IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AARON L. ESPENSCHEID,
GARY IDLER and MICHAEL CLAY,
on behalf of themselves and a class of
employees and/or former employees
similarly situated,

OPINION and ORDER

09-cv-625-bbc

Plaintiffs,

v.

DIRECTSAT USA, LLC and
UNITEK USA, LLC,

Defendants.

- -

This is a collection action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and a class action under the wage and overtime compensation laws of Wisconsin, Minnesota and Pennsylvania. In an opinion and order dated February 10, 2011, I granted a motion filed by plaintiffs Aaron L. Espenscheid, Gary Idler and Michael Clay and the class they represent to certify state classes under Fed. R. Civ. P. 23, and denied, in large part, the motion filed by defendants' DirectSat USA, LLC and Unitek USA, LLC to decertify the FLSA collective action. Dkt. #387. In particular, I certified three subclasses under § 216(b),

organized by the three main types of claims asserted by the opt-in plaintiffs. I certified similar subclasses for plaintiffs' state law claims. I instructed the parties to confer and submit a proposed notice to be sent to the state law class members.

Now before the court is plaintiffs' proposed notice, dkt. #434-1, to which defendants have filed several objections, dkt. #431. Also before the court is defendants' motion for the court to amend the February 10 order to certify an interlocutory review under 28 U.S.C. § 1292(b), of the denial of defendants' motion to decertify the FLSA class, dkt. #428. Finally, plaintiffs have filed a motion to amend the caption in the case to add UniTek Global Services, Inc. as a defendant, dkt. #384.

Plaintiffs' motion to amend the caption can be dealt with quickly. They request the addition of UniTek Global Services, Inc. under Fed. R. Civ. P. 15(a), which concerns amendments to pleadings, and Fed. R. Civ. P. 17(a), which requires that actions be prosecuted in the name of the "real party in interest." Plaintiffs contend that as a result of a merger, UniTek Global Services, Inc. is performing the same services for defendant DirectSat USA, LLC that defendant UniTek USA, LLC was performing previously. (Defendants deny that this is an accurate statement.) However, plaintiffs have not moved for substitution of parties under Fed. R. Civ. P. 25; rather, they have moved to amend their complaint and assert claims against defendant UniTek USA, LLC. I will not grant leave to amend at this late date without some explanation why the amendment should be granted

that takes into consideration its timing, potential prejudice to the parties and other factors affecting the interests of justice. Because plaintiffs make no effort to show why the amendment should be allowed, their motion to amend the caption will be denied.

Turning to defendants' motion, I will deny defendants' request for certification of an interlocutory appeal because the questions defendants seek to appeal are not pure questions of law and allowing an appeal at this stage is unlikely to "materially advance the ultimate termination of the litigation" as required by § 1292(b). Therefore, this case will proceed with notice to the state law class members, summary judgment and trial. I have considered defendants' objections to plaintiffs' proposed notice and have made modifications. After plaintiffs incorporate the changes, they may distribute the notices to the state law class members.

OPINION

A. Certificate of Appealability

Under 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if the order (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This type of appeal is discretionary and should "be used sparingly" and only when the circumstances are

exceptional. Asher v. Baxter International Inc., 505 F.3d 736, 741 (7th Cir. 2007)(dictum).

With respect to the first requirement, "the term 'question of law' in section 1292(b) refers 'to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine.'" In re Text Messaging Antitrust Litigation, 630 F.3d 622, 626 (7th Cir. 2010) (quoting Ahrenholz v. Board of Trustees of University of Illinois, 219 F.3d 674, 676 (7th Cir. 2000)). "[A] pure question of law [is] something the court of appeals could decide quickly and cleanly without having to study the record." Id. at 625-26 (question is not controlling question of law if court of appeals is required to review findings of fact or application of legal standard to set of facts).

In this case, defendants are asking the court to certify the following three questions:

> (1) What is the appropriate legal standard for determining whether employees are sufficiently "similarly situated" to justify adjudicating their claims in a collective action under 29 U.S.C. § 216(b)?
>
> (2) To what extent may employees be deemed "similarly situated" in wage-and-hour litigation because an employer's employment policies allegedly caused individual employees or their managers to engage in purportedly unlawful behavior although the behavior at issue varied widely among employees and managers?
>
> (3) Do the due process clause of the Fifth Amendment and the reexamination clause of the Seventh Amendment permit certification of FLSA subclasses whose members cannot be determined without individualized discovery from opt-in plaintiffs and who have widely differing claims based on their individual employment experiences, and that would likely require bifurcation of overlapping damages and liability issues?

These are not pure questions of controlling law; rather, they would require the court of appeals to study the record extensively. In re Text Messaging, 630 F.3d at 626 (questions requiring court of appeals to 'hunt[] through record or immers[e itself] in a complicated contract" not appropriate for interlocutory appeal). Although defendants contend that questions 1 and 2 ask the court of appeals to determine the appropriate legal standard for certification under § 216(b) generally, their arguments go to whether this court's application of the "similarly situated" standard was correct under the specific facts of this case.

In conducting the § 216(b) analysis to determine whether the opt-in plaintiffs were in fact similarly situated, I applied the legal standard that *defendants* argued was appropriate. Op. & Order, dkt. #387, at 21-22. In particular, I considered (1) whether the factual and employment settings of the individual plaintiffs are similar or disparate; (2) whether defendants may assert various defenses that appear to be individual to each plaintiff; and (3) whether fairness and procedural considerations support proceeding as a collective action. Id.; see also Defs.' Reply Br, dkt. #360, at 3-8 (arguing for application of the three factor similarly-situated analysis, rather than test proposed by plaintiffs). I considered the facts presented by both parties, including affidavits, depositions and company documents, and concluded that the opt-in plaintiffs were in fact similarly situated. In their request for certification of an interlocutory appeal, defendants do not question whether the three factor test is improper; rather, what they are actually arguing is that the application of the test to

the facts of this case should have led to decertification of the collective action. Resolving this question would require the court of appeals to review the record and consider the specific facts of the case to determine whether the opt-in plaintiffs are similarly situated in fact.

Likewise, defendants' questions about whether the use of subclasses violates their rights under the Fifth and Seventh Amendments are not pure questions of controlling law. As an initial matter, defendants' concerns about the Seventh Amendment reexamination clause are unfounded. They argue that bifurcation of the trial into separate phases would violate their Seventh Amendment rights because multiple jury panels would be examining overlapping questions. However, bifurcation of the trial into separate stages does not mean that different juries would be deciding each stage; the stages would be presented to only one jury panel.

Defendants do not contend that proceeding as a collective action with the use of subclasses and representative testimony automatically violates a defendant's constitutional rights; rather, they contend that under the facts of this case, proceeding as a collective action through the identified subclasses violates the Constitution. However, in concluding that subclasses were appropriate and would protect defendants' due process rights adequately in this case, I considered the particular facts and claims of the case, including the type of evidence in the record and the likelihood that certain questions affecting liability could be decided using company documents and representative testimony. The court of appeals

would be required to consider the facts of the case as well, making this an inappropriate question for interlocutory review.

Because I conclude that defendants have not presented pure, controlling questions of law for appeal, I do not need to consider the other requirements of § 1292(b). However, I note that given the stage of this case, an interlocutory appeal would not significantly advance termination of this litigation. The parties have filed cross-motions for summary judgment that are fully briefed and awaiting decision. Additionally, this case is scheduled for trial beginning June 6, 2011. Thus, the case is likely to be resolved fully in this court before defendants could receive a ruling from the court of appeals. An appeal at this point in the litigation would only slow down its advancement. For the above reasons, I will deny defendants' motion for certification of an interlocutory appeal.

B. Notice

Plaintiffs have filed a proposed notice form to be sent to members of the Rule 23 state law classes. Defendants object to the content of the proposed notice on several grounds. First, defendants object to the 30 days provided for class members to opt out, arguing that class members should have 60 days to opt out because FLSA class members were given 60 days to opt in. I agree with defendants. Also, allowing 60 days for class members to opt out will still put the opt-out deadline before trial. Plaintiffs should change all references to 30

days in the notice to 60 days.

Second, defendants object to the time periods referred to in the notice at pages two and three, arguing that the dates contradict the dates plaintiffs argue should control in their opposition to defendants' motion for summary judgment, dkt. #396, at pages 11 and 12. However, the dates set forth on pages two and three of the notice are taken directly from this court's February 10 order identifying the class definitions. Thus, the dates are appropriate.

Third, defendants contend that plaintiffs should not send the same notice to class members from Wisconsin, Minnesota and Pennsylvania, as allegations of potential violations of state laws that have no applicability to the recipient of the notice could be confusing. Plaintiffs agree that a separate notice should be sent to technicians from each of the three states at issue; thus, there is no dispute here.

Fourth, defendants object to the bullet points contained in section 2.A. through 2.P. that describe activities in which the class members may have engaged without compensation. Defendants contend that because the court certified a Rule 23 class for technicians who engaged in the activities contained in paragraphs 21(A)(i) through 21(A)(xvi) of plaintiffs' amended complaint, the language in the notice should be identical to the language in the amended complaint. I agree with defendants. Plaintiffs must use the language in the amended complaint in this section of the notice.

Fifth, defendants object to the language used in the section of the notice titled "Your

Right to Participate in This Lawsuit," because it explains why a technician would want to stay in the litigation but does not explain why one might want to opt out. Defendants have suggested language to make this section more neutral in terms of explaining the potential ramifications of both remaining as a class member and opting out. It is reasonable to include more information about opting out of the lawsuit. Thus, plaintiffs should include defendants' proposed language with a slight modification to include more information about when a plaintiff may wish to opt out. The section should read as follows (the new language is in italics):

> The Court will exclude from the class any member who requests exclusion by opting-out of this lawsuit. *You may opt out if, for example, you do not believe that you have a claim, you do not wish to pursue any claims or you wish to pursue claims independent of the class action.* If you take no action by *60* days after (mailing) then you will be included in this lawsuit and may be entitled to compensation, in an amount to be determined by the Court, for the uncompensated time you spent performing work for Defendants. *If you do not opt-out of the lawsuit, you will be bound by the decisions and rulings of the Court.*

Sixth, defendants object to the section of the notice titled "Time and Manner for Requesting Exclusion" to the extent that plaintiffs' proposed notice did not contain a form that could be returned to facilitate the process of opting out and remove the potential for technical issues relating to a technician's attempt to opt out. Also, defendants object to this section to the extent that the section does not require any technician who wished to opt out to send notice of the same to defendants' counsel as well as to plaintiffs' counsel. I agree

with defendants that inclusion of an opt-out form will facilitate the process of opting out. Defendants' proposed form, dkt. #432-3, at 8, is appropriate and plaintiffs should include the form with its notices. However, there is no need to require class members to send the form to both plaintiffs' and defendants' counsel because plaintiffs' counsel have represented that it will promptly provide duplicate copies of the received opt-out forms to opposing counsel.

Finally, defendants object to certain language used in the notice as prejudicial and likely to cause confusion. Defs.' Objections, dkt. #431, ¶ 8. Defendants' proposed changes are unnecessary, except for the following changes, which plaintiffs should make:

- change "the amount of wages owed" to "that any wages are owed" on page 5 when describing defendants' position in this litigation;
- add plaintiffs' firm names on page 7 to make it clear that class members have the right to contact plaintiffs' counsel; and
- change "you will be included in the Court's judgement for the Plaintiffs" on page 6 to "you will be included in the Court's judgment regarding the Plaintiffs' claims."

After plaintiffs make the above changes to the notice form and provide a corrected copy to defendants and the court, they may send the notice to all class members.

ORDER

IT IS ORDERED that

1. The motion filed by defendants DirectSat USA LLC and UniTek USA LLC to amend the February 10, 2011 order to include certification for an interlocutory appeal, dkt. #428, is DENIED.

2. Plaintiffs' motion to amend the caption to add UniTek Global Services, Inc. as a defendant, dkt. #384, is DENIED.

3. After plaintiffs modify their proposed notice to be compliant with this order and provide a corrected copy to defendants and the court, they are authorized to send the notice to state law class members as specified by this order. Class members will have a 60-day period in which to opt out of the state class actions.

Entered this 14th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge