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,	§	**Civil Action No.**
v.	§	**1:18-CV-0343-LY**
TOUCHPOINT 360, LLC and E.A. LANGENFELD ASSOCIATES, LTD.	§	
Defendants.	§	

PLAINTIFF'S SUPPLEMENT TO HER RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION (DKT. NO. 28) TO DEACTIVATE WEBSITE, ETC. AND FOR SANCTIONS

Donna Arugu, Plaintiff in the above-entitled and numbered action, files this her Supplement to Her Response in Opposition (Dkt. No. 34) to Defendants' Motion at Dkt. No. 28.

I. INTRODUCTION

Plaintiff files this supplement to apprise the Court of recently discovered facts bearing on Defendants' "Emergency Motion" filed on January 17, 2019 (*See* Dkt. No. 28) and which the Court has set for a hearing on March 7, 2019 (*See* Dkt. No. 54). The opt-in period is closed and—contrary to Defendants' stated concern—no one fraudulently or mistakenly joined the class. No one from outside the putative class submitted a Consent Form through the website. But two individuals who were part of the putative class—but whom Defendants did not disclose as they were ordered—opted into the lawsuit. Defendants concealed that those individuals should have been disclosed for 25 days after the undersigned raised the issue; and they only admitted the fact after Plaintiff presented declarations from the individuals. In the light of these events, Plaintiff believes

Defendant's true motivation for their Emergency Motion was not a concern over fraudulent or mistaken opt-ins, but instead to conceal its non-compliance with the Court's Order conditionally certifying a class and requiring disclosure of all class members.

II. SUPPLEMENTAL FACTUAL BACKGROUND

On December 28, 2018, the Court conditionally certified a class of "[a]ll former and current employees of TouchPoint 360, LLC who were compensated via TouchPoint's project pay compensation structure at any time [during the three-year period before December 28, 2018]." (Dkt. No. 23). Defendant disclosed 141 individuals as Class Members under the Order. Of those 141 individuals, 56 have thus far opted-into the case. Of those 56 opt-ins, 29 signed their Consent Form with an electronic signature. No one opted-into the lawsuit through the website, or otherwise, who is not a member of the putative class as defined in the December 28 Order.

On February 23, 2019 it became clear that Defendants did not disclose all class members as the Court had ordered it to do in its December 28, 2018 Order. (Dkt. No. 23). Defendants initially hid the fact of their non-disclosure but ultimately revealed that they had not disclosed a large group of class members (estimated by Defendants to be between 50 and 70 additional individuals) when presented with declarations from two individuals who opted-into the lawsuit but who were not disclosed to Plaintiff. Plaintiff has discussed in more detail the facts underlying these assertions in her Motion to Compel Compliance filed on February 28, 2019. (Dkt. No. 53, pp. 1-4). She incorporates that brief herein by reference. Fed. R. Civ. P. 10(c).

In light of the facts of Defendants' non-disclosure and subsequent attempts to mislead the undersigned regarding their non-disclosure, it now appears that Defendants knew in January 2019 that they had not disclosed everyone in the class. Consequently, it also appears that the Defendants' non-disclosure is the real reason that Defendants filed their Emergency Motion on January 17, 2019. (Dkt. No. 28). In that motion, Defendants asked the Court to order Plaintiff

to remove the Notice and Consent Forms from the website (even though Defendants had agreed to the content of those forms) and not allow electronic signatures (even though the December 28 Order and federal law permit them). (*Id.*). Plaintiff believes Defendants filed their motion because a website containing the notice and consent forms was too easily accessible to the class members that should have been—but were not—disclosed to Plaintiff's counsel. And the use of electronic signatures made it too easy for those undisclosed individuals to opt into the case.

Readily accessible information and ease of opting into the case made it more likely that the undisclosed individuals might opt in. Both of these facts made it difficult for Defendants to conceal their violation of the December 28 Order by not disclosing all class members. And that is exactly what happened in this case. Two individuals whom Defendants should have disclosed—but did not—opted into the case on January 22, 2019. (*See* Dkt. No. 53, pp.1-4). When the undersigned inquired about these two individuals, Defendants spent the better part of a month implying that they were not part of the class defined in the December 28 Order but that they were part of another class of workers. (*Id.*). In an email of February 23, 2019, Defendants finally admitted that the impression they had created was false. (*Id.*; Dkt. No. 53-5).

III. SUPPLEMENTAL ARGUMENT AND AUTHORITIES

A. NONE OF DEFENDANTS' CONCERNS CAME TO PASS

In their Emergency Motion, Defendants argued that the website and use of electronic signatures will result in harm to them. (Dkt. No. 28, pp. 7-8). No such harm occurred. For example, Defendants argued that the website and electronic signatures "increases the chances of mistake, or even fraud, in the opt-in process." The opt-in period closed on February 25, 2019; and, it appears, neither fraud nor mistake—at least of the type that Defendants claimed to have been concerned about—happened here.

Defendants also complained in their Emergency Motion that "individuals from outside the

putative class can review the Notice and submit Consent Forms to try and join the class." (*Id.*, p. 7). In retrospect, this argument is telling. Strictly speaking, this did not happen—no one from "outside the putative class" as the Court defined it—opted in. However, two people whom Defendants did not disclose—but who were in the putative class and should have been disclosed—opted into the class. (*See* Dkt. No. 53, pp. 1-4).

B. ACCORDING TO DEFENDANTS' COUNSEL'S ESTIMATE, THERE ARE APPROXIMATELY 50-70 CLASS MEMBERS WHOM DEFENDANTS DID NOT DISCLOSE IN VIOLATION OF THE AGREED ORDER, AND DEFENDANTS ACTIVELY MISLED PLAINTIFF'S COUNSEL REGARDING THEIR NON-DISCLOSURE

In Plaintiff's response to Defendants' Motion at Dkt. No. 28, Plaintiff unwittingly anticipated that Defendants had potentially not disclosed all class members. (Dkt. No. 34). In her Response, Plaintiff wrote that "Defendants will not [suffer harm by] hav[ing] to 'expend considerable resources verifying the proper class members[]' . . . if the Defendants have, in fact, complied with the Agreed Order and disclosed all putative class members." (*Id.*, p. 6). As it turned out, Defendants had not "complied with the Agreed Order and disclosed all putative class members." And when asked about the non-disclosure, Defendants misled the undersigned about the reasons for that non-disclosure until they could not mislead anymore.

On January 22, 2019, two individuals whom Defendants had not disclosed—Julianne Johnson and Gregg Gibson—opted into the class. (*See* Dkt. Nos. 31-6, 31-7, 53-1, 53-2). On January 29, as is his practice, the undersigned contacted counsel for Defendants to inquire about them. (Dkt. Nos. 53-2). During a telephone conference between counsel on February 4, Defendants' counsel implied that they had not been disclosed because they are in another class. According to Defendants at that time, Ms. Johnson and Mr. Gibson were compensated on a "task" basis, and not under Defendants' "project pay" structure; and the Agreed Order defined the class as workers paid in accordance with the "project pay" structure. (Dkt. Nos. 23, 53-5). According

to Defendants' counsel, however, Defendants would "agree" to include these "task" basis workers in the case as a separate class. (*See* Dkt. No. 53-3). Defendants' counsel then estimated that there were approximately 50-70 such workers.

Over the following days, Defendants continued to perpetuate this false impression, all the while attempting to negotiate over providing notice to this "task" basis class. (*Id.*). On February 19, the undersigned provided the declarations of Ms. Johnson and Mr. Gibson to Defendants' counsel. (*Id.*; Dkt. No. 53-4). In those declarations, Ms. Johnson and Mr. Gibson deny that they were compensated on a "task" basis; and they instead claim that they were paid pursuant to Defendants' "project pay" structure. (Dkt. No. 53-4). That testimony is directly contrary to the false impression that Defendants had attempted to create.

Faced with this testimony, on February 23, 2019, Defendants admitted for the first time what they had been trying to hide: that the "task" basis was, in fact, a "sub-category" of their "project pay" structure. The December 28 Order defines the class to include all individuals paid using the "project pay" structure. (Dkt. No. 53-5). Defendants thus finally admitted to having violated the Order; but they did so 25 days after the undersigned first raised the issue with them, and they did so only after engaging in a pattern of deception regarding their non-disclosure.

C. PLAINTIFF ATTEMPTED TO NEGOTIATE A REASONABLE ARRANGEMENT OVER THE "TASK" BASIS EMPLOYEES; DEFENDANTS REJECTED THOSE OFFERS

Before Defendants' counsel's February 23 email admitting Defendants' violation of the Agreed Order, counsel for Plaintiff attempted to negotiate over the alleged "task" basis class in an effort to avoid an unnecessary dispute. However, because Ms. Johnson and Mr. Gibson had testified that they were, in fact, paid pursuant to the "project pay" compensation structure (Dkt. No. 53-4), and because the December 28 Agreed Order defined the class to include all individuals paid on a "project pay" basis (Dkt. No. 23), Plaintiff had no choice but to insist on equitable tolling

of the statute of limitation for the undisclosed class members (Dkt. No. 53-3). Plaintiff also insisted that Defendants agree to have the Notice and/or Consent forms on a website and explicitly agree to permit electronic signatures[1] in order to clear up any confusion Defendants created with their "Emergency Motion." (*Id.*). However, Defendants rejected those key proposals, thus precipitating a dispute—a dispute that Defendants created by not complying with the Agreed Order in the first instance and filing their "Emergency Motion" in the second.

IV. CONCLUSION AND PRAYER

Upon the hearing on March 7, 2019, for these reasons and the reasons set forth in her Response in Opposition to Defendants' Motion, this Court should deny Defendants' Motion in its entirety and award Plaintiff such other and further relief to which she is justly entitled.

[1] The use of electronic signatures on FLSA consent forms is permissible and District Judges in this district and division (including Judge Yeakel) have allowed them. See, e.g., 15 U.S.C. § 7001(a)(1) ("[W]ith respect to any transaction in or affecting interstate or foreign commerce," a "signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."); *see also* Tex. Bus. & Com. Code § 322.007(a), (d) ("signature may not be denied legal effect or enforceability solely because it is in electronic form" and "[i]f a law requires a signature, an electronic signature satisfies the law.") *Yair Granados v. Hinojosa*, 219 F. Supp. 3d 582, 586 (W.D. Tex. 2016) (Yeakel, J.) (authorizing electronic signatures); *Dyson v. Stuart Petroleum Testers, Inc.*, 308 F.R.D. 510, 517 (W.D. Tex. 2015) (Pitman, J.) (collecting authorities and permitting electronic signatures).

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFF

Certificate of Service

I hereby certify that on this the 4th day of March 2019, I have submitted the foregoing document 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/ Edmond S. Moreland, Jr.
Edmond S. Moreland, Jr.