

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**DONNA ARUGU, Individually and On )  
Behalf of All Others Similarly Situated, )**

**Plaintiff, )**

**v. )**

**TOUCHPOINT 360, LLC and E.A. )  
LANGENFELD ASSOCIATES, LTD. )**

**Defendants. )**

**Civil Action No. 1:18-CV-0343**

**Hon. Judge Lee Yeakel**

**Hon. Mag. Judge Mark Lane**

**DEFENDANTS' EMERGENCY MOTION TO TEMPORARILY DEACTIVATE CLASS  
MEMBER WEBSITE, TO COMPEL REMOVAL OF THE NOTICE FROM WEBSITE,  
TO PROHIBIT THE WEBSITE FROM ALLOWING PUTATIVE CLASS MEMBERS  
TO OPT-IN WITH ELECTRONIC CONSENT SIGNATURES, AND FOR SANCTIONS**

Defendants, TouchPoint 360, LLC (“TouchPoint”) and E.A. Langenfeld, Ltd. (“EAL”) (collectively, “Defendants”), for their Emergency Motion, state as follows:

**I. INTRODUCTION**

The Parties entered an Agreed Order Conditionally Certifying Class (the “Order”). Doc. # 23, which is attached as Ex. A. The Order authorized the Notice of Collective Action and Consent Forms (the “Notice”) to be delivered to putative class members only by mail and email and a website mutually agreed upon by both parties that was solely dedicated to collecting and accepting Consent Forms. Ex. A at ¶ 2.

In addition, the Order allows putative class members to submit their Consent Form by uploading a PDF version of their executed Consent Form through the Website or by email. The Order does not allow, and Defendants explicitly rejected Plaintiffs’ request to allow, putative class members to submit electronic consent signatures via the website. See Email dated December 21, 2018 and redline revisions to draft agreed order at ¶ 4, attached as Ex. B.

Despite the obligations imposed by the Order, Plaintiff Arugu and Plaintiffs’ Counsel violated the Order by launching the website [www.Touchpoint360Lawsuit.com](http://www.Touchpoint360Lawsuit.com) (the “Website”) without ever conferring with Defense Counsel about its content. Defendants do not agree with the content and functionality of the Website.

Equally important, the Website violates the Order in the following ways:

1. The Website displays the Notice as a method to deliver the Notice and Consent Form to putative class members (and others) - a method other than by Mail and Email as only authorized under the Order;
2. The Website improperly allows anyone who accesses it to submit their electronic consent to opt-in by typing their name as an electronic signature – rather than requiring the user to upload a PDF version of the executed consent that they had received via Mail or Email. See electronic consent as it appears on Website, attached as Ex. C.

Defense Counsel asked Plaintiffs' Counsel to deactivate the Website to allow the Parties time to resolve these issues. See Email chain dated January 12, 2019 through January 15, 2019, attached as Ex. D. Plaintiffs' Counsel refused. Ex. D. Defense Counsel then asked Plaintiffs' Counsel to at least deactivate the electronic consent signature feature of the Website as the Parties worked to resolve these issues. Ex. D. Plaintiffs' Counsel refused. Ex. D. Defendants file this Motion as an Emergency Motion because the opt-in period has begun and immediate action is required to address Plaintiff and Plaintiffs' Counsel's improper dissemination of the Notice and Consent Form and to stop putative class members from using improper methods to opt-in to this lawsuit. Accordingly, Defendants seek an emergency telephonic hearing on this Motion in order to allow the Court to expeditiously address Defendants' serious concerns with the Website.

For these reasons, and the reasons discussed below, Defendants seek emergency relief and ask that this Court enter an order: (i) requiring Plaintiffs' Counsel to temporarily deactivate the Website immediately, (ii) requiring Plaintiffs' Counsel to remove the Notice from the Website; (iii) prohibiting the Website from allowing putative class members from submitting electronic consent signatures; and (iv) voiding any and all electronic consent signatures improperly collected on the Website. Further, Defendants ask the Court to enter sanctions against Plaintiff Arugu and Plaintiffs' Counsel in the amount of Defendants' attorneys' fees incurred in bringing this motion.

## **II. STATEMENT OF FACTS**

On April 25, 2018, Plaintiff filed the above captioned lawsuit alleging on behalf of herself and others similarly situated that Defendants failed to properly compensate its employees under the FLSA. Doc. #1. Defendants deny the allegations found in Plaintiffs' Complaint.

As part of the Parties settlement negotiations, the Parties agreed to: (1) a compensation structure for putative class members; (2) a list of putative class members; (3) the form of the Notice of Collective Action that would be provided to the putative class; (4) the method of issuing Notice by U.S. Mail and email only. See Doc. # 22, the Agreed Motion to Conditionally Certify Class, and Doc # 22-1, the Notice, which are attached as Exs. E and F.

On December 21, 2018, Plaintiffs' Counsel emailed Defense Counsel a proposed draft of an Agreed Motion for Class Certification and a draft Proposed Order regarding the same. See Ex. G. Defendants' revisions to Plaintiffs' Proposed Order required the Parties to mutually agree to the content of the Website before it went active and struck Plaintiffs' proposed language that allowed putative class members to join the class using electronic signatures. Ex. B at ¶¶ 2 and 4. Defendants' revised language allowed only for executed PDF files (or similar format) to be submitted through the Website. Ex. B at ¶3. In other words, putative class members may upload a scanned or pdf copy of the signed consent form onto the website, but are not permitted to opt-in through an electronic signature. Plaintiffs' Counsel reviewed Defense Counsel's revisions to the Proposed Order and agreed to those changes. Email dated December 21, 2018, attached as Ex. H.

Plaintiffs' Attorney filed the Agreed Motion and Proposed Order with the Court on December 21, 2018. Ex. E. The Court entered the Order on December 28, 2018. Ex. A. Paragraphs 2 and 3 of the Order accurately reflect the parties' agreement, as follows:

“2. It is further ORDERED that the Court authorizes the expedited issuance of the Notice of Collective Action and Consent Forms attached as Exhibit A to this Order, **to be delivered or otherwise disseminated by mail and email, and a website to be mutually agreed upon by both parties solely dedicated to collecting and accepting Consent Forms. . . .**

3. **Delivery of an executed Consent Form by a PDF or similar electronic file** shall be as effective as an original.”

Ex. A.

Defendants timely provided Plaintiffs' Counsel the addresses and emails of each putative class member as required by the Order. On Saturday, January 12, 2019, Plaintiffs' Counsel filed an advisement with the Court stating that Notice had been issued to the putative class members on Friday, January 11, 2019. Doc. # 25. Upon receiving the advisement, Defense Counsel checked the Website to determine whether it was active. Not only was the Website active, it also allowed for putative class members to consent to an electronic Consent Form using their electronic signature through the Website. See Ex. C.

As stated above, Plaintiffs' Counsel did not contact Defense Counsel at any time prior to activating the Website, and Defendants do not agree with the content of the Website. Specifically, Defendants do not agree that the Website should be a method to disseminate the Notice and Consent Form or be capable of accepting consent forms via electronic signature.

Upon learning that the website was active, Defense Counsel immediately contacted Plaintiffs' Counsel to request that the Website be deactivated, or at least deactivate the electronic signature feature, until the Parties could discuss the content of the Website. See Ex. D. Plaintiffs' Counsel refused, leaving Defendants no other option but to file this Motion. Ex. D.

### **III. ARGUMENT**

Plaintiff Arugu and Plaintiffs' Counsel are in violation of the Court's December 28, 2018 Order. First, they failed to consult with Defense Counsel to mutually agree to the content of the Website prior to activating it. Second, they are improperly using the Website to disseminate the Notice. Third, Plaintiff and Plaintiffs' Counsel are improperly using the Website as a method to accept electronic consent by electronic signature.

**A. Plaintiffs' Counsel failed to obtain the mutual agreement of Defendants prior to activating the Website.**

Plaintiffs' Counsel violated the Order by activating the Website before consulting with Counsel for Defendants. Paragraph 2 of the Order states that the Website shall be "mutually agreed upon by both parties." Ex. A at ¶ 2. Plaintiffs' Counsel failed to even contact Counsel for Defendants prior to activating the Website.

Plaintiffs' Counsel has refused Defense Counsel's multiple requests to deactivate the Website until the Parties could discuss its content. Ex. D. Plaintiff argues that the Notice that was posted on the Website and the Notice was previously mutually agreed upon. Ex. D. However, there was no agreement to post the Notice on the Website or to allow Plaintiffs' Counsel to collect Consent Forms via electronic signature. Therefore, Plaintiff and Plaintiffs' Counsel violated the Order by activating a Website without obtaining Defendants' agreement.

**B. Plaintiffs' Counsel may disseminate the Notice and Consent Form by Mail and Email only.**

The posting of the Notice and Consent Form on the Website violates the Order which states that the Notice and Consent Forms would be disseminated only by mail and email.

1. The Parties did not intend to allow the Notice to be posted on the Website.

Paragraph 2 of the Order addresses the Parties' agreement regarding the dissemination of the Notice to putative class members. Paragraph 2 provides that that Notice and Consent Forms are "to be delivered or otherwise disseminated by mail or email" and that the sole purpose for the Website is for "collecting and accepting Consent Forms." Ex. A.

While the Parties clearly intended to eliminate dissemination of the Notice through the Website, the table summarizing the scheduling of tasks under Paragraph 5 of the Order

mistakenly states that Plaintiffs' Counsel "may make the Notice and Consent Form available on a website solely dedicated to disseminating notice." Ex. A at ¶ 5.

To the extent Plaintiff and her counsel rely on Paragraph 5 of the Order as granting authority to disseminate the Notice on the Website, the language in Paragraphs 2 and 5 of the Order are inconsistent on their face, and as such, this Court must consider parol evidence to determine the Parties' intent. *See Moore v. Ford Motor Co.*, 755 F.3d 802, 807 n.10 (5th Cir. 2014) ("[R]ules of contract interpretation are applied to agreed orders," and, if the Agreed Protective Order lends itself "to one of two readings" and is therefore ambiguous, "[p]arol evidence . . . may be used to ascertain the intent of the parties."). The parol evidence shows that the Parties did not intend to post the Notice and Consent Form on the Website.

As illustrated below, the Parties agreed specifically to strike the prior language which allowed a "website solely dedicated to disseminating the Notice" and replaced it with language that limited the use of the Website solely for the purpose of "collecting and accepting Consent Forms":

2. It is further **ORDERED** that the Court authorizes the expedited issuance of the Notice of Collective Action and Consent Forms attached as Exhibit A to this Order, to be delivered or otherwise disseminated by mail and email, and a website to be mutually agreed upon by both parties solely dedicated to ~~disseminating the Notice of Collective Action and Consent Form~~ collecting and accepting Consent Forms. Counsel for the Conditional Class is

See Ex. B.

In Paragraph 2 of Defendants' revisions to the Order, Defendants state that the Website is to be used solely for the collection and accepting of Consent Forms. Ex. B. Plaintiff accepted Defendants' revisions. Ex. H. The Parties' intent was to issue the Notice and Consent Form by mail and email. Therefore, the Parties intended to be bound by the provisions of Paragraph 2,

which squarely addresses the Website, rather than the table summarizing the scheduling of tasks found at the end of the Order.

2. Defendants will be harmed by having the Notice posted on the Website.

The Order required Defendants to provide Plaintiffs' Counsel with an Excel spreadsheet of all putative class members, along with their last known mailing and email addresses, beginning dates of employment, and ending dates of employment. Ex. A. Defendants spent considerable time and resources compiling that information so that the Notice would be sent via mail and email only to individuals that had been established as putative class members. By posting the Notice and Consent Form online, individuals from outside the putative class can review the Notice and submit Consent Forms to try and join the class. There is no barrier preventing former employees who fall outside the putative class from filling out a consent form and Defendants will have to expend considerable resources verifying the proper class members.

Therefore, the Court should grant Defendants' Motion.

**C. Plaintiffs' Counsel is prohibited from using the Website to allow electronic consent using electronic signatures.**

Plaintiff and Plaintiffs' Counsel's use of the Website to collect Consent Forms using electronic signatures also violates the Order. Nothing in the Order allows Plaintiff and Plaintiffs' Counsel to substitute a putative class members' signature with an electronic signature. Defendants explicitly rejected Plaintiffs' Counsel's proposal that would allow for putative members to opt-in using electronic signatures. Ex. B. Defendants made their rejection of electronic signatures clear by providing Plaintiffs' Counsel a redlined version of the changes made to their original proposal. Ex. B. Plaintiff accepted the revisions made by Counsel for Defendants and filed this Order with the Court. Ex. H.

Despite Defendants' explicit rejection of the use of electronic signatures and the absence of any language in the Order permitting the use of electronic signatures, Plaintiffs' Counsel enabled the Website to allow putative class members to "sign" Consent Forms using an electronic signature. See Ex. C.

This Court should reject the use of electronic signatures in this context because they would make it unduly burdensome for Defendants or this Court to verify who has opted in on behalf of a putative class member. It increases the chances of mistake, or even fraud, in the opt-in process. The Website is not password protected or otherwise secured and any member of the public can access the Website and "sign" a Consent Form on behalf of themselves or any other individual, automatically opting an individual into this litigation. There is no indication that the Website employs a mechanism whereby a Consent Form submitted by an individual who is not a putative class member is automatically rejected. The Consent Form does not warn of any penalty for fraudulently completing a Consent Form. This leads to three concerns: 1) individuals who are not members of the putative class can easily submit Consent Forms, 2) a putative class member who is not interested in opting in could be opted in without their knowledge, and 3) neither Defendants nor this Court can be assured that a Consent Form was actually drafted by the individual bearing its name.

Additionally, there are no instructions found on the Website describing what happens after Plaintiff types his name into the "signature" box. This increases the likelihood that a putative class member may inadvertently opt-in to the litigation thinking that they may receive additional information after submitting their name on the Website.

If, during the negotiation process of the Order, Plaintiffs' Counsel had insisted on using electronic signatures, Counsel for Defendants would have been able to negotiate some security

measures for the website or, at minimum, directions to using the website. However, because Plaintiffs' Counsel agreed to Defendants' revisions to the Order eliminating the use electronic signatures, Defendants had no meaningful opportunity, or need, to negotiate these safeguards into the Order. This situation is compounded by the fact that Plaintiffs' Counsel did not contact Counsel for Defendants prior to activating the Website, which necessitated the need for this Motion.

Therefore, for the foregoing reasons, Defendants ask that the Court prohibit Plaintiffs' Counsel from accepting electronic Consent Forms using electronic signatures and that all electronic Consent Forms improperly obtained with electronic signatures be deemed void.

**D. Defendants request sanctions against Plaintiff Arugu and Plaintiffs' Counsel in the form of Defendants' fees incurred in filing this Motion.**

Defendants request that this Court sanction Plaintiff Arugu and Plaintiffs' Counsel for violating the Order by awarding Defendants their costs and fees incurred in preparing this Motion. This Court has the inherent power to enter sanctions against Plaintiffs. The Fifth Circuit has recognized that the inherent power "is necessarily incident to the judicial power granted under Article III of the Constitution." *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 898 (5th Cir.1997) (quoting *Woodson v. Surgitek, Inc.*, 57 F.3d 1406 (5th Cir.1995)). A court may sanction a party under its inherent powers for failure to obey an order of the Court. *Id.*

This Court should sanction Plaintiff Arugu and Plaintiffs' Counsel under its inherent powers for violating the Order. Plaintiffs' Counsel created and activated the Website without any input or agreement from Defendants, which is a violation of the Order. Additionally, Plaintiffs' Counsel had no authority to allow the Website to accept electronic Consent Forms via electronic signature.

Defendants made reasonable attempts to resolve this matter by immediately contacting Plaintiffs' Counsel and demanding that he deactivate the Website until its content could be mutually agreed upon by both Parties. Plaintiffs' Counsel refused, necessitating this emergency Motion. For these reasons, Defendants ask that the this Court sanction Plaintiff Arugu and Plaintiffs' Counsel for their misconduct in violating the December 28, 2018 Order and award Defendants their fees in having to bring this Motion.

#### **IV. CONCLUSION**

WHEREFORE, for the foregoing reasons, Defendants TouchPoint 360, LLC and E.A. Langenfeld Associates, Ltd. request that this Court enter an order: (i) requiring Plaintiffs' Counsel to temporarily deactivate the Website immediately, (ii) requiring Plaintiffs' Counsel to remove the Notice from the Website; (iii) prohibiting the collection of Consent Forms via electronic signatures; and (iv) voiding any and all electronic consent signatures improperly collected on the Website. Further, Defendants ask the Court to enter sanctions against Plaintiff Arugu and Plaintiffs' Counsel in the form of payment of Defendants' attorneys' fees incurred in bringing this motion, and for any other relief that the Court deems just and proper.

Dated: January 17, 2019

Respectfully submitted,

**TOUCHPOINT 360, LLC and  
E.A. LANGENFELD ASSOCIATES, LTD.**

By: /s/ Barry A. Moscowitz  
One of its attorneys

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**ATTORNEYS FOR DEFENDANTS TOUCHPOINT 360, LLC AND E.A. LANGENFELD, LTD.**

**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that from January 12, 2019 to January 15, 2019, counsel for Defendants conferred with counsel for Plaintiff via email regarding the contents of this Motion. Counsel for Plaintiff was opposed.

/s/Barry A. Moscowitz  
Barry A. Moscowitz

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 17th day of January 2019, I have submitted the foregoing document and all exhibits for filing through the Court's CM/ECF system. All counsel of record shall be served with a true and correct copy of these documents as a result of the operation of the Court's CM/ECF system.

/s/Barry A. Moscowitz  
Barry A. Moscowitz