SANDBERG PHOENIX

CLASS ACTION BLOG

Precertification Discovery – What Are The Limits?

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Fishon, class representative, was a consumer who sued Peloton for alleged misrepresentation as to what its digital fitness library contained. The question presented was whether Peloton could depose unnamed putative class members in advance of class certification. The Court pointed out that Federal Rule 45 allows every stranger to lawsuit protection from undue burden or expense. On the other hand, every defendant has a due process right to defend itself. Notably, there is nothing in the Rules about the discovery of class members before certification of any class.

Not surprisingly, the Court looked at a balancing test where the needs of the parties to develop their claims and defenses are balanced against the putative class members. The Court said Peloton needed to make a strong showing: "(1) discovery is not sought for any improper purposes to harass or to alter the membership of the class; (2) it is merely tailored to subjects which are plainly relevant; and (3) it does not impose an undue burden given the need for the discovery at issue and the availability of the same or similar discovery from a party." There was no evidence that Peloton sought to harass or alter the membership of the class and Peloton articulated a reasonable basis as to why it believed the absent class members had information which could help them inform the Court about whether to certify a class, in that each of the 21 absent class members had brought arbitration claims against Peloton with the same allegations asserted in the class action.

The Court allowed the discovery to proceed, but limited the number of depositions to 10, which is the number allowed under the Federal Rules absent court action. While it would seem that Peloton won this dispute, the Court's limitation of the number of depositions makes it an empty victory.

Case Citation: *Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67 (S.D.NY 2020)