IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

EMILIO LINERAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	1:10cv324 (JCC)
INSPIRATION PLUMBING LLC, *et al.*,	)	
	)	
Defendants.	)	

M E M O R A N D U M O P I N I O N

This matter is before the Court on the parties' motions regarding proper collective action notice. [Dkts. 41, 47, 48.] Plaintiffs are former laborers of Defendants and are suing for failure to pay overtime in violation of the Fair Labor Standards Act. They seek to issue notice to similarly situated individuals who may join the suit. Plaintiffs filed their initial Complaint on April 2, 2010. [Dkt. 1.] Plaintiffs moved for provisional collective action status on August 9, 2010. [Dkts. 20, 21.] This Court granted that motion on September 23, 2010. [Dkt. 37.] The parties then filed motions on October 4, 2010 [Dkts. 41, 47], regarding the proper notice to issue to similarly situated individuals ("P Notice Mot." and "D Notice Mot.," respectively). Plaintiffs further moved to modify the

case schedule for good cause on October 4, 2010 [Dkts. 43, 44] ("P Discovery Mot."), Defendants opposed on October 14, 2010 [Dkt. 55] ("D Discovery Mot."). All four motions are before the Court.

I. Analysis

The FLSA permits a plaintiff to file suit "for and on behalf of himself . . . and other employees similarly situated." 29 U.S.C. § 216(b). Such "collective actions" are intended to efficiently resolve FLSA claims and to lower cost barriers to deserving claims through pooling of resources. *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 831 (E.D. Va. 2008). Certification as a collective action permits additional persons to "opt-in" as plaintiffs by filing written consents with the Court. *Id.* Where collective status is deemed warranted, courts may facilitate notice to potential class members, through, for instance, discovery of names and addresses of potential plaintiffs. *Id.* Ultimately, "[t]he plaintiff has the burden on demonstrating that notice is appropriate." *Id.* (internal quotation marks omitted).

There appear to be several areas of disagreement with regard to the opt-in notice: (1) the length of the opt-in period (30 or 60 days), (2) the procedure for returning opt-in consent forms (to Plaintiffs' counsel or directly to the Court), (3) Spanish translation of the opt-in notice, (4) consent form

language pertaining to "pay-offs," (5) language as to plaintiffs' fee agreement, and (6) the form of the notice itself to be used. The Court will address each issue in turn.

A. Opt-in and Discovery Periods

Defendants argue for a 30-day opt-in period with a 15-day extension to the discovery cut-off (currently November 12, 2010), while Plaintiffs seek a 60-day opt-in period with discovery ending 60 days after that period expires. Because less than 30 days remain before November 12, the current discovery cut-off, the cut-off date must be moved. The questions, then, are how long the opt-in period should be, and how long discovery should be extended from the expiration of that period.

Regarding the length of the opt-in period, Plaintiffs cite a number of cases with longer opt-in periods than 60 days, and argue that because the potential opt-ins are Hispanic and unfamiliar with the American judicial system, 60 days are needed to reach possible opt-ins whose notices are returned as "undeliverable." (P. Notice Mem. at 2.) Defendants' opposition is largely obviated by the fact that less than 30 days remain before the discovery cut-off. This Court therefore sees no reason not to permit a 60-day opt-in period in this case.

Regarding the discovery cut-off, Plaintiffs seek an additional 60 days from the close of the opt-in period "so that

opt-in class members have an opportunity to join the case and to prove their claims for owed overtime, liquidated damages, and the tolling of the limitations period." (P Discovery Mot. at 1.) Defendants meanwhile point out that, were this Court to adopt Plaintiffs' request in addition to Plaintiffs' proposed 60-day opt-in period, it would effectively extend discovery by 120 days. (D Discovery Mot. at 3.) Defendants suggest a 15-day extension as an alternative. *Id.* at 4.

Federal Rule of Civil Procedure 16(b)(4) permits a schedule to be modified for good cause and with the judge's consent. "The good cause provision of Rule 16(b)(4) does not focus on the prejudice to the non-movant or bad faith of the moving party, but rather on the moving party's diligence." *Richardson v. United States*, No. 5:08cv620, 2010 WL 3855193, at *3 (E.D.N.C. Sept. 30, 2010).

Because Defendants have "stated unequivocally that names and addresses [of any potentially eligible employees] will be provided once the Court approves the form and method of notice," (D. Notice Mot. at 3 ¶ 5), and because Plaintiffs appear to be pursuing discovery diligently, this Court believes that 30-day extension following the opt-in period will provide adequate time for discovery.

B. Procedure for Returning Consent Forms

The parties next dispute whether consent forms should be returned to the Court or to Plaintiffs' counsel, and whether the forms should be returnable by fax, email, or U.S. Mail, or by U.S. Mail alone.

Plaintiffs seek to have the forms returned to Plaintiffs' counsel whereas Defendants argue that the Court is the proper recipient. Defendants argue that sending the forms to Plaintiffs' counsel will create needless complications and confusion as to the official date the consents are filed. (D. Notice Mot. at 2-3.) The Court is less concerned about potential confusion resulting from sending the forms to one address versus another, than it is about the possibility that potential plaintiffs will be penalized by the continued running of the limitations period during the time it takes to file their consent forms with the Court. A collective action commences when plaintiffs' written consents are "filed *in the court*." 29 U.S.C. § 256(b) (emphasis added). The language of the statute resolves any doubt as to the date that will apply: it is the date the consents are filed with the Court. *Lee v. Vance Executive Protection, Inc.*, 7 F. App'x 160, 167 (4th Cir. 2001).

Time will be lost if potential plaintiffs first send their consent forms to Plaintiffs' counsel who later file them with the Court, thus potentially penalizing those plaintiffs

from full vindication of their claims by limiting (albeit by days) the scope of their potential claims. The Court will therefore adopt Defendants' recommendation that the consents be returned directly to the Clerk of the Court. As such, original signed copies of the forms must be returned to the Court by U.S. Mail. With respect to this last point, the Court notes that Plaintiffs seek to include a self-addressed postage paid envelope with the collective action notice, and will permit inclusion of that envelope.[1]

C. Spanish Translation of the Notice

Plaintiffs seek to include both English and Spanish versions of the opt-in notice and consent forms, and claim that Defendants object to the Spanish translation. (P. Notice Mot. at 3.) The Court sees no objection in Defendants' briefs to a Spanish translation, and will permit the translation regardless, as the potential plaintiffs in this case are likely to be more fluent in Spanish.

D. Reference to Pay-offs

Plaintiffs wish to include the following language in the opt-in notice: "You can still join this suit, even though

[1] Plaintiffs also wish to stamp the envelope containing the notice and consent forms in English and Spanish: "IMPORTANT COURT-ORDERED NOTICE REGARDING YOUR OVERTIME WAGES." (P. Notice Mot. at 5.) And Plaintiffs wish to be permitted to communicate with possible opt-ins whose notices are returned as undeliverable. *Id.* at 6. Absent objection from Defendants, this Court will permit the envelopes to be stamped in that manner, and will permit the requested communications.

Inspiration Plumbing and/or Mr. Rude have paid you some amount of wages for past overtime work." Plaintiffs argue this statement is necessary because although Defendants have paid some potential plaintiffs for some past overtime, those potential plaintiffs may be entitled to additional payments including liquidated damages. (P. Notice Mot. at 3-4.) Defendants argue that the language is unnecessary under the language of their proposed notice. Because, as explained in Part F, the Court adopts Plaintiffs' proposed notice form, and because the proposed language in no way prejudices Defendants or misleads potential plaintiffs, this Court will permit the language to be inserted.

E. Fee Agreement Language

Defendants object to the following language in Plaintiffs' proposed notice: "If [sic] agree to be represented by Plaintiffs' counsel, then you agree to the fee agreement (a copy of which is available from Plaintiffs' counsel)." Defendants argue that this essentially asks potential plaintiffs to agree to an undisclosed fee agreement. Defendants provide no case law support for this argument, and Plaintiffs do not address it at all.

The Court agrees that more information as to the fee agreement should be provided. Responding to the same concerns in *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317,

324 (S.D.N.Y. 2007), and noting that "the fee structure may impact on "opt-in" Plaintiff[s'] recovery," the court required that the notice provision "include a statement informing 'opt-in' Plaintiff[s'] of any arrangements regarding attorneys'' fees and costs that they might be entering." This Court sees no reason why the contingency fee percentage should not be disclosed, as that percentage will better inform potential plaintiffs in their choice of whether to opt-in. The contingency fee percentage should therefore be added to the notice.

F. Notice Form

Finally, both parties have submitted proposed consent forms, both of which resemble forms used in past cases in the Eastern District of Virginia. While Defendants have raised objections to narrow portions of Plaintiffs' proposed notice, Defendants have not shown that proposed notice to be unsatisfactory as a whole. This Court therefore finds Plaintiff's consent form sufficient and approves its use, provided that the form is adjusted to conform with the remainder of this Opinion.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

November 3, 2010
Alexandria, Virginia