IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	Civil Action No. 4:16-CV-731-ALM

REPLY IN SUPPORT OF RESPONDENTS CARMEN ALVAREZ AND HER COUNSEL'S MOTION FOR STAY PENDING APPEAL

Chipotle's Opposition (Dkt. No. 134) ("Opp.") wholly fails to explain why a stay is not appropriate here. As explained below, the equities heavily favor a stay; the questions at stake are serious; and Respondents' merits arguments are substantial. A stay pending appeal is warranted.

I. Denying A Stay Will Irreparably Harm Respondents.

Chipotle's efforts to deny the immediate harm Respondents face are unpersuasive. *First*, Chipotle suggests that Respondents may merely withdraw their allegations in the New Jersey action and then "amend their complaint" if, in the pending appeal of the underlying *Nevada* case, the Overtime Rule is upheld. Opp. 3-4. But that appeal will very likely never be resolved on the merits; it has been held in abeyance pending a new rule-making. *See Nevada v. Dep't of Labor*, No. 17-41130 (5th Cir. filed Nov. 2, 2017). Chipotle tellingly does *not* concede that, if Respondents dismiss their allegations now and the *Contempt Order* is then reversed, Respondents may restore their allegations. Nor does Chipotle cite any case (let alone a Third Circuit case) guaranteeing Respondents that opportunity. Furthermore, if the Contempt Order takes effect, the New Jersey court may well lift the stay of the New Jersey action and direct that the case proceed without the allegations at issue here, as the New Jersey court may impose its own schedule for litigation before it. The status of the New Jersey action at the time of any future Fifth Circuit decision is thus highly uncertain. For all of these reasons, there can be no serious question that the Contempt Order requires Respondents to take an immediate action materially adverse to Respondent Alvarez—at the least jeopardizing her opportunity to obtain a ruling on the merits of her allegations. That injury alone warrants a stay. *See Reading & Bates Petrol. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir. 1994) (attorney ordered to dismiss pending claim suffers irreparable harm).[1]

[1] Chipotle's suggestion (at 6) that the Respondent attorneys are somehow failing to zealously represent Ms. Alvarez is unfounded and unfair. Ms. Alvarez's principal interest in this proceeding is to obtain the overtime pay to which she believes she is entitled. That was and remains the basis of Respondents' lead argument regarding irreparable harm. *See* Dkt. No. 131 ("Mot.") at 13.

Second, the Respondent attorneys also face other immediate harms to their professional interests. Mot. 13-14. Chipotle claims that these injuries should be dismissed by analogy to *E.I. du Pont de Nemours v. Phillips Petrol. Co.*, 659 F. Supp. 92 (D. Del. 1987). But, critically, the lost profits at issue in that case were *profits from the infringing product*. *See id*. at 94. The only possible analogy here would be further pursuit of *the New Jersey action* while the appeal is underway—but Respondents have repeatedly and emphatically agreed to stay that action, taking it out of play as a basis for a claim of injury. Chipotle next claims (at 8) that Respondents' injuries are "speculative," because a contempt citation is not *categorically* disqualifying for bar admissions, adequacy determinations, and other matters. But numerous courts have recognized the grave stigma associated with contempt findings (Mot. 5, 13-14), and Respondents need not prove any particular injury is absolutely certain. *See, e.g.*, *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (abuse of discretion to deny stay where there was "serious potential for irreparable harm"); *In re First S. Sav. Ass'n*, 820 F.2d 700, 715 (5th Cir. 1987) ("serious threat of irreparable harm"); *Paulsson Geophysical Servs. v. Sigmar*, 529 F.3d 303, 313 (5th Cir. 2008) ("substantial threat of irreparable injury" in the form of a "threat to potential business"). Indeed, courts have specifically held that "*potential* injury that counsel … face from [a] sanctions Order" warrants a stay. *Gibson v. Credit Suisse AG*, No. 10-CV-1, 2015 WL 105999, at *2 (D. Idaho Jan. 7, 2015) (emphasis added). And the threat here is undoubtedly serious: Courts and state bars do not require the reporting of facts they regard as immaterial, and courts have identified disciplinary history as an important factor in evaluating class counsel under Rule 23(g). Mot. 14. Beyond its generic retort that these harms are "speculative," Chipotle has no answer to any of these very real concerns.[2]

[2] Chipotle does suggest that, because reporting obligations will lapse some years from now, the harm they cause in the meantime is not "irreparable." Opp. 8. That is not what "irreparable" harm

II. Chipotle Will Suffer No Meaningful Harm From A Stay.

Chipotle devotes exactly one substantive paragraph to its own purported harm (Opp. 4), claiming that new potential class members will accumulate while the Fifth Circuit considers Respondents' appeal. But, first of all, this argument cannot be squared with Chipotle's prior insistence that the New Jersey case should not go forward until the question of Respondents' alleged contempt is resolved. *See* Ex. A at 9 (arguing that the New Jersey action should be stayed because Chipotle's "litigation strategy will be informed by the scope of the allegations and theories Plaintiff is permitted to bring"); *id.* at 1 (arguing that, because "the scope and binding effect of [the] injunction are the very issues" being litigated in this proceeding, it "makes good sense to wait"). Chipotle's sudden sense of urgency is also at odds with its prior argument that "irrespective of [this Court's] decision, [the New Jersey] litigation is likely to continue for years." *Id.* at 10. Chipotle previously thought that was a reason the New Jersey action need not be rushed forward; now it says that "every day that the New Jersey Action is stayed, Chipotle is further harmed." Opp. 4. This transparent opportunism eviscerates the credibility of Chipotle's present claim of harm. In short, Chipotle initiated the contempt proceeding and insisted that it be resolved before the New Jersey litigation proceeds; it cannot credibly claim injury from the further delay to the New Jersey litigation inherent in litigating the complex issues involved to a final result on appeal.

Even setting aside Chipotle's about-face, Chipotle's harm argument fails by its own terms. There are two relevant possibilities: Either the Contempt Order will be affirmed or it will be reversed. If the order is affirmed, Respondents will be barred from pursuing their relevant allegations against Chipotle, and any growth in the class in the interim will be irrelevant. If the

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means; the question is whether there will be a later remedy for the harm done. *See, e.g.*, *Plains Cotton Co-op. Ass'n v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1261 (5th Cir. 1987).

order is reversed, Respondents were entitled to proceed against Chipotle all along, and it could not be a cognizable "injury" that the class grew while Chipotle pursued a failed attempt to obstruct that litigation.[3] And because Respondents are proposing to stay the New Jersey action while the appeal of the Contempt Order proceeds, Chipotle will incur no fees or costs in the interim.[4]

Furthermore, as Chipotle acknowledges, the relevant question is whether "granting the stay would *substantially* harm" the nonmovant. Opp. 2 (quoting *In re First S. Sav. Ass'n*, 820 F.2d at 704 (emphasis added)). Chipotle's only asserted harm is one it was perfectly willing to accept when the contempt question was before this Court. It cannot claim the same harm is "substantial" now that the same question will be presented to the Fifth Circuit. Any possible injury to Chipotle could be further minimized by expediting the appeal, as Respondents would agree to do. In any event, when the real and concrete harms to Respondents are taken into account, the equities weigh "heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565-66 (5th Cir. 1981).

III. The Questions At Issue Are "Serious."

The questions at stake here are undoubtedly "serious to both the litigants and to the public at large." *Nevada v. U.S. Dep't of Labor*, 227 F. Supp. 3d 696, 698 (E.D. Tex. 2017). First, Chipotle's claim that the consequences for Respondents are not serious (Opp. 10) rests on Chipotle's arguments about Respondents' irreparable harms, addressed above. *See supra*, at 1-2. Second, Chipotle's suggestion that this is a "routine" case with no "far-reaching" significance is

[3] In fact, Chipotle cites no case suggesting that growth in a putative class is *ever* a cognizable harm. That is not surprising. If a defendant is ultimately found not liable, the size of a class is irrelevant. And if a defendant *is* liable, it is not a cognizable harm that it may be required to satisfy its legal obligations. *See E.I. du Pont de* Nemours, 659 F. Supp. at 94.

[4] There is no serious basis to doubt that the New Jersey court will continue the stay in that action if this Court stays the Contempt Order pending appeal (Opp. 4 n.1). The court already stayed the action pending the Contempt Order; if this Court stays the Contempt Order pending appeal, it will be as if the Contempt Order simply has not yet issued. *See also* Dkt. No. 134-7 (order of the New Jersey court noting that this Court might enter a stay pending appeal).

untenable. Opp. 11; *but cf.* Opp. 9-10 (arguing that there is a strong public interest at stake in this case). As far as the Contempt Order reflects, this is the first case in the history of the federal courts in which a private citizen has been held in contempt on the ground that she was adequately represented by, and so in privity with, a federal agency. Right or wrong, that is a holding of profound consequence for future litigation over agency policies that overlap with private enforcement. The issues are thus plainly "serious." *See, e.g.*, *Musslewhite*, 14 F.3d at 272 (court "had no trouble whatsoever" concluding that "serious legal question" was presented in far more routine case).

IV. Respondents Have Made Substantial Arguments On The Merits.

Finally, Chipotle has essentially nothing to say about the merits, except that this Court has already rejected Respondents' position (Opp. 12-15). That is of course true, but it is also irrelevant. As the Fifth Circuit has explained, "[t]he stay procedure … affords interim relief where relative harm and the uncertainty of final disposition justify it." *Ruiz*, 650 F.2d at 565. The Court need not *agree* with Respondents' merits arguments to conclude that the ultimate resolution here remains uncertain; indeed, the entire practice of seeking stays from district courts contemplates that courts can and will separate those two issues. *See id*. at 565-66. Here, the stay motion identified three grounds for Respondents' position—personal jurisdiction, the interpretation of Rule 65(d), and the scope of the *Nevada* order—any one of which could persuade the Fifth Circuit to reverse. *See* Mot. 5-13. Taken together, those arguments are, at the least, "substantial."

CONCLUSION

This is a classic case for a stay pending appeal. Respondents should not be made to suffer immediate and irreparable harm when a delay will cost Chipotle next to nothing and Respondents might well obtain appellate relief, but too late to avert their injuries. Respondents therefore respectfully ask that the Court exercise its discretion to grant a stay pending appeal.

Dated: March 26, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of March, 2018, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3).

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EXHIBIT A

Reply In Support of Chipotle's Motion to Stay

(Dkt. No. 19, *Alvarez v. Chipotle Mexican Grill*, No. 2:17-cv-4095 (D.N.J))

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CARMEN ALVAREZ, on behalf of herself and all others similarly situated, Plaintiff, vs. CHIPOTLE MEXICAN GRILL, INC., and CHIPOTLE SERVICES, LLC, Defendants.	2:17-cv-04095(KM)(JBC) Electronically Filed **MOTION DAY: SEPTEMBER 5, 2017**

REPLY BRIEF IN SUPPORT OF DEFENDANTS CHIPOTLE MEXICAN GRILL, INC. AND CHIPOTLE SERVICES, LLC'S MOTION TO STAY

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PRELIMINARY STATEMENT

Plaintiff devotes the bulk of her argument to attacking the merits of Chipotle's Motion for Contempt pending before the United States District Court for the Eastern District of Texas. Aside from the fact that the merits of that Motion do not bear on any of the factors that govern the instant Motion to Stay, Plaintiff's argument is legally unsound. Plaintiff contends that if Chipotle was "serious" about mounting a challenge to the Final Rule, it would have done so before this Court pursuant to Federal Rule of Civil Procedure 12(b)(6). Of course, Plaintiff's "salary threshold" theory is only a theory and not a claim or cause of action subject to dismissal, as Your Honor recognized in *First Aviation Services, Inc. v. NetJets, Inc.*, No. 13-CIV-2442 (KM) (MAH), 2014 WL 3345175 (D.N.J. July 8, 2014). Thus, the principle theory of Plaintiff's Opposition is readily dispatched.

With regard to the factors that are relevant to the instant Motion, Plaintiff offers only passing, but readily exposed, arguments. For example, Plaintiff contends that awaiting a ruling from the Eastern District concerning the scope of its injunction will not simplify the issues in this case because the ruling would not bind this Court. A wealth of authority says differently with respect to nationwide injunctions and, in any event, the scope and binding effect of that injunction are the very issues raised before the Eastern District. It therefore makes good sense to wait.

Likewise, Plaintiff contends that she and the putative class and collective will suffer prejudice because of a delay in receiving unpaid wages. This is an invented harm based upon two false constructs: (i) that Plaintiff's claim is made meritorious simply by filing the Complaint; and (ii) that Plaintiff is entitled to represent the interests of an unformed and likely uncertifiable class or collective given *Scott v. Chipotle Mexican Grill, Inc.*, No. 12-CV-8333 (ALC) (SN) (S.D.N.Y.). Plaintiff at the same time transparently minimizes the harm to Chipotle absent a stay: it is not a

matter of simply proceeding with costly and potentially unnecessary discovery, as Plaintiff posits, but the reality that Chipotle's litigation strategy as a whole will be determined by the scope and nature of the theories it faces.

Finally, Plaintiff wholly ignores Chipotle's arguments concerning where the public interest lies. Plaintiff takes this approach perhaps in recognition that there is no credible basis to argue against the logic in allowing the Eastern District to enforce its injunction to the extent it intended without interference and potential for inconsistent rulings. This concern is paramount among all others, and should guide this Court in issuing a brief stay.

Ultimately, this case is at its inception. The Eastern District will hold argument on Chipotle's Motion for Contempt on September 28, 2017. An informative and potentially seismic ruling, at least as the scope of this case is concerned, will likely follow shortly thereafter. The brief stay requested imposes no legitimate prejudice on Plaintiff. Accordingly, Chipotle respectfully submits that its Motion should be granted.

LEGAL ARGUMENT

I. PLAINTIFF'S MISAPPREHENSION OF APPLICABLE PROCEDURE DOES NOT SUPPORT DENIAL OF CHIPOTLE'S MOTION TO STAY THESE PROCEEDINGS

Plaintiff primarily argues that Chipotle's pending Motion before the Eastern District of Texas will be unsuccessful. Plaintiff contends that Chipotle filed that Motion in an effort to "forum shop," and goes so far as to contend that "[i]f Chipotle had been serious about seeking to adjudicate the effectiveness of the Final Rule, it could have moved to dismiss the claim in this Court where it has consented to jurisdiction." (Opp'n at 7.) Plaintiff's accusations misapprehend basic procedural realities and do not support denial of a stay.

Plaintiff accurately notes that she advances two theories in the instant case: (i) that Apprentices were misclassified as exempt under the FLSA (and corollary New Jersey state laws)

because they do not meet the salary threshold given the Final Rule; and (ii) that Apprentices were misclassified because they do not perform the duties necessary to qualify as exempt. (Opp'n at 5.) But these two theories are just that: theories. Neither serves as an independent claim for relief. To be sure, Plaintiff's claims incorporate by reference *both* of her salary threshold and duties test theories. (*See* Docket No. 1, ¶¶ 74-82.) Thus, if Chipotle had sought dismissal of Plaintiff's salary threshold theory and was successful, her claim – misclassification of Apprentices under the FLSA – would still survive based upon her alternative theory. Federal Rule of Civil Procedure 12(b) does not provide any substantive relief under these circumstances, and Chipotle proceeded accordingly. Indeed, Your Honor ruled upon this very issue in *First Aviation. See* No. 2014 WL 3345175, at *2-3 (denying motion to dismiss aimed at the legal theories and allegations underpinning the ultimate claims for relief).[1] Plaintiff's claims of forum shopping or a "lack of seriousness" are therefore without merit and do not support denial of Chipotle's Motion.

Plaintiff's effort to malign Chipotle by accusing it of forum-shopping lacks merit for another basic procedural reason. Plaintiff acknowledges that Chipotle's Motion for Contempt contends that her allegations in this case constitute a violation of the Eastern District's Order. That is an issue exclusively reserved to the Eastern District to rule upon. *See Texas Capital Bank v. Dallas Rodester, Ltd.*, 2015 WL 12910774, at *1 (E.D. Tex. June 5, 2015) ("It is elementary that the Court against which a contempt is committed has exclusive jurisdiction to punish for such contempt."); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985) ("Enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt

[1] To the extent Plaintiff argues that Chipotle should have proceeded under Rule 12(f) if it was "serious" about challenging the Final Rule, we note that Your Honor also addressed the unavailability of Rule 12(f) in similar circumstances in *First Aviation*. *See id*. at *3 (holding that motions to strike are "disfavored" and "are commonly a waste of everyone's time.").

is an affront to the court issuing the order."); *see also* Fed. R. Civ. P. 71 ("When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party."). Stated differently, Chipotle had no choice but to proceed before the Eastern District.

In short, Chipotle did not undertake a "brazen effort to secure adjudication in another court of the primary issue in this litigation." (Opp'n at 7.) Chipotle avoided wasteful motion practice before this Court and proceeded in accordance with the Federal Rules and applicable precedent. Plaintiff's overarching "thematic" argument should therefore be rejected and Chipotle's Motion to Stay should be granted.

II. PLAINTIFF DOES NOT OFFER CREDIBLE GROUNDS THAT SHOULD CAUSE THE COURT TO REFUSE TO EXERCISE ITS INHERENT AUTHORITY TO STAY THIS CASE

The remainder of Plaintiff's arguments do not provide any reason for this Court to decline to exercise its inherent authority to issue a stay until the Eastern District rules on Chipotle's pending Motion for Contempt.

A. A Stay May Narrow Discovery If Chipotle's Contempt Motion Is Successful

Plaintiff contends that even if Chipotle's Motion for Contempt is successful and the "Final Rule was found not to be in effect," discovery in this case "would not substantially change." (Opp'n at 8-9.) Plaintiff correctly points out that discovery would still be necessary concerning her "duties test" theory of misclassification.[2] (*Id.* at 8.) However, she grossly minimizes the discovery that will be sought with respect to her "salary threshold" theory. (*Id.* at 9) (contending that "little discovery, if any" will be needed). Plaintiff's Counsels' efforts in the nearly identical

[2] Plaintiff's admission in this regard echoes the absurdity of their contention, addressed in Point I, *supra*, that Chipotle should have sought dismissal under Rule 12(b)(6) of her salary threshold theory.

Scott matter reveal a probable pattern of the discovery Plaintiff is likely to engage in here. Specifically, as in *Scott*, Plaintiff will likely aggressively seek, at a minimum, depositions of multiple corporate witnesses and others involved with the decision-making process that led Chipotle to change the classification status of Apprentices twice in a period of weeks, as well as costly electronic discovery related to the issue—while insisting that Chipotle bear the costs associated with these demands.[3] In any event, this is a minor consideration when juxtaposed against the others that strongly support the stay.

B. A Stay Will Simplify And Narrow The Issues Before The Court

Plaintiff argues that Chipotle's success in the Eastern District will not simplify the issues for trial. (Opp'n at 9.) First, Plaintiff argues that the Eastern District's decision will not bind this Court and that she will be entitled to relitigate the matters presented in that action here. (*Id.*) Plaintiff is wrong.

As a threshold matter, Plaintiff conflates the issues presented here with those at issue in the Eastern District. Here, Plaintiff asserts that Chipotle violated the Final Rule by not paying her and those similarly situated to her in accordance with it. Chipotle, in the Eastern District, raises the issue of whether the Final Rule was ever effective in the first place (it was not). One (the Eastern District's) necessarily precedes resolution of the other (this action). Plaintiff's efforts to paint both with the same broad brush to minimize this reality should be ignored.

Further, Plaintiff again confuses applicable procedure: although a "decision of a federal district court judge is not binding precedent in [] a different judicial district," (*Id.* at 9 (internal citation omitted)), an injunction, particularly one issued on a nationwide basis concerning an

[3] If this Motion is to be denied on this basis, then Plaintiff should be held to the representation of her Counsel and be prohibited from conducting what they now contend will be "little, if any" discovery.

agency regulation, is. *See, e.g., Nat'l Mining Assoc. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); *see also Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979)) ("Thus there is no bar against class-wide, and nationwide relief in federal district court or circuit court when it is appropriate."); *Texas v. United States*, 809 F.2d 134, 188 (5th Cir. 2015) ("Furthermore, the Constitution vests the District Court with the judicial power of the United States. That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction.").

Plaintiff cites *Whitaker v. Stansberry*, 08-CV-662, 2009 WL 3762320 (E.D. Va. Nov. 9, 2009), for the proposition that the invalidation of an agency rule does not bind other courts, but *Whitaker* itself cites cases acknowledging that the result would be different if it were done in accordance with a nationwide injunction, as occurred here. *See id*. at *3 (citing *Va. Soc'y Human Life, Inc. v. Fed. Elec. Comm'n*, 263 F.3d 379, 393-94 (4th Cir. 2001).) Plaintiff's citation to *Right to Life of Dutchess County, Inc. v. Fed. Elec. Commission*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998), is also distinguishable, as a nationwide injunction was not at issue there. Because this Court would be bound by a determination by the Eastern District that its injunction extended to private parties and precludes Plaintiff's theory here, a stay would narrow the issues before this Court.

Second, Plaintiff argues that Chipotle "concedes" that "other courts outside the Eastern District have jurisdiction" to decide this issue by virtue of its reference to *Krokos v. The Fresh Market, Inc.*, No. 16-CV-12082-IT. (Opp'n at 10.) There, a Motion to Amend the Complaint to add "salary threshold" allegations is pending and has been opposed on grounds of futility. More importantly, the Massachusetts District Court has not reached any decision on the merits; the parties (including those represented by Plaintiff's Counsel here) voluntarily and jointly stayed

proceedings to explore the possibility of settlement before those motions were resolved. See Declaration of A. Nitka, ¶3, Exhibit A, June 5, 2017 Joint Mot. for Stay. Chipotle took no position concerning the authority of the District of Massachusetts to issue a ruling and, in any event, there, unlike here, it is not dispositive of Chipotle's request here.

Third, Plaintiff argues that Chipotle's Motion for Contempt before the Eastern District will fail, presumably suggesting that a stay here would be futile and this Court will eventually have to address the underlying issue anyway. "Likelihood of success" of a parallel motion is not a consideration on a Motion to Stay, which Plaintiff appears to concede. (Opp'n at n. 5.) Accordingly, Chipotle will not address here an argument that will be fully briefed before the Eastern District.

Lastly, Chipotle anticipates that Plaintiff may argue that, even if this Court were bound by the Eastern District's injunction ruling, it applies only to the U.S. Department of Labor and not private parties such that it cannot have the effect of simplifying issues before this Court. However, that is the issue at the crux of Chipotle's Motion for Contempt. Any argument advanced by Plaintiff in this regard only supports Chipotle's request for a stay as this issue will be resolved by the Eastern District of Texas, eliminating the need for the Court to duplicate those efforts here.

C. A Stay Will Not Unduly Prejudice Plaintiff Or The Putative Class/Collective

Plaintiff argues that a stay would delay recovery of wages by Plaintiff and the putative class and/or collective. Plaintiff puts the cart before the horse. There has been no merits determination made with respect to her claims or those of any other Apprentice. Further, it is unlikely that this matter will even be permitted to proceed as a class or collective action given the recently issued *Scott* decision, which prohibited Apprentices from proceeding as a class or collective with respect to misclassification claims. *See* Docket No. 12-CV-8333 (ALC) (SN) (S.D.N.Y. Mar. 29, 2017.) Plaintiff cannot therefore rely on unrealized harm to persons whom she

likely will not be permitted to represent to bolster a claim of prejudice. In any event, as set forth in Chipotle's motion, it is well-settled that delay does not necessitate a finding of undue prejudice. (Def. Mem. at 7 (citing, for example, *Depomed Inc. v. Purdue Pharma L.P.*, No. 13-571 (JAP), 2014 WL 3729349, at *2 (D.N.J. July 25, 2014).) While Plaintiff contends that these cases "do not involve back wages or the remedial purposes of the FLSA," (Opp'n at n. 8), Plaintiff cites no authority suggesting that a different rule should apply based upon the claims she is advancing here.

Plaintiff separately argues that a stay will prejudice members of the putative collective because the limitations period continues to run against their claims. First, as set forth above, Plaintiff does not represent their interests, they are not a part of this case, and they should not be considered. Second, even if they are considered, they are free to file individual claims if they are aggrieved. Third, if this case even proceeded to a motion for conditional certification, adequate legal and equitable remedies exist to address the situation.[4] Accordingly, this alleged harm, which does not impact the only Plaintiff in this case, should not impede the Court's authority to issue a stay.

D. Chipotle Will Suffer A Hardship In The Absence Of A Stay

Plaintiff contends that any claim of hardship by Chipotle "rings hollow because . . . Chipotle could have sought to avoid discovery by moving to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)" and instead "chose to answer Ms. Alvarez's claims." (Opp'n at 14-15.) As set forth in Point I, *supra*, Plaintiff's argument in this regard should be rejected as procedurally infirm.

Plaintiff separately argues that discovery is not a sufficient reason to grant a stay. In two of the cases Plaintiff cites, however, the potential for costly and/or unnecessary discovery was the

[4] Chipotle reserves the right to argue that any theory Plaintiff may later advance is inappropriate and unsupported, should occasion arise in this case.

only prejudice claimed by the movant. *See Nussbaum v. Diversified Consultants, Inc.*, 2015 WL 5707147, at *2 (D.N.J. Sep. 28, 2015); *Konopca v. Comcast Corp.*, No. 15-CIV-6044, 2016 WL 1645157, at *4 (D.N.J. Apr. 26, 2016) ("[T]he only purported 'hardship' identified…is the possibility that the parties may engage to some extent in unnecessary discovery.".) In *Akishev v. Kapustin*, 23 F. Supp. 3d 440, 448 (D.N.J. 2014), the Court did not even discuss discovery as part of the claimed hardship. And *Coyle v. Hornell Brewing Company*, No. 08-CIV-2797, 2009 WL 1652399 (D.N.J. June 9, 2009), concerned a motion to stay discovery, rather than a motion to stay proceedings, which is governed by different factors. *See id*. at *3 (determining only whether "good cause" existed for a stay of discovery).

Here, in contrast, Chipotle raises additional concerns about the prejudice it will suffer in the absence of a stay. Plaintiff does not address Chipotle's argument that in the absence of a stay it will be prejudiced since its entire litigation strategy will be informed by the scope of the allegations and theories Plaintiff is permitted to bring in this case. (Def. Mem. at 7-8.) Plaintiff also fails to address Chipotle's contention that she may abandon any attempt to proceed on a class or collective basis in this case if the Eastern District rules in Chipotle's favor, given the Southern District of New York's decision in *Scott*.[5]

E. The Requested Stay Is Likely Brief And Certainly Not "Indefinite"

Finally, Plaintiff's attempts to undermine Chipotle's prompt and efficient effort to stay these proceedings at the outset of this case fail. Chipotle's motion is consistent with applicable case law which disfavors stays where the parties are "deep into discovery or discovery had been almost completed." (Def. Mem. at 9 (citing *Nussbaum*).) Plaintiff contends that awaiting a

[5] Plaintiff disputes only that she does not intend to drop her individual claims. (Opp'n at n. 9.)

decision from the Eastern District "would prolong the instant litigation substantially and indefinitely." Plaintiff's argument is hollow for two reasons.

First, as Plaintiff and her Counsel well know, argument on Chipotle's Motion for Contempt has been set for September 28, 2017. Given that the Eastern District originally set the matter for argument the day after Chipotle filed its motion, Chipotle perceives it unlikely that the motion will languish as Plaintiff hypothesizes. See Declaration of A. Nitka, ¶4, Exhibit B, Eastern District of Texas August 2 Order). Second, and more importantly, irrespective of the Eastern District's decision, this litigation is likely to continue for years. In *Scott*, for example, nearly four and a half years passed between the filing of the Complaint and the Southern District's ruling decertifying the collective and denying class status. The Court should not be swayed by Plaintiff's empty predictions.

F. A Stay Is In The Public Interest

Chipotle argues that a stay here would be in the public interest because it would conserve judicial resources, it would allow the Eastern District to enforce its injunction to the extent it intended without interference from this Court, and it would avoid the potential for inconsistent rulings on an issue of national importance. (Def. Mem. at 9-10.) Plaintiff failed to address any of these concerns. Chipotle respectfully submits that these concerns in particular decidedly tip the equities in Chipotle's favor when balanced against the short stay requested.

CONCLUSION

For each of the foregoing reasons, Chipotle respectfully asks this Court to grant its Motion for Stay of Proceedings until seven (7) days after the United States District Court for the Eastern District of Texas rules on Chipotle's Motion for Contempt.

Dated: New York, New York
August 29, 2017

Respectfully submitted,
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