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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARY BILLINGSLEY, FANNIE THRASH, on behalf of themselves and all other similarly situated,	]	
Plaintiffs,	]	
	]	**4:12-CV-0627-KOB**
v.	]	
CITI TRENDS, INC.,	]	
Defendant.	]	

MEMORANDUM OPINION

This matter comes before the court on the Plaintiffs' "Motion to Strike and for Entry of Protective Order." (Doc. 42). The Plaintiffs claim that the Defendant Citi Trends engaged in coercive and improper communications with its Store Managers, who are potential putative class members in this case. Citi Trends alleges that its communications with its Store Managers were appropriate and in the normal course of its business. The affidavits presented by both parties create two very different pictures of the supposedly intimidating communications.

I. STATEMENT OF FACTS

The Plaintiffs filed a Complaint on February 23, 2012 on behalf of themselves and similarly situated Citi Trends' Store Managers claiming that Citi Trends did not pay them overtime compensation in accordance with the FLSA. Beyond this one statement, the parties dispute every statement of fact proffered by the other. The court cannot and will not attempt to reconcile the two differing statements of fact. Instead, the court will recount the parties' versions separately to illustrate the divergent evidence before the court.

A. Plaintiffs' Statement of Facts

After the parties' May 31, 2012 Status Conference and before the Plaintiffs' deadline for filing their Motion for Conditional Certification and Notice, Citi Trends initiated company-wide in-person meetings between two corporate representatives and its Store Managers, who are potential collective class members in this case. The Plaintiffs discovered that Citi Trends was meeting with potential class members and advised Citi Trends that its conduct was improper on July 10, 24, and 26, 2012. On July 25, 2012, two Citi Trends Store Managers and potential plaintiffs in the case, Roilisa Prevo and Diedra Cunningham, gave sworn declarations about their one-on-two meetings.

Both Prevo and Cunningham stated that their District Managers told them they needed to participate in a mandatory meeting to "go over the new handbook that will soon be sent out." (Doc. 42-3, at 1; Doc. 42-4, at 1). Vanessa Davis, Citi Trends' Director of Human Resources, conducted the meeting with the store managers, and both store managers stated a third person "who never identified herself" sat directly behind the store managers throughout the entire meeting. (Doc. 42-4, at 1). Both Prevo and Cunningham thought it "unnerving" or "odd and intimidating" that this unidentified third person sat behind them the entire meeting where they could not see her. (Doc. 42-3, at 1; Doc. 42-4, at 1). Prevo stated that, "[i]t felt like an interrogation where you were boxed in to make you feel uneasy." (Doc. 42-4, at 1).

Prevo and Cunningham both stated that Ms. Davis put several unfamiliar documents in front of them and asked that they sign them. We now know that the first document was the "Citi Trends, Inc. Store Manager Disclosure." (Doc. 47-2). Prevo told Ms. Davis she did not want to sign it, and Ms. Davis told her "it is nothing just notice that Citi Trends has been sued." (Doc.

42-4, at 1). Ms. Davis told Cunningham that "this case was an exemption lawsuit but did not tell me what an exemption lawsuit was, who it pertained to, if it involved me, or if I would be eligible to participate in the lawsuit." (Doc. 42-3, at 1).

Ms. Davis then gave the store managers "a multi-page document that [they] did not understand," which we now know was the "Citi Trends Arbitration Agreement." (Doc. 42-3, at 1; Doc. 42-4, at 1; Doc. 47-6). Prevo stated that "[t]he very first paragraph of the document said I could not join a class action lawsuit. This document coupled with the first document led me to believe I was not allowed by Citi Trends policy to join the *Billingsley* lawsuit." (Doc. 42-4, at 1). Cunningham also interpreted the arbitration agreement to mean "that I could not join the current lawsuit." (Doc. 42-3, at 2). She also stated that "this intimidated me and I was under the pressure to sign these documents or I could lose my job." (Doc. 42-3, at 2). Prevo also stated that she thought the arbitration agreement stated that "if I wanted to continue my employment with Citi Trends I had to sign the agreement or I could be terminated at will." (Doc. 24-2, at 2).

The final document that Ms. Davis gave the store managers was what we know now is the "Store Manager Declaration" that Citi Trends submitted in opposition to the Plaintiffs' Motion for Conditional Certification of the Class. (Doc. 40-7 and following). The Declaration had blanks for the store managers to fill in, but both Cunningham and Prevo stated that Ms. Davis told them not to worry about some of the blanks "because the company already had that information." (Doc. 42-3, at 2; Doc. 42-2, at 2). Prevo and Cunningham both stated that they told Ms. Davis that the document was not accurate and left out the physical duties that they performed as store managers. *Id.*

At the end of the meeting, Ms. Davis gave the store managers the new employee

handbook. Both store managers stated that they asked Ms. Davis for copies of the documents they had signed and still have not received copies from her. *Id.* Both store managers stated that they were "intimidated" during the meeting and have been "very scared" since the meeting. *Id.*

B. Defendant's Statement of Facts

Citi Trends contends that when this lawsuit was filed, it was evaluating possible company-wide alternative dispute resolution programs. Ultimately, Citi Trends decided to implement a mandatory arbitration process for all of its employees, and was ready to "roll out" the arbitration agreements in June 2012. Citi Trends decided to conduct individual meetings with its Store Managers to introduce the arbitration program and new employee handbook and investigate the current lawsuit. Citi Trends developed a Store Manager Disclosure to "accurately and adequately advise store managers of the present lawsuit." (Doc. 47, at 7).

Citi Trends decided the meetings should be conducted by a Human Resources Representative so that no supervisor who had authority to adversely impact the Store Managers' employment would be present. (Doc. 47-1, at 3). Additionally, Citi Trends hired a neutral third-party witness to be present at the meetings. (Doc. 47-5). Ms. Davis, the Director of Human Resources, who was present at Prevo and Cunningham's meetings, and Lakesha Wilkins, the third-party witness, both made sworn declarations about the Store Manager meetings. (Doc. 47-4; Doc. 47-5).

Ms. Davis stated that she always introduced herself and the third-party witness at the beginning of every meeting. (Doc. 47-4, at 3). Then, she would present the Disclosure and ask the Store Manager to read over the disclosure and ask her any questions he or she had. (Doc. 47-4, at 3). The Disclosure was a one page document that said:

This Store Manager Disclosure is intended to provide you (the Store Manager) with information concerning new Citi Trends' arbitration requirement and the effect it has on your rights as an employee of Citi Trends:

- Two plaintiffs have filed a collective action in the U.S. District Court for the Northern District of Alabama styled Billingsley v. Citi Trends, Inc. Case 4:12-cv-00627 ("Lawsuit"). Plaintiffs allege that Citi Trends store managers are misclassified as exempt under federal law. Citi Trends strongly disagrees with the allegations in the Lawsuit and is vigorously defending itself. If plaintiffs are able to certify the class of plaintiffs, you could potentially be a class member. However, participation in the lawsuit is voluntary.

- As you know, Citi Trends is in the process of rolling out a company-wide mandatory alternative dispute resolution program requiring all employees to enter into an arbitration agreement. The arbitration agreement does not and will not affect your substantive rights to seek relief from Citi Trends. Rather, it changes the forum where you resolve disputes with Citi Trends from a court to arbitration. While your execution of the arbitration agreement will mean that you could not join the Lawsuit, you still would be able to pursue any claim asserted in that Lawsuit, but in a different forum - arbitration instead of the courts. Beyond the difference in forum, you would be required to pursue any claim you believe you may have against Citi Trends individually rather than as part of a collective group.

- As part of its evaluation of the claims asserted in the Lawsuit, Citi Trends may conduct interviews of some or all of its store managers. The purpose of these interviews is to confirm the day-to-day duties of store managers. In some instances, store managers may be asked to execute a declaration which reflects the substance of their statements during the interview process.

My signature below acknowledges and confirms that I was given an opportunity to read and review this Citi Trends, Inc. Store Manager Disclosure and that I understand all of the disclosures contained herein.

Doc. 47-2. Ms. Davis then "elaborated on its contents, explaining the terms 'misclassified' and 'exempt' as those terms related to the store managers, the pending lawsuit, and how store managers' rights might be affected." (Doc. 47-4, at 3).

Next, Ms. Davis presented the arbitration agreement and "attempted to give Store Managers an overview of how the arbitration agreement affected their rights." *Id.* Ms. Davis "asked every store manager to read the entire arbitration agreement so that they could be sure that they were comfortable with, and had considered, the contents thereof." After the Store Manager signed the arbitration agreement, Ms. Davis "conducted interviews with store managers concerning their day-to-day job duties and responsibilities." *Id.* Ms. Davis asked the store managers to execute a declaration about their job duties and "advised store managers that to the extent there was information in the draft declaration that did not pertain to them, they should feel free to cross it out. At the same time, I advised that if there was important information missing, they should feel free to write it in." *Id.*

Ms. Wilkins confirmed Ms. Davis' actions in her sworn declaration, including that Ms. Davis never "told any store manager that they were required to sign any of the documents" and never "informed, intimated, or otherwise suggested that store managers could or would be terminated for failing to execute any document." (Doc. 47-5, at 3). Ms. Davis and Ms. Wilkins can only recall one store manager in Tennessee who declined to sign the documents. (Doc. 47-4, at 4; Doc. 47-5, at 3). Ms. Wilkins described the tone of the meetings as "cordial" and also stated that she "never got the impression that any store manager was threatened, uncomfortable, or otherwise intimidated by Ms. Davis of the process." (Doc. 47-5, at 3).

II. LEGAL ANALYSIS

The Plaintiffs request that the court strike the Store Manager Declarations obtained during the meetings referenced above from Citi Trends' Response to the Plaintiffs' Motion for Conditional Certification; enter a Protective Order prohibiting Citi Trends from communicating

with any plaintiff, opt-in plaintiff, or potential collective class member regarding matters related to this litigation in an intimidating, misleading, or coercive manner; and issue a corrective letter or court supervised notice to potential plaintiffs of their opt-in rights in this lawsuit. (Doc. 42, at 1). Citi Trends opposes all of these requests, claiming that it did not act unethically, unlawfully, or coercively in meeting with its Store Managers.

A. Protective Order

The burden rests on the moving party, here the Plaintiffs, to demonstrate "the particular abuses by which it is threatened." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981). The law clearly provides that "a defendant in a § 216(b) action is not categorically forbidden from communicating with prospective opt-in plaintiffs." *Longcrier v. HL-A Co.,* 595 F. Supp. 2d 1218, 1225 (S.D. Ala. 2008). Generally, "employers are free to communicate with unrepresented prospective class members about the lawsuit and even to solicit affidavits from them concerning the subject matter of the suit." *Id.* at 1226. However, "district courts are empowered with relatively broad discretion to limit communications between parties and putative class members." *Id.* (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1201-03) (11th Cir. 1985)).

This power to limit communication should be tempered by First Amendment considerations triggered by such prior restraints on speech. The Supreme Court has held that district courts "may not exercise the power [to issue a protective order] without a *specific record* showing by the moving party of the particular abuses by which it is threatened" and must give "explicit consideration to the narrowest possible relief which would protect the respective parties." *Gulf Oil Co.*, 452 U.S. at 102 (emphasis added) (citation omitted). "[A]n order limiting communications between parties and potential class members should be based on a *clear record*

and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 101 (emphasis added).

District Courts in the Eleventh Circuit have interpreted this admonishment to mean that a party moving for a protective order must show (1) "that a particular form of communication has occurred or is threatened to occur" and (2) "that the particular form of communication at issue is abusive in that it threatens the proper functioning of the litigation." *Cox Nuclear Medicine v. Gold Cup Coffee Services, Inc.*, 214 F.R.D. 696, 697-98 (S.D. Ala. 2003). "Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading, or confusing statements; and communications that undermine cooperation with or confidence in class counsel." *Id.* at 698 (citations omitted).

In this case, the parties do not dispute that communication in the form of the meetings between Store Managers and Human Resources representative took place, but the parties hotly contest whether the communication was abusive. In *Longcrier*, the defendant "called [employees] individually into a meeting with defendant's attorney(s) during work hours, and was informed that [the defendant] was conducting a survey." *Longcrier*, 595 F. Supp. 2d at 1227. In this survey, the defendant was "marshaling data to use against all of its hourly workers (including the declarants themselves) in litigation." *Id.* In granting a protective order, the court considered it of "critical importance" that the defendant's attorneys "neither informed the declarants that a class action lawsuit concerning the very pay practices about which they were being 'surveyed' was pending, nor that those declarants were themselves potential class members whose execution of a form declaration for [the defendant] might effectively strip them of an opportunity to join the

lawsuit." *Id.* at 1228.

Even taking the Plaintiffs' statement of facts above as true, Citi Trends did inform the Store Managers of the pending lawsuit in the Store Manager Disclosure. The Disclosure specifically lists the name and style of the class action and states that "you could potentially be a class member." (Doc. 47-2, at 1). Additionally, the Disclosure states that "your execution of the arbitration agreement will mean that you could not join the lawsuit." *Id.* Finally, the Disclosure specifically identifies that "store managers may be asked to execute a declaration" that Citi Trends will use in its "evaluation of the claims asserted in the Lawsuit." *Id.* This Disclosure distinguishes the instant case from *Longcrier* and other cases where the defendant "covertly concealed" the existence of the class action lawsuit and its implications from its employees. *Longcrier*, 595 F. Supp. 2d at 1228.

In *Burrell v. Crown Central Petroleum*, the court denied the plaintiffs' request for a protective order because no "potential for serious abuse" existed. 176 F.R.D. 239, 244 (E.D. Tx. 1997). In *Burrell*, like in this case, the defendant held meetings with its employees about the pending collective action, and the plaintiffs submitted sworn declarations that the employees in those meetings felt threatened. *Id.* at 245. The court held that it could not find a "clear record and specific findings" of abuse from the submitted sworn declarations, which described the meeting as generally intimidating. *Id.* at 241. The court stated that, "'Generalization' and 'the gist of' a presentation do not present a clear record and specific evidence upon which to base a finding, because one person's subjective impression of the meeting and its implied tone is insufficient to make a clear record." *Id.* at 245.

Like the defendant in *Burrell*, Citi Trends did not attempt to covertly hide the instant

action from its employees. Instead, it alerted the potential plaintiffs of its existence and attempted to convey important information about their rights and the implication of the arbitration agreement on those rights and their potential as plaintiffs in this case through the Disclosure. As the court emphasized in *Burrell*, the subjective impressions of two individuals about how they "felt" in a particular meeting is insufficient to prove that the court needs to restrain the defendant's speech. *See Burrell*, 176 F.R.D. at 245.

Although the store managers meetings may not have occurred the way that Ms. Davis and Ms. Wilkins stated that they did, it is just as likely that they did not occur the way Prevo and Cunningham stated that they did. With such differing accounts of the same meeting, the court cannot find that a clear record of "misleading communication" and "unabashedly deceptive activity" exists to justify this court stepping in and regulating Citi Trends' communications with its own employees. *See Longcrier*, 595 F. Supp. 2d at 1228. The court understands that communication with potential class members may present a risk of abuse and prejudice, but the Plaintiffs have failed to produce sufficient evidence to justify the restraint on Citi Trends' speech at this time. Therefore, the court will DENY the Plaintiffs' motion for the entry of a protective order.

B. Motion for Corrective Action

Although the Plaintiffs were not able to present a clear record of abuse or threatened abuse sufficient to justify a protective order limiting Citi Trends' communication with its employees, the court is concerned about the environment in which the Store Managers signed the mandatory arbitration agreements waiving their right to opt-in to the case. In this case, as in *Sanchez v. Bland Farms*, the "communications were in-person and required [the Store Managers]

to make a decision under the pressure of the moment." 600 F. Supp. 2d 1373, 1380 (S.D. Ga. 2009). This type of in-person meeting with corporate representatives "may exert pressure and often demand an immediate response, without providing an opportunity for comparison or reflection." *Id.*

Citi Trends did not include a statement in its Disclosure or Arbitration Agreement that Store Managers could seek independent legal counsel or that the Store Managers would not be terminated if they refused to sign the forms. Citi Trends' veiled attempt to discourage participation in this lawsuit by rolling out its Arbitration Agreement just as the Plaintiffs filed their motion for Conditional Certification of the Class has not gone unnoticed, and in fact, raises the concern of the court.

The court will DEFER RULING on the Plaintiff's motion for a corrective letter or court supervised notice to potential plaintiffs of their opt-in rights in this lawsuit until the court issues a ruling on the Plaintiffs' "Motion for Conditional Certification and Court Approved Notice pursuant to 216(b) of the Fair Labor Standards Act." (Doc. 23).

C. Motion to Strike

Because the court has already determined that Citi Trends' communications with its store managers was not per se inappropriate, the court must now determine whether the declarations it obtained from its store managers in those meetings should be before the court in its consideration of the Plaintiffs' Motion to Conditionally Certify the Class. The Plaintiffs assert that *Mevorah v. Wells Fargo Home Mortgage, Inc.* should inform this court's decision. 2005 WL 4813532 (N.D. Cal. 2005). In *Mevorah*, the defendant in an FLSA case "asked members of the potential class to sign declarations regarding the nature of their duties," and the plaintiff contended the declarations

were inaccurate and omitted "critical facts." *Id.* at *1. The defendant claimed that the declarations were part of its internal investigation, but one potential class member stated that she refused to sign the declaration because she felt that her words were manipulated and that it was not the complete truth. *Id.* While these facts mirror some of this case, the defendant in *Mevorah* went much further in making blatantly false and misleading statements to potential class members regarding the lawsuit and its potential implications. *Id.* at *4. Here, Citi Trends did not make any false or misleading statements to the store managers and even had them sign a Disclosure about the current case and its implications before it interviewed them and had them sign the declarations at issue.

This case is more akin to the court's decision to deny a protective order in *Bell v. Addus Healthcare, Inc.*, 2007 WL 2752893 (W.D. Wash. 2007). In *Bell*, the plaintiffs asked the court to limit the defendant's contact with putative class members because the defendant was interviewing its employees to obtain declarations for the case. Before Addus, the defendant, conducted the interview or had its employee sign a declaration, it gave each employee a disclosure statement that contained the following statements:

> • The individual(s) speaking with you is the legal representative of Addus and has been retained to defend the company in the lawsuit described above.
> • The individual(s) is seeking to investigate facts in order to evaluate and defend against the lawsuit.
> • You are under no obligation to speak with Addus' legal representative.
> • Addus will take no adverse or retaliatory act against any employee who chooses not to speak with its legal representative.
> • Addus will not reward any employee for choosing to speak to its legal representative.
> • Addus has not promised you anything in exchange for your decision to speak with its legal representative.
> • Any information you provide may be used in the lawsuit against Addus.
> • Neither Addus, nor its legal representative, will attempt to influence your

decision regarding whether you should "opt out" of the potential class action. *Id.* at *1. In response, the plaintiff submitted a declaration of a potential class member who stated she felt ambushed by the interview and felt that she did not receive an adequate explanation of her rights. *Id.* at *3. The court, however, aptly pointed out that in contravention of this testimony given in hindsight, the employee did initial the disclosure statement at the interview that "inform[ed] her of the purpose of the interview and declaration." *Id.*

Although Citi Trends' Disclosure was not as complete as the disclosure in *Bell*, it did contain information about the current case and the possibility that the store managers would be interviewed and asked to sign a declaration concerning their job duties. Ms. Davis stated that she "reiterated to store managers that the purpose of these interviews was in furtherance of Citi Trends' efforts to gather facts related to a pending lawsuit." (Doc. 47-4, at 3-4). Further, even a cursory examination of the objected-to declarations shows varying answers to the fill-in-the-blank portions of the declaration, as well as handwritten corrections and additions to the forms. These variations and departures from the form documents do not lend themselves to the interpretation that the declarations were signed under duress or coercion from Ms. Davis or any other employee of the defendant. Further, all of the declarants signed the Store Manager Disclosure, which explicitly says they were "given an opportunity to read and review" the Disclosure and that they "understand all of the disclosures contained herein." (Doc. 47-2, at 1).

Defendants in collective and class actions have a right to fully investigate their case, and the court will not strike the declarations simply because two employees who signed them now claim coercion and duress. *See Gulf Oil*, 452 U.S. at 89. Just as the court will not enter a protective order in this case, it will not strike the declarations of the Citi Trends store managers

and will consider them in the Plaintiffs' Motion for Conditional Certification of the Class.

III. CONCLUSION

The Plaintiffs' and Citi Trends' versions of the meetings between Ms. Davis and the Store Mangers paint very distinct but equally vivid pictures: one of a coercive and bullying corporation and one of a business trying to investigate claims, inform its employees, and perhaps encourage arbitration over litigation. Even assuming the Plaintiffs' version of the facts, every Store Managers signed an extensive Disclosure designed to inform them of this lawsuit and its implications. No clear record or specific finding of potential or actual abuse exists so that the court should restrain Citi Trends' speech with it employees or strike valid declarations.

Thus, the court will DENY the Plaintiffs' motion to strike and for protective order but will DEFER RULING on the motion for a corrective letter or court supervised notice to potential plaintiffs of their opt-in rights in this lawsuit until the court issues a ruling on the Plaintiffs' "Motion for Conditional Certification and Court Approved Notice pursuant to 216(b) of the Fair Labor Standards Act." (Doc. 23). The court will simultaneously enter an order to that effect.

DONE and ORDERED this 13th day of December, 2012.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE