

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

MATTHEW KREAMER,	:	No. 4:15-cv-01075
	:	
Plaintiff,	:	(Judge Brann)
	:	
v.	:	
	:	
GRANT PRODUCTION TESTING	:	
SERVICES, INC.,	:	
	:	
Defendant.	:	

ORDER

May 11, 2016

FINDINGS:

1. On February 1, 2016, the Court approved Plaintiff's Motion for Class Certification and Conditional Certification. ECF No. 33.
2. On February 11, 2016, the Plaintiff submitted the instant Motion for Approval of the Class/Collective Notice Protocols and Documents, ECF No. 34, with a supporting brief. ECF No. 35.

3. On February 26, 2016, Defendant submitted a brief in opposition and a red-lined version of the certification documents with changes tracked. ECF No. 36.
4. On March 4, 2016, Plaintiff submitted a reply brief and updated version of the certification documents, which accepted the majority of Defendant's proposed changes but took issue with some. ECF No. 37.
5. In its reply brief, Plaintiff wrote, "While Plaintiffs disagree with many of Defendant's proposed edits, in the spirit of compromise, they have accepted almost all of Defendant's changes." Id. at 1.
6. The Court will now address two of the remaining unresolved objections:
 - a. Insertion of the phrase "To determine if you are eligible and may participate as a plaintiff, or if you wish not to participate," in the first paragraph of section 5. ECF No. 36 at 17.

- b. Insertion of the sentence “If you do not prevail in this Lawsuit, court costs and expenses may be assessed against you.” at the conclusions of the final paragraph of Section 5. Id. at 18.
7. “Courts consider the overarching policies of the collective suit provisions and whether the proposed notice provides accurate and timely notice concerning the pendency of the collective action, so that an individual receiving the notice can make an informed decision about whether to participate.” Garcia v. Pancho Villa’s of Huntington Vill., Inc., 678 F. Supp. 2d 89, 95 (E.D.N.Y. 2010) (internal quotation marks and citations omitted).
8. “The Court has both the power and the duty to ensure that the notice is fair and accurate, [but] that power should not be used to alter plaintiffs' proposed notice unless such alteration is necessary.” Heitmann v. City of Chicago, No. 04 C 3304, 2004 WL 1718420, at *3 (N.D. Ill. July 30, 2004) (internal citation

omitted). “Under the FLSA, the Court has the power and duty to ensure that the notice is fair and accurate, but it should not alter plaintiff’s proposed notice unless such alteration is necessary.” Creten-Miller v. Westlake Hardware, Inc., No. CIV.A. 08-2351-KHV, 2009 WL 2058734, at *2 (D. Kan. July 15, 2009).

9. For the sake of clarity and to better frame the purpose of the notice form for its recipients, I agree with Defendant that the sentence, “To determine if you are eligible and may participate as a plaintiff, or if you wish not to participate,” should be inserted in the first paragraph of section 5. ECF No. 36 at 17.
10. However, I disagree with Defendant’s insertion of the sentence “If you do not prevail in this Lawsuit, court costs and expenses may be assessed against you.” at the conclusions of the final paragraph of Section 5. Id. at 18.

11. “[T]he Notice need not warn putative plaintiffs about their potential responsibility for Defendant's costs. The issue of costs is not amenable to a simple short statement. Defendant's proposed notice gives no indication of what those costs could be; indeed, the costs might be negligible when spread among the class. Yet the potential opt-ins might be chilled from joining the action based on unfounded and uniformed fears of large costs.” Alexander v. CYDCOR, Inc., No. 1:11-CV-01578-SCJ, 2012 WL 1142449, at *7 (N.D. Ga. Apr. 6, 2012)

12. “[D]efendants’ request for language stating that opt-in plaintiffs may be responsible for costs to the defendants if they do not prevail is, in the Court's view, unnecessary and potentially confusing, and thus should not be included.” Sexton v. Franklin First Fin., Ltd., No. 08-CV-04950 JFB ARL, 2009 WL 1706535, at *12 (E.D.N.Y. June 16, 2009). “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, I think 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., No. 07-CV-1126 (JG) (RER, 2007 WL 2994278, at *8 (E.D.N.Y. Oct. 11, 2007), order clarified, No. 07-CV-1126 JG RER, 2008 WL 597186 (E.D.N.Y. Mar. 2, 2008).

13. I consider the remoteness of the issue of costs in this matter to be significantly outweighed by the potential for such language to wrongfully discourage class participants whose claims should be disposed of by the instant action. Thus, in addition to my concern that the language of such a proposal would wrongly discourage certain potential class members from joining, I also would reject the language for the potentially negative consequences it could have on judicial economy.

AND NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Approval of the Class/Collective Notice Protocols and Documents, ECF No. 34, is GRANTED.
2. The Class/Collective Notice Protocols and Documents, as they appear in ECF No. 37 Ex. 1, are approved as to form and content pursuant to Fed. R. Civ. P. 23(c)(2)(B) and 29 U.S.C. § 216(b) with the following modification by the Court:
 - a. Plaintiff shall insert the phrase "To determine if you are eligible and may participate as a plaintiff, or if you wish not to participate," in the first paragraph of section 5.
3. Within seven (7) days of the Court's entry of this Order, Defendant shall provide the last known address for each member of the certified class/collective defined in the Court's February 1, 2016 Order ("Class/Collective"). See ECF No. 33.
4. Within fourteen (14) days of the Court's entry of this Order, Class Counsel will mail the attached Notice Package to each member of the Class/Collective.

5. Thereafter, Class Counsel will make all reasonable efforts to update the mailing addresses and re-mail the forms to any individuals whose Notice Package is returned by the post office as undeliverable.
6. Any individual wishing to participate in this action under the Fair Labor Standards Act (“FLSA”) pursuant to 29 U.S.C. § 216(b) must return the Consent Form to Class Counsel in accordance with the 60-day deadline described in the Notice Form. Class Counsel will promptly file all Consent Forms with the Court.
7. Any individual wishing to exclude themselves from this action under the Pennsylvania Minimum Wage Act (“PMWA”) pursuant to Fed. R. Civ. P. 23(c)(2)(B)(v) must send a letter in accordance with the protocols and 60-day deadline described in the Notice Form.
8. The Court appreciates the parties’ willingness to compromise and work cooperatively in this matter.

BY THE COURT:

/s Matthew W. Brann

Matthew W. Brann

United States District Judge