

(SEAL)

6-13-22

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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

BROCTON DIV. SUPERIOR COURT  
CIVIL ACTION NUMBER 2183CV00212

██████████ KELLY<sup>1</sup>

vs.

MARTY'S INC. & another<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO  
AMEND COMPLAINT AND PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER  
TO PREVENT DEFENDANT FROM IMPROPER COMMUNICATIONS WITH CLASS  
MEMBERS AND CORRECTIVE ACTION**

Plaintiff ██████████ Kelly ("plaintiff"), individually and behalf of others similarly situated, moves the court pursuant to Mass. R. Civ. P. 15(a) for leave to amend the Complaint and to join Marty's Chevrolet, Inc. ("Marty's Chevrolet") as a defendant (Docket #8).<sup>3</sup> The plaintiff also filed a Motion for a Protective Order and Corrective Action (Docket #7) to prevent the defendants from improper communications with putative class members and authorizing the issuance of a corrective notice of the same. The court conducted a hearing on the motions on March 17, 2022. For the reasons stated herein, the plaintiff's Motion to Amend Complaint is **ALLOWED**. The plaintiff's Motion for a Protective Order and Corrective Action is **ALLOWED**.

**BACKGROUND**

The following facts are taken from the plaintiff's Complaint, reserving certain facts for the Discussion section. The plaintiff commenced this action against defendants Marty's, Inc.

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<sup>1</sup> Individually and behalf of other similarly situated

<sup>2</sup> ██████████ Karnolt

<sup>3</sup> The parties filed supplemental briefings regarding the Motion to Amend (Docket #11, 12, 13).

(“Marty’s Inc.”) and [REDACTED] Karnolt (“Karnolt”), seeking relief for himself and a class of similarly situated employees who, the plaintiff alleges, were deprived of overtime wages and Sunday premium pay in violation of the Massachusetts Wage Act, G. L. c. 149, § 148 (the “Wage Act”), and the Massachusetts Overtime Law, G. L. c. 151, § 1A (the “Overtime Law”). Marty’s Inc. operates a car dealership in Kingston. Karnolt is the dealership’s President and Treasurer. The plaintiff was employed as a sales consultant at Marty’s Inc. from January 2019 to December 2019. During his employment, the plaintiff and other salespersons worked in excess of forty hours a week without receiving compensation as required under the Wage Act and Overtime Law. During his employment, the plaintiff and other salespersons worked on Sundays without receiving Sunday premium pay as required under the Wage Act and Overtime Law. The plaintiff filed a Motion to Amend the Complaint on December 10, 2021, seeking to add Marty’s Chevrolet as a joint-employer defendant.

## **DISCUSSION**

### **I. Motion to Amend**

Rule 15(a) of the Massachusetts Rules of Civil Procedure allows a party to amend its pleadings by leave of court. Such leave shall be freely given when justice so requires. Mass. R. Civ. P. 15(a). Denial may be justified by “futility of amendment.” *Lipsett v. Plaud*, 466 Mass. 240, 254 (2013) (citation omitted). The plaintiff alleges that Marty’s Chevrolet, a car dealership located in Bourne, should be added as a joint-employer defendant and that the Supreme Judicial Court’s (“SJC”) decision *Jinks v. Credico (USA) LLC*, 488 Mass. 691 (2021) is dispositive of the issue. The defendants argue that the amendment is futile because Marty’s Inc. and Marty’s Chevrolet are two separate and distinct business entities, not joint employers of the plaintiff or similarly situated class members.

In *Jinks*, the SJC concluded that Massachusetts wage laws derive from the Fair Labor Standards Act, and thus courts should apply the test for joint employer applied in that Act. *Jinks*, 488 Mass. 692. Specifically, “whether an entity is a joint employer of an individual is determined by considering the totality of the circumstances of the relationship between the individual and the entity, guided by a framework of four factors[.]” *Id.* The four factors are whether the entity “(1) had the power to hire and fire the individual, (2) supervised and controlled the individual’s work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *Id.* “The four factors . . . provide a useful framework for analysis . . . but they are not etched in stone and will not be blindly applied.” *Id.* at 703, quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). Additionally, no single factor is dispositive. *Jinks*, 488 Mass. at 704.

Here, the plaintiff has pleaded facts sufficient to establish that it would not be futile to add Marty’s Chevrolet as a joint-employer defendant. The plaintiff’s Amended Complaint largely references Karnolt and another individual, [REDACTED] Ihlefeld (“Ihlefeld”)<sup>4</sup> in describing how these individuals work concurrently for both Marty’s Inc. and Marty’s Chevrolet. The plaintiff alleges that Ihlefeld is the General Manager and corporate representative of both entities and that Karnolt is the president and treasurer of both entities. The plaintiff and putative class members are employed by Marty’s Inc., as they receive paychecks from Marty’s Inc. However, given that Ihlefeld and Karnolt each have corporate roles with Marty’s Inc. and Marty’s Chevrolet, their management of individuals identified as Marty’s Inc. employees would also confer employer

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<sup>4</sup> Ihlefeld was deposed on October 8, 2021.

and/or manager status over such individuals in their capacity as Marty's Chevrolet corporate officers.

The plaintiff also alleges that Ihlefeld and Karnolt had the power to hire and fire employees at both entities, to set the terms and conditions of employment, and to establish rates of pay and work schedules for all employees at both Marty's Inc. and Marty's Chevrolet. The plaintiff also alleges that Karnolt and Ihlefeld controlled the work of the plaintiff and all putative class members, including those working at Marty's Chevrolet, at all relevant times. The plaintiff additionally alleges that copies of sales' employees' payroll and personnel records were jointly stored and retained by the defendants. Further, the corporate filings for both Marty's Inc. and Marty's Chevrolet list 5 Kingston Collection Way, Kingston, Massachusetts as their principal office. In other words, the plaintiff's proposed Amended Complaint sufficiently alleges facts to support a claim against Marty's Chevrolet under the joint employment test established by the SJC in *Jinx*. Thus, amending the Complaint as the plaintiff proposes would not be futile. Accordingly, the plaintiff's Motion to Amend is **ALLOWED**.

## II. Motion for Protective Order and Corrective Action

The plaintiff also filed a Motion for a Protective Order to prevent the defendants from sending improper communications to class members. The plaintiff argues that Marty's Inc. improperly sent misleading letters to putative class members after being served with the Complaint. The plaintiff further argues that the issuance of a corrective notice is appropriate under these circumstances. The defendants argue that a letter sent to Marty's Inc. employees on June 9, 2021, was proper and the result of a review of its payroll records.

Rule 23(d) of the Massachusetts Rules of Civil Procedure gives the court broad authority to "impose such terms as shall fairly and adequately protect the interests of the class in whose

behalf the action is brought or defended.” “A protective order is appropriate to prevent misleading or coercive communications with potential class members that could or are intended to undermine participation in a class or collective action.” *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 111 (2016) (quotation and citation omitted). Additionally, “courts should scrutinize with care instances in which employers send communications to class and putative class members who are their workers, given the heightened possibility of coercion between an employer and its workers.” *Id.* “Moreover, when employers do send communications to class members, putative or otherwise, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action.” *Id.* (quotation and citation omitted).

Here, the plaintiff alleges that the Chief Financial Officer of Marty’s Inc. sent letters to putative class members, employees of Marty’s Inc., for the stated purpose of tendering back pay for their unpaid overtime and Sunday pay dating back to March 17, 2018. The plaintiff argues that because Marty’s Inc. sent these letters soon after receiving the instant Complaint alleging unpaid overtime and Sunday pay wages dating from March 2018, the date of the statute of limitations of this action, these payments constituted an effort by Marty’s Inc. to thwart the plaintiff’s class certification efforts. The plaintiff also alleges that Marty’s Inc. misled putative class members by omitting from the letters sent to Marty’s Inc. employees any mention of the pending litigation. In essence, the plaintiff contends that these payments were an intentional effort by the defendants to avoid the possibility of paying treble damages to class members should the plaintiff prevail on his claims for unpaid wages. See G. L. c. 149, § 150 (stating “defendant shall not set up as a defense a payment of wages after the bringing of the complaint”); G. L. c. 151, § 1B.

Bearing in mind the limits the First Amendment to the United States Constitution imposes on the court's authority to issue protective orders, the court concludes that, in this case, the issuance of a protective order is "justified by a likelihood of serious abuses." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103 (1981) (striking down protective order as invalid restraint on expression). Here, absent the material information within the letters regarding the ongoing litigation and considering the potential negative impact that receiving the unpaid wages by employees could have on class certification, the court concludes that the likelihood of abuse or coercion is high. Those undeniable facts, combined with the fact that these unpaid wages were issued so soon after the commencement of this litigation, reflect the need for judicial interference to ensure that there is no future interference with the rights of the parties, including putative class members. The court, in its discretion, concludes that a protective order and corrective action are appropriate remedies to ensure the interests of current and putative class members are protected.

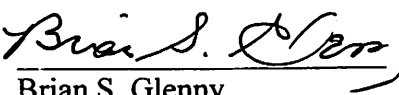
Accordingly, the plaintiff's Motion for a Protective Order and Corrective Action is **ALLOWED**.

## ORDER

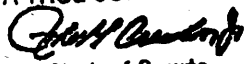
For the reasons stated herein, the plaintiff's Motion to Amend Complaint (Docket #8) is **ALLOWED**. The plaintiff's Motion for a Protective Order and Corrective Notice (Docket #7) is **ALLOWED**.

It is therefore **ORDERED** that:

1. The plaintiff's proposed Amended Complaint shall be **ALLOWED** in its entirety and  
- Marty's Chevrolet shall be added as a joint employer defendant;
2. The defendants, including counsel, are enjoined from further communications with  
putative class members related in any way to this lawsuit without the court's permission;
3. A corrective notice shall issue to putative class members informing them of this pending  
lawsuit, the claims at issue, and that they have not waived any rights in this lawsuit by  
virtue of receiving the subject overtime and Sunday premium payments from the  
defendants; and
4. The plaintiff shall have fourteen (14) days from the date of this Order's issuance to  
submit a proposed corrective notice.

  
Brian S. Glenny  
Justice of the Superior Court

**DATED:** June 13, 2022

A TRUE COPY ATTEST  
  
Clerk of Courts