

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
JEVIC HOLDING CORP., <i>et al.</i> ,)	Case No. 08-11006 (BLS)
)	
Debtors.)	(Jointly Administered)
<hr/>		
)	
In re CASIMIR CZYZEWSKI, MELVIN L. MYERS,)	
JEFFREY OEHLERS, ARTHUR E. PERIGARD,)	
and DANIEL C. RICHARDS on behalf of themselves)	
and all others similarly situated,)	
)	
Plaintiffs,)	Adv. Pro. No. 08-50662 (BLS)
)	
v.)	
)	
JEVIC TRANSPORTATION, INC., JEVIC)	
HOLDING CORP., CREEK ROAD PROPERTIES,)	
LLC, SUN CAPITAL PARTNERS, INC., and JOHN)	
DOE'S 1-10,)	
)	
Defendants.)	Re: Adv. Docket No. 72
<hr/>		

MEMORANDUM ORDER

Upon consideration of Sun Capital Partners, Inc.'s Motion for Clarification of Class Composition [Adv. Docket No. 72] (the "Motion"); the Joinder of the Debtors to the Motion of Sun Capital Partners, Inc. for Clarification of Class Composition [Adv. Docket No. 75]; the Joinder of Plaintiffs and the Certified Class to Sun Capital Partners, Inc.'s Motion for Clarification of Class Composition [Adv. Docket No. 76]; the Brief in Opposition to Sun Capital Partners, Inc.'s Motion for Clarification of Class Composition [Docket No. 854] (the "Opposition"); Sun Capital Partners Inc.'s Reply in Further Support of its Motion for Clarification of Class Composition [Adv. Docket No. 78] (the "Reply"); and the arguments and representations of counsel on the record at the hearing before the Court on August 17, 2010, the Court hereby FINDS as follows:

1. On December 16, 2008, the Court entered an Order [Adv. Docket No. 29] (the "Class Certification Order") certifying a class "comprised of the Plaintiffs and the other former

employees of Defendants, (i) who worked at or reported to one of the Defendants' Facilities and were terminated without cause on May 19, 2008, within 30 days of May 19, 2008, or in anticipation of or as the foreseeable consequence of the mass layoff or plant closing ordered by Defendants on or about May 19, 2008, and who are affected employees, within the meaning of 29 U.S.C. § 2102(a)(5), and the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, PL. 2007, C.212., C.34:31-2, and (ii) who have not filed a timely request to opt-out of the class.” Class Certification Order ¶ 2. The Class Certification Order appointed Outten & Golden, LLP and Loizides, PA as class counsel (together, “Class Counsel”).

2. The Class Certification Order also approved a form of notice (the “Notice”) to be sent to potential class members advising them of the action and their right to opt-out. See Class Certification Order ¶ 6. The Notice stated that if potential class members wanted to be excluded from the class, they should “CHECK THE BOX IN THE FORM BELOW, AND SIGN AND MAIL that form by certified mail, return receipt requested, to [Class Counsel]” Notice p. 3.

3. The Class Certification Order set forth a process by which Class Counsel was to obtain the names of potential class members from the defendants, mail the Notice to the potential class members, and subsequently file and serve a sworn statement listing the name of any person who opted-out of the class.

4. In accordance with these procedures, Class Counsel mailed the Notice to potential class members on January 9, 2009, with a return date of February 13, 2009 [See Adv. Docket No. 31].¹ Following the mailing of this Notice, on February 9, 2009, the Court received and docketed a letter (the “February Letter”) from counsel to former Jevic employees (“NJ Counsel”) in Civil Action No. 08-cv-3341 currently pending in the United States District Court for the District of New Jersey (the “NJ Action”). By the February Letter, NJ Counsel indicated that it represented

¹ With leave of the Court, Class Counsel mailed a supplemental Notice to additional omitted potential class members on May 15, 2009, with a return date of June 15, 2009 [See Adv. Docket No. 50].

143 former Jevic employees (the “143 Individuals”) in the NJ Action and purported to opt-out these individuals from this adversary class action.

5. Thereafter, on July 7, 2009, Class Counsel filed a declaration indicating that a total of eight people had opted-out of the class, and expressing the view that the February Letter was ineffective to opt-out those individuals who failed to independently submit an opt-out form [See Adv. Docket No. 56]. NJ Counsel responded by sending the Court another letter, which was docketed, expressing its view that the February Letter effectively opted-out the 143 Individuals listed therein [See Adv. Docket No. 60].

6. Over a year later, Sun Capital Partners, Inc. (“Sun”) filed the Motion seeking an order clarifying the composition of the class and delineating whether the 143 Individuals are class members. By its Motion, Sun argues that the better view to treat all individuals who failed to submit opt-out forms as class members. The Debtors and Class Counsel filed papers in support of this position and the Motion in general.

7. By the Opposition, NJ Counsel argues that the clarification requested in the Motion is unnecessary because the February Letter was a valid and timely request to opt-out the 143 Individuals. Opposition p.1. The Opposition further argues that the Notice was deficient because it failed to explain that the interplay between this adversary class action and the NJ Action. Opposition p.2.

8. Class certification was requested and granted in this proceeding pursuant to Federal Rule of Civil Procedure 23, made applicable here by Federal Rule of Bankruptcy Procedure 7023. More specifically, the Court granted class certification pursuant to of subsections (a) and (b)(3) of Rule 23. Rule 23 provides that “[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all member who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

9. In conducting a class action, this Court has “both the duty and broad authority to exercise control over [the] action and to enter appropriate orders governing the conduct of counsel and parties.” Georgine v. AmChem Prods., Inc., 160 F.R.D. 478, 489 (E.D. Pa. 1995); see also, Fed. R. Civ. P. 23(d)(1).² To properly perform its Rule 23 duties, this Court “closely monitor[s] the notice process and take[s] steps necessary to ensure that class members are informed of the opportunity to exclude themselves or to participate in the judgment.” Georgine, 160 F.R.D. at 490. It is incumbent upon the Court to ensure that through the notice process, individual due process rights are not abused. Id.

10. Courts generally apply some measure of flexibility in recognizing a potential class member’s desire to opt-out of a class. See In re Four Seasons Sec. Laws Litig., 493 F.2d 1288, 1291(10th Cir. 1974) (stating that “flexibility is desirable in determining what constitutes an expression of a class member’s desire to exclude himself and any written evidence of it ought to be sufficient.”); In re WorldCom Inc. Sec. Litig., 2005 WL 1048073 at *4 (S.D.N.Y.) (observing that “any written evidence containing a reasonable indication of a desire to opt out ought to be sufficient.”) (internal quotations omitted). Other courts, however, have found attorney-signed opt-out forms are inappropriate. See Moulton v. United States Steel Corp., 581 F.3d 344, 354-55 (6th Cir. 2009) (finding no abuse of discretion when district court refused to recognize an attorney-signed opt-out form); Georgine, 160 F.R.D. at 501 n.43 (noting that the court had previously concluded that attorney-signed opt-out forms were improper).

² Federal Rule of Civil Procedure 23(d)(1) provides, in relevant part,

In conducting an action under this rule, the court may issue orders that . . . (B) require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of: (i) any step in the action . . . ; (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action; (C) impose conditions on the representative parties . . . ; or (E) deal with similar procedural matters.

Fed. R. Civ. P. 23(d)(1).

11. There is no dispute that the February Letter was an unambiguous written request for exclusion of the 143 Individuals from the class. The authenticity of the February Letter is undisputed and there is no evidence of improper conduct by counsel or others. Nevertheless, the pleadings and representations of counsel raise substantial concerns regarding whether the 143 Individuals intend to participate in this adversary class action.

12. The Court has broad discretion to discharge its duty to manage class actions by issuing orders imposing conditions on the parties and dealing with procedural matters. See Fed. R. Civ. P. 23(d)(1). In furtherance of that duty and to ensure that the wishes of the 143 Individuals are heard, the Court will order the parties to re-notice those individuals and solicit individually-signed opt-out forms from each potential class member who does not want to be a part of the class in this adversary action.

Accordingly, based on the foregoing, it is hereby

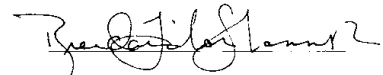
ORDERED, that the parties shall meet and confer regarding an acceptable form of notice to be sent to the 143 Individuals; and it is further,

ORDERED, that within 30 days, Class Counsel will file a motion seeking approval of a form of notice to be sent to the 143 Individuals; and it is further,

ORDERED, that the Motion is denied without prejudice; and it is further,

ORDERED, that this Court shall retain jurisdiction to enforce this Order.

Dated: August 27, 2010
Wilmington, DE



Brendan Linehan Shannon
United States Bankruptcy Judge