UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
CASSANDRA GREENE, et al.,

Plaintiffs,

- against -

C.B. HOLDING CORP. d/b/a CHARLIE BROWN'S STEAKHOUSE, et al.,

Defendant.
----------X

ORDER

10 CV 1094 (JBW)

On March 10, 2010, plaintiffs filed this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207 and 216(b), New York Labor Law §§ 190, 633, 12 New York Comp. Codes, R. & Regs. ("NYCRR") §§ 142-2.2 and 142-2.4, to recover unpaid minimum wages and overtime and improperly withheld wages and tips owed to plaintiffs and all similarly situated persons who are presently or were formerly employed by the defendants.

During a motion hearing held on August 11, 2010, the Honorable Jack B. Weinstein ordered the parties to collaborate in preparing the form of the class notice and publication requirements. The court also referred the issue of class notification to the undersigned and ordered expedited discovery. On August 12, 2010, an order formally granting plaintiffs' application for conditional certification of this FLSA collective action and permitting court supervised notification to the putative class pursuant to 29 U.S.C. § 216(b) was entered.

Subsequently, on September 7, 2010, plaintiffs filed a Proposed Notice of Pendency ("Notice"), Consent to Joinder Form, and Publication Order. While the parties were able to agree on the majority of the language in these documents, including the entirety of the Proposed

Publication Order, there remain some outstanding issues upon which the parties were unable to agree. As such, on September 7, 2010, both parties submitted letters to the Court regarding these disagreements.

The Court addresses these disputes in the order in which they appear within the documents submitted for review. "Questions regarding the form of the notice are largely left to [the Judge's] discretion." Guzman v. VLM, Inc., No. 07 CV 1126, 2007 WL 2994278, at *7 (E.D.N.Y. Oct. 11, 2007) (citing Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101, 105-06 (S.D.N.Y. 2003)). The Court therefore also addresses problems with the Notice that have not been raised by the parties.

1) Notice of Pendency

a) 'Potentially' Similarly Situated

The first issue about which the parties disagree is whether the Notice should refer to the potential plaintiffs as 'similarly situated' or as '*potentially* similarly situated.' Plaintiffs claim, without citing to any case law for support, that since Judge Weinstein has already conditionally certified the class, finding that plaintiffs have met the necessary minimal requirements for such certification, it is confusing and improper to add the word 'potentially.' (Pls.' Letter[1] at 1-2).

Defendants, in requesting the addition of 'potentially,' emphasize that "the Court has not yet *conclusively* determined that the collective action group . . . is similarly situated" (Defs.'

[1]Citations to "Pls.' Letter" refer to the letter that plaintiffs submitted to the Court on September 7, 2010.

Letter[2] at 1 (emphasis added)), and therefore, it is "inaccurate and prejudicial to permit the term 'similarly situated' to appear in the notice without qualification." (Id. at 1-2).

As the defendants point out, many collective action notices have been approved in this and other districts with the language "potentially similarly situated" or "you potentially are 'similarly situated.'" See, e.g., Sexton v. Franklin First Financial, Ltd., No. 08 CV 04950, 2009 WL 1706535, at *12 (E.D.N.Y. June 16, 2009); Sobczak v. AWL Industries, Inc., 540 F. Supp. 2d 354, 366 (E.D.N.Y 2007); Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d at 106. Since the circumstances and employment history of each opt-in will be considered individually, defendants are technically correct that the opt-ins are, at this point in time, only potentially eligible to participate in the action. Given that the language "you potentially are similarly situated" has been used by this Court in other cases without causing serious confusion,[3] the Court finds that it reasonable to permit the same language to be used in this Notice.

b) Retention of Counsel and the Filing of the Consent to Joinder Form

Although no issues have been raised by the parties regarding the section entitled "Filing the Consent to Joinder Form," the Court finds that certain changes must be made in order to clarify the rights of the potential plaintiffs. For example, in the first paragraph of this section, the

---

[2]Citations to "Defs.' Letter" refer to the letter that defendants submitted to the Court on September 7, 2010.

[3]Indeed, as plaintiffs recognize, if any language might be confusing to a lay person, it is the term "similarly situated," which has a specific legal connotation in the context of a class or collective action. (Pls.' Letter at 2 n.1). However, since the parties have agreed to the inclusion of "similarly situated" (id.), and numerous courts have approved of the use of similar language, this Court permits its inclusion as well.

Court notes that the word 'form' should be added in the last line after "enclosed yellow Consent to Joinder."

Next, the Court finds that it is unnecessarily confusing to have some individuals send their consent forms to plaintiffs' counsel and others directly to the Clerk of the Court. Setting out a separate procedure for those who choose to obtain separate counsel is also likely to discourage individuals from doing so. See Guzman v. VLM, Inc., 2007 WL 2994278, at *9 (ordering that all recipients be directed "to submit their consent forms to the Clerk of Court, not to the plaintiffs' attorneys," due to the potential for "inappropriately discourag[ing] employees from seeking outside counsel"). As such, recent decisions finding that such a procedure improperly discourages class members from seeking outside counsel have directed that Consent Forms be sent to the Clerk of Court. See, e.g., Bowens v. Atlantic Maintenance Corp., 546 F. Supp. 2d 55 (E.D.N.Y. 2008) (adopting the Report and Recommendation of this Court in its entirety); Hallissey v. America Online, Inc., No. 99 CV 3785, 2008 WL 465112, at *4 (S.D.N.Y. Feb. 19, 2008). As such, the Court orders that the Notice be amended to instruct that all consent forms be sent to the Clerk of Court and that the address of the Court be provided.

Next, the various references regarding choice of counsel need to be consolidated, clarified, and made more prominent, such that those receiving this Notice are fully aware of and understand their rights to obtain counsel of their own choosing. The section, starting with the second paragraph, should therefore be rewritten as follows:

> If you decide to join this case by filing a consent form, you should send the Consent to Joinder form to the Clerk of the Court. If you fail to mail a signed Consent to Joinder form to the Clerk of the Court, you will not be eligible to participate in the FLSA portion of this lawsuit. Consent to Joinder forms filed after [90

days from mailing of notice] will be rejected unless good cause is shown for the delay.

[Insert the capitalized language on the top of page 3 of the Proposed Notice as is, with the exception of replacing plaintiffs' counsel's address with the address of the Clerk of Court, in all caps].

The Plaintiffs are currently represented by Lloyd Ambinder, Esq., of Virginia & Ambinder, LLP, located at [insert contact information] along with Jeffrey K. Brown, Esq., of Leeds, Morelli & Brown, P.C., located at [insert contact information]. The Defendants are represented by Jonathan M. Kozak and Michael A. Jakowsky of Jackson Lewis, LLP, located at [insert contact information][4].

If you wish, you may choose to be represented by Plaintiffs' counsel in this case. You will not be required to pay any fee for services provided by Virginia & Ambinder, LLP or Leeds, Morelli & Brown, P.C.

However, you also have the right to consult with an attorney of your own choosing about this matter, and if you wish to be represented by counsel other than Plaintiffs' counsel, you may retain another attorney. You will be responsible for paying that attorney and that attorney must notify the Court of your representation.

[Insert the final paragraph of this section, which may remain as is].

c) Defendants' Counsel's Telephone Number

As noted in footnote three, defendants have inserted their counsel's telephone number into the Notice, to which plaintiffs object. Plaintiffs are concerned that, if contacted, defendants' counsel will improperly discourage individuals from opting-in to the lawsuit. (Pls.' Letter at 2).

---

[4]The disagreement regarding the inclusion of defendants' counsel's telephone number is addressed below.

However, the various cases that plaintiffs cite to support their argument for excluding defense counsel's telephone number, do not actually address this issue. (See Pls.' Letter at 2, n.2). Although the Notice in Shajan v. Barolo Ltd., for example, does not include the phone number of defendant's counsel, the opinion does not directly discuss the issue of contact information at all, but simply notes that references to things such as costs could "discourage putative class members from participating" and should therefore be excluded. Shajan v.Barolo, Ltd., No. 10 CV 1385, 2010 WL 2218095, at *2 (S.D.N.Y. June 2, 2010).

The other cases that plaintiffs cite concern the need to protect class members from misleading communications, misrepresentations, or coercion. See In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 252-54 (S.D.N.Y. 2005); In re Initial Public Offering Sec. Litig., 499 F. Supp. 2d 415, 418-19, 421 (S.D.N.Y. 2001); In re School Asbestos Litig., 842 F.2d 671, 682-83 (3d Cir. 1988). However, in these cases, improper communications had already occurred. See, e.g., In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d at 254 (holding that "defendants' unsupervised communications were improper because they sought to eliminate putative class members' rights in this litigation"). Like Shajan, none of these cases say, or even imply, that simply providing defense counsel's telephone contact information is inappropriate.

In another case cited by plaintiffs, Gulf Oil Co. v. Bernard, the lower court issued an order banning all communications with any actual or potential class members concerning the class action by any of the parties or counsel without prior approval from the court. 452 U.S. 89 (1981). On review, the Supreme Court held that any such order "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential

interference with the rights of the parties." Id. at 101. The holding admonished lower courts not to "exercise the power [to restrict such communications] without a specific record showing by the moving party of the particular abuses by which it is threatened." Id. at 102. In this case, plaintiffs have not presented any evidence that suggests that any such threat exists, and "the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules." Id. at 104. The Court finds that because defendants' counsel have an ethical obligation to refrain from communicating with a putative class member who opts-in to the litigation, N.Y. Rules of Prof. Conduct, Rule 4.2, that alone provides sufficient protection against impropriety.

Furthermore, courts in this circuit routinely permit the inclusion of defendants' counsel's telephone number in a collective action notice. While plaintiffs assert that it is not "prudent to invite potential class members to contact Defense counsel to inquire about this case" (Pls.' Letter at 2), the courts in this district have found otherwise.

In Guzman v. VLM, Inc., defendants sought to include counsel's phone number so that potential class members "can contact the defendants' attorneys for more information." In approving the inclusion of this contact information, the Honorable John Gleeson found that "it would be appropriate to notify potential class members that they can seek further information about the case, and to include the contact information of defense attorneys." 2007 WL 2994278, at *8. Another court considering this issue found that "[t]he notice must also include the contact information of counsel for Defendants as one source from whom potential plaintiffs could obtain information." Bah v. Shoe Mania, Inc., No. 08 CV 9380, 2009 WL 1357223, at *4 (S.D.N.Y. May 13, 2009). Numerous other cases have also permitted the insertion of defendants' counsel's

phone number. See, e.g., Sobczak v. AWL Industries, Inc., 540 F. Supp. 2d at 368; Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d at 108.

Based on the above, the Court finds it perfectly reasonable and appropriate that defendants' counsel's telephone number should be included in the Notice of Pendency.

d) Effects of Joining this Lawsuit

Defendants seek to add an entire section to the Notice of Pendency, entitled "Effect of Joining this Suit," which consists of three paragraphs. Plaintiffs object to the addition of this section in its entirety.

The first paragraph starts by notifying the potential class members that if they join this lawsuit they will be "bound by any decision of the Court, judgment of the Court, or settlement, whether favorable or unfavorable." Plaintiffs object to the use of this language and claim, again without citing to any case law for support, that this will dissuade participation in this action. (Pls.' Letter, at 3). Unlike the other language addressed below, such as the potential for paying costs and testifying at trial, which has been described as "remote," this language informing putative class members that they will be bound by the judgment is not only accurate, but it is information that will be useful in deciding whether they wish to join this action or commence their own. Moreover, many cases have permitted similar language to be included in a Notice of Pendency. See, e.g., Ayzelman, et al. v. Statewide Services Corp., 238 F.R.D. 358 (E.D.N.Y. 2006); Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d at 107. Therefore, the Court finds that this language is reasonable and may be included in the Notice.

The rest of the first paragraph refers to the possibility that class members will have to

produce documents, respond to interrogatories, be deposed, or testify at trial. While it is true that some courts, such as those cited by defendants (see Defs.' Letter at 2), have permitted the inclusion of the similar language in various forms, others have not. See, e.g., Garcia v. Pancho Villa's of Huntington Village, Inc., 678 F. Supp. 2d 89, 96 (E.D.N.Y. 2010). The courts rejecting the inclusion of this language have found that like references to "paying defendants' costs," this type of information, "is designed to discourage putative class members from participating." Shajan v. Barolo, Ltd., 2010 WL 2218095, at *2. In one discussion regarding the inclusion of references to defendants' costs, Judge Gleeson noted that:

> Given the remote possibility that such costs for absent class members would be other than de minimis, and the absence of any showing by defendants that counterclaims are likely to be meaningful in this case . . . such language is inappropriate. It may have an in terrorem effect that is disproportionate to the actual likelihood that costs or counterclaim damages will occur in any significant degree.

Guzman v. VLM, Inc., 2007 WL 2994278, at *8. This same rationale applies to references to burdensome involvement in discovery and other aspects of litigation, which also may never come to pass. As such, the Court finds that this language is likely to dissuade putative class members from exercising their legal rights in this lawsuit and is to be excluded. The Court notes that "Defendants cite no other Court that has *required* a notice to warn opt-in plaintiffs of potential discovery obligations and liability for Defendants' costs . . . ." Garcia v. Pancho Villa's of Huntington Village, Inc., 678 F. Supp. 2d at 96 (citing Delaney v. Geisha NYC, L.L.C., 261 F.R.D. 55, 59 (S.D.N.Y. 2009)) (emphasis added). Given that questions regarding the form of the notice remain within the Court's discretion, Guzman v. VLM, Inc., 2007 WL 2994278, at *7 (citing Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d at 105-06), the Court directs

that this language not be included in the Notice.

The second paragraph added by defendants in this section then explains that each individual designates the named plaintiffs as his or her agent and representative, recognizes that plaintiffs and plaintiffs' counsel will have control over how to conduct the litigation, and that class members will be bound by the decisions and agreements made and entered into by the named plaintiffs. Many other cases have permitted similar language to be included in a Notice of Pendency, see, e.g., Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d at 107, and the Court therefore finds it reasonable to allow this language to remain in the Notice.

Defendants have also added a paragraph explaining plaintiffs' counsel's contingency fees. Again, similar language has been permitted in many cases and may be included here as well. See, e.g., Guzman v. VLM, Inc., No. 07 CV 1126, 2007 WL 2994278; Sobczak v. AWL Industries, Inc., 540 F. Supp. 2d 354; Gjurovich v. Emmanuel's Marketplace, Inc., 282 F. Supp. 2d 101.

e) No Retaliation Permitted

The sentence comprising the section entitled "No Retaliation Permitted" must be clarified and should be replaced with the following: "Charlie Brown's Steakhouse is prohibited from discharging or in any way retaliating against you because of your decision to join this lawsuit."

f) So Ordered

The last argument regarding the language in the actual Notice of Pendency relates to plaintiffs' insertion of "SO ORDERED" and a line for this Court's endorsement of the Notice.

Defendants object to the inclusion of this language as "potentially misleading . . . as it may appear to a lay person that the Court has approved or endorsed this lawsuit." (Defs.' Letter at 3). The Court observes that the Notice already includes some language informing the recipients that the "Court is not endorsing the merits of this lawsuit or advising you to participate" and that "the Court has authorized Plaintiffs' counsel to send this notice." (Notice at 2). The Court finds therefore that, with the additions and changes indicated below, this language is sufficient to indicate that the Court approves of the Notice, but has not endorsed the lawsuit.

This language is also sufficiently important such that it should be set off from the rest of the text of the Notice and put in bold font, as it is in the Proposed Notice. The modified paragraph should therefore be moved to the end of the Notice to replace the "SO ORDERED" and should read as follows:

> This Notice and its contents have been authorized by the U.S. District Court, Honorable Cheryl L. Pollak, United States Magistrate Judge. Although the Court has authorized Plaintiffs' counsel to send this notice, the Court takes no position regarding the merits of Plaintiffs' claims or of the Defendants' defenses. No determination has been made that you (or any other persons) are owed any minimum wages, overtime wages, or withheld wages, and the Court is not endorsing the merits of this lawsuit or advising you to participate in this lawsuit. Plaintiffs' claims and the claims of any person who joins this lawsuit may be subject to later dismissal if the Court finds that the claims lack merit or that this lawsuit cannot be litigated on a collective basis. You are under no obligation to respond to this Notice.

2) <u>Consent to Joinder Form</u>

With regard to the content of the Consent to Joinder Form, which encompasses pages five and six of the Proposed Notice of Pendency submitted by plaintiffs, defendants appear to have

objected to plaintiffs' proposed insertion of the addresses and telephone numbers of plaintiffs' counsel. However, defendants do not address why they object to the inclusion of this information which also appears in the Notice, and accordingly, the Court finds no reason to exclude this information.

Defendants have also proposed many additions to the Consent to Joinder Form to which plaintiffs object.

a) Agreement to be Bound

First, defendants added a sentence stating that "I agree to be bound by any adjudication of this action by the Court, whether it is favorable or unfavorable." As discussed above, this language already exists in the Notice. See supra at 8. It is unnecessarily duplicative to repeat the same information in the Consent Form, which should be made as clear and straightforward as possible.

b) Reference to Named Plaintiffs and Plaintiffs' Counsel

Next, defendants have added an indication that the individuals signing the Consent to Joinder Form recognize that "[b]y signing and returning this consent to sue, [they] understand that [they] will be represented by the law firms of Virginia & Ambinder, LLP, and Leeds Morelli & Brown, P.C." This language is completely inappropriate, inaccurate, and misleading as noted in the prior discussion, supra at 4-5, because it ignores the right of potential class members to appoint their own counsel and still opt-in via the Consent to Joinder Form. Accordingly, this should not be included.

Defendants also added a recognition by potential class members that the named plaintiffs will serve as their agents and will make decisions on their behalf and that the method and manner

of conducting this litigation and other decisions will be decided by plaintiffs' counsel. For the same reasons as discussed above regarding the agreement to be bound by the judgment of this Court, this language, which also already exists in the Notice (see supra at 9), should be omitted.

c) Employment History

Lastly, defendants seek to add: "To the best of my memory, I was employed at the following Charlie Brown's Steakhouse location(s), during the following periods of time:" followed by three lines with spaces in which individuals can indicate the city and state where they were employed and the dates "on or about" which they were employed. (Notice at 5). Defendants cite no cases to support their claim that this language should be included on the Consent to Joinder Form and this Court is not convinced that this information is necessary to assist the parties in locating relevant information regarding these individuals. (Defs.' Letter at 3 (claiming this information is necessary in case an individual "may have been known by a different name during their employment (or in the event the form is not clear or completely legible)")). The form already provides space for individuals to include their name, address, phone number, and email address. The Court finds that this information should be sufficient at this time to put defendants on notice of the individuals who wish to participate in this lawsuit. Further information regarding the opt-ins will be developed during the ordinary course of discovery with counsel's advice.

3) Discovery Schedule

The parties, in their September 7, 2010 letters, also disagree about how discovery should

proceed at this time. The plaintiffs have suggested a pre-class certification discovery schedule (Pls.' Letter at 3), which defendants appear to oppose in its entirety. (Defs.' Letter at 3-4). Defendants have requested that class discovery be postponed until after the expiration of the opt-in period. (Id.) Pursuant to Judge Weinstein's previously referenced order that this Court expedite discovery, defendants' request is denied.

At this time, the Court adopts plaintiffs' proposed discovery schedule with respect to specific discovery related to the named plaintiffs only. General discovery relating to defendants' practices and procedures may proceed as well. Once additional individuals have opted into the class, the parties may initiate discovery with respect to said individuals.

If there are any disputes regarding the proper scope of discovery that cannot be resolved after conferring in good faith, the parties should promptly address those issues in letters to this Court.

Therefore, as proposed by plaintiffs, the parties shall exchange interrogatory and document requests on or before September 27, 2010 and responses to such requests shall be served on or before November 1, 2010. All pre-class certification depositions related to the discovery authorized herein shall be taken on or before December 3, 2010. Lastly, on or before December 6, 2010, the parties shall submit a proposed briefing schedule regarding plaintiffs' motion for class certification pursuant to Rule 23. The parties shall appear for a conference before this Court on **January 5, 2011 at 9:30 a.m.**, after the conclusion of the 90 day Notice return period.

CONCLUSION

Accordingly, for the reasons set forth above, plaintiffs are directed to submit a revised Notice of Pendency and Consent to Joinder Form for the Court's review on or before **September 24, 2010**. Since there is no disagreement as to the Proposed Publication Order, plaintiffs are to submit a final version, removing "Proposed," for the Court to sign.

SO ORDERED.

Dated: Brooklyn, New York
September 21, 2010

Cheryl L. Pollak
United States Magistrate Judge