IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOM LEWIS, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	**Case No. C2-11-CV-0058**
v.	:	
	:	**JUDGE ALGENON L. MARBLEY**
THE HUNTINGTON NATIONAL BANK,	:	
	:	**Magistrate Judge Terrence P. Kemp**
Defendant.	:	

ORDER

This is an action under federal and state law for unpaid overtime wages and related relief. On May 23, 2011, the Court granted conditional class certification and ordered the Parties to submit proposed procedures for distributing notice to potential class plaintiffs (Doc. 45). The Parties have submitted a joint proposed notice (Doc. 48), which this Court has approved (Doc. 52), and the Parties have now submitted competing procedures for distributing that Notice (Docs. 49 & 50).

The Plaintiffs have proposed that the Notice, the Consent to Join and Participate as Party Plaintiff form ("Consent"), and a pre-addressed return envelope be mailed to all Huntington Mortgage Loan Officers ("MLOs") employed at Huntington from may 23, 2008 to April 2, 2011 via first-class mail; these three items together shall be referred to as the "Notice Packet." The Plaintiffs state that they will arrange the mailing. Huntington has no objection to this proposal, and the Court accordingly **GRANTS** this portion of the Plaintiffs' Motion in Support of Plaintiffs' Proposed Notice Procedure (Doc. 49).

The Plaintiffs also seek the following additional methods of distributing the Notice Packet: (1) emailing the last known email address that Huntington has on record for MLOs

employed during the relevant time period; (2) insertion of the Notice Packet into the next paycheck distributed to current MLOs, or, if the MLO is paid by electronic deposit, inclusion of the Notice Packet with the deposit notice; and (3) posting a copy of the Notice on a bulletin board or other area used by Huntington for communication with its current MLOs. Plaintiffs argue that these supplemental methods of distribution will ensure that potential plaintiffs are informed of their right to participate in the litigation, are not unreasonable, and will not unduly burden Huntington.

Huntington opposes the use of each of these three supplemental methods. As a general matter, Huntington contends that the Plaintiffs have not shown that first class mailing will be insufficient to distribute the Notice Packet to all potential plaintiffs. The second two methods would be particularly redundant, Huntington argues, because they would only reach current employees whose addresses on file with Huntington are likely accurate. *See Gordon v. Kaleida Health*, No. 08-CV-378S, 2009 U.S. Dist. LEXIS 95729, at *36 (W.D.N.Y. Oct. 13, 2009) (noting that "the only group that will be reached by posting are current employees, who have an interest in providing their employer with an up-to-date mailing address."). With respect to emailing, Huntington further argues that providing its current or former employees' email addresses to the Plaintiffs would be an unwarranted intrusion into the employees' privacy. *See Hinterberger v. Catholic Health Sys*., No. 08-CV-380S, 2009 U.S. Dist. LEXIS 97944, at *36, 42-43 (W.D.N.Y. Oct. 20, 2009) (refusing plaintiffs' request for email addresses, phone numbers, social security numbers, and dates of birth of putative plaintiffs as unnecessarily invasive of putative plaintiffs' privacy, and approving notification by mail). Finally, Huntington opposes posting the Notice on the ground that posting would violate its First Amendment right against compulsion to engage in speech with which it disagrees. *See Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice

to speak includes within it the choice of what not to say."). In that regard, Huntington contends that a posting would not be narrowly tailored as it would reach more individuals than necessary. *See id*. at 19 (holding that burdens on free speech are permissible only where narrowly tailored to a compelling state interest).

The Court retains broad discretion to supervise the content and mode of the Notice to potential plaintiffs. *See Huffman-La Roche, Inc. V. Sperling*, 493 U.S. 165, 169 (1989); *Douglas v. GE Energy Reuter Stokes*, No. 1:07-CV-077, 2007 U.S. Dist. LEXIS 32449, at *5 (N.D. Ohio, April 7, 2007). Taking the request for email first, the court notes that, at this juncture, the Court must balance two competing interests: safeguarding the privacy of individuals not currently a party to this case and ensuring that all potential plaintiffs receive notice of their right to join this lawsuit. Inherent in this balance is the principle that individuals' private information, which they entrusted in their employer, shall not be disclosed except for cause. *Cf. Humphries v. Stream Int'l, Inc.*, No. 3:03-CV-1682-D, 2004 U.S. Dist. LEXIS 20465, at *12 (N.D. Tex. Feb. 13, 2004) ("[H]ighly personal information about persons who may in fact have no interest in this litigation should not be disclosed on the thin basis that [plaintiff's] counsel desires it. Any need for the compelled disclosure of such data is outweighed by the privacy interests of these current and former workers."); *Aguilar v. Complete Landsculpture, Inc.*, No. 3:04-CV-0776-D, 2004 U.S. Dist. LEXIS 20265, at *17-18 (N.D. Tex. Oct. 7, 2004) (following *Humphries*).

In this case, the Court finds that the disclosure of current MLOs' emails is not necessary. The likelihood that the addresses that Huntington has on file for its current employees are accurate is high, and communicating by two methods serves no purpose. The Plaintiffs argue that communication via email as well as via mail is necessary to remedy the misleading nature of the Acknowledgments that some current MLOs signed to receive back wages for work performed in late 2010 and early 2011. Sending the same notice twice, however, would not make clearer the

explanation in the Notice that signing an Acknowledgment dot not impact the right to join the lawsuit. The Court therefore **DENIES** the Plaintiffs' request to issue the Notice Package by email to currently employed MLOs.

The situation is different, though, with respect to former MLOs. The addresses on file for these individuals may or may not continue to be accurate, and using a second mode of communication will help ensure that all of these potential plaintiffs will receive at least one copy of the Notice Package. Nor is the Court persuaded by the concern, expressed by other district courts, that the email is likely to be corrupted. *See Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 91 (E.D.N.Y. 2007) ("[N]otification by electronic mail creates risks of distortion or misleading notification that are substantially reduced when first-class mail is used.") (citing *Reab v. Elec. Arts, Inc*., 214 F.R.D. 623, 630-31 (D. Colo. 2002)). If the Notice were attached to the email as a pdf file rather than typed into the body of the email, the risk that the Notice will be "copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court," *Reab*, 214 F.R.D. at 630, would be mitigated. The Court therefore **GRANTS** the Plaintiffs' request to issue the Notice Package by email to formerly employed MLOs. Because the Parties have not provided the Court with a detailed plan for issuing notice by email—which would resolve such issues as who is to send the email, what steps the MLO would have to take to opt-in, or what modifications, if any, would need to be made to the language of the Notice—the Court **ORDERS** the Parties to submit a procedure for notice by email for this Court's approval within ten days of the issuance of this Order.

Next, the Court finds Huntington's arguments regarding distribution of the Notice Package with current employees' paychecks and by posting to be persuasive. Courts have generally approved only a single method for notification unless there is a reason to believe that method will be inadequate. *See, e.g.*, *Shajan v. Barolo*, 2010 U.S. Dist. LEXIS 54581 (S.D.N.Y.

June 2, 2010) (rejecting alternative modes of distribution where first class mail would reach all potential plaintiffs); *Barnett v. Countrywide Credit Indus.*, No. 3:01-CV-1182-M, 2002 U.S. Dist. LEXIS 9099, at *6 (N.D. Tex. May 21, 2002) (same). In this case, as Huntington points out, the posting and paycheck methods would reach only those employees for whom Huntington's addresses are most likely to be accurate. The Court, therefore, in its discretion **DENIES** the Plaintiffs' request for notice by posting or by paycheck. Huntington's First Amendment defense is accordingly moot.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Court Judge

DATE: June 20, 2011