiffs are indeed similarly situated. Frye v. Baptist Mem'l Hosp., 495 F. App'x 669, 671 (6th Cir. 2012). At that point, the plaintiffs must show that their similarities "extend beyond mere facts of job duties and pay provisions." Id. at 671 (internal quotations omitted).

When some discovery has been conducted before conditional certification, many courts apply a hybrid approach that mixes the two stages' inquiries. See, e.g., Creely v. HCR ManorCare, Inc., 789 F. Supp. 2d 819, 826 (N.D. Ohio 2011) (requiring plaintiffs to make a "modest plus" factual showing when limited discovery had already been conducted); Bowman v. Crossmark, Inc., No. 3:09–CV–16, 2010 WL 2837519, at *5 (E.D. Tenn. July 19, 2010) (determining that a more demanding standard that includes a consideration of the second-stage factors was appropriate when substantial discovery had been completed); Jimenez v. Lakeside Pic-N-Pac, L.L.C., No. 1:06–CV–456, 2007 WL 4454295, at *3 (W.D. Mich. Dec. 14, 2007) (reviewing pleadings and affidavits as well as "evidence gleaned through discovery" to determine whether "there is some factual basis for plaintiffs' claims" before allowing them to send opt-in notices).

In granting conditional certification, this Court analyzed Plaintiffs' claims under the first-stage analysis. There is no new information produced by discovery that now warrants a shift to a more strict analysis of the potential plaintiffs' similarities. The only information that could be construed as "new" concerns the arbitration agreements that purport to cover a large portion of the putative class.

However, the fact that arbitration agreements possibly cover a large portion of opt-in plaintiffs is not new information. Defendants' argument that they could not have known whether potential plaintiffs would be subject to arbitration before conditional certification is unavailing. In their motion for conditional certification, Plaintiffs sought to certify as a class almost any employee similar to the named Plaintiff who worked for Defendants at any time since April 2012. (See ECF No. 53.) According to Defendants, every employee, regardless of position or location, hired by Defendants after June 2012 signed an arbitration agreement, and anyone currently working for Defendants in Texas has signed an arbitration agreement. Thus, at the time of the question of conditional certification, Defendants knew with an almost absolute certainty that there would be putative class members covered by arbitration agreements. They even mentioned the arbitration agreements in their opposition to conditional certification.[4] (ECF No. 56-9 at 19–20, n. 23, n .24.) Defendants' current motion fails to convince the Court that the situation has somehow changed since the Court granted conditional certification.

Therefore, the 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

[4] It is interesting to note that Defendants argued both that they previously raised the issue of arbitration so as not to waive it AND that arbitration is a new issue.

of a common policy or plan that violated the law"? [5] See Comer, 454 F.3d at 547. The answer is no. "[C]ourts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination.'" Romero v. La Revise Assoc., LLC, 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013) (quoting D'Antuono v. C & G of Groton, Inc., No. 3:11cv33 (MRK), 2011 WL 5878045, at *4 (D. Conn. Nov. 23, 2011)). That an employer may have a different merits-based defense for a certain group of employees is an issue that is addressed at the later stage of class certification. See Williams v. Omainsky, CIVIL ACTION 15-0123-WS-N, 2016 WL 297718, at *7 (S.D. Ala. Jan. 21, 2016) ("The [first-stage inquiry] under the FLSA turns on whether putative class members were all subject to the same allegedly violative pay practices, not whether their employer's merits defenses are precisely the same for all class members' efforts to vindicate their FLSA rights in federal court."); D'Antuono, 2011 WL 5878045, at *4 (noting that courts must later determine enforceability of arbitration agreements "on an individual basis"). The existence of arbitration agreements, then, does not affect whether notice is given to all potential class members. Villatoro v. Kim Son Rest., LP, 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003).

[5] Defendants also argue that the existence of the arbitration agreements renders the current class unmanageable because the arbitration agreements will require threshold jurisdictional determinations using multiple states' laws. The Court finds this argument to be unavailing. Class manageability is certainly a factor to consider during first-stage analysis. However, at this early stage, courts view manageability through the lens of whether the numerous potential plaintiffs' claims will be similar enough to manage. See, e.g., Struck v. PNC Bank NA., No. 2:11–CV–00982, 2013 WL 571849, at *4 (S.D. Ohio Feb. 13, 2013) ("[T]he relevant inquiry at this juncture is whether Plaintffs' claims are united by common *theories* of defendant's statutory violations . . . .") (emphasis in original); Heaps v. Safelite Solutions, LLC, No. 2:10 CV 729, 2011 WL 1325207, at *5 (S.D. Ohio, Apr. 5, 2011) ("The Court concludes that a manageable class exists here; one that would serve the purposes of a collective action under Section 216(b) of the FLSA, such as having one proceeding for common issues of law, which will redound to the advantage of employer and employee alike through avoidance of multiplicity of suits.").

In addition to the legal support for this approach, such a conclusion makes intuitive sense. At this stage, the Court cannot issue a blanket determination, without more facts, that the arbitration agreements are enforceable against all potential plaintiffs who may have signed them. There may be other gateway issues concerning enforceability or applicability of the agreements that some potential plaintiffs, once brought into the lawsuit, may assert as a defense to arbitration. The Court will not prematurely deny them the opportunity to assert those arguments.

The notice will go to all potential plaintiffs in the class as currently certified. Defendants may raise the issue of the arbitration agreements during final certification when the identities of the potential plaintiffs are more fully developed and more discovery has been conducted. The Court will then address any issues raised by the arbitration agreements. Because no claims will proceed to arbitration until the Court addresses the impact of the arbitration agreements in final certification, Defendants' request for a stay pending resolution of arbitration is **DENIED**.

III. Notice

The parties also disagree about how to send notice to the class, as well as what the notice should contain. Plaintiffs attached a proposed notice to their motion for conditional certification, and request the names, addresses, email addresses, telephone numbers and social security numbers of all potential plaintiffs. Plaintiffs request to post the notice at places of employment, as well as to mail and email the notice to all potential plaintiffs. They also would like potential opt-ins to be able to sign up using a class website.

Defendants object to Plaintiffs' request for telephone numbers, email addresses and social security numbers, arguing that there is no demonstrated "special need" for this information, and that privacy concerns and the potential for abuse should preclude Plaintiffs from obtaining it. Defendants also object to the posting of notice at potential plaintiffs' places of employment,

citing concerns that it will "stir up litigation" from non-class members. As to the notice itself, Defendants request that it include statements about the possibility that opt-ins may have to pay Defendants' cost of litigation, may have to appear for a deposition in Memphis and respond to written discovery, are entitled to choose their own counsel and a statement that joining the class action "is not a general consent for all possible claims against Pilot, only the claims as described in the notice." Defendants also argue that any use of the words "unpaid wages" should be omitted from the notice, contending that these words suggest that a decision has already been made that Defendants failed to pay wages to potential plaintiffs.

This Court has broad discretion to monitor the content and form of notice to a § 216(b) class. See Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 169–70 (1989). When deciding whether or not to allow notice to be transmitted via telephone call or email, courts consider: "(1) whether the plaintiff argues that the U.S. mail is inadequate; (2) whether communication to potential class members will be controlled or could be distorted; (3) whether communication will be disruptive; and (4) whether communication will be intrusive upon privacy." Ott v. Publix Super Markets, Inc., 298 F.R.D. 550, 555 (M.D. Tenn. 2014). As to email notices, some courts have held that allowing email notice increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit, and that fact outweighs any privacy concerns connected with email notice. See, e.g., Atkinson v. TeleTech Holdings, Inc., No. 3:14–cv–253, 2015 WL 853234, *5 (S.D. Ohio Feb. 26, 2015); Petty v. Russell Cellular, Inc., No. 2:13–cv–1110, 2014 WL 1308692, at *6 (S.D.Ohio Mar.28, 2014). However, other courts have held that when U.S. mail is sufficient, email notice is duplicative and unnecessarily raises issues of privacy and improper solicitation. See, e.g., Hart v. U.S. Bank NA, No. CV 12–2471–PHX–JAT, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013); Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 630–31 (D.

Colo. 2002).

Here, the Court is not convinced of Plaintiffs' need for email addresses, phone numbers and social security numbers of potential opt-in plaintiffs. Such information, especially one's social security number, is inherently private, and Plaintiffs have not shown why such information is needed. See Fengler v. Crouse Health Found., Inc., 595 F. Supp. 2d 189, 198 (N.D.N.Y. 2009). Furthermore, the difficulty in gathering email addresses and telephone numbers is apparently a significant hurdle, and that must be evaluated in light of the potential benefit. Defendants assert that their employees are not required to provide them with email addresses and telephone numbers, and that, if an employee did provide his or her email address or phone number, there is no guarantee of its accuracy, as Defendants do not verify that information. In contrast, Defendants have the addresses of all potential opt-in plaintiffs and routinely update and check that information. Therefore, use of U.S. Mail is sufficient to provide the class with notice. Plaintiffs' requests for email addresses, telephone numbers and social security numbers are **DENIED**. As U.S. Mail is sufficient to apprise all potential plaintiffs of this litigation, and Plaintiffs have not shown good cause to post the notice, Plaintiffs' request to post notice at Defendants' business locations is also **DENIED**. Watson v. Advanced Distrib. Serv., LLC, 298 F.R.D. 558, 565 (M.D. Tenn. 2014).

The Court also finds that the limitations Defendants seek to impose on the use of a case website are unnecessary. Plaintiffs may create a case website that includes the notice to the class and the consent forms, and allows potential plaintiffs to submit their opt-in consent forms utilizing electronic signatures.

Finally, the Court finds that Defendants' proposed alterations to the content of the notice do not help apprise potential plaintiffs of their rights in this action. Rather, Defendants'

suggested language seems calculated to discourage participation in the lawsuit. The Court holds that Plaintiffs' proposed notice, as attached to their motion for conditional certification, may be disseminated with its current language.

CONCLUSION

For the foregoing reasons, the Court finds that, while Defendants have not waived their right to arbitrate, they have prematurely attempted to assert those rights against people who have not yet joined Plaintiffs' action. The notice to the class will be sent to all potential plaintiffs, regardless of whether or not they signed an arbitration agreement. The notice shall follow the dictates of this Order. The parties may assert their arguments regarding arbitration at the final certification stage.

IT IS SO ORDERED, this 3rd day of March, 2016.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE