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September 7, 2010

VIA ECF
Magistrate Judge Pollak
United States District Court
Eastern District of New York
225 Cadman Plaza East, Rm 1230
Brooklyn, New York 11201

Re: **Greene et al v. C.B. Holding Corp. d/b/a Charlie Brown's Steakhouse et al. 10-CV-1094 (JBW)(CLP)**

Dear Judge Pollak:

This firm, along with the firm of Leeds, Morelli and Brown, LLP, are legal counsel to Plaintiffs and a putative class in the above-referenced action. Pursuant to the Court's August 12, 2010 Order, the Honorable Jack B. Weinstein granted Plaintiffs' application for an order permitting court supervised notification to the putative class pursuant to 29 U.S.C. § 216(b).

On September 1, 2010, Your Honor conducted a telephone conference with counsel for the parties, and directed the parties to submit a proposed Notice of Pendency ("Notice") and Consent to Join lawsuit form ("Consent") to be distributed to putative class members, along with a proposed Publication Order. Accordingly, attached hereto as Exhibits A and B, please find a proposed Notice, Consent and Publication Order for Your Honor's review. All language appearing in black has been agreed upon by the parties, however, not all differences in language could be reconciled. Thus, language proposed by Plaintiffs is highlighted in blue, and language proposed by Defendants appears in red. Plaintiffs' arguments regarding the language in the proposed Notice and Consent form appear below. Defendants shall submit a separate letter stating their arguments. The parties leave it to the Court's discretion to resolve these differences.

I. Plaintiffs Arguments Regarding the Proposed Notice

Defendants contend that the word "potentially" should be inserted before "similarly situated" in paragraph 1 of the "About this Lawsuit" section on page 1 of the Notice. Plaintiffs

object to the insertion of the word "potentially", because Judge Weinstein already found Plaintiffs to be similarly situated to members of the collective in his August 12, 2010 Order. These similarly situated individuals were defined in Plaintiffs' motion which was granted by Judge Weinstein, thus, there is no need for the inclusion of the word "potentially", which may serve to confuse potential claimants.[1]

Plaintiffs also object to Defendants' request that the Notice contain telephone contact information for Defendants' counsel (paragraph 5, page 2). While Plaintiffs do not object to identifying Defense counsel's name and mailing address, there is simply no need to include Defense counsel's telephone number. Nor is it prudent to invite potential class members to contact Defense counsel to inquire about this case, which could only serve one purpose – to discourage potential Plaintiffs from participating. This is not the intended purpose of a class notice. Shajan v. Barolo Ltd., 2010 WL 2218095 (S.D.N.Y. June 2, 2010).[2]

Plaintiffs further object to the inclusion of the entire section titled "Effect of Joining Lawsuit" which appears on pages 3-4. This section states that potential claimants agree to designate Plaintiffs Goff, Greene and Tello as their class representatives, and allow Plaintiffs to make decisions concerning the litigation, the method and manner of conducting the litigation, the entering of an agreement with Plaintiffs' counsel concerning attorney's fees and costs, and all other matters pertaining to this lawsuit. This language is unnecessary and confusing because, in actions brought pursuant to 29 U.S.C. § 216(b), each individual who elects to participate demonstrates their willingness by filing a consent to join the action, thereby elevating the claimant to that of an opt-in Plaintiff. At this stage, the Named Plaintiffs need only demonstrate that they are similarly situated to the opt-in Plaintiffs, thus, any issues regarding the adequacy of Plaintiffs Goff, Greene and Tello as class representatives are premature.

Likewise, this Court should deny Defendants request to include language that states potential opt-ins who file consents to join may be required to appear for a deposition, participate in discovery, testify at trial, and pay any costs if they do not prevail. This language will only serve to confuse potential opt-ins, and may have an *in terrorem* effect on their willingness to participate. See Guzman v. VLM, Inc., 2007 WL 2994278, *8 (E.D.N.Y. Oct. 11, 2007); Garcia v. Pancho Villa's of Hunt. Village Inc., 678 F.Supp.2d 89 (S.D.N.Y. 2010).

As stated by the Court in Garcia v. Elite Labor Service, Ltd., 1996 WL 33500122, *1 (N.D. Ill. July 11, 1996), "The purpose of class notice is to present a fair recital of the subject matter of the suit and to inform all class members…that their rights may have been violated for which there is legal redress." While a class notice "is not intended to serve as a complete source of information as to each and every alternative a class member may have in pursuing any

[1] In fact, Plaintiffs suggested to Defendants that the phrase "similarly situated" should be eliminated altogether as it is a legal term whose meaning is unknown to potential claimants. Nevertheless, Plaintiffs indicated they would consent to the inclusion of this phrase if desired by Defendants.

[2] Moreover, numerous courts have found that contacts with putative class members before a class is certified warranted judicial intervention, and evidences improper contact that is inconsistent with the policies behind the court-supervised class certification process. Gulf Oil Company v. Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981); In re Initial Pub. Offering Sec. Litig., 499 F.Supp.2d 415, 418, n.13 (S.D.N.Y.2007); In re Currency Conversion Fee Antitrust Litig., 361 F.Supp.2d 237, 252-53 (S.D.N.Y.2005); In re Sch. Asbestos Litig., 842 F.2d 671, 682-83 (3d Cir.1988).

potential claim", it is important that a notice contains neutral, understandable language, particularly when published to individuals, such as here, who are immigrants that speak little or no English, have minimal education and no concept of their legal rights. Id. at *3.

The language proposed by Defendants in the "Effect of Joining Lawsuit" section is not "neutral", nor does it present a fair recital of the subject matter of this action. Rather, it is superfluous and could dissuade potential opt-ins from participating in this case. Thus, the entire section should be omitted.

Finally, Plaintiffs contend that the Notice should be "So Ordered" by the Court, and include Your Honor's signature. The Notice contains plenty of language to inform the reader that the Court is not endorsing the merits of this lawsuit, however, it is a court-approved Notice, which should be indicated.

II. Plaintiffs Arguments Regarding the Consent to Join Form

Regarding the proposed Consent form, Plaintiffs object to the inclusion of the last sentence in paragraph 1, and the entirety of paragraph 2, for three reasons. First, the language is not neutral and is drafted to dissuade participation in this action. Secondly, as stated above, the inclusion of any language regarding the adequacy of Plaintiffs Goff, Greene and Tello as class representatives is unnecessary and premature. Thirdly, this language does not belong in a consent to join form, which should consist of a simple form where class members indicate their willingness to participate in an action, and provide basic contact information.

For the same reasons, Plaintiffs object to Defendants' proposed inclusion that claimants include any employment history they can recall. The consent to join form should be used solely to allow interested claimants to indicate their willingness to participate in an action, and provide basic information, such as their name, address, telephone, etc. This document should not be utilized as a discovery mechanism that could later be used against any class members who choose to opt-in to this action. This is particularly true in the instant matter where it appears the Defendants have extensive employment documentation. Indeed, the basic information provided by potential claimants, combined with Defendants' employment records, is more than enough to put Defendants on notice of who is participating in this action, and of the claimant's potential claims.

III. Plaintiffs Proposed Discovery Schedule

Plaintiffs propose the parties engage in pre-class certification discovery. Plaintiffs propose the interrogatory requests and requests for documents be served on or before September 27, 2010, and that responses to such requests be served on or before November 1, 2010. Plaintiffs further propose the parties conduct any pre-class certification depositions on or before December 3, 2010. At the close of pre-class certification discovery, and on or before December 6, 2010, the parties shall submit a proposed briefing schedule regarding Plaintiffs' motion for class certification pursuant to Rule 23.

Based on the foregoing, Plaintiffs respectfully request that the Court approve Plaintiffs proposed Notice, Consent and Publication Order, and authorize the parties to engage in pre-class certification as outlined above.

Respectfully submitted,

/s/LaDonna M. Lusher

Enclosures

cc: Jonathon M. Kozak, Esq. (via ECF)
Jeffrey K. Brown, Esq. (via ECF)