UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

MARK ROSS, individually and on behalf of similarly situated persons,

Plaintiff,

v.

SUBCONTRACTING CONCEPTS, LLC, AUTO-WARES, LLC, and JOHN DOES 1-10.

Defendants.

Case No. 2:20-cv-12994

Hon. Linda V. Parker

Magistrate Judge David R. Grand

PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND NOTICE PURSUANT TO 29 U.S.C. § 216(b)

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PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND NOTICE PURSUANT TO 29 U.S.C. § 216(b)

Plaintiff, individually and on behalf of others similarly situated, hereby moves this Court for an order conditionally certifying and allowing judicial notice of this action to be sent to potential opt-in plaintiffs informing them of their right to opt-in to this case under the Fair Labor Standards Act, 29 U.S.C. § 216(b). Specifically, Plaintiff seeks conditional certification pursuant to § 216(b) of the following collective:

> All individuals who contracted with SCI as last-mile delivery drivers using their own personal vehicles in the United States from three years prior to the filing of this Action who were classified as independent contractors (the "FLSA Collective" or "Collective").

As explained in the accompanying Brief in Support of this Motion, Plaintiff has submitted sufficient evidence to satisfy his lenient burden in order for notice to be issued pursuant to 29 U.S.C. § 216(b).

The undersigned counsel certifies that, prior to filing this Motion, counsel personally spoke to opposing counsel, explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; opposing counsel expressly denied concurrence. Plaintiff respectfully requests that this Court grant this Motion for Conditional Certification and authorize Plaintiff to issue the proposed notice and opt-in forms, which will allow potential FLSA Collective Members to participate in this case.

Respectfully submitted,

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SUBCONTRACTING CONCEPTS, LLC, AUTO-WARES, LLC, and JOHN DOES 1-10.

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PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION FOR CONDITIONAL CERTIFICATION AND NOTICE PURSUANT TO 29 U.S.C. § 216(b)

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ISSUES PRESENTED

I. Whether Plaintiff has met the lenient standard for conditional certification as an FLSA collective action under 29 U.S.C. § 216(b).

Plaintiff Answers: Yes
Defendants Answer: No

II. Whether this Court should authorize Plaintiff to send the proposed Notice and Consent Form to all members of the proposed FLSA Collective.

Plaintiff Answers: Yes
Defendants Answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

29 U.S.C. § 216(b)

Hoffman-La Roche v. Sperling, 493 U.S. 165 (1989)

Comer v. Wal-Mart Stores, Inc., 454 F. 3d 544 (6th Cir. 2006)

Monroe v. FTS USA, LLC, 860 F.3d 389 (6th Cir. 2017)

Brown v. AK Lawncare, Inc., No. 14-14158, 2015 U.S. Dist. LEXIS 139399 (E.D. Mich. Oct. 14, 2015)

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INTRODUCTION

Defendants employ last-mile delivery drivers around the country. These last-mile delivery drivers share the same job duties: provide the final stage of delivery of goods in the flow of interstate commerce. Defendants uniformly misclassify these last-mile delivery drivers as independent contractors, thus failing to pay them the legally-mandated time-and-one-half premium for hours worked over forty in a workweek. This results in Defendants' failure to comply with the overtime requirements of the Fair Labor Standards Act ("FLSA").

The only question before the Court is this: are the last-mile delivery drivers in the proposed collective similarly situated? Here, the drivers perform the same job duties; deliver products to Defendants' customers using their own vehicles; are paid straight hourly wages regardless of hours worked; are controlled by the same entities; and do not receive an overtime premium for hours worked over 40 in a week. Plaintiff has met his lenient burden to demonstrate that all last-mile delivery drivers are similarly situated such that notice should be sent to the proposed collective under the FLSA.

I. FACTUAL BACKGROUND

A. Defendants Employ Last-Mile Delivery Drivers Such as Plaintiff and the Putative Collective who Perform the same Job Duties

Defendants employ last-mile delivery drivers, such as Plaintiff Mark Ross and

opt-in Plaintiff Raynard Hurst, to perform delivery services throughout Michigan. Mr. Ross was employed by Defendants and erroneously classified as a 1099 independent contractor from about June 2015 until November 2019. (Compl., ECF No. 1, PageID. 4; Ex. 1, Ross Decl. ¶¶ 2-3, 12-14). Mr. Hurst was employed by Defendants and erroneously classified as a 1099 independent contractor from about September 2012 until the Spring of 2019. (Ex. 2, Hurst Decl. ¶¶ 2, 12-14). All Defendants' last-mile delivery drivers perform services for Defendants using their own vehicles. (Ex. 1, Ross Decl. ¶ 11; Ex. 2, Hurst Decl. ¶ 11).

B. DEFENDANTS' LAST-MILE DRIVERS PROVIDE SERVICES TO DEFENDANTS UNDER THE SAME MATERIAL TERMS

It is undisputed that the last-mile drivers at issue in this matter were all classified as independent contractors. (ECF No. 11, Def. SCI Mot. to Dismiss, PageID. 56-57; ECF No. 12, Def. Auto-Wares Mot. to Dismiss, PageID. 233). It is also undisputed that all last-mile delivery drivers sign an "Owner/Operator Agreement" with the same material terms as those of the agreement signed by Plaintiff Ross and opt-in Plaintiff Hurst. (ECF No. 11, Def. SCI Mot. to Dismiss, PageID. 56-57).

Last-mile drivers deliver automobile parts from Defendants' warehouses to their customers and the end users of the product. (Ex. 1, Ross Decl. ¶ 3; Ex. 2, Hurt Decl. ¶ 3). Last-mile drivers perform delivery services for SCI's clients. (Ex. 3, Owner/Operator Agreement). Defendants require their last-mile delivery drivers to

utilize their own vehicles and to maintain them in good operational condition. Ex. 4, Owner/Operator Agreement.

C. Defendants' Last-Mile Drivers Regularly Work Over Forty Hours in a Week

Defendants consistently pay their 1099 last-mile drivers a straight hourly wage. (Ex. 1, Ross Decl. ¶¶ 12-14; Ex. 2, Hurst Decl. ¶¶ 12-14). While performing these job duties, Plaintiff, the FLSA Collective, and other drivers in the putative collective regularly worked over 40 hours in a week. (Ex. 1, Ross Decl. ¶¶ 12-15; Ex. 2, Hurst Decl. ¶¶ 12-15).

D. Defendants Uniformly Pay Their 1099-Classified Drivers on a Straight Hourly Basis Without An Overtime Premium

Despite the fact that Defendants' last-mile delivery drivers regularly work over 40 hours in a week, Defendants pay them only on a straight hourly rate, without an overtime premium, regardless of the number of hours worked. (Ex. 1, Ross Decl. ¶¶ 13-14; Ex. 2, Hurst Decl. ¶¶ 13-14).

E. Defendants' Failure to Comply with the FLSA is Knowing and Willful

This is not the first case in which Defendants have been sued for the same violation. Defendants have been sued or subject to multiple wage and hour complaints over at least the last seven years. Despite being on notice of the violations, Defendants have not taken any action to change their illegal practices.

Instead, Defendants have relied on arbitration agreements to allow it to continue known illegal payroll practices with impunity.

For example, on December 29, 2016, a case was filed against Defendant Subcontracting Concepts, LLC and additional defendants Southeastern Automotive Warehouse Inc. and John Doe managers. *See Bender v. Subcontracting Concepts LLC., et al.*, No. 1:16-cv-04776-MHC (N.D. Ga. Filed Dec. 29, 2016) (Complaint attached as Ex. 4). The *Bender* case alleged that Defendants failed to pay their delivery drivers the legally-mandated overtime premium for hours worked over 40 in a workweek.

On August 22, 2017, a case was filed against Defendant Subcontracting Concepts, LLC and additional defendants SNAP Logistics Corp., USPack Logistics Corp., and SCI Holdco, LLC. *See Espinosa v. SNAP Logistics Corp., et al.*, No. 1:17-CV-06383-AT (S.D.N.Y. filed Aug. 22, 2017) (Berg, J.) (Complaint attached as Ex. 5). The *Espinosa* case alleged that Defendants failed to pay their delivery drivers the legally-mandated overtime premium for hours worked over 40 in a workweek.

On April 21, 2021, a case was filed against Defendant Subcontracting Concepts, LLC and additional defendants Smyth Automotive, Inc. and John Doe corporations. *See Kennedy v. Subcontracting Concepts, LLC, et al.*, No. 1:21-cv-00287-MWM (S.D. Ohio filed Apr. 21, 2021)(Ex. 6, *Kennedy* Complaint). The

Kennedy case alleged that Defendants failed to pay their delivery drivers the legally-mandated overtime premium for hours worked over 40 in a workweek.

Despite these prior and later lawsuits and other lawsuits and complaints, Defendants have not changed their practices regarding classifying their last-mile delivery drivers as independent contractors and failing to pay the legally-mandated overtime premium for hours worked over 40 in a workweek. Instead, Defendants have continued to conduct business in the same manner, conducting the same business with different distributors and different clients in a continued effort to avoid their FLSA obligations.

II. ARGUMENT

A. THE COURT MAY CONDITIONALLY CERTIFY THE PROPOSED FLSA COLLECTIVE UPON A MODEST FACTUAL SHOWING THAT SIMILARLY SITUATED COLLECTIVE MEMBERS EXIST

A proposed collective consists of similarly situated individuals, thus meriting conditional certification, if the proposed collective suffers from the same FLSA-violating policy. *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009), *abrog. on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). The goal of judicial economy weighs heavily in favor of certification and issuing notice to all Defendants' 1099 last-mile delivery drivers. *See Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989) (stating that "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact

arising from the same alleged discriminatory activity."). Further, a collective action provides employees an opportunity to "lower individual costs to vindicate rights by the pooling of resources." *Id*. Certification and court-supervised notice is thus typically granted under § 216(b). *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 547 (6th Cir. 2006) (citing cases and the lenient standard for collective certification and noting that, because of the modest factual showing required, the standard "typically results" in conditional certification).

The FLSA allows workers to bring an action either on an individual basis or on a collective basis for themselves "and other employees similarly situated." 29 U.S.C. § 216(b). The FLSA does not define the term "similarly situated," and the Sixth Circuit has not defined the term. In addressing the issue, however, the Sixth Circuit has adopted a two-step approach to certification of FLSA collective actions. *See O'Brien*, 575 F.3d 583 (stating that "[t]he district court followed a two-stage certification process, as many courts do….").

At the first step, known as the "notice" stage, "[t]he plaintiff must show only that 'his position is similar, not identical, to the positions held by the putative class members.'" *Comer*, 454 F.3d at 546-47 (quoting *Pritchard v. Dent Wizard, Int'l*, 210 F.R.D. 591, 595 (S.D. Ohio 2002)). "This determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." *Id.* at 547 (quoting *Morisky v. Public Serv. Elec. & Gas Co.*,

111 F. Supp. 2d 493, 497 (D.N.J. 2000)). At this stage, "district courts generally allow the lead plaintiffs to 'show that the potential claimants are similarly situated by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Fisher v. Michigan Bell Telephone Co.*, 665 F. Supp. 2d 819, 825 (E.D. Mich. 2009) (Edmunds, J.) (quoting *Olivo v. GMAC Mtg. Corp.*, 374 F. Supp. 2d 545, 548 (E.D. Mich. 2004) (Zatkoff, J.)).

At this preliminary stage, "'[t]he Court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations.'" *Id.* at 825 (quoting *Brasfield v. Source Broadband Servs., LLC*, 257 F.R.D. 641, 642 (W.D. Tenn. 2009)). Courts typically rely on the pleadings and any filed affidavits. *Pacheco v. Boar's Head Provisions Co.*, 671 F. Supp. 2d 957, 959 (W.D. Mich. 2009) ("At the initial stage, these courts typically apply a fairly lenient standard for determining whether the plaintiffs are similarly situated, based solely on the pleadings and any affidavits that have been filed.").

Further, "[a]t the 'notice stage,' any affidavits or declarations of representative plaintiffs that are offered in support of a motion for conditional certification are 'not required to 'meet the same evidentiary standards applicable to motions for summary judgment because to require more at this stage of the litigation would defeat the purpose of the two-stage analysis under [FLSA] Section 216(b).'"

Brown v. AK Lawncare, Inc., No. 14-14158, 2015 U.S. Dist. LEXIS 139399, at *7 (E.D. Mich. Oct. 14, 2015) (Borman, J.) (quoting *Fisher*, 665 F. Supp. 2d. at 826)) (Ex. 7). "Generally, where putative class members are employed in similar positions, the allegation that defendants engaged in a pattern or practice of not paying overtime is sufficient to allege that plaintiffs were together the victims of a single decision, policy, or plan." *Renfro v. Spartan Computer Servs.*, 243 F.R.D. 431, 433-34 (D. Kan. 2007).

Courts find that plaintiffs meet the lenient standard when the proposed collective members perform the same job and the plaintiff alleges a FLSA-violating policy that is company-wide. *Monroe v. FTS USA, LLC*, 860 F.3d 389, 406-07 (6th Cir. 2017). In *Monroe*, the Court upheld the district court's denial of the defendants' motion to decertify the collective of 293 cable technicians who alleged that the defendants promulgated a company-wide time-shaving policy under which they required employees to underreport their overtime hours. *Id.* at 393. The *Monroe* panel reasoned that the collective was similarly situated where all technicians in the collective were in the same position, had the same job duties, and had the same job description regardless of the location at which they worked, and the policy of requiring employees to underreport hours originated at the corporate level. *Id.* at 402-03; s*ee also Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1041-42 (2016) (upholding the district court's grant of conditional certification for employees

working in 400 jobs across three plants for company-wide claims of unpaid wages for time donning and doffing, despite the varying times it took employees to don and doff); *O'Brien*, 575 F.3d at 584-85 (finding that the employees in the collective were similarly situated when their claims were "unified by common theories of defendants' statutory violations" when the defendant made all employees work off the clock and improperly edited time punches after the fact).

Applying these standards, Court inside the Sixth Circuit have affirmed that conditional certification is appropriate for a collective of similarly situated delivery drivers. In *Hall v. U.S. Cargo & Courier Serv., LLC*, 299 F. Supp. 3d 888, 894 (S.D. Ohio 2018), the plaintiff delivery drivers sought conditional certification of a collective of delivery drivers. The plaintiffs alleged that they and the putative collective members were misclassified as independent contractors, resulting in unpaid overtime under the FLSA. *Id.* The court granted the plaintiffs' motion for conditional certification because the putative collective members were "unified by a common theory that they have been misclassified as independent contractors when they were indeed employees" and the drivers had to adhere to the defendant's procedures and delivery routes. *Id.* at 896.

Similarly, in *Williams v. King Bee Delivery, LLC*, No. 5:15-cv-306-JMH, 2017 U.S. Dist. LEXIS 36195, at *2 (E.D. Ky. Mar. 14, 2017) (Ex. 8), the plaintiff delivery drivers sought conditional certification for claims of unpaid overtime

wages. The plaintiff drivers delivered pharmaceuticals and other materials from the defendants to their client pharmacies and hospitals. *Id.* The court granted the plaintiffs' motion because the putative collective performed similar duties, had similar schedules, followed similar rules, and were classified as independent contractors and thus were denied overtime wages. *Id.* at *11-12.

In line with this, courts outside of the Sixth Circuit have granted conditional certification to putative collectives of delivery drivers who allege that they were not properly classified under the FLSA. In *Carter v. XPO Last Mile, Inc.*, No. 16-cv-01231-WHO, 2016 U.S. Dist. LEXIS 137176, at *2-4 (N.D. Cal. Oct. 3, 2016) (Ex. 9), the plaintiff last-mile delivery driver sought conditional certification of a class of delivery drivers classified as independent contractors who had signed a "Delivery Service Agreement" with the defendants to provide services. The Court found that the plaintiffs had met their lenient burden for conditional certification when they presented evidence that, *inter alia*, all drivers were classified as independent contractors; the drivers were not paid overtime; all drivers signed agreements with the same material terms; the drivers had no ability to negotiate rates of pay or contract terms; all delivery drivers performed the same basic job duties of "pick[ing] up merchandise from warehouse or stores and deliver[ing] it to the retailers' customers' homes"; and all drivers had to provide their own vehicle and pay for its maintenance, repair, and insurance. *Id.* at *7-8; *see also Neff v. Flower Foods, Inc.*,

No. 5:15-cv-254, 2016 U.S. Dist. LEXIS 183025, at *8-9 (D. Vt. Nov. 7, 2016) (Ex. 10), *decertification denied* 2019 U.S. Dist. LEXIS 238105 (D. Vt. May 16, 2019) (Ex. 11) (granting conditional certification to a collective of delivery drivers who picked up baked goods from warehouses and delivered the product to the defendants' customers when the drivers all signed similar distribution and franchise agreements and the defendant did not pay overtime to the drivers); *Rehberg v. Flowers Baking Co. of Jamestown, LLC*, No. 3:12-cv-00596-MOC-DSC, 2013 U.S. Dist. LEXIS 40337, at *5-6 (D.N.C. Mar. 22, 2013) (Ex. 12) (granting conditional certification to a group of last-mile delivery drivers for baked goods when the drivers shared the same job duties and were subject to the same oversight and wage policies and practices).

B. THE COURT SHOULD AUTHORIZE THE ISSUANCE OF NOTICE BECAUSE MEMBERS OF THE PUTATIVE COLLECTIVE ARE SIMILARLY SITUATED

Timely notice and opportunity to opt-in is essential. Collective members' statute of limitations continue to run until they can opt-in. The evidence Plaintiff presents at this stage is sufficient for conditional certification. In this case, all individuals in the proposed collective were classified as independent contractors and signed agreements with the same material terms. (ECF No. 11, Def. SCI Mot. to Dismiss, PageID. 56-57; ECF No. 12, Def. Auto-Wares Mot. to Dismiss, PageID. 233; Ex. 1, Ross Decl. ¶¶ 12-15; Ex. 2, Hurst Decl. ¶¶ 12-15). These individuals

delivered goods from distribution centers to end users around Michigan, using their own vehicles. (Ex. 1, Ross Decl. ¶¶ 13, 11; Ex. 2, Hurst Decl. ¶¶ 3, 11).

The individuals in the proposed collective are all paid on a straight hourly basis, regardless of hours worked. Ex. 1, Ross Decl. ¶¶ 12-15; Ex. 2, Hurst Decl. ¶¶ 12-15). Finally, all individuals in the proposed collective worked over 40 hours in a workweek and were not paid an overtime premium. (Ex. 1, Ross Decl. ¶¶ 13-15; Ex. 2, Hurst Decl. ¶¶ 13-15). This evidence supports a finding that Plaintiff and the proposed collective are similarly situated.

Defendants have a uniform policy of paying all 1099 last-mile delivery drivers on a straight hourly basis without providing an overtime premium. It would thus be disingenuous for Defendants to claim, especially at the conditional certification stage, that the proposed collective members are not "similarly situated" where Defendants have already treated them as one group for purposes of assigning them to Prudential job sites and paying them a straight hourly rate. *See Delgado v. Ortho-McNeil, Inc.*, No. SACV 07-263 CJC (MLGx), 2007 U.S. Dist. LEXIS 74731, at *7 (C.D. Cal. Aug. 7, 2007) (Ex. 13) (observing that it "is somewhat disingenuous . . . for Defendants to argue that they should be permitted to treat all sales representatives as one group for purposes of classifying them as exempt, but that this Court can only determine the validity of that classification by looking to the specific job duties of each individual sales representative").

C. Any Alleged Arbitration Agreements Do Not Prevent This Court From Issuing Notice

Plaintiff anticipates that Defendants may argue that any alleged arbitration agreements bar the granting of notice to the putative collective. However, in evaluating whether arbitration agreements are enforceable as to each individual, courts resolve a factual dispute. Moreover, Defendants have themselves admitted that the arbitration agreements are optional as drivers have the option to opt-out "at any time." There is no principled reason to withhold judicial notice to collective members who may have 1) never signed an arbitration agreement; 2) signed under circumstances that render it unenforceable; 3) signed but already exercised a right to to opt-out or 4) may in the future exercise their right to opt out "at any time." For instance, Opt-In Plaintiff Raynard Hurst has exercised his right to opt out. Ex. 14, Opt-Out Letter.

Furthermore, in the Sixth Circuit, courts are prohibited from considering the merits of disputes at the conditional certification stage. *See, e.g., Anderson v. P.F. Chang's China Bistro, Inc.*, No. 16-14182, 2017 U.S. Dist. LEXIS 134523, at *20 (E.D. Mich. Aug. 23, 2017) (Ex. 15) ("At this first stage of conditional certification, the court 'does not resolve factual disputes, decide substantive issues on the merits, or make credibility determinations.'"); *Neville v. Nelson Tree Serv., LLC*, No. 3:18-cv-368, 2019 U.S. Dist. LEXIS 66446, at *11 (S.D. Ohio Apr. 18, 2019) (Ex. 16) ("At no point in resolving the conditional certification issue, however, does the Court

opine on, or even consider, the merits of plaintiffs' claims.").

The Sixth Circuit has also declined to determine arbitrability with parties who are not actually before the court. *Taylor v. Pilot Corp*., 697 F. App'x 854, 860-61 (6th Cir. 2017). In *Taylor*, the defendant sought interlocutory review of the district court's grant of conditional certification, arguing that the district court erred in approving notice to members of the FLSA Collective who may have signed an arbitration agreement. *Id.* at 856. The Sixth Circuit ruled that the defendant could not seek appeal of the district court's order on the ground that a right to arbitrate had been denied when the opt-in plaintiffs were not before the court. *Id.* at 860-61.

District courts inside the Sixth Circuit have concluded that questions regarding enforceability of alleged arbitration agreements do not preclude certification, because the Court does not make merits determinations at the conditional certification stage, and because arbitrability is a merits question,. *See Bradford v. Team Pizza, Inc.*, No. 1:20-cv-60, 2020 U.S. Dist. LEXIS 113681, at *14-17 (S.D. Ohio June 29, 2020) (Ex. 17) (emphasis in original) (granting conditional certification despite the defendants' presentation of a sample arbitration agreement when "there are insufficient facts at this stage regarding the validity of these agreements as to *each* delivery driver defendants seek to exclude from receiving notice of this collective action" and "given that none of these delivery drivers have joined this suit and defendants cannot presume that drivers with

arbitration agreements will ultimately opt-in to this suit, it is premature for the Court [to] consider the arbitration agreements at the conditional certification stage.").

Courts outside of the Sixth Circuit agree. *See, e.g.*, *Cuevas v. Conam Mgmt. Corp.*, No. 18cv1189-GPC(LL), 2019 U.S. Dist. LEXIS 181832, at *13-15 (S.D. Cal. Oct. 21, 2019) (Ex. 18) (finding that conditional certification is not defeated because of purported arbitration agreements and collecting cases finding the same); *Mode v. S-L Distrib. Co., LLC*, No. 3:18-cv-00150-RJC-DSC, 2019 U.S. Dist. LEXIS 42143, at *13 (W.D.N.C. Mar. 15, 2019) (Ex. 19) ("[I]t is premature—and would be prejudicial—to preclude potential plaintiffs from participating in this lawsuit solely based on arbitration provisions in their Distributor Agreements when those very provisions might ultimately be declared void."); *Meyer v. Panera Bread Co.*, 344 F. Supp. 3d 193, 207 (D.D.C. 2018) (collecting cases) ("[C]ourts have generally found that the existence of an arbitration agreement is irrelevant to conditional certification of a collective action, because the enforceability of such agreements is a merits-based determination better dealt with at the decertification stage.").[1]

[1] *See also Friscia v. Panera Bread Co.*, No. 16-3754 (ES) (SCM), 2018 U.S. Dist. LEXIS 106446, at *23 (D.N.J. June 26, 2018) ("Panera also argues that approximately half the proposed collective is covered by binding arbitration agreements. . . . This argument is inappropriate at the notice stage, however, because it goes to Panera's merits defenses.") (Ex. 20); *Ansoralli v. CVS Pharmacy, Inc.*, No. 16-CV-1506, 2017 U.S. Dist. LEXIS 20075, at *6 n.3 (E.D.N.Y. Feb. 13, 2017) ("[Defendant's] arguments regarding timeliness,

D. PLAINTIFFS' PROPOSED NOTICE IS PROPER

Congress's purpose in authorizing § 216(b) collective actions was to avoid multiple lawsuits where numerous employees have been harmed by a common violation of the FLSA. *See Hoffman-La Roche*, 493 U.S. at 170. As the Supreme Court has noted, "[t]hese benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* Court-authorized notice also prevents "misleading communication" about the nature of the pending case. *Id.* at 172.

1. *The Proposed Notice Is Accurate and Informative*

In the instant case, Plaintiffs' proposal for court-approved notice to potential

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preclusive effect of arbitration agreements, and the *de minimis* exception to the FLSA are irrelevant. These are issues to be raised in the decertification phase, after discovery has been completed.") (Ex. 21); *Gordon v. TBC Retail Group, Inc.*, 134 F. Supp. 3d 1027, 1039 n.9 (D.S.C. 2015) ("[Defendant] . . . assert[s] that there are very few potential class members who could join the litigation, due to the fact that '[its] employees started to sign mandatory arbitration agreements in October 2013.' The court does not find this consideration compelling, as it prematurely assumes that such arbitration agreements are enforceable. Instead, the court finds that the better approach is to address arbitration issues after conditional certification, when the scope and substance of those issues become clearer."); *Sylvester v. Wintrust Fin. Corp.*, No. 12 C 01899, 2013 U.S. Dist. LEXIS 140381, at *33 (N.D. Ill. Sept. 30, 2013) (refusing to consider at conditional certification stage the effect of arbitration clauses because "the enforceability of arbitration clauses are dealt with on a case-by-case basis. Without being presented with the circumstances surrounding the manner of formation of an actual agreement, [the Court] will not prejudge the enforceability of…arbitration clauses") (Ex. 22).

opt-in plaintiffs (attached hereto as Ex. 23) meets the timeliness, accuracy, and informational requirements established by the Supreme Court in *Hoffman-La Roche*. Plaintiffs' proposed notice describes the lawsuit in plain English, informs individuals who have worked as 1099 last-mile delivery drivers for Defendants of their opportunity to "opt-in," instructs them how to opt-in, and notifies them of the effect of their decision to opt-in. The proposed notice is also appropriate in its scope. Where a Complaint alleges a willful FLSA violation, courts in the Sixth Circuit regularly apply a three-year statute of limitations at the notice stage, recognizing that "[i]t is appropriate to allow a three-year look-back period in the notice where '[t]he absence of willful conduct is not established as a matter of law by the pleadings.'" *Benion v. LeCom, Inc.*, No. 15-14367, 2016 U.S. Dist. LEXIS 63210, at *35-36 (E.D. Mich. May 13, 2016) (Lawson, J.) (quoting *Colley v. Scherzinger Corp.*, 176 F. Supp. 3d 730, 735 (S.D. Ohio 2016)) (Ex. 24).[2]

2. *The Court Should Permit Plaintiffs to Issue Notice via U.S. Mail and Email*

[2] *See also Smith v. Generations Healthcare Servs. LLC*, No. 2:16-CV-807, 2017 U.S. Dist. LEXIS 106583, at *16-17 (S.D. Ohio July 11, 2017) (collecting cases) (Ex. 25) ("Whether Defendants' alleged FLSA violations are 'willful' is a question better suited for a later stage of the litigation. . . . Accordingly, the Court should use a three-year limitations period and reject any of Defendants' objections to the form of notice based on its reference to a three-year statute of limitations); *see also Anderson v. Minacs Grp. (USA) Inc.*, No. 16-13942, 2017 U.S. Dist. LEXIS 70513, at *31 (E.D. Mich. May 9, 2017) (Edmunds, J.) (Ex. 26) (allowing a three-year limitations period in a FLSA collective notice).

Plaintiffs seek leave to send the attached Notice and Opt-in Form by First Class Mail and e-mail to all 1099 delivery drivers who provided last-mile delivery services for Defendants or their customers during the past three years. E-mail is increasingly recognized and approved by courts as an effective method for providing notice. *See, e.g., Kim v. Detroit Med. Informatics, LLC*, No. 19-11185, 2019 U.S. Dist. LEXIS 204014 at *11 (E.D. Mich. Nov. 25, 2019) (Parker, J.) (stating that "[c]ourts nationwide now recognize that e-mail notice increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit and advances the remedial purpose of the FLSA") (internal quotation marks and citation omitted) (Ex. 27); *Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 575 (D. Md. Apr. 10, 2012) (authorizing notice via First Class mail and email and remarking that "communication through email is [now] the norm") (internal quotation marks omitted).

Courts in the Sixth Circuit, including in the Eastern District of Michigan, have granted requests to serve notice to potential collective members via first-class mail and email. *See, e.g., Westley v. CCK Pizza Co., LLC*, No. 18-13627, 2019 U.S. Dist. LEXIS 93015, at *16 (E.D. Mich. June 4, 2019) (Ludington, J.) (authorizing notice via First Class Mail, email, or both (Ex. 28)); *Kim*, 2019 U.S. Dist. LEXIS 204014, at *19 (authorizing notice via First Class Mail and email) (Ex. 27); *Benion*, 2016 U.S. Dist. LEXIS 63210, at *36-37 (granting the plaintiffs' motion for conditional

certification and ordering notice by first-class mail and email) (Ex. 24); *Brittmon v. Upreach, LLC*, 285 F. Supp. 3d 1033, 1044 (S.D. Ohio 2018) (quoting *Williams v. King Bee Delivery, LLC*, No. 5:15-cv-306-JMH, 2017 U.S. Dist. LEXIS 36195, at *18-19 (E.D. Ky. Mar. 14, 2017) (stating that "[a]llowing dual notice 'advances the remedial purpose of the FLSA, because service of the notice by two separate methods increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit, and of their opportunity to participate'") (Ex. 8).

To facilitate notice, Plaintiff requests that this Court order Defendants to produce the names, last known mailing and e-mail addresses, telephone numbers, dates of employment, job title(s), work location(s), and last four digits of Social Security Numbers for all collective members in electronic and importable format within seven (7) days after this Court grants Plaintiff's Motion. This request is appropriate, and courts granting conditional certification routinely order the defendant to produce this information to facilitate notice to the collective. *See Cobus v. DuHadway, Kendall & Assocs.*, No. 13-CV-14940, 2014 U.S. Dist. LEXIS 116403, at *5 (E.D. Mich. Aug. 21, 2014) (Levy, J.) ("The court may also order the defendant to provide plaintiffs with the contact information of potential opt-in plaintiffs.") (Ex. 29); *Hoffman-LaRoche*, 493 U.S. at 170 (holding that district courts have the authority to compel the production of contact information of employees for purposes of facilitating notice in FLSA collective actions).

After Defendants have produced collective members' names and contact information, Plaintiff's counsel will send notice to the FLSA Collective within seven (7) days. After notices have been issued, collective members should be given a 90-day window to return a signed consent form. Courts within this Circuit, including this District, have routinely approved 90-day notice period. *See, e.g.*, *Wlotkowski v. Mich. Bell Tel. Co.*, 267 F.R.D. 213, 220 (E.D. Mich. 2010) (Edmunds, J.) (approving a ninety-day notice period); *Fenley*, 170 F. Supp. 3d at 1063, 1076 (same); *Henry v. Dish Network, L.L.C.*, No. 1:11-cv-1376, 2012 U.S. Dist. LEXIS 192484, at *7 (W.D. Tenn. June 29, 2012) (same) (Ex. 30). Plaintiffs propose that collective members be given the option to return the form by mail, email, facsimile, or electronically. *See Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2017 U.S. Dist. LEXIS 129955, at *25-26 (W.D. Ohio Aug. 15, 2017) (permitting opt-in plaintiffs to return consent forms via DocuSign) (Ex. 31); *Ross v. Jack Rabbit Servs., LLC*, No. 3:14-CV-00044-TBR, 2014 U.S. Dist. LEXIS 33142, at *15-16 (W.D. Ky. Mar. 14, 2014) (allowing opt-in plaintiffs to return consent forms by mail, email, or facsimile) (Ex. 32).

3. *The Court Should Permit Plaintiff to Issue a Reminder Notice*

Finally, Plaintiff proposes that a "reminder" notice be sent forty-five (45) days prior to the close of the opt-in period (i.e., halfway through the opt-in period). Courts have recognized that a second notice is appropriate in an FLSA collective action.

See Westley, 2019 U.S. Dist. LEXIS 93015, at *16 (allowing a reminder notice in a FLSA collective action) (Ex. 28); *Kidd v. Mathis Tire & Auto Serv., Inc.*, No. 2:14-cv-02298-JPM-dkv, 2014 U.S. Dist. LEXIS 142164, at *6 (W.D. Tenn. Sept. 18, 2014) (finding that a reminder notice serves the remedial function of the FLSA) (Ex. 33); *Craft v. Ray's LLC*, No. 1:08:cv-00627-RLY-JMS, 2008 U.S. Dist. LEXIS 105807, *8 (S.D. Ind. Dec. 31, 2008) (authorizing the plaintiffs to send a reminder notice midway through the notice period to individuals who do not respond to the original notice) (Ex. 34); *Sanchez v. Sephora USA, Inc.*, No. 11-03396 SBA, 2012 U.S. Dist. LEXIS 99924, at *18 (N.D. Cal. July 18, 2012) ("[C]ourts have recognized that a second notice or reminder is appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in.") (Ex. 35).

III. CONCLUSION

The burden Plaintiff carries to demonstrate that the putative collective members are similarly situated is light. Defendants' last-mile delivery drivers perform the same job duties, perform services for Defendants using their own vehicles, are paid a straight hourly rate, and are not paid a time-and-a-half overtime premium for hours worked over 40 in a workweek. This is more than sufficient for Plaintiff to satisfy his burden at this stage.

Plaintiff respectfully requests that the Court grant this Motion for Conditional Certification and authorize Plaintiff to issue the proposed notice and opt-in forms,

which will allow potential FLSA Collective Members to participate in this case.

Respectfully submitted,

/s/ David M. Blanchard
David M. Blanchard (P67190)
Frances J. Hollander (P82180)
BLANCHARD & WALKER, PLLC
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
Telephone: (734) 929-4313
blanchard@bwlawonline.com
hollander@bwlawonline.com

Date: July 26, 2021

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, my paralegal, Natalie M. Walter, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ David M. Blanchard
David M. Blanchard (P67190)
BLANCHARD & WALKER PLLC
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INDEX OF EXHIBITS

Exhibit No.	Description of Exhibit
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5	*Espinosa v. SNAP Logistics Corp., et al.* Complaint
6	*Kennedy v. Subcontracting Concepts, LLC, et al.* Complaint
7	*Brown v. AK Lawncare, Inc.*, No. 14-14158, 2015 U.S. Dist. LEXIS 139399 (E.D. Mich. Oct. 14, 2015)
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9	*Carter v. XPO Last Mile, Inc.*, No. 16-cv-01231-WHO, 2016 U.S. Dist. LEXIS 137176 (N.D. Cal. Oct. 3, 2016)
10	*Neff v. Flower Foods, Inc.*, No. 5:15-cv-254, 2016 U.S. Dist. LEXIS 183025 (D. Vt. Nov. 7, 2016)
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34 *Craft v. Ray's LLC*, No. 1:08:cv-00627-RLY-JMS, 2008 U.S. Dist. LEXIS 105807 (S.D. Ind. Dec. 31, 2008)

35 *Sanchez v. Sephora USA, Inc.*, No. 11-03396 SBA, 2012 U.S. Dist. LEXIS 99924 (N.D. Cal. July 18, 2012)

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK ROSS, individually and on behalf of similarly situated persons,

Plaintiff,

v.

SUBCONTRACTING CONCEPTS, LLC, AUTO-WARES, LLC, and JOHN DOES 1-10.

Defendants.

Case No. 2:20-cv-12994

Hon. Linda V. Parker

Magistrate Judge David R. Grand

I, Mark Ross, hereby declare the following:

1. I am a Plaintiff in this action against Defendants Subcontracting Concepts, LLC, Auto-Wares, LLC, and John Does 1-10. I am over the age of eighteen and competent to testify to the matters set forth in this declaration. The statements made in this declaration are made based on my personal knowledge, experiences, and observations.

2. I was employed by Defendants as a last-mile delivery driver from approximately June 2015 until November 2019.

3. As a last-mile delivery driver, my primary job duty was to deliver automobile parts from Defendant Auto-Wares' warehouses to their customers and the end users of the products.

4. Defendant SCI recruited me using craigslist.

5. Towards the end of my employment Defendant SCI implemented a smart phone application system that tracked my work and locations throughout the day called ecMobil.

6. I was supervised by an SCI regional supervisor named Rodney who occasionally checked in on me at my job sites.

7. SCI Assigned me to the job site with Defendant Auto-Wares.

8. Defendant SCI required me to report any on-the-clock accidents within 24 hours and provide documentation of the accident.

9. After was hired to work for SCI, the company assigned me to work at the Defendant Auto-Wares warehouses, and I had no discretion to accept or decline a job assignment.

10. Defendant Auto-Wares set the hours I worked and routed or re-routed me throughout the workday.

11. I performed delivery services for Defendants using my own personal vehicle.

12. While working for Defendants, I was paid as an independent contractor. I occasionally spoke to other SCI drivers at the facility about pay and working conditions and so I know others were also paid as independent contractors and not paid an overtime premium.

13. While working for Defendants, I regularly worked over 40 hours per week without receiving overtime compensation. I was also unreimbursed for the mileage and cost of driving 100 or more miles per day.

14. Defendant SCI paid me only $11 per hour, even when I worked more than forty hours.

15. Based on my personal knowledge, observations, experiences, and conversations, I believe that many other individuals performed similar job duties as me and were subject to the same company-wide compensation plan.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: Jul 16, 2021

Mark E. Ross
Mark E. Ross (Jul 16, 2021 09:16 EDT)

Mark Ross

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Exhibit 2

MARK ROSS, individually and on behalf of similarly situated persons,

Plaintiff,

v.

SUBCONTRACTING CONCEPTS, LLC, AUTO-WARES, LLC, and JOHN DOES 1-10.

Defendants.

Case No. 2:20-cv-12994

Hon. Linda V. Parker

Magistrate Judge David R. Grand

I, Raynard Hurst, hereby declare the following:

1. I am an opt-in Plaintiff in this action against Defendants Subcontracting Concepts, LLC, Auto-Wares, LLC, and John Does 1-10. I am over the age of eighteen and competent to testify to the matters set forth in this declaration. The statements made in this declaration are made based on my personal knowledge, experiences, and observations.

2. I was employed by Defendant SCI as a last-mile delivery driver from approximately September 2012 until spring of 2019.

3. As a last-mile delivery driver, my primary job duty was to deliver automobile parts from Defendants' warehouses to their customers and the end users of the products.

4. After I was hired to work for SCI, the company assigned me to work at various warehouses, and I had no discretion to accept or decline a job assignment.

5. Early in my employment with SCI, SCI assigned me to deliver automobile parts from the Hastings-Conant building for a few weeks, then from A & J for a few weeks. For the remainder of my employment, SCI assigned me to Maxi/Auto-Wares.

6. At Hastings, I worked with three other SCI drivers. At A & J, I worked with approximately eight other drivers. At Maxi/Auto-Wares, I worked with approximately 8-10 other drivers. I also worked with 4-5 other drivers who worked directly out of Defendant Auto-Wares' Warehouse.

7. It is my understanding that Maxi was purchased by Defendant Auto-Wares on or around 2017 or 2018.

8. I was referred to SCI by a friend who gave me the number for a hiring recruiter. When I called we discussed the job duties and anticipated mileage for the delivery work and then I was given paperwork for hiring.

9. SCI would send someone to the job site to check my insurance and licensing every six months or so.

10. Defendant Maxi/Auto-Wares set the hours I worked and routed or re-routed me throughout the workday.

11. I performed delivery services for Defendants using my own personal vehicle.

12. While working for Defendants, I was classified as an independent contractor and not paid overtime.

13. While working for Defendants, I regularly worked over 40 hours per week without receiving overtime compensation. I was also unreimbursed for the mileage and cost of driving 100 or more miles per day.

14. Defendant SCI paid me only $11 per hour, even when I worked more than forty hours.

15. Based on my personal knowledge, observations, experiences, and conversations, I believe that many other individuals, such as other drivers I worked alongside: Eric, Chris Martin, Jean-Luc, Nick and others, performed similar job duties as me and were subject to the same company-wide compensation plan.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: Jul 23, 2021

Raynard Hurst
Raynard Hurst (Jul 23, 2021 18:30 EDT)

Raynard Hurst

For Office Use Only
*Client #*_____
*ID#*_____
Version 2015-0401

OWNER / OPERATOR AGREEMENT

Exhibit 3

THIS AGREEMENT and its APPENDICES A and B, made this

1 day of June 2015 by and between Subcontracting Concepts LLC, a New York limited
(day) (month) (year)

liability Company, "SCI", located at 25 Willowbrook Road, Queensbury, NY 12804, and

Mark Ross, an entity or proprietor or authorized agent of
(first name) (last name)

_____ a business located at
(company name if paid via EIN)

[redacted], Detroit, MI 48219,
(address) (city) (state) (zip code)

DEFINITIONS

1. **"Logistics Brokers"** shall refer to businesses that market, sell, and provide logistical support for the delivery of tangible items.
2. **"Owner / Operators"** are in the business of providing delivery services for Logistics Brokers and receivers of deliveries.
3. **"Delivery Customers"** shall refer to the receivers of any tangible items by an Owner / Operator.
4. **"Customers"** shall refer collectively to Logistics Brokers and Delivery Customers.
5. **"Third Party Administrator or TPA"** shall refer to business that procures, qualifies, and supports Owner / Operators.

WITNESSETH

WHEREAS, SCI is a third party administrator or TPA.

WHEREAS, Mark Ross is an Owner / Operator.

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements contained herein, the parties agree as follows:

FIRST: The Owner / Operator agrees to provide SCI its legal business name, DBA(s), and Federal Employer ID Number prior to offering its services to any Logistics Brokers and further agrees to provide proof of registration, vehicle insurance and a valid license. Owner / Operator further understands the failure to provide updated valid licensing, registration, and insurance information as necessary will incur additional fees as detailed in paragraph twenty-one and twenty-two. The Owner / Operator also agrees to obtain all necessary business licenses required for their geographic area.

SECOND: The Owner / Operator agrees to use the vehicle(s) described in Appendix A in support of its business, and represents that the vehicle(s) is/are owned, leased or is fully authorized to utilize the vehicle(s) in connection with the delivery services agreed to perform; Owner / Operator also agrees to read the applicable state specific warranties attached as Appendix B and incorporated herein.

THIRD: The Owner / Operator represents that the vehicle(s) listed in Appendix A are properly registered and agrees to keep all valid registrations in full force and effect. Owner / Operator may display on any vehicle(s) used to perform services under this Agreement, logos, including any that are registered trademarks of any of its Customers, meeting the requirements of the applicable Federal and State Department of Transportation/Public Utility or other similar authority. Owner / Operator may be issued an identification card containing the name and/or logo of a Customer while performing services, and may be furnished with clothing or be required to purchase or rent such clothing containing such name and/or logo, to be worn or shown, as the case may be, when required or requested by its Customers for security purposes. Such cards and clothing shall be worn or shown, as the case may be, only when performing services for such customer.

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MR
INITIAL

FOURTH: The Owner / Operator agrees to keep, at its sole expense all the equipment it provides pursuant to this Agreement, including but not limited to the vehicle(s) described above, in good operational condition throughout the term of this Agreement. The Owner / Operator further agrees that, at their discretion, it will replace any disabled equipment with equivalent equipment expeditiously.

FIFTH: In lieu of rendering services directly, the Owner / Operator has the right to provide and utilize qualified licensed drivers and other personnel as required in connection with the execution and performance of delivery assignments accepted by the Owner / Operator. If additional drivers are used, then the Owner / Operator warrants: 1) All such drivers shall have the same qualifications required of Owner / Operator; 2) Owner / Operator shall be fully responsible for all acts of such drivers in connection with this Agreement; 3) Whenever required by law, the Owner / Operator shall obtain and maintain, and shall utilize only drivers who have valid licenses; and 4) All licenses remain valid for so long as Owner / Operator and its drivers, as the case may be, continue to perform services hereunder. Due to freight regulations and its Customers' requirements, the Owner / Operator agrees not to have any "non-essential" personnel on board his or her vehicle while the vehicle is on the Delivery Customer's premises or while the Owner / Operator's vehicle contains any freight, packages or envelopes that have been consigned for transportation and delivery.

SIXTH: The Owner / Operator agrees that no employer/employee relationship is created under this Agreement as a result of the relationship between SCI and the Owner / Operator or its Customers, and that the Owner / Operator is solely responsible for, and shall timely file all required returns and reports and pay any and all estimated and definitive Federal, State, and local income taxes, social security taxes, withholding taxes, payroll taxes, unemployment taxes, and any other taxes attributable to or imposed upon Owner / Operator in connection with the services furnished hereunder. Owner / Operator further understands and agrees that the Owner / Operator shall not be entitled to participate in any plans, arrangements or distributions pertaining to or in connection with any pension, stock, bonus, profit sharing, medical or similar benefits, and that the Owner / Operator is not covered under any unemployment, disability or workers' compensation insurance policy of SCI or the Owner / Operator's Customers. Owner / Operator further agrees that prior to providing any services hereunder he/she shall obtain, and shall keep in full force and effect throughout the term of this Agreement and for so long as Owner / Operator shall furnish services hereunder, such worker's compensation or occupational accident insurance, disability insurance, automobile and general liability insurance as are described in this Agreement, and any other insurance necessary and appropriate to cover loss or damage to property and injury or death to persons in connection with the services furnished by Owner / Operator hereunder. All of such insurances shall be in such amounts, and in such form as is acceptable.

SEVENTH: SCI may recommend to Owner / Operator Occupational Accident Insurance providers and plans that SCI has had experience dealing with. In the event the Owner / Operator declines SCI's recommendations, then an Owner / Operator is free to choose his or its own plans and providers; However, Owner / Operator agrees to present a policy Certificate of Worker's Compensation Insurance or Occupational Accident coverage naming SCI. If Owner / Operator accepts a recommended Occupational Accident Insurance plan or provider, then Owner / Operator authorizes and directs SCI to deduct directly from any compensation payable to Owner / Operator a program fee for services furnished hereunder, the costs and premiums payable in connection with the maintenance of such policy for Owner / Operator will be included therein. Owner / Operator shall submit accident and injury occupational accident policies with a $1 million dollar combined limit that meets the insurance standards herein.

EIGHTH: The Owner / Operator warrants its drivers used in its delivery services will comply with all applicable laws, customary rules of conduct, regulations and ordinances related to the services provided by Owner / Operator under this Agreement, including but not limited to, the maximum hours of services, safety of operation and other requirements of the Motor Carrier Safety Regulations. The Owner / Operator and its drivers agree to maintain at all times all driver logs required by any Federal and/or State agencies which have jurisdiction over them. Owner / Operator acknowledges that many states' Department of Transportation, as well as other state and federal agencies, restrict the use of drugs or alcohol while on dispatch and prohibit unauthorized personnel from being inside a delivery vehicle while under dispatch and may require drug and/or alcohol testing at random checkpoints or in the event of an accident; Owner / Operator further agrees to abide by these state and federal mandated requirements.

NINTH: The Owner / Operator is responsible for, and shall pay, expense items which are normal costs of a delivery business, such as tolls, fuel, oil, tires, repairs, garaging, parking and maintenance of vehicle(s) and other equipment, as well as, office rent, overhead, salaries, taxes and any other business expenses that may be required to perform services for its Customers. The Owner / Operator further agrees to supply at his sole expense all business cards, manifests and material associated with marketing for the delivery business. The Owner / Operator warrants it will file business tax returns for the year(s) in business.

TENTH: The Owner / Operator is not required to purchase or rent any products, equipment or services from SCI or Owner / Operator's Customers as a condition of its entering into this Agreement, but may do so at their own discretion. The Owner / Operator acknowledges the need to supply communications equipment compatible with the system being used by the Logistics Broker for the purpose of offering, accepting, and providing delivery services.

ELEVENTH: The Owner / Operator shall obey, and shall cause all drivers utilized by Owner / Operator to obey, all State and Federal laws, and shall pay and shall cause all drivers and/or other Owner / Operators utilized by Owner / Operator to pay all fines

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for violations of any law, rules or regulations arising out of the use of the vehicle(s) described herein. The Owner / Operator must maintain required Customer specified liability insurance, valid vehicle registration and a valid driver's license as required by the state. SCI, at their discretion, may require photocopies or other proof of any or all of these required documents for security purposes.

TWELFTH: The Owner / Operator agrees to maintain throughout the term of this Agreement, and, for so long as services are furnished herein, insurance that will hold SCI and Owner / Operator's Customers harmless from any and all liabilities, losses, damages, injuries, claims, expenses or the like, that result, at least in part, from or arise out of or by reason of, the operation or use of vehicles or the utilization of drivers or other Owner / Operators. Such insurance shall include, but not be limited to, insurance covering loss, theft or damage to cargo in the Owner / Operator's possession; automobile liability insurance in an amount not less than the state mandated minimum or an amount defined by any of Owner / Operator's Customers, as well as workers' compensation or occupational accident insurance described in this Agreement.

THIRTEENTH: For insurance purposes, the Owner / Operator agrees to notify SCI and its Customer of any and all accidents in which the Owner / Operator's drivers are involved, and of any loss or damage to property transported. The initial report will be made via telephone within four (4) hours of the accident or loss or damage, followed by a written report within five (5) days of the occurrence, together with, in the case of an accident, a copy of the MV-104 accident report (or such other applicable accident report form), as filed with the Department of Motor Vehicles.

FOURTEENTH: The results achieved are more important than the methods used by which the results are achieved; therefore, the Owner / Operator and its drivers are free to select their own routes or the order of their deliveries, taking into account the needs and deadlines of their Customers. The Customer may have specific requirements and the Owner / Operator must decide to accept or decline the offer of work if they cannot meet those delivery requirements.

FIFTEENTH: For each completed delivery or negotiated route, the Owner / Operator shall be paid a fee based on the schedule of rates negotiated by them. In order to ensure proper payment, a delivery shall be deemed complete when the pickup and delivery has been finished and all required paperwork, including a correct and complete invoice have been furnished. A complete invoice shall include all related bills of lading and other shipping documentation. Payment should be received after completion of the delivery and the receipt of the invoice and documentation from Owner / Operator in the time period agreed to with the Logistics Broker. SCI will immediately process payments it has received funding for from the Logistics Broker and distribute payment at the appropriate time. The Owner / Operator may challenge the amount processed by SCI within fifteen (15) days from the date the payment was issued, by submitting a letter to SCI and/or the Owner / Operator's Customer, setting forth the specific reason for the challenge. The negotiation of the settlement check by the Owner / Operator, without timely objection as described above, shall constitute acceptance of the fees and payment processed for the Owner / Operator. The Customer is under no obligation to continue to offer delivery work to an Owner / Operator they feel is not meeting the Customer's expectations or for acting in an unprofessional manner. It is also understood delivery volumes will fluctuate and may have an effect on the amount of work offered to the Owner / Operator.

SIXTEENTH: Owner / Operators have the right, in their discretion, to accept or reject assignments from Customers. The Owner / Operators will be notified of any assignment by any agreed upon means of communication. In the event, the Owner / Operator rejects an assignment, it shall notify the Customer by whatever means of communication are suitable. Before the Owner / Operator decides to accept an assignment from another Customer, the Owner / Operator must check with its Customer to be certain that there are no legal restrictions or Customer rules that would preclude Owner / Operator from mixing product during transport, (i.e. a TSA regulated package, a class 2 regulated narcotic, radio pharmaceuticals, etc) The Owner / Operator also agrees to assist the Customer in the resolution of complaints.

SEVENTEENTH: The Owner / Operator and all of its drivers or associates, if any, agrees not to transport any hazardous materials (as defined in 49 CFR 172.101), unless the Owner / Operator and such drivers handling and transporting such items, is in complete compliance with all applicable Federal, State and local laws, ordinances, rules, regulations and other requirements.

EIGHTEENTH: The Owner / Operator shall be responsible for all losses, injuries or damages that occur in connection with the performance of services provided hereunder by the Owner / Operator or its drivers. The Owner / Operator agrees to indemnify, defend, and hold harmless SCI and/or Owner / Operator's Customers for any and all liability, damage, cost and expense incurred by SCI and/or its Customer(s).

NINETEENTH: The Owner / Operator may be further financially liable for failure to complete a delivery and for any driver replacement costs, claims for coverage, shortage or damage. The Owner / Operator specifically grants SCI and the Logistics Broker the right to subrogate against it/him, and deduct any such costs from any settlements due, including driver replacement costs, for any claims that SCI and/or the Logistics Broker elects or is obligated to pay or settle.

The Owner / Operator further agrees to indemnify, defend, and hold harmless SCI and the Logistics Broker for and against all damage to, destruction of, or loss of use of the equipment described herein under this Agreement.

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TWENTIETH: Non-Disclosure / Confidentiality Provision. The Owner / Operator understands that during performance of services hereunder the Owner / Operator and drivers retained to perform services hereunder, may become privy to confidential information of SCI, and the Logistics Broker, including but not limited to, contact information, personal data, routes, customer identities, costs and billing methods, financial information, and information regarding the business, operations, processes, procedures,

along with technology, software, systems, and other confidential and proprietary information. It is agreed that these items are considered to be "Confidential Information", proprietary, and the trade secrets belonging to SCI or the Logistics Broker, respectively, and such information shall not be disclosed by Owner / Operator or any person or entity associated with the Owner / Operator or used IN ANY WAY by Owner / Operator (its drivers or associates) for any purpose whatsoever, other than as necessary in the performance of its service obligations. Owner / Operator agrees that, in the event of any breach or threatened breach of these confidentiality obligations by the Owner / Operator or its drivers or associates, the damages to be suffered by the rightful owner of such Confidential Information are immeasurable, and therefore, such rightful owner shall have the right, in addition to any other remedies available at law or in equity, to obtain an injunction enjoining such threatened breach or further breach of such obligations. The Owner / Operator is not obligated to inform SCI or the Logistics Broker about similar services he or she may be performing for others.

TWENTY-FIRST: The term of this Agreement shall commence on the date of execution of this document by SCI and the Owner / Operator, and shall continue for a period of ninety (90) days, subject to renewals, unless either party desires to cancel this Agreement. Notification of a party's intent not to renew this Agreement must be in writing and served upon the other party at least ten (10) days before the upcoming expiration date and shall be delivered by US Mail, Certified or Registered, return receipt requested, or by hand with receipt by the party to be served, acknowledged. If the Owner / Operator terminates this contract without 10 days' notice and not on the anniversary of the 90 day renewal, the Owner / Operator may be required to pay a penalty for said cancellation and authorizes SCI to deduct $250 from the final settlement payment. In addition, this Agreement may be canceled by SCI upon the failure of the Owner / Operator to comply with any of the terms and conditions herein, including failure of the Owner / Operator to follow generally accepted rules of conduct, as may be expected by any Customer and for not providing current valid licensing, insurance, and vehicle registration information. Such cancellation shall be immediate upon notice from SCI, or may occur at some later date, at the sole election of SCI specified in its notice of cancellation. Cancellation will also result if SCI has not received a request to process payment for a period of ninety (90) days.

TWENTY-SECOND: In order to comply with certain state and federal regulations, as well as many Delivery Customer's requirements, Owner / Operator authorizes SCI to perform or cause to be performed background checks on Owner / Operator or any of its drivers or associates or on other Owner / Operators, so engaged, at the expense of the Owner / Operator. Owner / Operator futher agrees additional costs and fees will be withheld by SCI for failing to provide current valid licensing, vehicle insurance, and registration information. The background checks may include but are not limited to, criminal and motor vehicle driving records, drug testing and credit reports. The Owner / Operator also agrees to random drug testing and DMV reports through the term of this agreement.

TWENTY-THIRD: This Agreement shall constitute the entire Agreement between the parties and shall supersede any other written or oral agreement between the parties with respect to the subject matter hereof. This Agreement may not be altered or amended except by a writing signed by both parties. This Agreement shall be governed by the laws of the State of New York. If any provision of this Agreement or portion thereof is held to be unenforceable by a court of law or equity, said provision or portion thereof shall not prejudice the enforceability of any other provision or portion of the same provision, and instead such provision shall be modified to the least extent necessary to render such provision enforceable while maintaining the intent thereof.

TWENTY-FOURTH: Owner / Operator acknowledges that any electronic signature has the same force and effect as the use of a signature affixed by hand, under New York Law Section 302.3 of the Electronic Signatures and Records Act.

TWENTY-FIFTH: Owner / Operator agrees he or she has read and understood the terms of this contract and by signing this agreement acknowledge they did not need a version of its terms in another language, although other foreign language versions of this agreement are available.

TWENTY-SIXTH: ARBITRATION

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, or service arrangement between Owner / Operator and SCI's clients, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, the parties shall consult and negotiate with one another in good faith, in an attempt to reach a just and equitable solution, satisfactory to both parties. If resolution of the dispute, claim, question, or disagreement is not reached within a period of 60 days, then upon notice by either party, disputes that are within the jurisdictional maximum for small claims will be settled in the small claims court where the Owner / Operator resides.

All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts within the locality of the Owner / Operator's residence shall be finally settled by arbitration in accordance with the Federal Arbitration Act.

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Neither you nor SCI shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.

The arbitration panel shall be made up of three (3) people. Each party shall choose one arbitrator that will serve on the panel in a non-neutral capacity. The two chosen arbitrators will select a third arbitrator who will be neutral. If the chosen arbitrators are unable to select a third arbitrator within ten (10) days of their selection, a third arbitrator shall be appointed by the American Arbitration Association. Each arbitrator shall have experience in the transportation industry and have a legal background.

Consistent with the expedited nature of arbitration, each party will upon written request of the other party promptly provide copies of any relevant documents necessary to support any claim or defense. All parties shall have the discretion to examine up to three (3) witnesses per party. Each deposition shall be limited to a maximum of two (2) hours. Any objections based on privilege and/or confidential information will be reserved for arbitration. The arbitration and any discovery prior to the arbitration will take place in a location convenient to both parties. The parties may submit briefs in lieu of any formal gathering for arbitration.

The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. All parties shall bear their own costs for arbitration and no attorney's fees or other costs shall be granted to either party.

The arbitrators' decision shall be final and legally binding and judgment may be entered thereon.

TWENTY-SEVENTH: Owner / Operator acknowledges they have read this contract and its terms and agree to abide by the terms and conditions outlined in these documents.

IN WITNESS WHEREOF, the Owner / Operator has had sufficient time to review this document and the parties hereto have caused this Agreement and specific states endorsement and understandings to be duly executed the day and year first above written.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS-ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES

OWNER / OPERATOR:

DocuSigned by:
X Mark Ross
SIGNATURE: [redacted]7A2447...

6/1/2015
DATE:

Mark Ross
PRINTED NAME:

[redacted]
ADDRESS:

Detroit MI, 48219
CITY/STATE/ZIP:

FEDERAL EIN#:

[redacted]
SOCIAL SECURITY NUMBER:

SCI:

SIGNATURE

6/1/2015
DATE:

BY: Robert Slack

ADDRESS: 25 Willowbrook Road
Queensbury, NY 12804

APPENDIX A

EQUIPMENT LIST

First Name: Mark Last Name: Ross SSN: [redacted]

LICENSE INFORMATION *(please attach copy of license)*

Driver's License #: [redacted] Expiration: [redacted]/2018 State of Issue: MI

Is this a Commercial Driver's License? (Yes/No) No

Do you have a Department of Transportation Number (DOT#)? If so, please enter: _____

Do you have an interstate Operating Authority (MC/FF/MX Number)? If so, please enter: _____

VEHICLE & INSURANCE INFORMATION *(please attach copy of vehicle registration and insurance card / declaration page)*

Main vehicle to be used by you for delivery work

Year: 2002 Registration State: MI Make: Ford Model: Focus

Vehicle Identification Number (VIN): [redacted] Registration Expiration: [redacted]/2016

Insurance Carrier: State Farm Policy #: [redacted]

Insurance Expiration: 07/26/2015 Limit Per Person: $3,000,000,000 Limit Per Accident: $3,000,000,000

Do you (Own/Lease/Rent) the vehicle you are driving? Own

Is this a (choose one: personal/commercial/unknown) auto insurance policy? Personal

Are you the insurance policy holder on this vehicle? (Yes / No) Yes

Is this vehicle a Motor Vehicle, Truck or Power Unit?: (see definition below) Motor Vehicle

Motor Vehicle - means a private passenger land motor vehicle, automobile, van, or four-wheel drive vehicle that weighs 10,000 lbs. or less. Motor Vehicle does not include any of the following motorized and non-motorized bicycles (2-wheels), tricycle (3-wheels), scooters, skates, skateboards, foot messengers, snowmobiles, motorcycles, mopeds, ATV's (all-terrain vehicles), and trucks or any vehicles weighing more than 10,000 lbs.

Truck – means a private passenger land motor vehicle, truck or vehicle that weighs more than 10,000 lbs., but less than 26,000 lbs. Truck does not include any of the following; motorized and non-motorized bicycles (2 wheels), tricycles (3 wheels), scooters, skates, skateboards, foot messengers, snowmobiles, motorcycles, mopeds, or ATVs (all-terrain vehicles). It also does not include automobiles, vans, four wheel drive vehicles, trucks, or any vehicles weighing 10,000 lbs. or less, or more than 26,000 lbs.

Power Unit - means a truck or vehicle that weighs 26,000 lbs. or more. Power Unit does not include any of the following; motorized and non-motorized bicycles (2 wheels), tricycles (3 wheels), scooters, skates, skateboards, foot messengers, snowmobiles, motorcycles, mopeds or ATV's (all-terrain vehicles). It also does not include automobiles, vans, four wheel drive vehicles, trucks, or any vehicles weighing less than 26,000 lbs.

FOR OWNER OPERATORS PERFORMING SERVICES IN THE STATE OF CALIFORNIA

Please enter your Motor Carrier Permit

(MCP) Number: _____

MCP Expiration Date: _____

FOR OWNER OPERATORS PERFORMING SERVICES IN THE STATE OF WASHINGTON

Please enter your Unified Business Identifier

(UBI) Number: _____

UBI Expiration Date: _____

Signature: DocuSigned by: Mark Ross 05B69B44E7A2447... Date: 6/1/2015

APPENDIX B - STATE SPECIFIC WARRANTIES

1. **COLORADO:**

The Owner / Operator further warrants:

- It is not required to work exclusively for any Customer, but if it does, it does so for a finite period of time;
- This Agreement is mutually agreed upon and does not authorize SCI to oversee the actual work or instruction on how to perform such work;
- The Owner / Operator will not receive a salary or hourly rate, only a negotiated fixed or contract rate.
- The contract will terminate as stated herein;
- SCI is not authorized to provide training;
- SCI will not provide tools or employment like benefits;
- SCI will not dictate the time of performance for deliveries;
- SCI will provide payment to any trade or business name provided by the Owner / Operator;
- Its business operations will remain separate and distinct from SCI and its Customers;
- **Owner / Operator is not entitled to receive unemployment insurance compensation coverage.**

2. **OREGON and NEW JERSEY:**

Owner / Operator acknowledges they are responsible to pay expense items that are the normal costs of doing business, such as tolls, fuel, oil, tires, repairs, garaging, parking and maintenance of vehicle(s) and other equipment, as well as, rent, office overhead, salaries, taxes and any other business expenses that may be required to perform its services. Owner / Operator further acknowledges and warrants:

- Owner / Operator is registered to do business within its respective state and locality of operation;
- Owner / Operator has or will file Federal and state income tax returns in the name of the business;
- Owner / Operator advertises its business;
- Owner / Operator maintains a separate office or base of operation;
- Owner / Operator endeavors to perform delivery services for various Customers.

3. **NEW YORK:**

Owner / Operator acknowledges they are responsible to pay expense items that are the normal costs of doing business, such as tolls, fuel, oil, tires, repairs, garaging, parking and maintenance of vehicle(s) and other equipment, as well as, rent, office overhead, salaries, taxes and any other business expenses that may be required to perform its services.
Owner / Operator further warrants:

- Owner / Operator may set their own work schedules, and is free to accept or reject assignments;
- Any settlement payment was the result of a negotiated fixed or contract rate;
- The Owner / Operator files the appropriate business tax returns for any year in business;
- The Owner / Operator maintains a separate business identity with an EIN number;
- The Owner / Operator advertises its business and work for others;
- The Owner / Operator maintains a separate business or office space.

4. **ILLINOIS / NEVADA / MARYLAND / NEW HAMPSHIRE:**

- Owner / Operator is registered to do business within its respective state and locality of operation;
- Owner / Operator has or will file Federal and state income tax returns in the name of the business;
- This Agreement does not void any benefits Owner / Operator may be entitled to receive under state or federal law;
- The Owner / Operator advertises its business and work for others;
- The Owner / Operator maintain separate business or office space.
- The Owner / Operator is responsible for paying Social Security Taxes and State and Federal income Taxes; that the Social Security tax includes the individual's portion as well as the business's portion; that the work is not covered employment under Maryland law

5. **OHIO / WASHINGTON:**

- Owner / Operator is registered to do business within its respective state and locality of operation;
- Owner / Operator has or will file Federal and state income tax returns in the name of the business;
- Owner / Operator maintains workers' compensation insurance for any employees that reside in the state or reside outside the state but fall with the respective state's guidelines for maintaining workers' compensation insurance.

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Independent Contractor Acknowledgement Form

By initialing, you are acknowledging you read and understood each provision

As an Owner / Operator and self-employed businessperson, you have many advantages that would not be afforded you otherwise. Likewise, you have many obligations. To give you the best opportunity to have your business grow and succeed, please read the provisions below and initial each verifying you understand the advantages and obligations of offering your services as an independent Owner Operator.

1. You are responsible for all of your own expenses related to the daily operations of your business and you are not entitled to reimbursement for those expenses (i.e. gas, tolls, cell phone, etc.). Initial to the right

INITIALS DS MR

2. In order to perform delivery services for SCI's clients you are responsible for providing proof of a valid license, auto insurance and registration initially and as each expire. Failure to provide such information may result in the payment of additional fees for SCI to gather this information.

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3. You will receive no instruction about how to perform a particular delivery, except those received from the delivery customer regarding when and where a delivery is to be performed and addressing any security concerns.

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4. You will receive no supervision about how to perform agreed upon delivery services but will have available to you an initial orientation regarding particular customer procedures, communication and government regulations.

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5. You may choose to perform delivery services for other courier companies or shippers.

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6. You are entitled to set your own hours and may accept or reject any delivery opportunity offered.

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7. You are responsible to provide your own equipment, tools, and supplies to perform agreed upon delivery services (i.e. vehicle, map book, etc.). In addition, if you are contracted to perform routed or dedicated courier service, you are required to provide a qualified replacement driver to execute your contract when you are unable to.

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8. You are not required to perform a delivery services contract personally, but may utilize assistants or other replacements to perform agreed upon services. Sub-contractor drivers will be subjected to the same contracting criteria as you.

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9. You can terminate your contract with written notice as per your Agreement with SCI. There is no obligation to offer delivery work continually.

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10. You will be paid a negotiated amount or commission percentage for each service contract that you successfully execute.

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11. You will not have employment taxes withheld from your settlement commission check. You are not entitled to workers' compensation, unemployment benefits, health insurance, paid vacation time or other fringe benefits. You are responsible for providing your own insurance coverage and securing your own benefits.

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12. You will receive an IRS 1099-MISC form, to complete your income tax at year-end. You are required to file a Schedule C with your income tax return and to take advantage of business deductions available to self-employed businesspersons like yourself. You are responsible for filing and paying your own quarterly income tax if applicable. As well as any social security taxes.

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13. You are holding yourself out as a distinct and separately established business available to provide services to the general public for a fee. You intend to create an Owner / Operator relationship between all parties.

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14. You are free to make business investment and operational decisions at your discretion, which will affect the amount of your income and profit or loss.

INITIALS DS MR

15. You understand you are under no obligation to participate in the Occupational Accident policy program and or may purchase an equivalent policy.

INITIALS DS MR

16. You understand you may opt out of the Arbitration provisions within the Owner Operator Agreement by notifying SCI in writing, and by not opting out you are subject to the arbitration and class action waiver provisions contained therein.

INITIALS DS MR

I acknowledge that I understand the content that was included in this document. In addition, I intend to enter into an Owner / Operator Agreement of my own free will. I have been offered the opportunity to have this document reviewed before signing.

DocuSigned by:
Mark Ross
Owner / Operator's Name (signature)

6/1/2015
Date

Exhibit 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THEODORE BENDER Plaintiff, SUBCONTRACTING CONCEPTS LLC, a Foreign Limited Liability Company and AUTO TECH SOLUTIONS CORP. a Georgia Domestic Profit Corporation, and and JOHN DOE I and JOHN DOE II, Individual Managers of SUBCONTRACTING CONCEPTS LLC and JOHN DOE III and JOHN DOE IV, Individual Managers of AUTO TECH SOLUTIONS CORP. Defendants.	))) Civil Action Number:)))) Jury Trial Demanded)))))))))

FAIR LABOR STANDARDS OVERTIME COMPLAINT

COMES NOW Plaintiff Theodore Bender (hereinafter "Plaintiff" or "Bender"), by and through his undersigned counsel, and files this lawsuit against Defendants Subcontracting Concepts LLC (hereinafter "SCI") and JOHN DOE I and JOHN DOE II, individuals who operate and manage SCI and Auto Tech Solutions Corp. (hereinafter "ATS") and JOHN DOE III and JOHN DOE IV, individuals who operate and manage ATS (collectively "Defendants") pursuant to § 216(b) of the

Fair Labor Standards Act of 1938, and in support thereof would further state as follows:

INTRODUCTION

1. The instant action arises from Defendants' violations of Plaintiff's rights under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., as amended (hereinafter "FLSA"), to remedy violations of the overtime provisions of the FLSA by Defendants which have deprived Plaintiff of his lawful overtime wages.

2. Defendants employed Plaintiff as a deliveryman.

3. During the time relevant this action ("Liability Period"), Defendants improperly classified Plaintiff as an independent contractor rather than as an employee.

4. During the employment of Plaintiff, Defendants committed violations of the FLSA by failing to compensate him at the legally appropriate overtime rate for hours worked in excess of forty hours in a given workweek.

5. Plaintiff seeks overtime compensation for work performed, an equal amount of liquidated damages, attorneys' fees, costs, and other appropriate relief pursuant to 29 U.S.C. § 216(b).

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 29 U.S.C. § 216(b) (FLSA).

7. Venue is proper in the Northern District of Georgia under 28 U.S.C. § 1391 (b) and (c) because a substantial part of events or omissions giving rise to the claims occurred within the jurisdiction of this Court and because Defendants are subject to personal jurisdiction in this District.

PARTIES

8. Plaintiff Bender resides in Tucker, DeKalb County, Georgia (within this District).

9. At all times material to this action, Bender was an "employee" of Defendants defined by § 203(e)(1) of the FLSA, engaged in interstate commerce, and worked for Defendants within the territory of the United States. Plaintiff is further covered by §§ 203, 206, and 207 of the FLSA for the period in which he was employed by Defendants.

10. Defendants conduct business within this State and District.

11. Defendant SUBCONTRACTING CONCEPTS LLC ("SCI") is a Delaware corporation which has its principal place of business in Warren County,

New York, and is subject to the requirements of the FLSA. SCI conducts business in Gwinnett County, Georgia.

12. Defendant SCI is subject to personal jurisdiction in the State of Georgia for purposes of this lawsuit and can be served through its registered agent, CT CORPORATION SYSTEM, 1201 PEACHTREE STREET, N.E., Fulton, Atlanta, GA, 30361, USA.

13. Defendants JOHN DOE I and JOHN DOE II are individuals employed by SCI conducting business in Gwinnett County, Georgia and are responsible, in concert with ATS, and JOHN DOE III and JOHN DOE IV for the decisions that deprive Plaintiff, from receiving overtime compensation in accordance with the FLSA.

14. Defendant AUTO TECH SOLUTIONS CORP. is a Georgia corporation which has its principal office place at 225 Peachtree Street, #1100, Atlanta, GA, 30303, USA, and is subject to the requirements of the FLSA. ATS conducts business in Gwinnett County, Georgia.

15. Defendant ATS is subject to personal jurisdiction in the State of Georgia for purposes of this lawsuit and can be served through its registered agent, Carsten Alting, 191 Peachtree Street, #2900, Fulton, Atlanta, GA, 30303, USA

16. Defendants JOHN DOE III and JOHN DOE IV are individuals employed by ATS conducting business in Gwinnett County, Georgia and are responsible, in concert with SCI and JOHN DOE I and JOHN DOE II, and ATS for the decisions that deprive Plaintiff, from receiving overtime compensation in accordance with the FLSA.

17. At all times material to this action, SCI was an enterprise engaged in commerce or in the production of goods for commerce as defined by § 203 of the FLSA, and had an annual gross volume of sales which exceeded $500,000.

18. At all times material to this action, ATS was an enterprise engaged in commerce or in the production of goods for commerce as defined by § 203 of the FLSA, and had an annual gross volume of sales which exceeded $500,000.

19. At all times material to this action, Defendants were "employers" of Plaintiff as defined by § 203(d) of the FLSA.

20. The overtime provisions set forth in § 207 of the FLSA apply to Defendants.

21. At all times material to this action, Plaintiff was an employee of Defendants engaged in commerce or in the production of goods for commerce as defined by § 203 of the FLSA.

FACTUAL ALLEGATIONS

22. SCI contracts with ATS to supply drivers, including Plaintiff, to deliver auto parts to auto repair shops.

23. Plaintiff was required to complete various forms provided by SCI falsely indicating that he was an independent contractor.

24. Plaintiff was paid weekly by SCI varying amounts depending upon the number of hours worked after SCI first deducted an SCI "Admin Fee" and an SCI "Program Fee (P) Courier."

25. Plaintiff was assigned to work from Defendant ATS' location at 352 Swanson Drive, Lawrenceville, Georgia, 30043 ("ATS Lawrenceville Location") by a Bryan Simon of SCI who hired Plaintiff and had him complete a drug test among other pre-hire requirements.

26. Ms. Charlotte Letham, the only ATS employee at the ATS Lawrenceville Location, managed said facility and managed Plaintiff and the other similarly SCI supplied drivers.

27. Plaintiff was required by SCI and ATS to work six days per week (8:00 am to 5:30 pm Monday thru Friday, and 8:00 am to 3:00 pm on Saturdays).

28. Plaintiff was required during those work hours to remain at the ATS Lawrenceville Location for Ms. Letham to provide him with work assignments including auto parts packages to deliver to auto repair businesses.

29. At times Ms. Letham also gave Plaintiff ATS invoices for delivery.

30. At times Ms. Letham required Plaintiff to collect payments from auto repair shops in the form of cash or check.

31. At times Ms. Letham required Plaintiff to perform other work duties at the ATS Lawrenceville Location such as putting away deliveries onto shelves.

32. Should Plaintiff want a day off, he had to get prior approval from both SCI by contacting Steve Tobin and ATS by contacting Ms. Letham.

33. If Plaintiff was late reporting for work, he would get a phone call from Ms. Letham, asking where he was.

34. Ms. Letham of ATS would keep track of Plaintiff's hours worked.

35. Plaintiff was required to telephonically stay in touch with Ms. Letham when he was out making deliveries.

36. Ms. Letham would tell Plaintiff when he was to take his lunch break.

37. If a driver was a no-show to work, Ms. Letham would call and let Steve Tobin of SCI know.

38. Plaintiff never rejected making a requested delivery as he did not believe he was allowed to.

39. Plaintiff also related to Ms. Letham's boss "Chris" and with Kevin Hudgins, a salesman for ATS on various other ATS issues.

40. Defendants employed Plaintiff between on or about September, 2014 thru the present as a delivery driver.

41. Defendants improperly treated Plaintiff as an independent contractor, when he should have been treated as an employee.

42. Plaintiff's duties while employed by Defendants were such that they did not satisfy the requirements of any of the exemptions set forth in the FLSA or its attendant regulations.

43. Plaintiff worked in excess of forty (40) hours a workweek while employed by Defendants.

44. Despite regularly working in excess of forty (40) hours a workweek, Plaintiff did not receive overtime compensation for such overtime hours as required under the FLSA.

45. At all times relevant to this action, Defendants did not compensate Plaintiff for hours worked in excess of forty hours per week at a rate not less than one and one-half times the regular rate at which he was employed.

46. Defendants failed to meet the requirements for any of the exemptions from application of the overtime compensation requirements of the FLSA under 29 U.S.C. §§ 207 or 213 with respect to Plaintiff.

47. Defendants failed to meet the requirements for paying Plaintiff at a rate not less than one and one-half times the regular rate at which he was employed, at which Plaintiff was legally required to be paid under the compensation requirements of the FLSA under 29 U.S.C. §§ 203 and 207.

48. Plaintiff is entitled to compensation for any and all time worked in excess of forty hours per week at the rate of at least one and one-half times his regular rate at which he was legally required to be paid under the compensation requirements of the FLSA under 29 U.S.C. §§ 203 and 207.

49. By reason of the said intentional, willful and unlawful acts of Defendants, Plaintiff has suffered damages plus incurring costs and reasonable attorneys' fees.

50. As a result of Defendants' failure to act with good faith in compensating Plaintiff, he is entitled to liquidated damages.

51. Plaintiff has retained the undersigned counsel to represent him in this action, and pursuant 29 U.S.C. § 216(b), Plaintiff is entitled to recover all reasonable attorneys' fees and costs incurred in this action.

52. Plaintiff demands a jury trial.

COUNT I

53. Plaintiff repeats and incorporates by reference all preceding Paragraphs herein.

54. By its actions alleged herein, Defendants willfully, knowingly and/or recklessly violated the FLSA provisions and corresponding federal regulations as detailed herein, by failing to properly pay overtime wage compensation to Plaintiff in accordance with §§ 203 and 207 of the FLSA.

55. Defendants have not made a good faith effort to comply with the FLSA with respect to their overtime compensation of Plaintiff.

56. As a result of Defendants' violations of the FLSA, Plaintiff has suffered damages by failing to receive overtime compensation in accordance with §§ 203 and 207 of the FLSA.

57. As a result of the unlawful acts of Defendants, Plaintiff has been deprived of overtime compensation in an amount to be determined at trial, and is entitled to

recovery of such amounts, liquidated damages, pre- and post-judgment interest, costs, attorneys' fees, and other relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, pursuant to § 216(b) of the FLSA, prays for the following relief:

A. That Plaintiff be awarded damages in the amount of his unpaid compensation, plus an equal amount of liquidated damages;

B. That Plaintiff be awarded reasonable attorneys' fees;

C. That Plaintiff be awarded the costs and expenses of this action; and

D. That Plaintiff be awarded such other, further legal and equitable relief, including, but not limited to, any injunctive and/or declaratory relief to which he may be entitled.

Respectfully submitted this 29th day of December, 2016.

MARTIN & MARTIN, LLP

By: /s/ Th*omas F. Martin*
Thomas F. Martin
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Georgia Bar No. 482595

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Exhibit 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nestor Espinosa, Plaintiff, -v- SNAP Logistics Corp, USPack Logistics Corp., Subcontracting Concepts, LLC, and SCI Holdco, LLC, Defendants.	**Civ. Action #:** **Complaint** **Date Filed:** **Jury Trial Demanded**

Plaintiff Nestor Espinosa ("Plaintiff" or "Espinosa") by Abdul Hassan Law Group, PLLC, their attorney, complaining of Defendants SNAP Logistics Corp, USPack Logistics Corp., Subcontracting Concepts, LLC, and SCI Holdco, LLC, (collectively "Defendants"), respectfully alleges as follows:

NATURE OF THE ACTION

1. Plaintiff alleges that he was employed by Defendants, individually and/or jointly, and pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216 (b), that he is: (i) entitled to unpaid wages from Defendants for working more than forty hours in a week and not being paid an overtime rate of at least 1.5 times their regular rate for all such hours over forty in a week; and (ii) entitled to maximum liquidated damages, costs and attorneys' fees pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. including 29 U.S.C § 216(b).

2. Plaintiff further complains, that he is: (i) entitled to unpaid overtime wages from Defendants for working more than forty hours in a week and not being paid an overtime rate of at least 1.5 times the regular rate for all such hours over forty in a week, and (ii) entitled to maximum liquidated damages, costs and attorney's fees, pursuant to the New York Minimum Wage Act ("NYMWA"), N.Y. Lab. Law §§ 650 et seq., ("NYLL") including NYLL § 663, and the regulations thereunder - 12 NYCRR § 142-2.2.

3. Plaintiff is also entitled to recover his unpaid wages, and unlawful wage deductions, under Article 6 of the New York Labor Law including sections 191, 193, 196, compensation for not receiving notices and statements required by NYLL 195, under Article 6 of the New York Labor Law and is also entitled to maximum liquidated damages, including maximum liquidated damages on all wages paid later than weekly, and attorneys' fees pursuant to Section 198 of the New York Labor Law.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367. In addition, the Court has jurisdiction over Plaintiff's claims under the Fair Labor Standards Act pursuant to 29 U.S.C. § 216 (b).

5. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b) and/or 29 U.S.C. § 216 (b).

6. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

THE PARTIES

7. Plaintiff Nestor Espinosa (Plaintiff" or "Espinosa") is an adult, over eighteen years old, who currently resides in Bronx County in the State of New York.

8. Upon information and belief and at all times relevant herein, Defendants SCI Holdco, LLC, and Subcontracting Concepts, LLC (collectively "SCI"), were New York for-profit Limited Liability Companies, located at 25 Willowbrook Road, 2nd Floor North, Queensbury, NY 12804.

9. Upon information and belief and at all times relevant herein, Defendant USPack Logistics Corp. ("USPack") was a New York for-profit corporation with its principal place of business at 350 5th Ave, New York, NY 10118 – telephone: 212-631-0233.

10. Upon information and belief and at all times relevant herein, Defendants SNAP Logistics Corp ("SNAP") was a for-profit corporation, located at 581 Main Street, Suite #640, Woodbridge, NJ 07095.

11. At all times relevant herein, Defendants individually, and/or jointly controlled the employment of Plaintiff and was responsible for hiring, firing, scheduling, controlling, managing, supervising, and record- keeping as to plaintiff's employment, among other employment functions.

12. Upon information and belief and at all times relevant herein, Defendant SNAP was an agent of defendant USPack and were hired by USPack to service its contract with the United States Postal Service. In turn, SNAP and USPack hired Plaintiff to deliver to and pick up packages from numerous post offices in Long Island New York.

13. At all times relevant herein, defendant SNAP and USPack controlled Plaintiff's employment and supervised Plaintiff each workday – Defendants SCI provided payroll services and made payment of wages to Plaintiff each pay period.

14. At all times relevant herein, Defendants employed Plaintiff individually and/or jointly.

STATEMENT OF FACTS

15. Upon information and belief, and at all relevant times herein, Defendants were engaged in the business of providing shipping and delivery services across several states in the United States. See http://snap-go.com/services.php, http://www.gouspack.com/.

16. Upon information and belief and at all times relevant herein, Defendants, individually and/or jointly, employed hundreds or thousands of employees, including hundreds or thousands of employees in New York State.

17. At all times relevant herein, Plaintiff Espinosa was hired by Defendants as a manual worker performing duties such as driving, loading over 100 packages a day into the delivery vehicle, and handling/delivering packages throughout his workday.

18. At all times relevant herein, Defendants hired and employed Plaintiff to deliver to and pick up packages from numerous post offices in Long Island, New York, on a daily basis. Plaintiff would load over 100 packages from a warehouse shared by SNAP/USPack starting around 4:00 a.m. or 4:30 a.m. He would then drive to Long Island New York to deliver the packages to US post offices. After delivering packages all day, Plaintiff would pick up packages from the post office in Long Island at the end of the day and transport them to the warehouse of SNAP/USPack where they were offloaded.

19. At all times relevant herein, Plaintiff's work was integral to Defendants' business.

20. At all times relevant herein, throughout his workday, Plaintiff had to be available by electronic device/cellular phone to respond to calls from Defendants SNAP/USPack.

21. At all times relevant herein, the delivery vehicle Plaintiff drove and used to make deliveries, had the name of Defendant SNAP on it.

22. At all times relevant herein, Plaintiff was required by Defendants to wear an identification badge with the name of Defendant USPack printed on it.

23. At all times relevant herein, Plaintiff was required to represent himself as SNAP/USPack and was required to follow their rules and procedures in performing his job.

24. At all times relevant herein, Plaintiff was supervised by Defendants – personnel of SNAP/USPack would monitor Plaintiff's work in the field to determine if Plaintiff was complying with their delivery instructions and deadlines etc.

25. At all times relevant herein, Defendants, including Defendants SNAP/USPack directed and instructed Plaintiff as to what work to do and how to do such work.

26. At all times relevant herein, Defendants set Plaintiff's work schedule and work hours based on the requirements of SNAP/USPack delivery schedule.

27. At all times relevant herein, Defendants SNAP/USPack provided Plaintiff with tools and equipment to perform his job, including the electronic device used to scan packages and report information back to them during the workday.

28. At all times relevant herein, Plaintiff was never in business for himself and was economically dependent for employment, work and wages on Defendants. When Defendants terminated Plaintiff's employment on or about July 26, 2017, Plaintiff was out of work.

29. At all times relevant herein, Defendants, including SNAP/USPack, tracked and recorded the work hours of Plaintiff using the electronic device/scanner provided by them – they provided Plaintiff with an identification number and credentials to log into its system during his work shift.

30. At all times relevant herein, Plaintiff began working for Defendants at around 4:00 a.m. to 4:30 a.m. each day and his work day lasted about 11-13 hours each day or more (depending on traffic), six days a week throughout the period of his employment with Defendants – about 66-78 hours each week.

31. At all times relevant herein, Defendants paid Plaintiff approximately $28 an hour and did not pay him *any* wages for his overtime hours (hours over 40 in a week).

32. A more precise statement of the hours and wages will be made when Plaintiff Espinosa obtains the wage, time and employment records Defendants were required to keep under the FLSA (29 USC 211 and 29 CFR 516) and NYLL (NYLL 195 and 12 NYCRR 142-2.6). *Accurate* copies of Plaintiff's wage and time records that Defendants were required to keep are incorporated herein by reference.

33. At all times relevant herein and for the time Plaintiff was employed by Defendants, Defendants failed and willfully failed to pay Plaintiff an overtime rate of at least 1.5 times his regular rate of pay for all hours worked in excess of forty hours in a week.

34. At all times relevant herein, Defendants had a policy of making a variety of improper deductions from the wages of Plaintiff in violation of NYLL, including NYLL 193. For

example, Defendants deducted about $4590 from Plaintiff's wages for the cost of the vehicle Defendants required Plaintiff to use to perform his job for Defendants, and Defendants deducted about $300 from Plaintiff's wages for the cost of the scanner Defendants required Plaintiff to use to perform his job for Defendants – Plaintiff also had to pay about $500 a week from his wages to cover the cost of gas and tolls incurred while performing his job for Defendants. Defendants also made unlawful deductions from Plaintiff's wages for items such as program fees, damage to work/delivery vehicle, parking tickets, a State of Florida fund, transaction fees, etc. Plaintiff is entitled to recover these deductions/expenses pursuant to NYLL § 193.

35. At all times relevant herein, Defendants paid Plaintiff on a bi-weekly basis in violation of NYLL § 191 (1)(a)(i), which requires manual workers like Plaintiff to be paid on a weekly basis.

36. At all times relevant herein, Defendants did not provide Plaintiff with the notice(s) required by NYLL § 195(1).

37. At all times relevant herein, Defendants did not provide Plaintiff with the statement(s) required by NYLL § 195(3) – the statements provided to Plaintiff did not contain the hours worked by Plaintiff nor all rates of pay, among other deficiencies and do not list the employer(s) by name and address.

38. Upon information and belief and at all times relevant herein, Defendants, individually and/or jointly, had annual revenues from their operations of more than $500,000 – Defendants, individually and/or jointly, had annual revenues of millions of dollars at all times relevant herein.

39. All times applicable or relevant herein refers to the period that Plaintiff performed worked for Defendants, individually and/or jointly.

40. Upon information and belief and at all times applicable herein, Defendants did not display the required FLSA and NYLL posters of employee wage rights as was required by the FSLA and NYLL and the regulations thereunder.

41. The relevant and applicable times will be refined as is necessary, including after discovery if necessary.

42. The "·present" or the "present time" as used in this complaint refers to the date this complaint was signed.

AS AND FOR A FIRST CAUSE OF ACTION

(DECLARATORY JUDGMENT)

43. Plaintiff alleges and incorporates by reference the allegations in paragraphs 1 through 42 above as if set forth fully and at length herein.

44. At all times relevant herein, Defendants misclassified Plaintiff as an independent contractor, even though Plaintiff was at all relevant times, an employee of Defendants as a matter of law. Upon information and belief, Defendants individually, and/or jointly, were under investigation by the United States Department of Labor concerning their misclassification of workers as independent contractors instead of employees.

45. Plaintiff seeks a declaratory judgment that at all relevant times herein, he was an employee of Defendants, individually and/or jointly, under the Internal Revenue Code, and specifically, under the Federal Insurance Contributions Act ("FICA"). See 26 U.S.C. § 3121(b). U.S. v. MacKenzie, 777 F.2d 811, 814 (2d Cir., 1985).

46. Plaintiff also seeks a declaratory judgment that at all relevant times herein, he was an employee of Defendants, individually and/or jointly, under the federal Fair Labor Standard Act and New York Labor Law under which Plaintiff sues herein. See Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141–42 (2d Cir.2008). Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir.1988).

47. The declarations of employee status sought by Plaintiff herein, will allow Plaintiff to seek certain tax contributions from Defendants, as well as make him eligible to seek a range of benefits that comes with employee status such as unemployment insurance benefits, as well as benefits offered by Defendants to their other employees and other benefits provided by

law to employees. Plaintiff herein is seeking to recover all benefits that come with employee status that can be recovered in this action under law.

AS AND FOR A SECOND CAUSE OF ACTION

FAIR LABOR STANDARDS ACT - 29 U.S.C 201 et Seq. (Unpaid Overtime)

48. Plaintiff alleges and incorporates by reference the allegations in paragraphs 1 through 47 above as if set forth fully and at length herein.

49. At all times relevant to this action, Plaintiff was employed by Defendants, individually and/or jointly, within the meaning of the FLSA - 29 U.S.C 201 et Seq.

50. Upon information and belief, and at all times relevant to this action, Plaintiff was engaged in commerce and/or in the production of goods for commerce and/or Defendants constituted an enterprise(s) engaged in commerce within the meaning of the FLSA including 29 U.S.C. § 207(a).

51. Upon information and belief and at all times relevant herein, Defendants transacted commerce and business in excess of $500,000.00 annually or had revenues and/or expenditures in excess of $500,000.00 annually.

52. At all times relevant herein, Defendants failed and willfully failed to pay Plaintiff overtime compensation at rates of at least 1.5 times his regular rate of pay for each and all hours worked in excess of forty hours in a work week, in violation of 29 U.S.C. § 207.

Relief Demanded

53. Due to Defendants' FLSA violations, Plaintiff is entitled to recover from Defendants, his unpaid overtime and minimum wage compensation, maximum liquidated damages, attorneys' fees, and costs of the action, pursuant to 29 U.S.C. § 216(b).

AS AND FOR A THIRD CAUSE OF ACTION

NYLL 650 et Seq. and 12 NYCRR 142-2.2 (Unpaid Overtime)

54. Plaintiff alleges and incorporates by reference the allegations in paragraphs 1 through 52 above as if set forth fully and at length herein.

55. At all times relevant to this action, Plaintiff was employed by Defendants, individually and/or jointly, within the meaning of the New York Labor Law, §§ 2 and 651 and the regulations thereunder including 12 NYCRR § 142.

56. At all times relevant herein, Defendants, individually and/or jointly, failed to pay and willfully failed to pay Plaintiff overtime compensation at rates not less than 1.5 times his regular rate of pay for each and all hours worked in excess of forty hours in a work-week, in violation of the New York Minimum Wage Act and its implementing regulations. N.Y. Lab. Law §§ 650 et seq.; 12 NYCRR § 142-2.2.

Relief Demanded

57. Due to Defendants' NYLL overtime violations, Plaintiff is entitled to recover from Defendants, his unpaid overtime wages, maximum liquidated damages, prejudgment interest, attorney's fees, and costs of the action, pursuant to NYLL § 663.

AS AND FOR A FOURTH CAUSE OF ACTION

(NYLL § 190, 191, 193, 195, 196 and 198)

58. Plaintiff alleges, and incorporates each and every allegation contained in paragraphs 1 through 57 above with the same force and effect as if fully set forth at length herein.

59. At all times relevant to this action, Plaintiff was employed by Defendants, individually and/or jointly, within the meaning of the New York Labor law, §§ 190 et seq., including §§ 191, 193, 195, 196 and 198 and the applicable regulations thereunder.

60. At all times relevant herein, Plaintiff was employed by Defendants as a manual worker within the meaning of NYLL 191 (1)(a)(i) who should have been paid no later than weekly.

61. At all relevant times herein, Defendants violated and willfully violated Plaintiff's rights under NY Labor Law § 190 et seq. including NY Labor Law §§ 191, 193, 196 and 198 by

failing to pay Plaintiff his wages, including his unpaid non-overtime and overtime wages, (FLSA and NYMWA), and reimbursement for unlawful wage deductions such as gas/tolls/rental/electronic device etc. as further laid out above, within the time required under NY Labor Law § 190 et seq.

62. At all times relevant herein, Defendants failed and willfully failed to provide Plaintiff, with the notice(s) required by NYLL 195(1) – Plaintiff is therefore entitled to and seeks to recover in this action the maximum recovery for this violation, plus attorneys' fees and costs pursuant to NYLL 198 including NYLL 198(1-b), as well as an injunction directing Defendants to comply with NYLL 195(1).

63. At all times relevant herein, Defendants failed and willfully failed to provide Plaintiff with the statement(s) required by NYLL 195(3) – Plaintiff is therefore entitled to and seek to recover in this action the maximum recovery for this violation, plus attorneys' fees and costs pursuant to NYLL 198 including NYLL 198(1-d), as well as an injunction directing Defendants to comply with NYLL 195(1).

Relief Demanded

64. Due to Defendants' New York Labor Law Article 6 violations including violation of sections 191, 193, 196 and 198, Plaintiff is entitled to recover from Defendants, his entire unpaid wages, including his unpaid non-overtime wages, overtime wages, reimbursement for unlawful wage deductions, maximum liquidated damages, prejudgment interest, maximum recovery for violations of NYLL 195(1) and NYLL 195(3), reasonable attorneys' fees, and costs of the action, pursuant to N.Y. Labor Law § 190 et seq. including § 198.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

65. Declare Defendants, individually and/or jointly to be employers of Plaintiff, and declare Defendants, individually and/or jointly, (including their overtime and wage payment policy and practice), to be in violation of the rights of Plaintiff under the FLSA and New York Labor Law - 12 NYCRR § 142, and Article 6 of the NYLL, including NYLL §§ 191, 193,

196 and 198.

66. As to the **First Cause of Action**, issue a declaratory judgment that Plaintiff at all relevant times was an employee of Defendants, individually and/or jointly, under the Internal Revenue Code, including the Federal Insurance Contributions Act, as well as under the FLSA and NYLL.

67. As to the **Second Cause of Action,** award Plaintiff his unpaid overtime wages under the FLSA, together with maximum liquidated damages, costs and attorneys' fees pursuant to 29 USC § 216(b);

68. As to the **Third Cause of Action,** award Plaintiff his unpaid overtime wages due under the New York Minimum Wage Act and the regulations thereunder including 12 NYCRR § 142-2.2, together with maximum liquidated damages, prejudgment interest, costs and attorney's fees pursuant to NYLL § 663;

69. As to the **Fourth Cause of Action**, award Plaintiff his entire unpaid wages, including his unpaid non-overtime and overtime wages, reimbursement for unlawful wage deductions, maximum liquidated damages, including maximum liquidated damages on all wages paid later than weekly, prejudgment interest, maximum recovery for violations of NYLL 195(1) and NYLL 195(3), reasonable attorney's fees, and costs of the action, pursuant to N.Y. Labor Law § 190 et seq. including § 198, and issue an injunction directing Defendants to comply with NYLL 195(1) and NYLL 195(3).

70. Award Plaintiff, any relief requested or stated in the preceding paragraphs but which has not been requested in the WHEREFORE clause or "PRAYER FOR RELIEF", in addition to the relief requested in the wherefore clause/prayer for relief;

71. Award Plaintiff further and different relief as the Court deems just and proper.

Dated: Queens Village, New York

August 22, 2017

Respectfully submitted,

Abdul Hassan Law Group, PLLC

/s/ Abdul Hassan__________________
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Exhibit 6

Larry Kennedy, individually and on behalf of all others similarly situated, Plaintiffs, v. **Subcontracting Concepts, LLC**, a Delaware Limited Liability Company; **Smyth Automotive, Inc**., an Ohio Corporation, and **John Doe Corporations I-XX**, Defendants.	No. **COLLECTIVE AND CLASS ACTION COMPLAINT** **(Jury Demand Endorsed Hereon)**

Plaintiff, Larry Kennedy ("Plaintiff"), sues the Defendant, Subcontracting Concepts, LLC ("Defendant SCI"), Smyth Automotive, Inc., ("Defendant Smyth"), and John Doe Corporations I-XX (collectively "Defendants") and allege as follows:

PRELIMINARY STATEMENT

1. This is an action for unpaid wages, liquidated damages, attorneys' fees, costs, and interest under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.; Kentucky Revised Statutes ("KRS") § 337.285; and Ohio Revised Code Ann. ("ORC") § 4111.03 for Defendants' failure to pay Plaintiff all earned overtime wages.

2. The FLSA was enacted "to protect all covered workers from substandard wages and oppressive working hours." Barrentine v. Ark Best Freight Sys. Inc., 450 U.S. 728, 739 (1981). Under the FLSA, employers must pay all non-exempt employees a minimum wage of pay for all time spent working during their regular 40-hour workweeks. See 29 U.S.C. § 206(a). Under the FLSA, employers must pay all non-exempt employees one and one-half their regular rate of pay for all hours worked in excess of 40 hours in a workweek. See 29 U.S.C § 207.

3. KRS § 337.285 establishes the law regarding overtime within the State of Kentucky.

4. ORC § 4111.03 establishes the law regarding overtime within the State of Ohio.

5. Plaintiff brings this action on behalf of himself and all similarly-situated current and former employees of Defendants who were delivery drivers[1] classified by Defendants as independent contractors.

6. Plaintiff, individually, and on behalf of all others similarly-situated, brings this action against Defendants for their unlawful failure to pay minimum wage and overtime in violation of the Fair Labor Standards Act, 29 U.S.C. § 201-219 (the "FLSA").

7. Plaintiffs, individually, and on behalf of all others similarly-situated, bring this action against Defendants for their unlawful failure to pay overtime due and owing Plaintiff and others similarly-situated in violation of KRS § 337.285.

8. Plaintiff, individually, and on behalf of all others similarly-situated, brings this action against Defendants for their unlawful failure to pay overtime due and owing Plaintiff and others similarly-situated in violation of ORC § 4111.03.

9. Plaintiff brings a collective action under the FLSA to recover the unpaid overtime owed to him individually and on behalf of all other similarly-situated employees, current and former, of Defendants. Members of the Collective Action are referred to as the "Collective Members."

[1] For the purposes of this Complaint, "delivery drivers" is exclusively a job title used for the purpose of classifying the putative class of similarly situated individuals, is not necessarily the job title of Plaintiffs and putative class, and has no bearing or relation to any specialization, skill, education, training, or other qualification that might otherwise be associated with such a job title.

10. Additionally, Defendants' failure to compensate Plaintiff and all other similarly-situated employees at a rate equal to Kentucky's required overtime rates violates Kentucky Revised Statutes § 337.285. Plaintiff, therefore, brings a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure to recover unpaid wages and other damages owed under Kentucky wage laws. Members of the Kentucky Rule 23 Class Action are referred to as the "Kentucky Class Action Members."

11. Additionally, Defendants' failure to compensate Plaintiff and all other similarly-situated employees at a rate equal to Ohio's required overtime rates violates Ohio Revised Statutes § 4111.03. Plaintiff, therefore, brings a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure to recover unpaid wages and other damages owed under Ohio wage laws. Members of the Ohio Rule 23 Class Action are referred to as the "Ohio Class Action Members."

12. The Collective Members are all current and former employees who worked as delivery drivers for Defendants and were classified as independent contractors at any time starting three years before this Complaint was filed, up to the present.

13. The Kentucky Class Action Members are all current and former employees who worked as delivery drivers for Defendants in the State of Kentucky and were classified as independent contractors at any time starting three years before this Complaint was filed, up to the present.

14. The Ohio Class Action Members are all current and former employees who worked as delivery drivers for Defendants in the State of Ohio and were classified as independent contractors at any time starting three years before this Complaint was filed, up to the present.

15. Defendants own and operate a company that functions as an auto parts courier and whose primary marketplace offering is providing auto parts delivery services.

16. At all relevant times, Defendants have operated pursuant to a policy and practice of intentionally misclassifying Plaintiffs and all other similarly-situated employees as independent contractors.

17. At all relevant times, pursuant to this misclassification, Defendants have willfully refused to pay overtime to its delivery drivers, including Plaintiff and all other similarly situated individuals.

18. In willfully refusing to pay overtime wages, Defendants have violated the overtime provisions of 29 U.S.C. § 207.

19. In willfully refusing to pay overtime wages, Defendants have violated the overtime provisions of Kentucky Revised Statutes § 337.285.

20. In willfully refusing to pay overtime wages, Defendants have violated the overtime provisions of Ohio Revised Code Ann. § 4111.03.

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 201, *et seq*. because this civil action arises under the Constitution and law of the United States. This Court also has subject matter jurisdiction pursuant 28 U.S.C. § 1367 because the state law claims asserted herein are so related to claims in this action over which this Court has subject matter jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

22. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii) because acts giving rise to the claims of Plaintiff occurred within the Southern District of Ohio, and

Defendants regularly conduct business in and have engaged in the wrongful conduct alleged herein – and, thus, are subject to personal jurisdiction in – this judicial district.

PARTIES

23. At all material times, Plaintiff is an individual residing in Campbell County, Kentucky, and is a former employee of Defendants.

24. At all material times, Defendant SCI is a Delaware limited liability company licensed to transact business in the State of Kentucky. At all material times, Defendant SCI does business, has offices, and/or maintains agents for the transaction of its customary business in Boone County, Kentucky.

25. At all material times, Defendant SCI is a limited liability company licensed to transact business in the State of Ohio. At all material times, Defendant SCI does business, has offices, and/or maintains agents for the transaction of its customary business in Hamilton County, Ohio.

26. At all relevant times, Defendant SCI was an employer under the FLSA. The FLSA defines "employer" as any person who acts directly or indirectly in the interest of an employer in relation to an employee. At all relevant times, Defendant SCI had the authority to hire and fire employees, supervised and controlled work schedules or the conditions of employment, determined the rate and method of payment, and maintained employment records in connection with Plaintiffs' employment with Defendants. As a person who acted in the interest of Defendants in relation to the company's employees, Defendant SCI is subject to liability under the FLSA.

27. At all material times, Defendant Smyth is an Ohio corporation licensed to transact business in the State of Kentucky. At all material times, Defendant Smyth does business, has

offices, and/or maintains agents for the transaction of its customary business in Boone County, Kentucky.

28. At all material times, Defendant Smyth is a corporation licensed to transact business in the State of Ohio. At all material times, Defendant Smyth does business, has offices, and/or maintains agents for the transaction of its customary business in Hamilton County, Ohio.

29. At all material times, Defendant Smyth does business as "Smyth Auto Parts."

30. At all relevant times, Defendant Smyth was an employer under the FLSA. The FLSA defines "employer" as any person who acts directly or indirectly in the interest of an employer in relation to an employee. At all relevant times, Defendant Smyth had the authority to hire and fire employees, supervised and controlled work schedules or the conditions of employment, determined the rate and method of payment, and maintained employment records in connection with Plaintiffs' employment with Defendants. As a person who acted in the interest of Defendants in relation to the company's employees, Defendant Smyth is subject to liability under the FLSA.

31. Upon information and belief, Defendant(s) John Doe Corporations I-XX are and/or were, at all times relevant herein, individuals, groups, partnerships, and/or other entities which: (1) may have been contracted by Defendant Home Depot U.S.A., Inc. to perform delivery services; (2) may have hired individuals, including the Collective and Class Action Members to perform delivery services for Defendant Home Depot U.S.A., Inc.; (3) may have been involved in Plaintiffs' and the Collective and Class Action Members' damages; and/or (4) are otherwise proper parties to this lawsuit. The identities of Defendant(s) John Doe Corporations I-XX remain unknown despite Plaintiffs' due diligence.

32. At all relevant times, Defendant(s) John Doe Corporations I-XX were employers under the FLSA. The FLSA defines "employer" as any person who acts directly or indirectly in the interest of an employer in relation to an employee. At all relevant times, Defendant(s) John Doe Corporations I-XX had the authority to hire and fire employees, supervised and controlled work schedules or the conditions of employment, determined the rate and method of payment, and maintained employment records in connection with Plaintiffs' employment with Defendants. As a person who acted in the interest of Defendants in relation to the company's employees, Defendant(s) John Doe Corporations I-XX is subject to liability under the FLSA.

33. Upon information and belief, Defendant(s) John Doe Corporations I-XX do business as "Expedite."

34. At all material times, Defendants SCI, Smyth, and John Doe Corporations I-XX are Plaintiffs' "employer" as defined by the FLSA, 29 U.S.C. § 201, *et seq*.

35. At all material times, Defendants SCI, Smyth, and John Doe Corporations I-XX are Plaintiffs' "employer" as defined by Kentucky Revised Statutes § 337.010, *et seq*.

36. At all material times, Defendants SCI, Smyth, and John Doe Corporations I-XX are Plaintiffs' "employer" as defined by Ohio Revised Code § 4111, *et seq*.

37. Defendants individually and/or through an enterprise or agent, directed and exercised control over Plaintiffs' work and wages at all relevant times.

38. At all material times, Defendants have operated as a "single enterprise" within the meaning of Section 203(r)(1) of the FLSA. 29 U.S.C. § 203(r)(1). That is, Defendants perform related activities through unified operation and common control for a common business purpose; namely, the operation of a delivery company operating under the name "Expedite."

39. At all material times: (1) Defendants were not completely disassociated with respect to the employment of Plaintiffs; and (2) Defendants were under common control. In any event, at all relevant times, all Defendants were joint employers under the FLSA.

40. Defendants are engaged in related activities, *i.e.* all activities which are necessary to the operation and maintenance of the aforementioned delivery service.

41. Defendants constitute a unified operation because they have organized the performance of their related activities so that they are an organized business system, which is an economic unit directed to the accomplishment of a common business purpose.

42. Plaintiff, in his work for Defendants, was employed by an enterprise engaged in commerce that had annual gross sales of at least $500,000.

43. At all relevant times, Plaintiff, in his work for Defendants, was engaged in commerce or the production of goods for commerce.

44. At all relevant times, Plaintiff, in his work for Defendants, was engaged in interstate commerce.

45. Plaintiff, in his work for Defendants, regularly handled goods produced or transported in interstate commerce.

NATURE OF THE CLAIM

46. Defendants do business as Subcontracting Concepts, LLC. and provide auto part delivery services to customers.

47. Plaintiff was hired by Defendants and worked for Defendants as a delivery driver from approximately May 2019 through approximately March 2020.

48. At all relevant times, in his work for Defendants, Plaintiff worked as a delivery driver, delivering auto parts to Defendants' customers.

49. Defendants, in their sole discretion, agreed to compensate Plaintiff at a rate of $12.78 per hour. Plaintiff was compensated this rate by Defendants regardless of how many hours he worked in a given workweek.

50. Plaintiff, in his work for Defendants, typically worked 45 hours or more per week.

51. Rather than classify Plaintiff as an employee, Defendants classified him as an independent contractor.

52. As a matter of common policy and practice, Defendants misclassify all of their delivery drivers as independent contractors.

53. Consistent with this common policy and practice, Plaintiff and others similarly situated individuals have been intentionally misclassified by Defendants as independent contractors.

54. As a result of Defendants' common misclassification policy, Defendants have not paid overtime pay to Plaintiffs and others similarly situated.

55. Defendants required Plaintiff and others similarly situated to work approximately 45 hours or more in a given workweek.

56. The FLSA applied to Plaintiff and all individuals similarly situated at all times during which they worked for Defendants. No exceptions or exemptions to the FLSA apply to Plaintiff and those similarly situated.

57. Upon information and belief, Defendants employed hundreds of delivery drivers throughout the relevant time period without paying them overtime pay, and while denying them the rights and benefits due an employee.

58. At all relevant times, Defendants directly or indirectly exercised significant control over the wages, hours, and working conditions of Plaintiff and similarly situated individuals.

59. At all relevant times, the employment terms, conditions, and policies that applied to Plaintiff were the same as those applied to other putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members who also worked as delivery drivers for Defendants.

60. Plaintiffs and the putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members incurred financial loss, injury, and damage as a result of Defendants' business practice of misclassifying them as independent contractors and failing to pay them overtime pay.

61. Because Defendants failed to pay their employees proper wages, the putative Collective Members', Kentucky Class Action Members', and Ohio Class Action Members' income consisted solely of the hourly rate of pay they received for all hours worked.

62. Defendants' misclassification of Plaintiff and other putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members as independent contractors was specifically intended to enhance Defendants' profit margins at the expense of the putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members by willfully suffering and permitting Plaintiffs and the putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members to work in excess of 40 hours in a given workweek without paying overtime compensation at a rate of one and one-half times their regular rates and adopting and implementing employment policies that violate the FLSA, KRS § 337.285, and ORC § 4111.03.

63. Defendants' misclassification of Plaintiff and those similarly situated was willful.

64. Defendants knew or should have known that it was improper to classify Plaintiff and the putative Collective Members, Kentucky Class Action Members, and Ohio Class Action Members as independent contractors.

65. Workers in the putative Collective and Classes cannot "elect" to be treated as employees or independent contractors. Nor can workers in the putative Collective or Classes agree to be paid less than the applicable minimum wage. Despite this, Defendants unfairly, unlawfully, fraudulently, and unconscionably attempted to coerce workers in the putative Collective and Classes to waive their statutory rights and elect to be treated as independent contractors.

66. Any contract which attempts to have workers in the putative Collective and Classes waive, limit, or abridge their statutory rights to be treated as an employee under the FLSA or other applicable wage and hour laws is void, unenforceable, unconscionable, and contrary to public policy.

67. The determining factor as to whether Plaintiff and those similarly situated are employees or independent contractors under the FLSA is not the workers' elections, subjective intent, or any contract. Rather, the test for determining whether an individual is an "employee" under the FLSA is the economic reality test. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). Under the economic reality test, employee status turns on whether the individual is, as a matter of economic reality, in business for herself and truly independent, or, rather, is economically dependent upon finding employment in others.

68. Under the applicable test, court use the following factors to determine economic dependence and employment status: (1) the degree of control exercised by the alleged employer;

(2) the relative investments of the alleged employer and employee; (3) the degree to which the employee's opportunity for profit and loss is determine by the employer; (4) the skill and initiative required in performing the job; (5) the permanency of the relationship; and (6) the degree to which the alleged employee's tasks are integral to the employer's business.

69. The totality of circumstances surrounding the employment relationship between Defendants and the putative Collective and Classes establishes economic dependence by the putative Collective and Classes on Defendants and employee status. Here, Plaintiff and all individuals similarly situated are not in business for themselves and truly independent, but rather are economically dependent upon finding employment in Defendants. The putative Collective and Classes are not engaged in occupations or businesses distinct from that of Defendants. To the contrary, the putative Collective and Classes are the basis for Defendants' business. Defendants obtain the customers who seek out delivery services, and Defendants provide the workers who conduct the deliveries on behalf of Defendants. Defendants retain pervasive control over the business operation as a whole, and putative Collective and Classes.

Degree of Control Exercised by Defendants

70. Plaintiff and the other members of the putative Class do not exert control over any meaningful part of Defendants' business operation and do not stand as a separate economic entity from Defendants. Defendants exercise control over all aspects of the working relationship with Plaintiff and the other Class members.

71. Plaintiff and Class members' economic status is inextricably linked to conditions over which Defendants have complete control, including without limitation advertising and promotion, business and financial relationships with customers, business and financial relationship with insurers, and customer volume.

72. Defendants exercise the following significant control over the work conditions of Plaintiffs and others similarly situated:

a. The work performed by the delivery drivers, including Plaintiff and putative Collective and Class Members, is akin to a specialty job on the production line;

b. Defendants require Plaintiff and putative Collective and Classes to work 45 hours or more per week;

c. Defendants pay Plaintiff and the putative Collective and Classes a flat hourly rate for all hours worked in a given workweek;

d. Defendants made the decision not to pay overtime to their delivery drivers, including Plaintiff and the putative Collective and Class Members;

e. Defendants direct Plaintiff and the putative Collective and Classes with respect to which deliveries to make;

f. Defendants exercise control over setting the schedules for their delivery drivers, including Plaintiff and the putative Collective and Class Members;

g. Defendants require Plaintiff and the putative Collective and Classes to wear Defendants' uniform;

h. Defendants supervised their delivery drivers, including Plaintiff and the putative Collective and Class Members, and subjected them to the same rules as W-2 drivers employed by Defendants;

i. Defendants require Plaintiffs and the putative Collective and Classes to use forms and invoices Defendants provided; and

j. Defendants require Plaintiffs and the putative Collective and Classes to deliver to Defendants all invoices and customer service reports within the same day of each service job/run.

Facts Establishing No Skill or Initiative of a Person in Business for Themselves

73. Plaintiff, like all members of the putative Collective and Classes, does not exercise the skill and initiative of a person in business for oneself.

74. Plaintiff and the putative Collective and Classes are not required to have any specialized or unusual skills to perform their jobs. The sills used in performing delivery services are commensurate with those exercised by ordinary people.

75. Plaintiff, like all members of the putative Collective and Classes, does not have the opportunity to exercise the business skills and initiative necessary to elevate his status to that of an independent contractor: they own no enterprise, nor do they maintain a separate business structure or facility.

76. Plaintiff and the putative Collective and Classes has no control over customers, nor does he actively participate in any efforts to increase Defendants' customer base or profit, or to improve business in any capacity.

77. Defendants do not permit Plaintiff and the putative Collective and Classes to hire or subcontract other qualified individuals to provide additional delivery services to customers, thereby increasing their revenue, as an independent contractor in business for himself would have the authority to do.

Facts Establishing Relative Investment

78. Plaintiffs' and the putative Collective's and Classes' relative investment is minor when compared to the investment made by Defendants.

79. Plaintiffs and the putative Collective and Classes make no financial investment in Defendants' facilities, advertising, maintenance, staffing, and contractual relationships. All capital investment and risk belong to Defendants.

80. Plaintiff's and the putative Collective's and Classes' investment is limited to fuel. Absent Defendants' investment and provision of the business, the delivery drivers would not earn anything.

Facts Establishing Opportunity for Profit and Loss

81. Defendants manage all aspects of the business operation, including without limitation attracting investors, establishing business and customer relationships, maintaining the premises, establishing the hours of operation, coordinating advertising, and hiring and controlling of staff. Defendants provide all necessary capital to open and operate the business.

82. Neither Plaintiff nor the putative Collective and Classes have responsibility for any aspect of Defendants' ongoing business risk.

Facts Establishing Permanency

83. Plaintiff worked for Defendants as a delivery driver from approximately May 2019 through approximately March 2020 in Defendants' Florence, Kentucky area location, often travelling into Ohio to make deliveries.

Fact Establishing Members of the Putative Collective and Classes Are an Integral Part of Defendants' Business

84. Plaintiff and the putative Collective and Classes are critical to Defendants' success. Defendants' operation is wholly dependent on the delivery services that Plaintiff and the putative Collective and Classes provide for customers.

85. The primary "product" or "good" Defendants are in business to sell consists of delivery services provided by members of the putative Collective and Classes.

86. Members of the putative Collective and Classes, like Plaintiff, are economically dependent on Defendants and subject to significant control by Defendants.

Facts Establishing that Defendants' Acts Were Willful

87. All actions and agreements by Defendants described herein were willful and intentional, and they were not the result of mistake or inadvertence.

88. Defendants were aware that the FLSA applies to their business at all relevant times and that, under the economic realities test applicable to determining employment status under those laws, Plaintiff and Members of the putative Collective and Classes were misclassified as independent contractors.

89. Delivery drivers working under conditions similar to those employed with Defendants have been determined to be employees–not independent contractors–in other FLSA cases.

INJURY AND DAMAGE

90. Plaintiff and all Members of the putative Collective and Classes suffered harm, injury, and damages, including financial loss, as a result of Defendants' conduct complained of herein.

91. Plaintiff and all Members of the putative Collective and Classes were entitled to a minimum wage and overtime pay for their work performed for Defendants. Further, Defendants were not allowed to make improper and unlawful deductions from Plaintiff's and the Members' of the putative Collective and Classes pay. By failing to pay Plaintiff and the Members of the putative Collective and Classes a minimum wage and overtime pay and interfering with their right to retain all of their earnings, Defendants injured Plaintiff and the Members of the putative Collective and Classes and caused them financial loss, harm, injury, and damage.

FLSA COLLECTIVE ACTION ALLEGATIONS

92. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

93. Plaintiff brings the FLSA claims in this action as a collective action under 29 U.S.C. § 216(b).

94. Plaintiff asserts those claims on behalf of himself, and on behalf of all similarly situated delivery drivers of Defendants, who were not paid all minimum wage and overtime compensation required by the FLSA during the relevant time period as a result of Defendants' compensation policies and practices.

95. Plaintiff seeks to notify the following individuals of their rights under 29 U.S.C. § 216(b) to join this action by filing in this Court written notice of their consent to join this action:

> **All delivery drivers (or individuals with other similar job duties or titles) who worked for Defendants and were misclassified as independent contractors at any time during the past three years.**

96. The FLSA provides for a three-year statute of limitations for causes of action arising out of a willful violation of the Act. 29 U.S.C. § 255. As alleged above, Plaintiff and similarly situated delivery drivers' claims arise out of Defendants' willful violations of the FLSA. Accordingly, the Court should require appropriate notice of this action be given to all tipped employees employed by Defendants within three years from the filing of this Complaint.

97. Upon information and belief, Defendants have employed more than one thousand (1,000) delivery drivers during the period relevant to this action.

98. The identities of these individuals, as a group, are known only to Defendants. Because the numerous members of this collective action are unknown to Plaintiff, joinder of each member is not practicable.

99. Because these similarly situated employees are readily identifiable by Defendants and may be located through their records, they may be readily notified of this action and allowed to opt into it pursuant to 29 U.S.C. § 216(b), for the purpose of collectively adjudicating their FLSA claims.

100. Collective adjudication is appropriate in this case because the individuals whom Plaintiff wishes to notify of this action have been employed in positions similar to Plaintiffs; have performed work similar to Plaintiff; and have been subject to compensation practices similar to those to which Plaintiff have been subjected, including unlawful misclassification as independent contractors and failure to pay the applicable overtime rates as required by the FLSA.

KENTUCKY CLASS ACTION ALLEGATIONS

101. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

102. Plaintiff brings his Kentucky wage claims as a Rule 23 class action on behalf of the following Kentucky Class Action Members:

> **All delivery drivers (or individuals with other similar job duties or titles) who worked for Defendants in Kentucky and were misclassified as independent contractors at any time during the past three years.**

103. Numerosity. The number of Kentucky Class Action Members is believed to be over two hundred. This volume makes bringing the claims of each individual Kentucky Class Action Member before this Court impracticable. Likewise, joining each individual Kentucky Class Action Member as a plaintiff in this action is impracticable. Furthermore, the identity of the Kentucky Class Action Members will be determined from Defendants' records, as will the compensation paid to each of them. As such, a class action is a reasonable and practical means

of resolving these claims. To require individual actions would prejudice the Kentucky Class Action Members and Defendants.

104. Typicality. Plaintiff's Kentucky claims are typical of the Kentucky Class Action Members because like the Kentucky Class Action Members, Plaintiff was subject to Defendants' uniform policies and practices and was compensated in the same manner as the other Kentucky Class Action Members. Defendants regularly required Plaintiff and the Kentucky Class Action Members to work in excess of 40 hours in a given workweek without paying them overtime. Defendants misclassified Plaintiff and the Kentucky Class Action Members as independent contractors. This was commonly, though not exclusively, done in order to prevent Plaintiff and the Kentucky Class Action Members from being paid overtime for all hours worked in excess of 40 in a given workweek. As a result, Defendants failed to pay Plaintiff and the Kentucky Class Action Members overtime for all hours worked.

105. As a result of such policy and practice by Defendants, Defendants violated the overtime wage provisions of Kentucky Revised Statutes § and 337.285.

106. Adequacy. Plaintiff is a representative party who will fairly and adequately protect the interests of the Kentucky Class Action Members because it is in his interest to effectively prosecute the claims in this Complaint in order to obtain the unpaid wages and penalties required under Kentucky law. Plaintiff has retained attorneys who are competent in both class actions and wage and hour litigation. Plaintiff does not have any interest that may be contrary to or in conflict with the claims of the Kentucky Class Action Members he seeks to represent.

107. Commonality. Common issues of fact and law predominate over any individual questions in this matter. The common issues of fact include, but are not limited to:

a. The number of hours worked by Plaintiff and the Kentucky Class Action Members;

b. The amounts paid to Plaintiff and the Kentucky Class Action Members;

c. The degree of control Defendants exerted over Plaintiff and the Kentucky Class Action Members;

d. The relative investments of Defendants and Plaintiff and the Kentucky Class Action Members;

e. The degree to which Plaintiff's and the Kentucky Class Action Members' opportunity for profit and loss was determined by Defendants;

f. The skill and initiative required in performing the job;

g. The permanency of the relationship; and

h. The degree to which Plaintiff's and the Kentucky Class Action Members' tasks are integral to Defendants' business.

108. Common issues of law include, but are not limited to:

a. Whether Defendants paid all minimum wages due and owing to Plaintiff and the Kentucky Class Action Members;

b. Whether Defendants paid overtime wages due and owing to Plaintiff and the Kentucky Class Action Members for all hours worked in excess of 40 in a given workweek;

c. Whether Defendants improperly misclassified Plaintiff and the Kentucky Class Action Members as independent contractors;

d. Whether Plaintiff and the Kentucky Class Action Members are entitled to compensatory damages;

e. The proper measure of damages sustained by Plaintiff and the Kentucky Class Action Members; and

f. Whether Defendants' actions were "willful."

109. Superiority. A class action is superior to other available means for the fair and efficient adjudication of this lawsuit. Even in the event any of the Kentucky Class Action Members could afford to pursue individual litigation against companies the size of Defendants, doing so would unduly burden the system. Individual litigation would magnify the delay and expense to all parties and burden the court system with duplicative lawsuits. Prosecution of separate actions by individual Kentucky Class Action Members would create the risk of inconsistent or varying judicial results and establish incompatible standards of conduct for Defendants.

110. A class action, by contrast, presents far fewer management difficulties and affords the benefits of uniform adjudication of the claims, financial economy for the parties, and comprehensive supervision by a single court and Judge. By concentrating this litigation in one forum, judicial economy and parity among the claims of individual Kentucky Class Members are promoted. Additionally, class treatment in this matter will provide for judicial consistency. The identities of the Kentucky Class Action Members are readily identifiable from Defendants' records.

111. This type of case is well-suited for class action treatment because: (1) Defendants' practices, policies, and/or procedures were uniform; (2) the burden is on each Defendant to prove it properly compensated its employees; and (3) the burden is on each Defendant to accurately record hours worked by employees.

112. Ultimately, a class action is a superior forum to resolve the Kentucky state law claims set forth in this Complaint because of the common nucleus of operative facts centered on the continued failure of Defendants to pay Plaintiff and the Kentucky Class Action Members according to applicable Kentucky laws.

113. Nature of Notice to be Proposed. As to the Rule 23 Kentucky Class Action Members, it is contemplated that notice would be issued giving putative class members an opportunity to opt out of the class if they so desire, *i.e.* an "opt-out notice." Notice of the pendency and resolution of the action can be provided to the Kentucky Class Action Members by mail, electronic mail, print, broadcast, internet, and/or multimedia publication.

OHIO CLASS ACTION ALLEGATIONS

114. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

115. Plaintiff brings his Ohio wage claims as a Rule 23 class action on behalf of the following Ohio Class Action Members:

> **All delivery drivers (or individuals with other similar job duties or titles) who worked for Defendants in Ohio and were misclassified as independent contractors at any time during the past three years.**

116. Numerosity. The number of Ohio Class Action Members is believed to be over two hundred. This volume makes bringing the claims of each individual Ohio Class Action Member before this Court impracticable. Likewise, joining each individual Ohio Class Action Member as a plaintiff in this action is impracticable. Furthermore, the identity of the Ohio Class Action Members will be determined from Defendants' records, as will the compensation paid to each of them. As such, a class action is a reasonable and practical means of resolving these

claims. To require individual actions would prejudice the Ohio Class Action Members and Defendants.

117. Typicality. Plaintiff's Ohio claims are typical of the Ohio Class Action Members because like the Ohio Class Action Members, Plaintiff was subject to Defendants' uniform policies and practices and was compensated in the same manner as the other Ohio Class Action Members. Defendants regularly required Plaintiff and the Ohio Class Action Members to work in excess of 40 hours in a given workweek without paying them overtime. Defendants misclassified Plaintiff and the Ohio Class Action Members as independent contractors. This was commonly, though not exclusively, done in order to prevent Plaintiff and the Ohio Class Action Members from being paid overtime for all hours worked in excess of 40 in a given workweek. As a result, Defendants failed to pay Plaintiff and the Ohio Class Action Members both minimum wage and overtime for all hours worked.

118. As a result of such policy and practice by Defendants, Defendants violated the minimum and overtime wage provisions of Ohio Revised Code § 4111.

119. Adequacy. Plaintiff is a representative party who will fairly and adequately protect the interests of the Ohio Class Action Members because it is in his interest to effectively prosecute the claims in this Complaint in order to obtain the unpaid wages and penalties required under Ohio law. Plaintiff has retained attorneys who are competent in both class actions and wage and hour litigation. Plaintiff does not have any interest that may be contrary to or in conflict with the claims of the Ohio Class Action Members she seeks to represent.

120. Commonality. Common issues of fact and law predominate over any individual questions in this matter. The common issues of fact include, but are not limited to:

a. The number of hours worked by Plaintiff and the Ohio Class Action Members;

b. The amounts paid to Plaintiff and the Ohio Class Action Members;

c. The degree of control Defendants exerted over Plaintiff and the Ohio Class Action Members;

d. The relative investments of Defendants and Plaintiff and the Ohio Class Action Members;

e. The degree to which Plaintiff's and the Ohio Class Action Members' opportunity for profit and loss was determined by Defendants;

f. The skill and initiative required in performing the job;

g. The permanency of the relationship; and

h. The degree to which Plaintiff's and the Ohio Class Action Members' tasks are integral to Defendants' business.

121. Common issues of law include, but are not limited to:

a. Whether Defendants paid all minimum wages due and owing to Plaintiff and the Ohio Class Action Members;

b. Whether Defendants paid overtime wages due and owing to Plaintiff and the Ohio Class Action Members for all hours worked in excess of 40 in a given workweek;

c. Whether Defendants improperly misclassified Plaintiff and the Ohio Class Action Members as independent contractors;

d. Whether Plaintiff and the Ohio Class Action Members are entitled to compensatory damages;

e. The proper measure of damages sustained by Plaintiff and the Ohio Class Action Members; and

f. Whether Defendants' actions were "willful."

122. Superiority. A class action is superior to other available means for the fair and efficient adjudication of this lawsuit. Even in the event any of the Ohio Class Action Members could afford to pursue individual litigation against companies the size of Defendants, doing so would unduly burden the system. Individual litigation would magnify the delay and expense to all parties and burden the court system with duplicative lawsuits. Prosecution of separate actions by individual Ohio Class Action Members would create the risk of inconsistent or varying judicial results and establish incompatible standards of conduct for Defendants.

123. A class action, by contrast, presents far fewer management difficulties and affords the benefits of uniform adjudication of the claims, financial economy for the parties, and comprehensive supervision by a single court and Judge. By concentrating this litigation in one forum, judicial economy and parity among the claims of individual Ohio Class Members are promoted. Additionally, class treatment in this matter will provide for judicial consistency. The identities of the Ohio Class Action Members are readily identifiable from Defendants' records.

124. This type of case is well-suited for class action treatment because: (1) Defendants' practices, policies, and/or procedures were uniform; (2) the burden is on each Defendant to prove it properly compensated its employees; and (3) the burden is on each Defendant to accurately record hours worked by employees.

125. Ultimately, a class action is a superior forum to resolve the Kentucky state law claims set forth in this Complaint because of the common nucleus of operative facts centered on

the continued failure of Defendants to pay Plaintiff and the Ohio Class Action Members according to applicable Ohio laws.

126. Nature of Notice to be Proposed. As to the Rule 23 Ohio Class Action Members, it is contemplated that notice would be issued giving putative class members an opportunity to opt out of the class if they so desire, *i.e.* an "opt-out notice." Notice of the pendency and resolution of the action can be provided to the Ohio Class Action Members by mail, electronic mail, print, broadcast, internet, and/or multimedia publication.

COUNT ONE: FAIR LABOR STANDARDS ACT
FAILURE TO PAY OVERTIME
(Against All Defendants)

127. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

128. Defendants willfully failed or refused to pay Plaintiff and the Collective Members the applicable overtime wage for all hours worked in excess of 40 in a given workweek throughout the duration of their employment.

129. As a result, Defendants failed to compensate Plaintiff and the Collective Members at least the applicable overtime wage rate for all hours worked in excess of 40 in a given workweek.

130. Defendants' practice of willfully failing or refusing to pay Plaintiff and the Collective Members at the required overtime wage rate violates the FLSA, 29 U.S.C. § 207(a).

131. Defendants knew that – or acted with reckless disregard as to whether – their failure to pay Plaintiff and the Collective Members the proper overtime rate would violate federal and state law, and Defendants were aware of the FLSA overtime requirements during

Plaintiff's and the Collective Members' employment. As such, Defendants' conduct constitutes a willful violation of the FLSA.

132. Plaintiff and the Collective Members are therefore entitled to compensation for the unpaid overtime wages at an hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages, together with interest, reasonable attorney's fees, and costs.

WHEREFORE, Plaintiff, Larry Kennedy, individually, and on behalf of all delivery drivers similarly situated, respectfully request that the Court grant relief in Plaintiff's favor, and against Defendants for compensation for unpaid overtime wages, plus an additional equal amount as liquidated damages, prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and disbursements of this action, and any additional relief this Court deems just and proper.

COUNT TWO: KENTUCKY REVISED STAUTES § 337.285
FAILURE TO PAY OVERTIME FOR HOURS IN EXCESS OF 40
(Against All Defendants)

133. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

134. Defendants willfully failed or refused to pay Plaintiff and the Kentucky Class Action Members the applicable overtime wage for all hours worked in excess of 40 in a given workweek throughout the duration of their employment.

135. As a result, Defendants failed to compensate Plaintiff and the Kentucky Class Action Members at least the applicable overtime wage rate for all hours worked in excess of 40 in a given workweek.

136. Defendants' practice of willfully failing or refusing to pay Plaintiff and the Kentucky Class Action Members at the required overtime wage rate violates Kentucky Revised Statutes § 337.285.

137. Defendants knew that – or acted with reckless disregard as to whether – their failure to pay Plaintiff and the Kentucky Class Action Members the proper overtime rate would violate federal and state law, and Defendants were aware of the FLSA overtime requirements during Plaintiff's and the Kentucky Class Action Members' employment. As such, Defendants' conduct constitutes a willful violation of the FLSA.

138. Plaintiff and the Kentucky Class Action Members are therefore entitled to compensation for the unpaid overtime wages at an hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages, together with interest, reasonable attorney's fees, and costs.

WHEREFORE, Plaintiff, Larry Kennedy, individually, and on behalf of all delivery drivers similarly situated, respectfully request that the Court grant relief in Plaintiff's favor, and against Defendants for compensation for unpaid overtime wages, plus an additional equal amount as liquidated damages, prejudgment and post-judgment interest, reasonable attorneys' fees, costs, and disbursements of this action, and any additional relief this Court deems just and proper.

COUNT THREE: OHIO REVISED CODE § 4111
FAILURE TO PAY OVERTIME
(Against All Defendants)

139. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

140. Defendants willfully failed or refused to pay Plaintiff and the Ohio Class Action Members the applicable overtime wage for all hours worked in excess of 40 in a given workweek throughout the duration of their employment.

141. As a result, Defendants failed to compensate Plaintiff and the Ohio Class Action Members at least the applicable overtime wage rate for all hours worked in excess of 40 in a given workweek.

142. Defendants' practice of willfully failing or refusing to pay Plaintiff and the Ohio Class Action Members at the required overtime wage rate violates the overtime provisions of ORC § 4111.

143. Defendants knew that – or acted with reckless disregard as to whether – their failure to pay Plaintiff and the Ohio Class Action Members the proper overtime rate would violate federal and state law, and Defendants were aware of the FLSA overtime requirements during Plaintiff's and the Ohio Class Action Members' employment. As such, Defendants' conduct constitutes a willful violation of the FLSA.

144. Plaintiff and the Ohio Class Action Members are therefore entitled to compensation for the unpaid overtime wages at an hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages, together with interest, reasonable attorney's fees, and costs.

WHEREFORE, Plaintiff, Larry Kennedy, individually, and on behalf of all delivery drivers similarly situated, respectfully request that the Court grant relief in Plaintiff's favor, and against Defendants for compensation for unpaid overtime wages, plus an additional equal amount as liquidated damages, prejudgment and post-judgment interest, reasonable attorneys'

fees, costs, and disbursements of this action, and any additional relief this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED this 21st day of April, 2021.

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Exhibit 7

Brown v. AK Lawncare, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

October 14, 2015, Decided; October 14, 2015, Filed

Case No. 14-14158

Reporter
2015 U.S. Dist. LEXIS 139399 *; 2015 WL 5954811

DANIEL BROWN, NATHANEAL BLACKBURN, and TIMOTHY MINER, on behalf of themselves and all others similarly situated, Plaintiffs, v. AK LAWNCARE, INC., and ADAM KAROUB, Defendants.

Subsequent History: Motion granted by, Settled by *Brown v. Lawncare, Inc., 2017 U.S. Dist. LEXIS 71825 (E.D. Mich., May 11, 2017)*

Counsel: **[*1]** For Daniel Brown, Nathaneal Blackburn, Timothy Miner, Plaintiffs: Caitlin E. Malhiot, Gold Star Law, PC, Troy, MI; David A. Hardesty, Gold Star Law, Troy, MI.

For AK Lawncare, Inc., Defendant: Randolph T. Barker, Berry Moorman, Detroit, MI.

For Adam Karoub, Defendant: Randolph T. Barker, LEAD ATTORNEY, Berry Moorman, Detroit, MI.

Judges: PAUL D. BORMAN, UNITED STATES DISTRICT JUDGE. Mona K. Majzoub, United States Magistrate Judge.

Opinion by: PAUL D. BORMAN

Opinion

OPINION AND ORDER

(1) GRANTING PLAINTIFFS' MOTION FOR CONDITIONAL CLASS CERTIFICATION AND (2) REQUIRING SUBMISSION OF A REVISED PROPOSED NOTICE

The three named Plaintiffs filed this action on behalf of themselves and a putative class of similarly situated individuals pursuant to the class action provisions of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 207*. Plaintiffs allege on behalf of the putative class that Defendants AK Lawncare ("AKL") and Adam Karoub, failed to pay them one and one-half times their regular rates of pay for hours worked in excess of forty hours per week. Plaintiffs have filed a motion for conditional class certification under *29 U.S.C. § 216(b)*. Defendants oppose conditional class certification, arguing that Plaintiffs have failed to support their motion with **[*2]** sufficient evidence of similarly situated putative class members. Defendants additionally argue that, if the Court grants conditional certification, it should conclude that Plaintiffs' proposed notice to class members is deficient. The Court held a hearing on September 9, 2015 and, for the reasons that follow, GRANTS the Plaintiffs' motion and ORDERS the submission of a revised proposed notice to the putative class.

I. BACKGROUND

Defendant AKL is in the business of lawn care and snow removal. Compl. ¶ 15. Defendant Karoub is an owner and the president of AKL. Compl. ¶ 16. The Plaintiffs, Daniel Brown, Nathaneal Blackburn and Timothy Miner, were employees of AKL during the years 2011-2014 and each performed physical labor, including lawn mowing, landscaping and snow removal for AKL. ECF No.

10, Mot. Ex. 2, April 15, 2015 Affidavit of Daniel Brown ¶¶ 1-3; Ex. 3, April 15, 2015 Affidavit of Nathaneal Blackburn ¶¶ 1-3; Ex. 4, April 15, 2015 Affidavit of Timothy Miner ¶¶ 1-3. Plaintiff Brown has been employed by AKL since 2011 and continued to work for AKL at the time the Complaint was filed.[1] Compl. ¶ 18. Plaintiff Blackburn began working for AKL on or about August, 2011 and ceased working **[*3]** for AKL in March, 2014. Compl. ¶ 19. Plaintiff Miner began working for AKL on or about July, 2011 and ceased working for AKL in July, 2014. Compl. ¶ 20.

Each of the three named Plaintiffs attests that throughout his employment with AKL he worked in excess of forty hours per week and was not paid at a rate of one and one half times his regular pay for the hours worked in excess of forty hours per week. Brown Aff. ¶¶ 4-5; Blackburn Aff. ¶¶ 4-5; Miner Aff. ¶¶ 4-5. Each named Plaintiff alleges that based on discussions each of them has had with coworkers, they believe that other employees of AKL who performed similar manual labor also were not paid one and one half times their regular pay rate for hours that they worked in excess of forty hours per week. Compl. ¶¶ 26-27; Brown Aff. ¶¶ 7-8; Blackburn Aff. ¶¶ 7-8; Miner Aff. ¶¶ 7-8.

II. ANALYSIS

Plaintiffs seek to conditionally certify a class of:

> All current and former employees performing landscaping and snow removal duties for AK Lawncare and Adam Karoub after October 28, 2011 who worked overtime hours but were **[*4]** not paid overtime wages during all or part of their employment.

ECF No. 10, Mot. Ex. 1, Proposed Notice to Join a Lawsuit to Recover Back Overtime Wages.

In support of their motion, the three named Plaintiffs offer their personal affidavits attesting to the fact that they engaged in similar manual labor involving lawn care, landscaping and snow removal for AKL and each worked in excess of forty hours per week without receiving one and a half times his regular rate of pay for hours worked in excess of forty. Each named Plaintiff additionally attests to the fact that based on conversations with other manual laborers who worked for AKL and performed the same job duties, he believes that other manual laborers also were not paid at a rate of one and a half times their regular rate for hours worked in excess of forty per week.

A. Standards Governing Conditional Certification of a Collective FLSA Action

The FLSA requires employers to pay time-and-a-half for nonexempt employees who work more than forty hours per week. *29 U.S.C. § 207*. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 545 (6th Cir. 2006)*. *Section 216(b)* of the FLSA authorizes employees to maintain a collective action on behalf of themselves and "similarly situated" individuals and provides in pertinent part:

> An action to recover the liability **[*5]** prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

Unlike a class action under *Fed. R. Civ. P. 23*, a collective action under the FLSA requires putative class members to affirmatively "opt-in" to the collective action by giving their consent:

[1] In their response to Plaintiffs' motion, Defendants assert that Brown ceased working for AKL in April, 2015. ECF No. 13, Resp. 1 n.1.

> Unlike class actions under *Fed. R. Civ. P. 23*, collective actions under FLSA require putative class members to opt into the class. See *29 U.S.C. § 216(b)* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court in which such action is brought."). These opt-in employees are party plaintiffs, unlike absent class members in a *Rule 23* class action.

O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 583 (6th Cir. 2009).

"*Section 216(b)* establishes two requirements for a representative action: 1) the plaintiffs must actually be 'similarly situated,' and 2) all plaintiffs must **[*6]** signal in writing their affirmative consent to participate in the action." *Comer, 454 F.3d at 546* (citing *29 U.S.C. § 216(b)* and *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 167-68, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*). The threshold inquiry for the court in determining whether to conditionally certify a class under *§ 216(b)* is "whether plaintiffs have shown that the employees to be notified are, in fact, 'similarly situated.'" *Comer, 454 F.3d at 546*. If the plaintiffs sustain their burden at this stage, the Court "may use its discretion to authorize notification of similarly situated employees to allow them to opt into the lawsuit." *Id.*

The Sixth Circuit has not expressly defined the phrase "similarly situated," but the determination typically occurs in two stages: The first stage or "notice stage" occurs early in the discovery process, at which time the Court determines whether plaintiffs have provided sufficient evidence of "similarly situated" plaintiffs to merit sending notice to potential opt-in plaintiffs. *Comer, 454 F.3d at 546*. At this preliminary stage, plaintiffs must show only that their "'position is similar, not identical, to the positions held by the putative class members.'" *Comer, 454 F.3d at 546-47* (quoting *Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 595 (S.D. Ohio 2002)*). "Because only minimal evidence is available to the parties and to the court at this point, the 'similarly situated' question is measured by a lenient standard." **[*7]** *Monroe v. FTS USA, LLC, 257 F.R.D. 634, 637 (W.D. Tenn. 2009)*. In this preliminary discovery phase, "district courts generally allow the lead plaintiffs to 'show that the potential claimants are similarly situated by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Fisher v. Michigan Bell Telephone Co., 665 F. Supp. 2d 819, 825 (E.D. Mich. 2009)* (quoting *Olivo v. GMAC Mtg. Corp., 374 F. Supp. 2d 545, 548 (E.D. Mich. 2004)*). "The 'first stage' or notice standard is 'fairly lenient,' requiring only that Plaintiffs 'submit evidence establishing at least a colorable basis for their claim that a class of 'similarly situated' plaintiffs exists.'" *Fisher, 665 F. Supp. 2d at 825* (quoting *Olivo, 374 F. Supp. 2d at 548*). At this preliminary stage, "'[t]he Court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations.'" *Id.* (quoting *Brasfield v. Source Broadband Servs., LLC, 257 F.R.D. 641, 642 (W.D. Tenn. 2009)*) (alteration in original). At the "notice stage," any affidavits or declarations of representative plaintiffs that are offered in support of a motion for conditional certification are "not required to 'meet the same evidentiary standards applicable to motions for summary judgment because to require more at this stage of the litigation would defeat the purpose of the two-stage analysis under *Section 216(b)*.'" *Fisher, 665 F. Supp. 2d at 826* (quoting *Monroe, 257 F.R.D. at 639*). The Court has the opportunity to revisit the **[*8]** "similarly situated" determination following the completion of discovery, "usually in response to a motion for decertification." *Monroe, 257 F.R.D. at 637*.

B. Plaintiffs' Evidence of "Similarly Situated" AKL Employees

Plaintiffs' affidavits, although brief, appear to contain the minimal assertions necessary to suggest

a "colorable basis" for their claim that a class of "similarly situated" plaintiffs exist. *Fisher, 665 F. Supp. 2d at 825*. They, and the class they purport to represent, are all manual laborers who performed "lawn mowing, landscaping and snow removal" for AKL in the years 2011-2014. They, and the class they purport to represent, "were paid at a flat hourly rate for all hours worked." Based upon conversations that each of them has had with coworkers, each of them believes that other employees who performed similar manual labor also were not paid one and a half times their hourly rate for hours worked in excess of forty per week. Thus, according to the Plaintiffs' affidavits, the purported class members "perform the same job functions and were all paid under the same compensation system alleged to be unlawful in this case." *Monroe, 257 F.R.D. at 638*.

Defendants attack the competency and sufficiency of the Plaintiffs' affidavits. First, relying on *Harrison v. McDonald's Corp., 411 F. Supp. 2d 862 (S.D. Ohio 2005)*, Defendants **[*9]** assert that the Court cannot consider the Plaintiffs' affidavits because they contain unsupported hearsay and therefore would be inadmissible under the Federal Rules of Evidence. *Harrison*, however, is not binding on this Court and has been criticized as representing a minority opinion regarding the type of evidence that a court may consider at this notice stage, and "a majority of courts have determined that evidentiary rules should be relaxed at this stage." *Shaia v. Harvest Mgmt. Sub LLC, 306 F.R.D. 268, 275 (N.D. Cal. 2015)* (collecting cases). Indeed, as Judge Nancy Edmunds of this District noted in *Fisher, supra*, requiring strict compliance with the Federal Rules of Evidence at this notice stage "would defeat the purpose of the two-stage analysis under *Section 216(b)*." *665 F. Supp. 2d at 826* (internal quotation marks and citation omitted). Plaintiffs expressly attest that their belief as to the existence of a widespread policy is based on "conversations" with other AKL manual laborers who perform the same job functions of lawn care and snow removal. This is sufficient at this notice stage to sustain Plaintiffs' modest burden. The fact that Defendants may have obtained the affidavits of other employees (notably only three, no more in number than the three Plaintiffs who do feel aggrieved) **[*10]** who do not share the Plaintiffs' beliefs serves only to identify some employees who presumably would not opt-in to a collective action if one ultimately were to be certified by the Court. Such evidence is more appropriately considered at a subsequent stage, after notice and discovery.

Defendants also make several arguments attacking the sufficiency of the Affidavits that are directed toward the merits of the Plaintiffs' claims. Defendants submit the identically worded Declarations of three AKL laborers, Dustin Joly and David McCray, and Michael Barnett, who explain that (1) AKL has certain employment policies in place that require them to routinely review their paychecks and report discrepancies, (2) that AKL pays all employees for all hours worked, including overtime, (3) that AKL has always paid them all wages owed and (4) that they are not interested in joining the case and are not aware of any other current or former employees of AKL who have expressed an interest in joining the case. ECF No. 13, Defs.' Resp. Ex. B, May 12, 2015 Declaration of Dustin Joly and Ex. C, May 12, 2015 Declaration of David McCray; ECF No. 17, May 12, 2015 Declaration of Michael Barnett. Defendants also **[*11]** submit the Declaration of Adam Karoub, the President of AKL, who states that the job duties and compensation arrangements of AKL employees are "varied" and that "team members" have "little if any interaction" with each other. Defs.' Resp. Ex. A, May 11, 2015 Declaration of Adam Karoub ¶¶ 1-4. Karoub further states that AKL has longstanding employee policies that ensure that all employees are paid for all hours worked, including overtime. *Id.* ¶ 5. Karoub states that none of the named Plaintiffs ever complained about his compensation and that, if he had, his concerns would have been reviewed and resolved. *Id.* ¶ 8.

Without a doubt, these Declarations contradict the

Plaintiffs' Affidavits and create issues of fact regarding the merits of Plaintiffs' proposed class claims and indicate that not all AKL employees share the Plaintiffs' belief that they were underpaid for their overtime. However, the notice stage is not the time for the Court to weigh dueling affidavits and to evaluate the merits of the underlying claims. At this preliminary stage, "'[t]he Court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations.'" *Fisher, 665 F. Supp. 2d at 825* (quoting **[*12]** *Brasfield v. Source Broadband Servs., LLC, 257 F.R.D. 641, 642 (W.D. Tenn. 2009))* (alteration in original). The fact that AKL management disputes the Plaintiffs' claims and that some employees are satisfied with the manner in which they have been compensated does not serve as a valid basis to deny conditional certification at this notice stage.

The Defendants' Declarations assert that overtime hours are required to be pre-approved by management but do not refute the Plaintiffs' assertions that all manual laborers are paid under a common plan based upon a flat hourly wage. This does not appear to be a complicated business with a particularly sophisticated or complex employee compensation program. The simplicity of Plaintiffs' Affidavits appears consistent with the nature of the business described in the Defendants' Declarations. Simplicity does not necessarily indicate insufficiency. In short, Defendants' response fails to convince the Court, at this notice stage, that Plaintiffs will be unable to establish their proposed class composed of similarly situated individuals who are compensated pursuant to a common wage plan and worked overtime without being paid time and a half for those hours.

Defendants cite to several cases in which courts denied conditional certification **[*13]** but, importantly, those cases involved either a lone plaintiff who purported to represent a class of similarly situated individuals, *see Simmons v. T-Mobile USA, Inc., No. 06-1820, 2007 U.S. Dist. LEXIS 5002, 2007 WL 210008, at *5 (S.D. Texas Jan. 24, 2007)* (denying conditional certification where plaintiff submitted only his own affidavit attesting that there were similarly situated individuals being uncompensated for overtime), or a few vague plaintiff declarations that were countered with a massive number of declarations submitted by defendant, *see Rodgers v. CVS Pharmacy, Inc., No. 05-770-27, 2006 U.S. Dist. LEXIS 23272, 2006 WL 752831, at * (M.D. Fla. March 22, 2006)* (denying motion for conditional certification where plaintiff provided his own affidavit and two vaguely worded declarations that did not attest to conversations with other employees in the proposed class (of whom there were over 250,000) who were similarly denied overtime and defendant submitted thirty one contrary affidavits who indicated they would not join in the lawsuit and were never denied overtime, sufficiently demonstrating that plaintiff had failed to meet the minimal burden of demonstrating that other aggrieved employees existed in the class proposed). In this case, the Affidavits and Declarations are at best equal in number and weight which leads the Court to conclude that Plaintiffs have satisfied their minimal **[*14]** burden at this notice stage to "'submit evidence establishing at least a colorable basis for their claim that a class of 'similarly situated' plaintiffs exists.'" *Fisher, 665 F. Supp. 2d at 825* (quoting *Olivo, 374 F. Supp. 2d at 548*).

For the foregoing reasons, the Court GRANTS the motion for conditional certification.

C. The Proposed Notice

In their Response to Plaintiffs' Motion, Defendants identify several objections to the proposed Notice and request that the Court direct the parties to meet and confer regarding Defendants' objections and agree on a form of Notice. Plaintiffs do not substantively address the content of the Notice in their Motion and do not mention the Defendants' objections to the Notice in their Reply. Accordingly, the Court directs the parties to meet and confer regarding Defendants' objections to the

proposed Notice and to submit to the Court within 45 days of the date of this Order a revised Notice (with the correct case caption) to which both parties agree and which the Court can review and approve.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion for conditional certification of the proposed collective class and ORDERS the parties to meet and confer regarding a revised proposed Notice for the Court's **[*15]** approval.

IT IS SO ORDERED.

/s /Paul D. Borman

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

Dated: October 14, 2015

End of Document

Exhibit 8

Williams v. King Bee Delivery, LLC

United States District Court for the Eastern District of Kentucky, Central Division

March 14, 2017, Decided; March 14, 2017, Filed

Civil Case No. 5:15-cv-306-JMH

Reporter
2017 U.S. Dist. LEXIS 36195 *; 2017 WL 987452

CRAIG WILLIAMS, on behalf of himself and all others similarly situated, et al., Plaintiffs, v. KING BEE DELIVERY, LLC, and BEE LINE COURIER SERVICES, INC., Defendants.

Prior History: *Williams v. King Bee Delivery, LLC, 199 F. Supp. 3d 1175, 2016 U.S. Dist. LEXIS 104001 (E.D. Ky., Aug. 8, 2016)*

Counsel: **[*1]** For Craig Williams, on behalf of himself & all others similarly situated, John Williams, on behalf of himself & all others similarly situated, Fred Berry, on behalf of himself & all others similarly situated, Plaintiffs: Benjamin J. Weber, LEAD ATTORNEY, PRO HAC VICE, Lichten & Liss-Riordan, PC, Boston, MA; Harold L. Lichten, LEAD ATTORNEY, Lichten & Liss-Riordan, PC, Boston, MA; Trent Taylor, LEAD ATTORNEY, Barkan Meizlish Handelman Goodin DeRose Wentz, Columbus, OH.

For King Bee Delivery, LLC, Bee Line Courier Services, Inc., Defendants: Keith Moorman, LEAD ATTORNEY, Frost Brown Todd LLC - Lexington, Lexington, KY; Kyle Donald Johnson, Robert C. Webb, LEAD ATTORNEYS, Frost Brown Todd LLC - Louisville, Louisville, KY.

Judges: Joseph M. Hood, Senior United States District Judge.

Opinion by: Joseph M. Hood

Opinion

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Plaintiffs Craig Williams, John Williams, and Fred Berry filed this action, on behalf of themselves and all others similarly situated, against Defendants King Bee Delivery, LLC and Bee Line Courier Services, Inc., seeking redress for violations of the Fair Labor Standards Act ("FLSA) and Kentucky Wage and Hour Act ("KWHA"). Plaintiffs now move the Court to conditionally **[*2]** certify their FLSA claim for unpaid overtime wages as a collective action. [DE 32]. Meanwhile, Defendants urge the Court to dismiss Plaintiffs' claim for unlawful deductions in violation of the KWHA. [DE 62]. Both Motions are now fully briefed and ripe for the Court's review. [DE 59, 63, 66, 69]. For the reasons stated herein, both Motions are hereby **GRANTED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendants provide delivery services to pharmacies and hospitals located in Kentucky, Ohio, and Indiana.[1] [DE 58, p. 3, ¶ 13]. As part of their

[1] In their Amended Complaint, Plaintiffs characterized King Bee and Bee Line as joint employers, noting that the two businesses share a registered agent, office space, and dispatchers. [DE 23]. Defendants urged the Court to dismiss Bee Line from this action, arguing that Plaintiffs had not made any substantive allegations against it. [DE 29]. The Court denied this request, finding that Plaintiffs' joint employment claim was plausible. [DE 43].

business, Defendants retain delivery drivers to load, transport, and deliver pharmaceuticals and other materials to their clients. [*Id.*]. Plaintiffs worked as delivery drivers for Defendants, operating out of their Kentucky warehouses.[2] [*Id.* at p. 2, ¶ 7-10].

An Independent Contractor Agreement governed the relationship between Plaintiffs and Defendants. [DE 33-1, 33-2, 33-3]. Plaintiffs agreed not to hold themselves out as "employee[s] or partner[s] of [Defendants] or as having authority to represent [Defendants], but only as [] independent delivery contractor[s] to [Defendants] for the purpose of performing this Agreement." [*Id.*]. Defendants in turn, relinquished the right to "exercise any direction, **[*3]** control or determination over the manner, means or methods of [Plaintiffs'] activities and objectives in operating [their] business" or restrict Plaintiffs from "being concurrently or subsequently engaged in another delivery service business or other occupation."[3] [*Id.* at 6].

Plaintiffs typically arrived at Defendants' warehouses, along with fifteen to twenty other delivery drivers, between 4:30 a.m. and 4:45 a.m. [DE 33-3, 33-6]. Each driver received a manifest from Defendants, listing the deliveries that they were supposed to make that day and a time window for making each delivery. [*Id.*]. Plaintiffs then loaded their trucks with the appropriate packages and began their daily routes. [*Id.*]. They carried GPS trackers with them throughout the day so that Defendants could track their progress. [*Id.*].

Defendants did not compensate Plaintiffs based on the number of hours worked. [*Id.*]. Instead, Plaintiffs received a flat rate per delivery route or a sum based on the number of deliveries made per route.[4] [*Id.*]. This compensation scheme did not vary when Plaintiffs worked more than forty hours per week, as they often did. [*Id.*].

In November 2014, Craig Williams spoke with Rusty Quill, an Operations **[*4]** Managers in Lexington, about his independent contractor classification and showed him a workers'-rights pamphlet produced by Kentucky Jobs for Justice. [*Id.* at p. 9, ¶ 43-44]. Quill later mailed this pamphlet to Defendants' headquarters in Louisville. [*Id.*]. On December 2, 2014, Williams discussed this issue with Quill and Jay Baumert, another Operations Manager, via telephone. [*Id.* at p. 9, ¶ 45]. Williams stated that he would file a complaint with a government agency if Defendants did not begin treating him like an employee. [*Id.*]. About ten minutes later, Norman Seger, President of Bee Line and Manager of King Bee, contacted Williams and informed him that Defendants would no longer need his services.[5] [*Id.*].

On October 14, 2015, Plaintiffs filed the instant action, asserting the following claims: (1) unlawful deductions in violation of the KWHA; (2) unpaid overtime wages in violation of the FLSA; (3) unpaid overtime wages in violation of the KWHA; (4) retaliation in violation of the FLSA on behalf of Craig Williams; (5) discrimination in violation of

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[2] Plaintiff Craig Williams worked at Defendants' Lexington facility from 2009 to 2014. [DE 58, p. 2, ¶ 7]. Defendants hired Plaintiff John Williams in April 2013. [*Id.* at p. 2, ¶ 8]. He continues to work at the Lexington facility. [*Id.*]. Plaintiff Fred Berry also worked at the Lexington facility from June 2014 to June 2015. [*Id.* at p. 2, ¶ 9].

[3] While Plaintiffs could work for other delivery services, the Agreement prohibited them from "deliver[ing] or attempt[ing] to divert any delivery order received through [Defendants] to a competitive delivery service." [*Id.*].

[4] Under the terms of the Agreement, Plaintiffs furnished their own vehicle and cell phone; bore the costs of fuel, repairs, and motor vehicle insurance; and wore King Bee shirts and badges while making deliveries. [DE 33-3 at 2-3]. Defendants routinely deducted expediting fees, administrative fees, customer loss or damage claims, lease expenses for GPS tracking devices, and costs for King Bee apparel from Plaintiffs' paychecks. [*Id.* at 4-5].

[5] According to the record, the United States Department of Labor ("DOL") investigated Defendants' labor practices in 2011. [DE 63-1]. At that time, the DOL's Wage and Hour Division "would not ... contest the employer's assertion that these individuals were independent contractors rather than employees." [*Id.*]. However, the DOL investigated Defendants again in 2015 and determined that Defendants "had misclassified [their] drivers as independent contractors." [63-2 at 9]. The investigation was cut short due to the filing of this action. [*Id.*]. It is unknown whether Williams delivered on his promise to file a complaint with a government agency, and if so, whether his complaints spurred the 2015 investigation.

the FLSA on behalf of Craig Williams; and (6) wrongful discharge in violation of public policy on behalf of Craig Williams. [DE 1].

Defendants promptly **[*5]** filed a Motion to Dismiss for Failure to State a Claim. [DE 12]. Plaintiffs rendered that Motion moot by filing an Amended Complaint. [DE 23, 26]. Defendants then renewed their Motion to Dismiss. [DE 29]. Shortly thereafter, Plaintiffs filed a Motion for Conditional Certification of a Collective Action. [DE 32]. The Court granted Defendants' request for an extension of time to respond to Plaintiffs' Motion and tolled the FLSA's statute of limitations during until Defendants filed their Response.[6] [DE 40].

On August 8, 2016, the Court entered a Memorandum Opinion and Order granting in part and denying in part Defendants' Motion to Dismiss. [DE 43]. The Court dismissed Plaintiffs' claim for unlawful deductions in violation of the KWHA, as well as their requests for civil penalties and punitive damages under the FLSA and KWHA. [DE 44]. Plaintiffs then filed a Motion for Leave to File a Second Amended Complaint, which the Court granted. [DE 46, 57, 58]. Defendants responded by filing the instant Motion to Dismiss, again attacking Plaintiffs' unlawful deductions claim. [DE 62]. This Motion to Dismiss is now before the Court for review, along with Plaintiffs' Motion for Conditional Certification. **[*6]** [DE 32, 62]. The Court will evaluate each Motion in turn.

III. ANALYSIS

A. Motion for Conditional Certification

i. The Certification Question

"Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 132 S. Ct. 2156, 2162, 183 L. Ed. 2d 153 (2012)* (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*); *see also 29 U.S.C. § 202(a)*. Chief among the FLSA's provisions is the overtime wage requirement, which generally obligates "employers to compensate employees for hours in excess of 40 per week at a rate of 1½ times the employees' regular wages." *Id.*; *see also 29 U.S.C. § 207(a)*.

As the above-cited language suggests, "only employees are entitled to overtime and minimum-wage compensation" under the FLSA. *Keller v. Miri Microsystems, LLC, 781 F.3d 799, 806 (6th Cir. 2015)* (observing that "[t]he FLSA's definition of 'employee' is strikingly broad"); *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)* (noting that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"). "Independent contractors do not enjoy [the] FLSA's protections." *Id.* However, "[t]he

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[6] To be precise, the Court took action in two steps. Defendants argued that Plaintiffs' Motion for Conditional Certification was premature because they had not yet filed an Answer and the Court had not yet entered a Scheduling Order pursuant to *Federal Rule of Civil Procedure 16*. [DE 37]. Defendants also noted that a ruling on the pending Motion to Dismiss could impact the Motion for Conditional Certification. [*Id.*]. Accordingly, the Court ordered that "Defendants' response to Plaintiffs' motion for conditional certification of a collective action and to provide notice ... shall be due seven (7) days after any Answer is due in this matter." [DE 38].

Plaintiffs then filed a Motion for Reconsideration or, in the Alternative, to Toll the Statute of Limitations, explaining that the Court's ruling would have adverse consequences for potential opt-in plaintiffs because the filing of a complaint does not toll the statute of limitations in FLSA cases. [DE 39]. The Court entered an Order tolling the FLSA's statute of limitations "during the extension of time granted to Defendants to respond to Plaintiffs' motion for conditional certification of a collective action and to provide notice." [DE 40].

After the Court issued its Memorandum Opinion and Order, the parties submitted an Agreed Order, stating that Defendants had until September 12, 2016 to file an Answer. [DE 44]. The Court signed this Order. [DE 45]. The parties later agreed, and the Court approved, another extension of time to October 17, 2016. [DE 55, 56]. Defendants filed their Response on October 17, 2016, and Plaintiffs replied on November 7, 2016. [DE 63].

Supreme Court has recognized ... that businesses are liable to workers for overtime wages even if the company 'put[s] ... an "independent contractor" label' on a worker whose duties 'follow[] the usual path of an employee."[7] ***[*7]*** *Id.* (quoting *Rutherford Food Corp. v. McComb, 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947))*.

"[A]ny one or more employees" may seek redress for violations of the FLSA by initiating a collective action "on behalf of himself or themselves and other employees similarly situated." *29 U.S.C. § 216(b)*. Similarly situated employees may "opt-into" such suits by "signal[ing] in writing their affirmative consent to participate in the action." *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)* (noting that this type of suit "is distinguished from the opt-out approach utilized in class actions under *Fed. R. Civ. P. 23*").

Certification of FLSA collective actions typically proceeds in two phases. *Comer, 454 F.3d at 546-47*. "[A]t the notice stage, the certification is conditional and by no means final." *Id.* (internal quotations omitted). "The plaintiff must show only that his position is similar, *not identical*, to the positions held by the putative class members." *Id.* (internal quotations omitted) (emphasis added). "[T]his determination is made using a fairly lenient standard, and typically results in conditional certification of a representative class." *Id.* (stating further that "authorization of notice need only be based on a modest factual showing") (internal quotations omitted).

"At the second stage, following discovery, trial courts examine more closely the question of whether particular members of the class **[*8]** are, in fact, similarly situated." *Id. at 547*. The final-certification decision depends upon "a variety of factors, including the factual and employment settings of the individual[] plaintiffs, the different defenses to which the plaintiffs may be subject on an individual basis, [and] the degree of fairness and procedural impact of certifying the action as a collective action." *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009)* (internal quotations omitted), *overruled on other grounds by Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*.

This case sits at the notice stage of the bifurcated-certification process. Plaintiffs ask the Court to conditionally certify their FLSA claim for unpaid overtime wages as a collective action and order notice of the action to all delivery drivers who were classified as independent contractors while working for Defendants, thereby providing these individuals with an opportunity to participate therein. Plaintiffs argue that such action is appropriate because they are similarly situated to the putative class members, having worked as delivery drivers for Defendants and performed the same basic duties under similar circumstances.

In support of this proposition, Plaintiffs Craig Williams and John Williams submitted declarations, detailing their daily routine and **[*9]** describing their compensation scheme. [DE 33-3, 33-6]. They insist that other drivers followed a similar routine and received wages on a similar basis, citing conversations that they had with unidentified drivers at Defendants' warehouses.

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[7] To determine whether a business has improperly classified a worker as an independent contractor, rather than an employee, courts apply the "economic-realities" test, which consists of the following six factors: (1) the permanency of the relationship between the parties; (2) the degree of skill required for the rendering of services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon his skill; (5) the degree of the alleged employer's right to control the manner in which the work is performed; and (6) whether the service rendered is an integral part of the alleged employer's business. *Id. at 806-07* (stating that "[n]o one factor is determinative"). The goal of this test is to ascertain whether the worker in question is, as a matter of economic reality, "dependent upon the business to which [he or she] render[s] service." *Keller, 781 F.3d at 806-07* (quoting *Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir. 1984))*. This inquiry is a mixed question of law and fact, which may be resolved by the court in some instances and require submission to a jury in others. *Id. at 804*.

In ruling on Defendants' prior Motion to Dismiss, the Court held that Plaintiffs had alleged sufficient facts to support a reasonable inference that they were Defendants' employees. [DE 43 at 4-6].

[*Id.*]. Plaintiffs bolster this assertion with declarations from two opt-in plaintiffs, Kevin Berry and Mark Lafferty, who described a similar experience with Defendants. [DE 33-4, 33-5].

As a threshold matter, Defendants assert that conditional certification is inappropriate because Plaintiffs were properly classified as independent contractors, and thus, were not entitled to overtime wages under the FLSA. Courts generally do not evaluate the legality of the challenged policy or the applicability of an FLSA exemption at this stage of the certification process. *See* *Bradford v. Logan's Roadhouse, Inc., 137 F. Supp. 3d 1064, 1072 (M.D. Tenn. 2015)* ("[T]he court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations" at the notice stage) (internal quotations omitted); *Waggoner v. U.S. Bancorp, 110 F. Supp. 3d 759, 769 (N.D. Ohio 2015)* ("It would be inappropriate to consider the merits of defendant's defense at this time, before the record has been developed."). Because Defendants' argument is premature, the Court need not consider **[*10]** it further.

Defendants next urge the Court to deny Plaintiffs' request for conditional certification because their declarations, composed of conclusory statements and inadmissible hearsay, do not present competent evidence that potential opt-in plaintiffs exist. While some courts have refused to consider inadmissible evidence at the notice stage, applying "the evidentiary standard for affidavits found in *Rule 56(e) of the Federal Rules of Civil Procedure*," the majority of courts within the Sixth Circuit "have held that plaintiff's evidence on a motion for conditional certification need not meet the same evidentiary standards applicable to motions for summary judgment because to require more at this stage of litigation would defeat the purpose of the two-stage analysis under *Section 216(b)*." *Waggoner, 110 F. Supp. 3d at 770, n. 6* (conditionally certifying a collective action even though plaintiffs' "generalized statements about the job duties" of potential opt-in plaintiffs and conversations described "in the broadest of terms" were "quite thin"). Because the majority approach is most consistent with the logic underlying the FLSA's two-stage certification process, the Court will consider Plaintiffs' declarations in full.

Even if these declarations are worthy of consideration, Defendants **[*11]** insist that Plaintiffs cannot satisfy the "similarly situated" standard because their experiences differ too much from those of the opt-in plaintiffs. For example, Plaintiffs Craig Williams and John Williams signed Independent Contractor Agreements, while opt-in plaintiffs Kevin Berry and Mark Lafferty merely state that Defendants classified them as independent contractors.[8] [DE 33-3, 33-4, 33-5, 33-6]. Again, the Court declines to consider Defendants' argument because it is more appropriate for the final certification stage.[9] *See* *O'Brien, 575 F.3d at 584* (stating that courts may consider "the factual and employment settings of the individual[] plaintiffs" at the final-certification stage); *Waggoner, 110 F. Supp. 3d at 769-70* (finding that evidence of plaintiffs' varying job duties is best reserved for the second stage of the process).

Having considered the allegations set forth in the Second Amended Complaint, along with the declarations submitted by Plaintiffs and opt-in plaintiffs, the Court concludes that Plaintiffs have

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[8] Defendants also note that Craig and John Williams worked out of the Lexington warehouse, while Berry worked out of the Louisville warehouse and Lafferty operated out of a hospital in Corbin. [*Id.*]. Craig and John Williams worked between five and six days per week; Berry and lafferty consistently worked five days per week. [*Id.*]. Finally, Craig Williams shouldered additional supervisory responsibilities, while the others simply made deliveries. [*Id.*].

[9] Defendants submitted their own declarations from current and former delivery drivers in an effort to demonstrate that Plaintiffs are not similarly situated to potential opt-in plaintiffs. In *Waggoner*, the defendants used a similar tactic at the conditional certification stage, but the court declined to consider the evidence because it was "best left for consideration at the decertification stage." *See* *110 F. Supp. 3d at 769-70*; *see also* *Killion v. KeHE Distrib., 2012 U.S. Dist. LEXIS 156745, 2012 WL 5385190, at *6* ("At the notice stage, this Court does not undertake a credibility determination to weigh the declarations in support of each side.").

made the "modest factual showing" that their "position is similar, not identical, to the positions held by the putative class members." *Comer, 454 F.3d at 546-47*. Plaintiffs have demonstrated that they performed similar **[*12]** duties, adhered to similar schedules, and followed similar rules as other delivery drivers working for Defendants. Moreover, Plaintiffs have introduced evidence to suggest that Defendants misclassified all of their delivery drivers as independent contractors instead of employees, then used this misclassification as a basis to deny them overtime wages to which they were otherwise entitled. *See O'Brien, 575 F.3d at 585* ("[I]t is clear that plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs."). For these reasons, the Court will conditionally certify Plaintiffs' claim for unpaid overtime wages as a collective action under the FLSA.

ii. The Composition of the Notice Group

The FLSA "grant[s] the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible and not otherwise contrary to the statutory commands or the provisions of the Federal Rules of Civil Procedure." *Hoffman-LaRoche v. Sperling, 493 U.S. 165, 171, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)* (discussing *29 U.S.C. § 216(b)*, the FLSA's enforcement provision, as incorporated into the ADEA). Thus, "district courts have discretion, in appropriate cases, **[*13]** to implement *29 U.S.C. 216(b)* ... by facilitating notice to potential plaintiffs." *Id.* "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Id.*

Plaintiffs move the Court to authorize notice to "[a]ll individuals who were classified as independent contractors while working as delivery drivers for King Bee Delivery, LLC and/or Bee Line Courier Service, Inc. from February 2, 2013 to present." [DE 32]. Plaintiffs also ask the Court to facilitate notice by ordering Defendants to produce a list of all delivery drivers who worked for them in the last three years, complete with last-known mailing addresses, last-known telephone numbers, last-known email addresses, work locations, and dates of employment. [DE 33 at 14].

Defendants seek to limit the Notice Group to delivery drivers who worked in Kentucky, arguing that Plaintiffs have not produced any evidence of misclassification and unpaid overtime wages relating to drivers who worked in Ohio and Indiana. Plaintiffs insist that they have presented such evidence, citing Kevin Berry's declaration that he had conversations with Ohio and Indiana drivers, **[*14]** who reported similar working conditions and compensation schemes. [DE 33-4]. Plaintiffs also rely heavily on the Department of Labor's 2015 Report, which suggests that Defendants classified drivers at all locations as independent contractors and failed to pay them overtime wages when they worked more than forty hours per week. Because this evidence supports the inference that the Defendants' labor practices affected drivers in all three states, the Court finds it appropriate to include Ohio and Indiana drivers in the Notice Group.

Defendants next ask the Court to limit its authorization of notice to delivery drivers who worked for them at some point in the three years prior to the date that notice is sent. Plaintiffs insist that all drivers who worked for Defendants from February 2, 2013, the date that they filed the Motion for Conditional Certification, to present should receive notice of the collective action. In support of this proposition, Plaintiffs note that the Court tolled the FLSA's statute of limitations in this case. While Plaintiffs are correct in stating that the Court tolled the statute of limitations in this case, their argument suggests that the tolling lasted throughout **[*15]** the pendency of their Motion for Conditional Certification. It did not.

On February 11, 2016, nine days after Plaintiffs filed their Motion, the Court ordered that the statute of limitations be tolled during the extension of time granted to Defendants to respond to Plaintiffs' Motion for Conditional Certification. [DE 40]. Defendants' response brief was ultimately due on October 17, 2016. [DE 50, 52, 56, 59]. Thus, the statute of limitations did not run from February 11, 2016, to October 17, 2016, or for 249 of the 400 days that this Motion has been pending. The Court will account for this tolling by authorizing notice to all individuals who were classified as independent contractors while working as delivery drivers for Defendants in the three years and 249 days preceding the date that notice is sent.

Finally, Defendants complain that the Notice Group includes all delivery drivers who were classified as independent contractors, when it should be limited to drivers who worked as independent contractors *and* worked more than forty hours per week without receiving overtime wages. While both of these criteria are crucial to the ultimate success of Plaintiffs' overtime wages claim, the Court **[*16]** finds that defining the Notice Group in such a way could confuse potential opt-in plaintiffs and deter them from participating in this action. It seems likely that potential opt-in plaintiffs will remember that they were classified as independent contractors while working as delivery drivers, but they may not recall how many hours they worked in a given week. Moreover, defining the Notice Group in broader terms best serves the remedial objectives of the FLSA. If, after discovery, the parties find that an opt-in plaintiff was an independent contractor who did not work more than forty hours per week without receiving overtime wages, then he or she will simply be regarded as a member of the collective action with no damages.

iii. The Method and Timing of Notice

In addition to facilitating notice, the FLSA allows courts to "monitor[] preparation and distribution of the notice" to the putative members of the collective action, thereby "ensur[ing] that it is timely, accurate, and informative." *Hoffman-LaRoche, 493 U.S. at 171-72*. Plaintiffs have submitted a Proposed Notice and Opt-In Consent Form, to be sent via first class mail, which sets an opt-in period of ninety days. They also ask the Court for permission to send these documents **[*17]** to the Notice Group via email and to issue a reminder halfway through the notice period.

Defendants urge the Court to shorten the ninety-day period requested by Plaintiffs to thirty days, arguing that Plaintiffs have failed to explain why such a lengthy opt-in period is necessary. While this may be true, Defendants have likewise failed to explain why a thirty-day opt-in period is more appropriate. Because "[t]here is no hard and fast rule controlling the length of FLSA notice periods" across jurisdictions, and because the Eastern District of Kentucky has yet to adopt a standard notice period, the Court will follow the Western District of Kentucky's example and authorize a notice period of sixty days. *See Ganci v. MBF Inspection Servs., Inc., Case No. 2:15-cv-2929, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *3 (S.D. Ohio Sept. 20, 2016)* (expressing a preference for ninety-day opt-in periods, but noting that many courts limit opt-in periods to sixty days or less); *see Green v. Platinum Rest. Mid-America, LLC, Civ. An. No. 3:14-cv-439-GNS, 2015 U.S. Dist. LEXIS 144802, 2015 WL 6454856, at *5 (W.D. Ky. Oct. 26, 2015)* ("The standard in FLSA cases in this jurisdiction is ... sixty days.").

Defendants also ask the Court to deny Plaintiffs' request for dual notification, observing that "[c]ourts generally approve only a single method for notification unless **[*18]** there is a reason to believe that method is ineffective." *Wolfram v. PHH Corp., No. 1:12-cv-599, 2012 U.S. Dist. LEXIS 181073, 2012 WL 6676778, at *4 (S.D. Ohio Dec. 21, 2012)*. They argue that notice should be sent via first class mail only because it "is generally considered to be the best notice practicable." *Lindberg v. UHS of Lakeside, LLC, 761 F. Supp. 2d*

752, 765 (W.D. Tenn. 2011). Defendants insist that email is less preferable because it invades the privacy of potential opt-in plaintiffs and presents the possibility that the Notice will be forwarded and distorted.

Nevertheless, a growing number of courts have authorized dual notification as to former employees only, recognizing that employers may not have current residential addresses for them. (observing that this approach "advances the remedial purpose of the FLSA, because service of the notice by two separate methods increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit, and of their opportunity to participate"); *Lewis v. Huntington Nat'l Bank, No. C2-11-CV-0058, 2011 U.S. Dist. LEXIS 65068, 2011 WL 8960489, at *2 (S.D. Ohio June 20, 2011)* (limiting email notification to former employees because "[t]he likelihood that the addresses that [defendant] has on file for its current employees are accurate is high, and communicating by two methods serves no purpose").

In such situations, this approach "advances the remedial **[*19]** purpose of the FLSA because service of the notice by two separate methods increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit, and of their opportunity to participate." *Atkinson v. TeleTech Holdings, Inc., No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *4-5 (S.D. Ohio Feb. 26, 2015)* (finding that these objectives "outweigh[] any privacy concerns associated with the disclosure of email addresses"). While the Court could authorize alternative forms of notice at a later date if necessary, efficiency favors limited dual notification at the outset. *Compare* *Lindberg, 761 F. Supp. 2d at 765* (adopting the "wait-and-see" approach) *with* *Lutz v. Huntington Bancshares, Inc., No. 2:12-cv-01091, 2013 U.S. Dist. LEXIS 56477, 2013 WL 1703361, at *7 (S.D. Ohio Apr. 19, 2013)* ("By allowing e-mail notice to former employees now, the Court hopes to avoid the added step of having to resend notice in the event that a former employee's last known home address proves to be inaccurate.").

In an effort to efficiently effectuate the goals of the FLSA, the Court will authorize Plaintiffs to send the Notice and Opt-In Consent Form to former delivery drivers via first class mail and email. Dual notification is *not* appropriate for current drivers. Because Defendants have raised concerns about the integrity of notice transmitted via email, **[*20]** the Court orders Plaintiffs to attach the notice documents to the email as a PDF. *See, e.g.*, *Lewis, 2011 U.S. Dist. LEXIS 65068, 2011 WL 8960489, at *2* (finding that such a step minimizes the risk that notice sent via email will be distorted or otherwise altered).

Finally, Defendants insist that reminder notices are inappropriate, observing that "[m]any courts have rejected reminder notices, recognizing the narrow line that divides advising potential opt-in plaintiffs of the existence of the lawsuit and encouraging participation." *Wolfram, 2012 U.S. Dist. LEXIS 181073, 2012 WL 6676778, at *4*; *see also* *Fenley v. Wood Grp. Mustang, Inc., 170 F. Supp. 3d 1063, 1074-75 (S.D. Ohio 2016)* (concluding that issuance of a reminder notice "may unnecessarily stir up litigation or improperly suggest the Court's endorsement of [p]laintiff's claims"). *But see* *Kidd v. Mathis Tire and Auto Serv., Inc., 2014 U.S. Dist. LEXIS 142164, 2014 WL 4923004, at *2-3 (W.D. Tenn. Sept. 18, 2014)* (allowing the issuance of a reminder notice because such a step serves the remedial purpose of the FLSA). Because Plaintiffs have not explained why reminder notices are necessary in this case, and in the interest of eliminating the concerns of judicial endorsement detailed above, the Court declines to authorize the issuance of a reminder notice.

iv. The Content of the Notice and Opt-In Consent Form

Defendants have also raised several concerns about the content of Plaintiffs' Proposed Notice and Opt-In Consent Form. Specifically, Defendants argue

that these **[*21]** documents are deficient because they refer to pendent state law claims, bear the Court's name at the top of the page, and fail to sufficiently articulate the rights and responsibilities of potential opt-in plaintiffs.

The Court agrees that the Proposed Notice and Opt-In Consent Form should not discuss Plaintiffs' pending state law claims. These documents are only intended to notify potential opt-in plaintiffs of their opportunity to participate in a collective action to recover unpaid overtime wages under the FLSA. Because the Proposed Notice and Opt-In Consent Form do not offer potential opt-in plaintiffs a similar opportunity to participate collectively in the state law claims, any mention of them is confusing as well as irrelevant.

By contrast, Defendants' concerns about the use of the Court's name are overstated. Although courts have held that the inclusion of the court's name at the top of such documents could be interpreted "as a judicial endorsement of the claims" in the case, such concerns are not present when the name of the court is accompanied by the styling of the case, the case number, and a statement that the court takes no position on the merits of the action. *See* *Russell v. Ill. Bell Tele. Co., 575 F. Supp. 2d 930, 938-39 (N.D. Ill. 2008)*. Because **[*22]** Plaintiffs' Proposed Notice and Opt-In Consent Form contain all of these elements, the use of the Court's name could not be reasonably construed as a judicial endorsement of this action.

Defendants next argue that the Proposed Notice should inform potential opt-in plaintiffs that they may be responsible for Defendants' costs and attorney's fees if their claims are unsuccessful. While Plaintiffs insist that such language will discourage potential opt-in plaintiffs from participating in the collective action, courts within the Sixth Circuit have held that such concerns do not justify the exclusion of this information. *Snide v. Discount Drug Mart, Inc., No. 1:11-cv-0244, 2011 U.S. Dist. LEXIS 133736, 2011 WL 553722, at *7 (E.D. Mich. Feb. 21, 2012)* (reasoning that "potential plaintiffs, in order to make an informed decision about whether to opt-in, should be made aware that there is a possibility that they may be liable for a defendants' costs of litigation"); *Fenley, 170 F. Supp. 3d at 1074-75* (observing that "[c]ourts across the country are split on this issue, but ultimately deciding to advise potential opt-in plaintiffs of the possibility that they will be liable for defendants' costs and fees). Thus, Plaintiffs must edit the Proposed Notice to include such information.

Defendants also insist that Plaintiffs **[*23]** notify potential opt-in plaintiffs of their right to retain counsel of their own choosing. Consistent with this language, Defendants argue that the Opt-In Consent Forms should not include language automatically designating Plaintiffs' counsel as attorneys for the potential opt-in plaintiffs. However, several courts within the Sixth Circuit have observed that "Plaintiffs' counsel is counsel of record; and, if any potential plaintiff chooses to opt-in, that plaintiff will be represented by Plaintiffs' counsel." *Fisher v. Mich. Bell Tele. Co., 665 F. Supp. 2d 819, 829 (E.D. Mich. 2009)*; *see also* *Gomez v. ERMC Prop. Mgmt., LLC, No. 3:13-cv-01081, 2014 U.S. Dist. LEXIS 91778, 2014 WL 3053210, at *2 (N.D. Ohio July 7, 2014)* (citing *Adams v. Inter- Con Sec. Sys., Inc., 242 F.R.D. 530, 541 (N.D. Cal. 2007)* (concluding that the invitation to bring additional counsel into the lawsuit likely would defeat the efficient operation of the litigation). *But see* *Fenley, 170 F. Supp. 3d at 1073* (quoting *Heaps v. Safelite Solutions, LLC, No. 2:12-CV-159, 2012 U.S. Dist. LEXIS 178647, 2012 WL 6593936, at *3 (S.D. Ohio Dec. 17, 2012))* ("Informing potential plaintiffs of their right to choose their own counsel is an appropriate element in a notice.").

To be clear, this case law "does not imply that any potential plaintiff is precluded from choosing not to opt-in or choosing instead to litigate a claim individually." *Fisher, 665 F. Supp. 2d at 829*; *see also* *Gomez, 2014 U.S. Dist. LEXIS 91778, 2014 WL 3053210, at *2* (observing that the notice documents informed potential opt-in plaintiffs that

"they may choose to hire their **[*24]** own attorneys and pursue a lawsuit individually, unaffected by the course of this collective action"). Because the addition of attorneys in this case would likely diminish the efficiency of the collective action mechanism, and because Plaintiffs' Proposed Notice clearly states that potential opt-in plaintiffs may pursue relief individually, the Court sees no need to incorporate Defendants' suggested language therein.

Finally, Defendants request that the Notice include language advising potential opt-in plaintiffs of their right to consult with defense counsel. Several courts within the Sixth Circuit have indicated that such communication would be inappropriate. *Gomez, 2014 U.S. Dist. LEXIS 91778, 204 WL 3053210, at *1*; *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *5* (concluding that, "[a]t a minimum, including such information creates a risk of confusing putative plaintiffs" and "[a]t worst ... opens the door to potentially inappropriate or unethical communications"). *But see Potts v. Nashville Limo & Transport, LLC, No. 3:14-cv-1412, 2015 U.S. Dist. LEXIS 89825, 2015 WL 4198793, at *7 (M.D. Tenn. July 10, 2015)* (stating, without explanation, that the notice should include contact information for defense counsel). Because the Court sees no need to facilitate such communication, it will not require Plaintiffs to include such language in the Notice.

B. Motion to Dismiss

A **[*25]** Complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *see also Fed. R. Civ. P. 12(b)(6)*. It should also include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly v. Bell Atl. Corp., 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that a defendant is liable for the misconduct alleged." *Id.* "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*.

In its Memorandum Opinion and Order, the Court dismissed Plaintiffs' claim for unlawful deductions under the KWHA as conclusory. [DE 43 at 11]. After all, Plaintiffs alleged that the deductions for the GPS tracker, uniforms, and fees constituted rebates or other unlawful deductions under *KRS § 337.060(1)*, but "failed to provide any legal support or otherwise explain why the other deductions were forbidden under *KRS § 337.060(1)*, particularly because Plaintiffs gave their written consent." [*Id.*]. As for the deductions relating to damaged property, the Court held that "Plaintiffs have provided no supporting facts whatsoever, and a recital of the elements of the statute will not do." [*Id.* **[*26]**].

Plaintiffs attempted to cure these defects by filing a Second Amended Complaint. They now assert that the deductions relating to the GPS tracker, uniforms, and fees qualify as "rebates" or "deductions" because these items "provided no value to Plaintiffs." [DE 58 at 11-12]. Plaintiffs do not describe the factual basis for this conclusion, nor do they explain why these deductions are forbidden when they agreed to them in writing. [DE 58 at 12]. Plaintiffs also fail to offer additional facts to support their claim for unlawful deductions relating to damaged property. In short, Plaintiffs offer nothing more than additional conclusory allegations to support their amended claim for unlawful deductions. Dismissal of the claim is therefore appropriate.

IV. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED as follows:

(1) Plaintiffs' Motion to Certify Collective Action Status [DE 32] is hereby **GRANTED**;

(2) Plaintiffs shall **REMOVE** all references to their pendent state law claims from their Proposed Notice;

(3) Plaintiffs shall **INCLUDE** language in their Proposed Notice advising potential opt-in plaintiffs that they may be liable for costs and attorney's fees if their claim is unsuccessful; **[*27]**

(4) The Notice Group shall **INCLUDE** all individuals who were classified as independent contractors while working as delivery drivers for King Bee Delivery, LLC and/or Bee Line Courier Service, Inc. from [a date three years and 249 days prior to the sending of the Notice] to present;

(5) Defendants shall **PROVIDE** Plaintiffs' counsel with an electronic file containing the names, last-known mailing addresses, last-known telephone numbers, work locations, and dates of employment as to all current and former workers who are members of the Notice Group, as well as last-known email addresses for former workers who are members of the Notice Group, **within ten** (10) **days of the date of entry of this Order**;

(6) Plaintiffs' counsel shall **CAUSE** the Revised Notice and Opt-In Consent Form to be sent to all members of the FLSA Notice Group who have not already filed Opt-In Consent Forms on the docket **within ten (10) business days of receiving the above-referenced electronic file**;

(7) All members of the FLSA Notice Group shall be **provided sixty (60) days from the date of mailing** the Notice and Opt-In Consent Form to opt-in to this lawsuit;

(8) All Opt-In Consent Forms will be deemed to have been filed with **[*28]** the Court the date that they are stamped as received, and Plaintiffs' counsel will file them electronically on the docket on a weekly basis, at a minimum;

(9) The parties shall **FILE** a Joint Status Report, detailing their compliance with this Order and describing the progression of the case, **within fourteen (14) days of the close of the opt-in period**; and

(10) Defendants' Motion to Dismiss [DE 62] is **GRANTED**.

This the 14th day of March, 2017.

Signed By;

/s/ Joseph M. Hood

Joseph M. Hood

Senior U.S. District Judge

End of Document

Exhibit 9

Carter v. XPO Last Mile, Inc.

United States District Court for the Northern District of California

October 3, 2016, Decided; October 3, 2016, Filed

Case No. 16-cv-01231-WHO

Reporter
2016 U.S. Dist. LEXIS 137176 *

RON CARTER, et al., Plaintiffs, v. XPO LAST MILE, INC, Defendant.

Subsequent History: Settled by, Stay granted by *Carter v. XPO Logistics, Inc., 2019 U.S. Dist. LEXIS 230601 (N.D. Cal., June 27, 2019)*

Settled by, Motion granted by, Costs and fees proceeding at, Judgment entered by *Carter v. XPO Logistics, Inc., 2019 U.S. Dist. LEXIS 181017, 2019 WL 5295125 (N.D. Cal., Oct. 18, 2019)*

Counsel: **[*1]** For Ron Carter, Juan Estrada, Jerry Green, Burl Malmgren, Bill McDonald, Joel Morales, on behalf of themselves and all others similarly situated, Plaintiffs: Beth A. Ross, LEAD ATTORNEY, Amy Sayoko Endo, Jennifer Grace Keating, Leonard Carder LLP, Oakland, CA.

For XPO Logistices, Inc, Defendant: Becki Diana Graham, LEAD ATTORNEY, Ogletree Deakins Nash Smoak & Stewart, P.C., San Francisco, CA; James Clay Rollins, Jeffrey Hamilton Newhouse, PRO HAC VICE, Ogletree, Deakins, Nash, Smoak and Stewart, P.C., Richmond, VA.

Judges: WILLIAM H. ORRICK, United States District Judge.

Opinion by: WILLIAM H. ORRICK

Opinion

ORDER GRANTING CONDITIONAL CERTIFICATION

Re: Dkt. No. 49

Plaintiffs seek conditional certification under the Fair Labor Standards Act (FLSA) of a class of Delivery Drivers who signed Delivery Service Agreements with defendant XPO Last Mile, Inc. (XPO). XPO argues that the Delivery Drivers are not similarly situated for several reasons, but given the low burden for FLSA conditional certification in this District and the fact that discovery is needed to test the strength of XPO's assertions (which may be re-raised on a motion to decertify), plaintiffs' motion for conditional certification is GRANTED.

BACKGROUND

XPO **[*2]** provides delivery services to retail merchants like Home Depot, Lowe's Home Improvement, Macy's, Ethan Allen, Pottery Barn, and Kraftmaid. FAC P 5. These companies contract with XPO to provide delivery and basic installation of newly purchased appliances and other merchandise, and removal of old appliances from their customers' homes. *Id.* XPO utilizes plaintiffs and similarly situated class members ("Delivery Drivers") to pick up the merchandise at the merchants' stores or warehouses and to deliver and install them at the customers' homes. It also utilizes the Delivery Drivers to haul away old appliances from the customers' homes for disposal. *Id.*

Plaintiffs claim that XPO misclassifies the Delivery Drivers as independent contractors pursuant to the Delivery Service Agreements (DSAs) that XPO

requires the Delivery Drivers to sign. Plaintiffs argue the Delivery Drivers should be classified as employees, and as a result assert claims on behalf of Delivery Drivers for: (1) failure to pay overtime under the Federal Labor Standards Act (FLSA, *29 U.S.C §§ 201 et seq.*); (2) failure to pay a minimum wage under FLSA; (3) failure to pay a minimum wage under California law (*Cal. Labor Code §§ 1182.11*, *1194*; IWC Wage Order 9); (4) failure to pay **[*3]** overtime under California law (*Cal. Labor Code §§ 510*, *1194*; IWC Wage Order 9); (5) reimbursement of employee expenses under California law (*Cal. Labor Code § 2802*); (6) unlawful deduction from wages under California law (*Cal. Labor Code §§ 221*, *223*; Wage Order 9); (7) failure to provide meal periods under California law (*Cal. Labor Code §§ 226.7*, *512*; Wage Order 9); (8) failure to permit rest breaks under California law (*Cal. Labor Code § 226.7*; Wage Order 9); (9) failure to provide accurate wage statements under California law (*Cal. Labor Code §§ 226*, *226.3*; Wage Order 9); (10) waiting time penalties under California law (*Cal. Labor Code §§ 201-203*); (11) violations of California's Unfair Competition Law (*Cal. Bus. & Prof. Code §§ 17200 et seq.*); and (12) civil penalties under the California Private Attorneys General Act (*Cal. Labor Code §§ 2698, et seq.*).

Through this motion, plaintiffs ask me to conditionally certify a class of Delivery Drivers under FLSA, so that they can inform similarly situated Delivery Drivers of this action and allow those drivers to opt-in to being represented by plaintiffs' counsel in this action. The class plaintiffs seek to conditionally certify is:

> All persons who are or have operated as a Delivery Driver for Defendant in the State of California and who executed an XPO or 3PD "Delivery Service Agreement" or a similar written contract on behalf of themselves or entities in which they have an **[*4]** ownership interest that was in effect during the period commencing March 11, 2013 through the present.

Memo. at 1. "Delivery Drivers" are defined in the FAC as individuals who pick up, deliver, and install merchandise at the retailer's stores or warehouses. FAC PP 5, 45.

XPO opposes, arguing that conditional certification is not appropriate here given the individual circumstances of the Delivery Drivers and lack of common proof for misclassification.

LEGAL STANDARD

Under *29 U.S.C. § 216(b)*, an employee may bring a collective action on behalf of other "similarly situated" employees.[1] The majority of courts have adopted a two-step approach for determining whether a class is "similarly situated." *Harris v. Vector Mktg. Corp., C-08-5198 EMC, 716 F. Supp. 2d 835, 837 (N.D. Cal. 2010)*; *see also Daniels v. Aéropostale West, Inc., C-12-05755 WHA, 2013 U.S. Dist. LEXIS 59514, * 5 (N.D. Cal. Apr. 24, 2013)*. At step one, the court must determine whether the proposed class should be informed of the action. *Harris, 716 F. Supp. 2d at 837*. The "notice" stage determination of whether the putative class members will be similarly situated is made under a "fairly lenient standard" which typically results in conditional class certification. *Daniels, 2013 U.S. Dist. LEXIS 59514,* 6*. The plaintiff must make substantial allegations that the putative class members were subject to an illegal policy, plan, or decision, by showing **[*5]** that there is some factual basis beyond the "mere averments" in the complaint for the class allegations. *Id.*[2]

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[1] This analysis is distinct from the *Rule 23* class certification analysis. *See, e.g., Hill v. R+L Carriers, Inc., C-09-1907 CW, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010)* ("collective actions under the FLSA are not subject to the requirements of *Rule 23 of the Federal Rules of Civil Procedure* for certification of a class action.").

[2] At step two, which occurs after discovery is completed, defendant may move to decertify the class and the court makes a factual determination whether the plaintiffs are similarly situated by weighing factors including: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available

Given the lenient standard at the notice stage, courts have held that plaintiffs bear a "very light burden" in substantiating the allegations. *Prentice v. Fund for Pub. Interest Research, Inc., C-06-7776 SC, 2007 U.S. Dist. LEXIS 71122, *5 (N.D. Cal. Sept. 18, 2007)* ("Given that a motion for conditional certification usually comes before much, if any, discovery, and is made in anticipation of a later more searching review, a movant bears a very light burden in substantiating its **[*6]** allegations at this stage."). Courts have also rejected attempts by defendants to introduce evidence going to the merits of plaintiffs' allegations at the notice stage. *See, e.g., Labrie v. UPS Supply Chain Solutions, Inc., C-08-3182 PJH, 2009 U.S. Dist. LEXIS 25210, * 20 (N.D. Cal. Mar. 18, 2009)* (rejecting defendant's evidence in evaluating conditional certification as "beyond the scope of this court's analysis in a first tier determination insofar as the evidence raises questions going to the merits of whether plaintiffs are sufficiently similarly situated to allow this action to proceed as a FLSA collective action, and is more appropriately considered as part of the court's analysis in a second tier determination on a motion to decertify after conditional certification is granted, notice has been given, the deadline to opt-in has passed, and discovery has closed."); *see also Harris, 716 F. Supp. 2d at 838* ("A plaintiff need not submit a large number of declarations or affidavits to make the requisite factual showing. A handful of declarations may suffice . . . . The fact that a defendant submits competing declarations will not as a general rule preclude conditional certification.").

DISCUSSION

I. CONDITIONAL CERTIFICATION

The only question is whether plaintiffs have met their "light **[*7]** burden" by setting forth substantial allegations showing that the Delivery Drivers are "similarly situated." To do so, plaintiffs submit declarations from five named plaintiffs testifying that:

- XPO uniformly classified Delivery Drivers as independent contractors;
- XPO requires Delivery Drivers to sign DSA that have the same material terms (although some DSAs differ in non-material respects);
- DSAs are presented to drivers as a "complete document" and Delivery Drivers have no ability to negotiate rates of pay or other terms;
- All Delivery Drivers perform the same basic job duties (pick up merchandise from warehouse or stores and deliver it to the retailers' customers' homes);
- Delivery Drivers are assigned by XPO to one or more retailer stores and provided with the delivery manifest lists and time slots;
- Delivery Drivers do not have any "say" in their assigned deliveries and cannot refuse deliveries;
- Delivery Drivers must notify XPO upon completion of delivery through a scanner or smartphone app provided by XPO;
- Delivery Drivers must wear XPO shirts, dark pants, black shoes, and a company issued badge;
- Delivery Drivers must use trucks that meet certain requirements for age, appearance, **[*8]** and have an XPO logo when making deliveries;
- XPO collects customer satisfaction data on their Delivery Drivers and "at times" Delivery Drivers are required to attend meetings to discuss the customer satisfaction data;
- Delivery Drivers must provide their own vehicle and pay for the vehicle's maintenance, repair, and insurance;
- "Most" Delivery Drivers are required to engage helpers at the Delivery Drivers' own cost and required to post a $5000 bond to cover lost or damaged merchandise or damage to a customer's home;
- Delivery Drivers routinely work more than 40

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to the defendant which appeared to be individual to each plaintiff; and (3) fairness and procedural considerations. *Harris, 716 F. Supp. 2d at 837*.

hours a week for XPO, do not perform deliveries for other companies, and are typically scheduled by XPO for five, often six and not infrequently seven days a week; and

• Under the DSAs, Delivery Drivers are paid a flat fee per delivery, per day, or per week worked.

See generally Dkt. Nos. 50-1, 50-3, 50-4, 50-5, 50-6 (Driver Declarations).

Not surprisingly, XPO challenges this testimony and counters with declarations from XPO employees and Delivery Drivers who testify that:

• The named plaintiff Delivery Drivers themselves operated "businesses" and signed the DSAs in their businesses' names;

• Delivery Driver businesses can be single-vehicle **[*9]** sole proprietorships or corporations (who themselves operate a fleet of vehicles with their own employees or sub-contractors);

• XPO has no input on who the Delivery Drivers employ as their employees or sub-contractors;

• XPO has no input on the types or number of vehicles used (purchased or leased) by the Delivery Driver businesses;

• Delivery Drivers may work for other companies, including XPO competitors;

• Delivery Drivers are free to reject deliveries offered by XPO without negative consequences;

• Some of the Delivery Drivers have been in business for less than 2 years or more than 15;

• Delivery Drivers negotiate different terms under the DSAs, including the rates that their companies charge XPO depending on the types of deliveries being made and the location of deliveries;

• Delivery Drivers may control the routes and scheduling of the XPO deliveries;

• Delivery Driver vehicles do not have XPO logos;

• The Delivery Driver business employees and contractors do not wear XPO uniforms; and

• Delivery Drivers in the class pleaded by plaintiffs have signed at least five different versions of the DSAs.

See generally Dkt. Nos. 57-2 (Delivery Driver Business Declarations); 57-1 (Torres XPO Decl.); **[*10]** Dkt. No. 57-5 (Rollins XPO Decl. & Exs thereto [DSAs]).

As noted above, in this District the question on a conditional certification motion is simply whether plaintiffs have made "substantial allegations" that the putative class members were subject to an illegal policy, plan, or decision, by showing that there is some factual basis beyond the "mere averments" in the complaint for the class allegations. *Daniels, 2013 U.S. Dist. LEXIS 59514,* 6*. They have done so here. Although XPO may dispute some of plaintiffs' allegations — for example, whether the typical Delivery Driver could or did negotiate the rates of services under the DSAs, whether the typical Delivery Driver worked exclusively or primarily for XPO, whether the typical Delivery Driver was required to wear a uniform or carry an XPO logo on their vehicle — those disputes will be considered at the "second step" of the FLSA certification process. *See, e.g., Harris, 716 F. Supp. 2d at 837*; *see also Kellgren v. Petco Animal Supplies, Inc., No. 13CV644 L KSC, 2015 U.S. Dist. LEXIS 118615, 2015 WL 5167144, at *6 (S.D. Cal. Sept. 3, 2015)* (refusing to "give Defendant's happy camper declarations any weight" at the first conditional certification stage).[3]

XPO focuses on the fact that the determination of

[3] XPO relies on a Southern District case which imposed on plaintiffs the burden to support their "detailed allegations" by "affidavits which **[*11]** successfully engage a defendant's affidavits to the contrary." *Trinh v. JP Morgan Chase & Co., No. 07-CV-1666 W (WMC), 2008 U.S. Dist. LEXIS 33016, 2008 WL 1860161, at *3 (S.D. Cal. Apr. 22, 2008)* (relying on *Hipp v. Nat'l Liberty Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir.2001)*). Even if that sort of evidentiary showing was required, it has been provided here. Plaintiffs' detailed declarations "engage" defendants' declarations. To the extent there are factual disputes between them, those are not appropriately resolved at this juncture.

whether a Delivery Driver was properly classified as an independent contractor is, by its nature, a fact-intensive analysis. Oppo. 11-12.[4] That, in and of itself, does not mean conditional certification is inappropriate. Supported by declarations, plaintiffs assert that XPO treated the Delivery Drivers similarly in ways that would support their misclassification argument. If that is true, then common proof will be used to answer the fact-intensive inquiry.

If some Delivery Drivers are shown, upon development of the evidence, to be differently situated from the others in material respects — *i.e.*, in respects that would impact the analysis of whether they were properly classified as independent contractors under FLSA — then the class definition can be refined to exclude Delivery Drivers who are not similarly situated or, at the second step, decertification of the FLSA class may be appropriate.

XPO relies on a number of decisions from districts outside California **[*13]** that have rejected conditional certification in independent contractor misclassification cases. Those cases are inapposite or not persuasive. For example, in *Pfaahler v. Consultants for Architects, Inc., No. 99 C 6700, 2000 U.S. Dist. LEXIS 1772, 2000 WL 198888, at *2 (N.D. Ill. Feb. 8, 2000)*, conditional certification was inappropriate because there was no evidence that "those in the pool of potential claimants perform the same duties as the plaintiff." That is not the case here. *See also Bamgbose v. Delta-T Grp., Inc., 684 F. Supp. 2d 660, 670 (E.D. Pa. 2010)* (denying conditional certification for healthcare workers assigned by defendant temporary staffing agency to work at various client sites because nature of client sites and amount of control by client sites varied widely, creating further issues to plaintiffs' "joint employer" theory).

I am also not persuaded by the analyses of courts that reject conditional FLSA certification in independent contractor misclassification cases solely because the independent contractor analysis is fact intensive and because there are alleged differences between class members (*e.g.*, hours worked, investments made). If that were the test, no independent contractor misclassification case could be certified under FLSA. *See Demauro v. Limo, Inc., No. 8:10-CV-413-T-33AEP, 2011 U.S. Dist. LEXIS 1229, 2011 WL 9191, at *3 (M.D. Fla. Jan. 3, 2011)* ("the individualized analysis needed to determine whether each driver is an independent **[*14]** contractor or employee for FLSA purposes precludes class certification."); *In re FedEx Ground Package Sys., Inc., Employment Practices Litig., 662 F. Supp. 2d 1069, 1083 (N.D. Ind. 2009)* (denying conditional certification because "the court must take into consideration the actual history of the parties' relationship, necessitating an individualized examination of the multiple factors relating to each drivers' employment."). Whether there are *materially* significant differences is best tested at the "second step" of the FLSA certification process.[5] *See, e.g.*,

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[4] Under FLSA, that determination depends on a multi-factor test considering whether "as a matter of economic reality," the individuals are dependent upon the business to which they render service and: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the **[*12]** alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business; (7) ownership of property or facilities when work occurred; and (8) whether responsibility under the contracts between a labor contractor and an employer passes from one labor contractor to another without material changes. *See, e.g., Torres-Lopez v. May, 111 F.3d 633, 646 (9th Cir. 1997)*; *see also Saravia v. Dynamex, Inc., No. C 14-05003 WHA, 2016 U.S. Dist. LEXIS 103613, 2016 WL 4140509, at *3 (N.D. Cal. Aug. 4, 2016)*.

[5] As noted, courts in this district usually do not usually consider defendants' evidence in determining conditional certification. *See, e.g., Wellens v. Daiichi Sankyo, Inc., No. 13-CV-00581-WHO, 2014 U.S. Dist. LEXIS 70628, 2014 WL 2126877, at *2 (N.D. Cal. May 22, 2014)*; *but see* ***Andel v. Patterson-UTI Drilling Co., LLC, 280 F.R.D. 287, 290 (S.D. Tex. 2012)*** (denying conditional certification based on in depth review of evidence showing, in part, that plaintiffs' relative investments and ability to control profit and loss varied significantly).

*Gilbert v. Citigroup, Inc., C-08-0385 SC, 2009 U.S. Dist. LEXIS 18981, * 10 (N.D. Cal. Feb. 18, 2009)* ("Defendants' concern about individualized inquiries does not require the Court to deny conditional certification. . . . Under the two-stage certification procedure, Defendants can present this evidence and make these arguments as part of a motion to decertify the class once discovery is complete.").

XPO's argument that there **[*15]** are differences in the DSAs entered into by the Delivery Drivers that demonstrate that conditional certification is inappropriate merits some further discussion. XPO points to: (i) the 2009 amendment of the DSA to include haul away duties; (ii) 2010 revisions to reconciliation and indemnification provisions, as well as the addition of a class action waiver in the arbitration provision; (iii) 2013 changes to the arbitration and indemnification clauses, and requirements that the Delivery Drivers take specific steps to "maintain" their independence; and (iv) a 2015 change to the indemnification clause. As an initial matter, XPO is simply incorrect that because I will be required to review each form of DSA at issue, certification is inappropriate. Reviewing the legal impact of five different DSAs is not the sort of highly individualized assessment that precludes certification, but at most might lead to sub-classes or a refined class definition.

XPO more narrowly focuses on the different arbitration provisions in the DSA to argue that because potential class members might have different defenses to the different arbitration clauses, conditional certification is not appropriate. Opp. 17-19. **[*16]** I note that XPO has not moved to compel arbitration. If and when it does so, that there may be different defenses to the different arbitration provisions does not undermine that plaintiffs have made a showing that the class members they seek to represent and provide notice to are similarly situated with respect to *their claims. See, e.g., Carrillo v. Schneider Logistics, Inc., 2012 U.S. Dist. LEXIS 26927 at * 45 (C.D. Cal. Jan. 31, 2012)* (question is whether class members are "similarly situated with respect to the disputed claims.").

I conclude that plaintiffs have met their burden to show substantial similarity between the claims they intend to assert on behalf of Delivery Drivers sufficient for conditional certification under FLSA.[6] To facilitate prompt notice, defendants shall provide the class information within 30 days of the date of the oral argument.

II. FORM OF NOTICE

XPO objects to the proposed form of notice suggested by plaintiffs. At oral argument, I directed the parties to review the FLSA notice I approved in *Wellens et al v. Daiichi Sankyo, Inc*., 13-cv-00581-WHO, which addressed many of the objections defendants raise. The parties shall submit an agreed-to notice on or before **October 17, 2016**. If the parties cannot stipulate to the form of notice, they may submit a joint letter of no more than five pages, and attach the redlined versions of their proposals.

CONCLUSION

Plaintiffs' motion for conditional certification is GRANTED.

IT IS SO ORDERED.

Dated: October 3, 2016

/s/ William H. Orrick

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[6] In support of their motion, plaintiffs rely on three decisions certifying classes of drivers (in cases brought against XPO's predecessor 3PD, Inc.) under *Rule 23* in other jurisdictions. *See Brandon v. 3PD, Inc., No. 13 C 3745, 2014 U.S. Dist. LEXIS 185760, 2014 WL 11348985, at *1 (N.D. Ill. Oct. 20, 2014)*; *Martins v. 3PD, Inc., No. CIV.A. 11-11313-DPW, 2013 U.S. Dist. LEXIS 45753, 2013 WL 1320454 (D. Mass. Mar. 28, 2013)*; *Phelps v. 3PD, Inc., 261 F.R.D. 548 (D. Or. 2009)*. XPO objects that those cases involved different facts and different states' law. Oppo. 21. I do not consider the certifications in those cases as determinative or even relevant **[*17]** to my granting conditional certification under FLSA.

WILLIAM H. ORRICK

United States District Judge

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Exhibit 10

Neff v. Flowers Foods, Inc.

United States District Court for the District of Vermont

November 7, 2016, Decided; November 7, 2016, Filed

Case No. 5:15-cv-254

Reporter
2016 U.S. Dist. LEXIS 183025 *

NICK NEFF and MATTHEW McCREA, individually and on behalf of all similarly situated individuals, Plaintiffs, v. FLOWERS FOODS, INC., LEPAGE BAKERIES, PARK STREET, LLC, and CK SALES CO., LLC, Defendants.

Subsequent History: Motion granted by *Neff v. Flowers, Inc., 2018 U.S. Dist. LEXIS 233909, 2018 WL 10374594 (D. Vt., Nov. 14, 2018)*

Motion denied by, Class certification granted by *Neff v. Flowers Foods, Inc., 2019 U.S. Dist. LEXIS 238105 (D. Vt., May 16, 2019)*

Prior History: *Rehberg v. Flowers Foods, Inc., 2013 U.S. Dist. LEXIS 40337 (W.D.N.C., Mar. 22, 2013)*

Counsel: **[*1]** For Nick Neff, individually and on behalf of all similarly situated individiuals, Matthew Mccrea, individually and on behalf of all similarly situated individuals, Plaintiffs: Brian D. Clark, Esq., Rachel A. Kitze Collins, Esq., Susan E. Ellingstad, Esq., Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN USA; Charles E. Schaffer, Esq., Levin, Fishbein, Sedran & Berman, Philadelphia, VT USA; Christopher D. Jozwiak, Esq., Shawn J. Wanta, Esq., Baillon Thome Jozwiak & Wanta LLP, Minneapolis, MN USA; David M. Cialkowski, Esq., J. Gordon, Jr. Rudd, Esq., Zimmerman Reed, LLP, Minneapolis, MN USA; Patrick J. Bernal, Esq., Woolmington, Campbell, Bernal & Bent, P.C., Manchester Center, VT USA.

For Paul Glennon, James Checca, Reynaldo Pena, Anthony Thompson, James Kelly, Jason Poulin, Bobby Forbes, Carl Garland, David Borden, David Stockford, Edward Owsinski, Eric Thompson, Gary Despart, Gary Kimball, Gerald Mcmahon, Greg Withcomb, Jason Wood, Jean Noel, John Hafner, John Higgins, Jose Garcia, Joseph Bokanoski, Joseph Duclos, Joshua Reynolds, Kenneth Wawer, Kevin Donovan, Larry Fournier, Louis Perciballi, Martins Ennis, Michael Brown, Michael Travassos, Raymund Arunasalam, Rene Oliva, Richard **[*2]** Carneiro, Robert Brodeur, Wayne Nogler, Michael Camera, Keith Fiske, Emad Abdelsayed, Clifford Fosmer, Carmen Massaro, Michael Morey, Michael Lovely, Jr., Michael LA Goy, Plaintiffs: Shawn J. Wanta, Esq., Baillon Thome Jozwiak & Wanta LLP, Minneapolis, MN USA.

For Flowers Foods, Inc., Ck Sales Co., Llc, Lepage Bakeries Park Street, Llc Defendants: Frederick B. Finberg, Esq., Peter Bennett, Esq., The Bennett Law Firm, P.A., Portland, ME USA; Kevin P. Hishta, Esq., Ogletree Deakins, Atlanta, GA USA.

Judges: Geoffrey W. Crawford, United States District Judge.

Opinion by: Geoffrey W. Crawford

Opinion

OPINION AND ORDER

(Doc. 31)

Plaintiffs have filed a Motion for Conditional

Certification in this employment case. Plaintiffs claim that Defendants Flowers Foods, Inc. ("Flowers Foods"), LePage Bakeries Park Street, LLC ("LePage"), and CK Sales Company, LLC ("CK Sales") violated the *Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq.*, by misclassifying their bakery distributor drivers as independent contractors, thus depriving them of overtime pay due under the FLSA.

Plaintiffs seek conditional certification of a class of plaintiffs under *29 U.S.C. § 216(b)*, which authorizes collective enforcement of FLSA violations. The proposed class consists of distributors **[*3]** (commonly known as "route drivers" in the bakery business). Plaintiffs describe the class as:

> All persons who are or have performed work as "Distributors" for Defendants under a "Distributor Agreement" or a similar written contract with LePage Bakeries or CK Sales that they entered into during the period commencing three years prior to the commencement of this action through the close of the Court-determined opt-in period and who file a consent to join this action pursuant to *29 U.S.C. § 216(b)*. (Doc. 31 at 1.)

Plaintiffs also seek class action certification under *Fed. R. Civ. P. 23* for state law causes of action.

The court GRANTS Plaintiffs' motion (Doc. 31) IN PART, regarding the Distributors employed in Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, and New York, and DENIES with respect to Distributors in Maine who are already subject to a similar lawsuit brought by the same counsel.

I. FACTS

The court draws the following facts from the complaint and the motion for conditional certification and supporting memorandum (Does. 1, 31, and 31-1) as well as the Defendants' memorandum (Doc. 42).

Flowers Foods is a corporation which prepares and distributes bakery and snack food products to retailers such as local **[*4]** grocery stores, fast food chains, and large national stores like Wal-Mart and Dollar General. It operates in many parts of the United States. In 2012 Flowers Foods acquired LePage Bakeries. (Doc. 42 at 3.) LePage is now a subsidiary of Flowers Foods. LePage operates three bakeries, two in Maine and one in Vermont. CK Sales, a subsidiary of LePage, is based in Maine and, together with LePage, operates several warehouses.

Defendants employ Distributors to function as the "last mile" delivery service for Flowers Foods. The Distributors pick up baked goods from warehouses and deliver the product to Defendants' customers, stock shelves, and return unsold inventory.

The dispute between the parties concerns the eligibility of the Distributors for over-time pay under the FLSA and other provisions of law. Defendants contend that the Distributors are independent contractors who are not entitled to over-time. Each Distributor has entered into one or more distribution agreements which identifies them as independent contractors. Each is responsible for an exclusive territory which he or she has purchased from Defendants. A Distributor may have employees of his or her own and may hold more than one **[*5]** territory. Some may not drive the route themselves. Under some circumstances, a Distributor may be able to sell a territory to someone else. Defendants decline to pay overtime pay to independent contractors.

The Distributors contend that every Distributor is require to enter into a "cookie-cutter" distribution agreement with Defendants which requires them to deliver product at the time and locations specified by Defendants. They point out that terms such as price and product selection are all negotiated by Defendants with the retailers. Many Distributors were employees at LePage before Flowers Foods acquired the company. Plaintiffs contend that they

are still employees in practice and for purposes of the FLSA and other employment laws even if they are called "independent contractors" by their employer.

II. ANALYSIS

The FLSA contains a provision authorizing collective enforcement of its terms. *29 U.S.C. § 216(b)* allows "any one or more employees for and in behalf of himself or themselves and other employees similarly situated" to bring an action against an employer for unpaid overtime and minimum wage violations. An employee may join such a lawsuit by giving written consent and filing that consent with the **[*6]** court. If a plaintiff files on behalf of other employees and seeks certification of a class, the district courts have discretion to certify the class and order notice to potential plaintiffs of the pending FLSA action. The class consists only of plaintiffs who decide to join in the litigation and file a written consent with the court. The district courts exercise discretion in recognizing the potential class and authorizing notice to potential plaintiffs. *Myers v. Hertz Corp., 624 F.3d 537, 554 (2d Cir. 2010)*; *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170-72, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*; *Forauer v. Vt. Country Store, Inc., No. 5:12-cv-276, 2013 U.S. Dist. LEXIS 107261, 2013 WL 3967932, at *3-4 (D. Vt. July 31, 2013)*. Certification of a class of employees is consistent with the remedial purpose of the FLSA and the court's interest "in avoiding multiplicity of suits." *Braunstein v. E. Photographic Labs, Inc., 600 F.2d 335, 336 (2d Cir. 1978)*.

A. The Two-Step Approach

Courts within the Second Circuit commonly follow a two-step approach to certification of a collective action under *section 216(b) of the FLSA*. "The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Myers, 624 F.3d at 555*. This step may be ordered after a "modest factual showing" that plaintiffs and potential opt-in plaintiffs "together were victims of a common policy or plan that **[*7]** violated the law." *Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997)*. The second step requires a review by the court on a fuller record of whether the plaintiffs who have chosen to opt in "are in fact 'similarly situated' to the named plaintiffs." *Myers, 624 F.3d at 555*. This two-step approach is followed by federal courts around the United States. *See, e.g., Rehberg v. Flowers Baking Co. of Jamestown, LLC, No. 3:12-cv-00596-MOC, 2015 U.S. Dist. LEXIS 36929, 2015 WL 1346125, at *14 (W.D.N.C. Mar. 24, 2015)*; *Coyle v. Flowers Foods Inc., No. CV-15-01372-PHX-DLR, 2016 U.S. Dist. LEXIS 116422, 2016 WL 4529872, at *2 (D. Ariz. Aug. 29, 2016)*.

This court will follow the two-step procedure and limits this decision to the first step which requires a modest factual showing of a common policy or plan that violates the FLSA. Before reaching that issue, however, the court considers decisions around the nation in similar claims against Flowers Foods.

In *Rehberg*, the district court certified a collective action under the FLSA. The allegations are virtually identical to those in this case. Baking and distribution of Flowers products in North Carolina are managed by Flowers Baking Co. of Jamestown, another subsidiary of Flowers Foods, Inc. Plaintiffs are a group of bakery product distributors who filed suit under the FLSA and North Carolina law claiming that they were misclassificd as independent contractors and were therefore denied overtime **[*8]** pay. In denying the defendants' motion to decertify the FLSA class at the second step of the certification analysis, the court determined that the Plaintiffs were "similarly situated" for purposes of *section 216(b)* because they all signed similar distribution agreements with defendants, had similar job duties, and were subject

to the same classification by defendants as independent contractors. *2015 U.S. Dist. LEXIS 36929, [WL] at *15*. Variations in the circumstances of individual employees was held insufficient to overcome evidence that they were similarly situated. Similarly, differences in the facts supporting various defenses were insufficient to overcome the broad similarities among class members. Finally, the court found that fairness and procedural considerations supported the resolution of common issues in a single collective proceeding.

Courts have reached the same result in *Coyle* and *Stewart v. Flowers Foods, Inc., No. 15-cv-01162-JDH-egb, 2016 U.S. Dist. LEXIS 129025, 2016 WL 5122041 (W.D. Tenn. Aug. 12, 2016)* (report and recommendation), adopted *2016 U.S. Dist. LEXIS 127977, 2016 WL 5118309 (W.D. Tenn. Sept. 20, 2016)*.

Plaintiffs in this case have made the "modest showing" required to satisfy the first step of the certification process. The route drivers have all signed similar distribution and franchise agreements and Flowers Foods has declined to pay overtime to any of them **[*9]** based upon these agreements. All Plaintiffs are employed by LePage and CK Sales. Defendants' objections to initial certification focus on claims that the distribution agreement and related documents resolve the question of whether the drivers are self-employed. This contention goes to the merits of the claim and does not disqualify Plaintiffs from seeking to form a class of distributors who have received similar treatment by Defendants. Plaintiffs do not need to prove at the first step that they were actually misclassified in order to bring a collective action. *See Lynch, 491 F. Supp. 2d at 368*; *Forauer, 2013 U.S. Dist. LEXIS 107261, 2013 WL 3967932, at *4*. It is sufficient to demonstrate that they have been treated alike by the same employer for similar reasons.

Defendants also contend that the distributors in the proposed class vary greatly in their investment in their businesses, the scale of their operations, and in how they perform their jobs. For instance, some Distributors work in multiple territories and hire employees to help deliver products. Others work alone in a more limited territory. (Doc. 42 at 4-12). Despite these differences, common issues predominate. Plaintiffs' complaint and sworn declarations describe their job duties under their Distribution Agreements **[*10]** and state that Defendants hold all Distributors to the same performance standards and protocols. (Doc. 1: Doc. 31-5 at 3-7; Doc. 31-6 at 3-7). Plaintiffs have also provided copies of their own Distribution Agreements which are substantially similar in all material respects. These agreements all describe the Plaintiffs as self-employed. Plaintiffs have provided sworn declarations that Defendants' company-wide policy is not to pay overtime to Distributors because of the Defendants' determination that they are self-employed.

The court concludes that Plaintiffs have met their burden on the first of the two-step analysis. They have made a sufficient showing that the Distributors are "similarly situated" to justify asking the other Distributors whether they wish to "opt-in" and join Plaintiffs' lawsuit. The motion for conditional certification (first-step) is GRANTED.

B. Geographic Scope of the Proposed Class

Cases against Flowers Foods and its subsidiaries under the FLSA have typically followed the company's own organizational pattern. In *Coyle*, the district court rejected a request from the defense that the collective action should be certified only for the Tucson, Arizona distributors because **[*11]** the named plaintiffs worked out of the Tucson distribution center. In certifying a statewide class, the court noted that "all Arizona Distributors are controlled by the same subsidiary of Flowers: Holsum. And it is reasonable to infer that Holsum uses the same Distributor Agreement at all twelve of its Arizona warehouses. As such, the Court will not limit the scope of the proposed collective action." *2016 U.S. Dist. LEXIS 116422, [WL] at *6*.

In *Stewart v. Flowers Foods, 2016 U.S. Dist. LEXIS 129025, 2016 WL 5122041 (W.D. Tenn. Aug. 12, 2016)*, the magistrate judge did not recommend a request from the defendant that conditional certification be limited to the three warehouses where the named plaintiffs actually worked. The judge recommended conditional certification of a class consisting of all distributors who contracted with Flowers Baking Co. of Batesville, LLC within Tennessee. The judge rejected a broader claim for a nationwide class. These recommendations were recently accepted by the district court.

Similarly, the class in *Rehberg*, was defined as all distributors employed by Flowers Baking Co. of Jamestown, LLC within the State of North Carolina. *Rehberg, 2015 U.S. Dist. LEXIS 36929, 2015 WL 1246125, at *20*.

In this case, the Plaintiffs seek conditional certification of all Distributors employed by LePage Bakeries and CK Sales. These include Distributors in all six New England **[*12]** states and a portion of New York. (Doc. 42 at 2.) The common thread is that every Distributor has signed a distribution agreement with CK Sales.

The Court concludes that for purposes of conditional certification, all Distributors who have contracted with CK Sales should receive notice. The exception is Distributors working in Maine. These individuals arc already the subject of an identical action, filed by the same attorneys, seeking overtime pay for CK Sales distributors in Maine. There is no good reason for sending overlapping notices inviting the same people to join two lawsuits. With respect to distributors in the other states, however, the common feature of their employment relationship is that they signed contracts with the same company for the same type of work and that CK Sales relies upon the same provisions in these contracts in denying them overtime pay.

Because this is a two-step process, the Defendants will have an opportunity to point out problems and unbridgeable differences between Plaintiffs after the parties know who intends to join in the lawsuit. For the same reason, exemptions from the FLSA for certain employees (certain motor vehicle operators or sales personnel) **[*13]** may be considered at the second stage when the parties will know whether these statutory exceptions apply. Many of the issues raised in the Defendants' memorandum will be appropriate for consideration at the second step. These issues may include problems raised by Plaintiffs in different states with different state law remedies. But at this preliminary stage, the court is satisfied that notice to all Distributors who have signed distribution agreements with CK Sales is appropriate.

C. Proposed Notice

The court approves the form of notice supplied by Plaintiffs as well as the posting of a placard at each warehouse. The court seeks to maximize notice to potential plaintiffs in order to give each Distributor time and an opportunity to make a considered decision about whether to join this action or not. The "Summary of the Case" paragraph provides an adequate and neutral explanation of the position of the Defendants.

The court imposes the following conditions on notice. First, a 90-day period is sufficient between the date of notice and the deadline for response. The Defendants shall supply a list of all Distributors subject to this lawsuit within 30 days. The list shall include names, addresses, **[*14]** e-mail address and telephone numbers. The Plaintiffs are authorized to send the requested followup notices. The Plaintiffs are authorized to set the date of notice after receiving the list of Distributors and to send out the notice and follow up notices. Notice and the opt-in process shall be complete not later than March 1, 2017.

The Defendants are ordered to post copies of the notice at each warehouse location where Distributors pick up bakery products for delivery. The notice shall be posted in the break room or

other location where Defendants post other notices and information for the Distributors.

The court sees no need to include partial or entire social security numbers in the certification process. Absent further application to the court and for good cause, Plaintiffs shall not obtain social security numbers from Defendants or from prospective class members. The "Consent to Join FLSA Class" shall be modified in this respect. The reason for this limitation is obvious. With name, address, date of birth, and social security numbers disclosed, identity theft becomes a real hazard and the court does not wish to require disclosure of social security numbers as a condition of participating **[*15]** in a federal lawsuit.

Dated at Rutland, in the District of Vermont, this 7th day of November, 2016.

/s/ Geoffrey W. Crawford

Geoffrey W. Crawford, U.S. District Judge

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Exhibit 11

Neff v. Flowers Foods, Inc.

United States District Court for the District of Vermont

May 16, 2019, Decided; May 16, 2019, Filed

Case No. 5:15-cv-254

Reporter
2019 U.S. Dist. LEXIS 238105 *

NICK NEFF and MATTHEW McCREA, individually and on behalf of all similarly situated individuals, Plaintiffs, v. FLOWERS FOODS, INC., CK SALES CO., LLC, and LEPAGE BAKERIES PARK STREET, LLC, Defendants.

Prior History: *Neff v. Flowers Foods, Inc., 2016 U.S. Dist. LEXIS 183025 (D. Vt., Nov. 7, 2016)*

Counsel: **[*1]** For Nick Neff, individually and on behalf of all similarly situated individuals, Plaintiff: Behdad C. Sadeghi, Esq., David M. Cialkowski, Esq., J. Gordon Rudd, Jr., Esq., Zimmerman Reed, LLP, Minneapolis, MN; Brian D. Clark, Esq., Rachel A. Kitze Collins, Esq., Susan E. Ellingstad, Esq., PRO HAC VICE, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Charles E. Schaffer, Esq., PRO HAC VICE, Levin, Fishbein, Sedran & Berman, Philadelphia, VT; Christopher D. Jozwiak, Esq., PRO HAC VICE, Baillon Thome Jozwiak & Wanta LLP, Minneapolis, MN; Merrill E. Bent, Esq., Woolmington, Campbell, Bernal & Bent, P.C., Manchester Center, VT; Scott A. Moriarity, Esq., Shawn J. Wanta, Esq., PRO HAC VICE, Baillon Thome Jozwiak & Wanta LLP, Minneapolis, MN.

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Judges: Geoffrey W. Crawford, Chief United States District Judge.

Opinion by: Geoffrey W. Crawford

Opinion

DECISION ON MOTION TO DECERTIFY CLASS UNDER THE FAIR LABOR STANDARDS ACT AND TO CERTIFY CLASS UNDER *FED. R. CIV. P. 23* (Docs. 251, 252)

Plaintiffs work as distributors for Defendants

Flowers Foods, Inc. ("Flowers Foods"), LePage Bakeries Park Street, LLC ("LePage"), and CK Sales Company, LLC ("CK Sales"). They deliver bread, snacks, and other baked goods produced **[*3]** by Defendants to stores and other retail locations. Prior to 2012, most Plaintiffs were full-time employees of LePage and received overtime wages after 40 hours of work each week.

In 2012, Flowers Foods acquired LePage. Flowers Foods is the second-largest commercial bakery company in the United States. Flowers Foods follows a business model in which most distributors are classified as independent contractors.[1] In the months following the acquisition, Plaintiffs were presented with identical distribution agreements which described this new business arrangement. As independent contractors, they no longer received overtime pay.

Plaintiffs have filed suit, claiming that Defendants misclassified distributors as independent contractors, thus depriving them of overtime wages due under the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.* A subset of Plaintiffs who are located in Vermont have filed claims under Vermont law seeking compensation for alleged unlawful deductions from their pay and other damages. All Plaintiffs also seek injunctive and declaratory relief establishing their right as employees to receive overtime pay.

On May 5, 2016, Plaintiffs filed a motion for conditional certification under *29 U.S.C. § 216(b)*, which authorizes collective enforcement **[*4]** of FLSA violations. (Doc. 31.) This court issued a decision granting conditional certification on November 7, 2016. (Doc. 56.)

Currently pending before the court are Defendants' motion for decertification of the conditionally certified FLSA collective action (Doc. 251) and Plaintiffs' motion for class certification of their Vermont law claims under *Rule 23 of the Federal Rules of Civil Procedure* (Doc. 252).

[1] Flowers Foods continues to employ some delivery drivers as conventional, full-time employees. These drivers are not parties to this lawsuit.

BACKGROUND

I. Procedural History

This action commenced in December 2015. (Doc. 1.) It is one of approximately two dozen lawsuits filed around the United States against Flowers Foods and its subsidiaries.[2] These cases challenge the designation of distributors as independent contractors. The action is a "hybrid" action that includes a claim for collective relief under the FLSA and a class action claim seeking damages under Vermont law. (Doc. 1 at 14-21.) The FLSA Plaintiffs include distributors from Vermont, New Hampshire, Massachusetts, Connecticut, Rhode

[2] *See, e.g.,* *Noll v. Flowers Foods, Inc., No. 1:15-CV-00493-LEW, 2019 U.S. Dist. LEXIS 6868, 2019 WL 206084 (D. Me. Jan. 15, 2019)*, *appeal docketed*, *Noll v. Flowers Foods, Inc., No. 19-8001, 442 F. Supp. 3d 345 (1st Cir. Jan. 29, 2019)*; *Goro v. Flowers Foods, Inc., 334 F.R.D. 275, 2018 WL 3956018 (S.D. Cal. 2018)*; *Richard v. Flowers Foods, Inc., Civil Action No. 6:15-2557, 2018 U.S. Dist. LEXIS 219559, 2018 WL 5305377 (W.D. La. Aug. 13, 2018)*; *Wiatrek v. Flowers Foods, Inc., No. SA-17-CV-772-XR, 2018 U.S. Dist. LEXIS 18227, 2018 WL 718548 (W.D. Tex. Feb. 5, 2018)*; *Schucker v. Flowers Foods, Inc., No. 16-CV-3439 (KMK), 2017 U.S. Dist. LEXIS 136178, 2017 WL 3668847 (S.D.N.Y. Aug. 24, 2017)*; *Medrano v. Flowers Foods, Inc., Civ. No. 16-350 JCH/KK, 2017 U.S. Dist. LEXIS 102812, 2017 WL 3052493, at *1 (D.N.M. July 3, 2017)*; *Soares v. Flowers Foods, Inc., 320 F.R.D. 464 (N.D. Cal. 2017)*; *Rosinbaum v. Flowers Foods, Inc., 238 F. Supp. 3d 738 (E.D.N.C. 2017)*; *Carr v. Flowers Foods, Inc., Civil Action No.15-6391, 2017 U.S. Dist. LEXIS 11347, 2017 WL 393604 (E.D. Pa. Jan. 26, 2017)*; *Stewart v. Flowers Foods, Inc., Case No. 15-CV-1162-JDB-EGB, 2016 U.S. Dist. LEXIS 129025, 2016 WL 5122041 (W.D. Tenn. Aug. 12, 2016)*, *report and recommendation adopted*, *Case No. 15-CV-1162, 2016 U.S. Dist. LEXIS 127977, 2016 WL 5118309 (W.D. Tenn. Sept. 20, 2016)*; *McCurley v. Flowers Foods, Inc., No. 5:16-CV-00194-JMC, 2016 U.S. Dist. LEXIS 146739, 2016 WL 6155740 (D.S.C. Oct. 24, 2016)*; *Coyle v. Flowers Foods Inc., No. CV-15-01372-PHX-DLR, 2016 U.S. Dist. LEXIS 116422, 2016 WL 4529872 (D. Ariz. Aug. 30, 2016)*; *Martinez v. Flower Foods, Inc., No. CV 15-5112 RGK (EX), 2016 U.S. Dist. LEXIS 188989, 2016 WL 10746664 (C.D. Cal. Feb. 1, 2016)*; *Rehberg v. Flowers, Baking Co. of Jamestown, LLC, No. 3:12-CV-00596-MOC-DSC, 2015 U.S. Dist. LEXIS 36929, 2015 WL 1346125, at *1 (W.D.N.C. Mar. 24, 2015)*.

Island, and portions of New York. The proposed class action concerns Vermont residents only and is limited to claims arising under Vermont law.

In November 2016, this court issued a decision granting conditional certification **[*5]** under the FLSA. (Doc. 56.) The court's order established an "opt-in" deadline of March 1, 2017, for any distributor to join the lawsuit. Seventy-three individual Plaintiffs have joined the FLSA claim. Thirty-three of these Plaintiffs deliver products for a bakery located in Vermont. These Plaintiffs also seek recovery under Vermont law for alleged unlawful deductions.

The parties completed discovery, including expert disclosures, in July 2018. (Doc. 227.) They stipulated to a deadline of September 22, 2018, for the filing of motions related to class certification. (*Id.*)

On March 22, 2016, the court held a hearing concerning Defendants' motion to decertify the FLSA class (Doc. 251) and Plaintiffs' motion to certify a class on Vermont law issues under *Rule 23 of the Federal Rules of Civil Procedure* (Doc. 252). (Doc. 277.) The court addresses both motions in this decision.

II. Facts

The principal facts relevant to the class certification issues under both the FLSA and *Rule 23* are not in dispute.

Prior to 2012, LePage produced bread and other baked goods in multiple locations in New England. LePage employed distributors to pick up the product at a bakery or warehouse and deliver it to customers on fixed routes. The distributors drove trucks owned **[*6]** or leased by LePage. LePage paid the distributors a combination of hourly wages, including overtime after 40 hours, and commissions. The distributors also received vacations, sick time, and other benefits.

After acquiring LePage, Flowers Foods introduced its own business model. It required distributors who wished to deliver its products to sign a standard "Distributor Agreement." (Doc. 251-2.) The agreement described a distributor as an "independent contractor" who purchased the bread and other baked goods, resold the product to customers on the route, and sold back any returns or leftover product to a thrift outlet run by Flowers Foods. (*Id.* at 1, 4, 11-12.) Each distributor was required to purchase his or her route from Flowers Foods. (*Id.* at 1-3, 17.) Distributors were required to organize their business as a corporation. (*Id.* at 4, 33.) They were required to purchase the company trucks, lease trucks from a specified company, or buy their own. (*Id.* at 9; *see also* Doc. 254-34 at 29.) They were required to obtain and keep insurance at prescribed levels. (Doc. 251-2 at 9; *see also* Doc. 254-34 at 33.) Flowers Foods offered financing for the purchase of routes and vehicles. It also offered **[*7]** the services of an insurance broker. Distributors were not required to use these in-house services and were permitted to buy their own vehicles and obtain their own financing if they wished.

Many features of the distributor position remained the same before and after the acquisition by Flowers Foods. All distributors continue to make use of handheld computers which track their orders and the details of each delivery. These computers are connected to a central sales office at LePage, which enters daily orders for each location based on historical levels of purchases. There is a factual dispute over how much discretion a distributor can exercise in altering these central orders. The times and frequency of visits to large accounts, such as Walmart or large supermarket chains, are set through discussions between representatives of the stores and LePage. Staff at LePage communicate these requirements to the distributors. Distributors who violate these orders can be sanctioned in various ways, including possible termination of their right to service a route. In addition to bread deliveries, distributors are required to visit store locations to freshen the displays ("pull-ups") and

remove **[*8]** out-of-date product.

Other features of the distributor position were introduced after Flower Foods acquired LePage Bakeries. Distributors can sell their route to another driver subject to approval by LePage and Flowers Foods. (Doc. 251-2 at 12-13.) Distributors can buy additional routes, either from LePage Bakeries or from a fellow distributor. Distributors are no longer responsible for driving their route personally. (*Id.* at 14.) They can hire substitutes for their own work or subcontract with other distributors to service additional routes. (*Id.*) If distributors leave the bakery delivery business altogether and lack an approved buyer for their route or routes, they can return the route to LePage and receive in return the total "paid-in equity" they had paid to LePage since signing the distribution agreement. (*Id.* at 3, 10.)

Faced with this new business plan, distributors who continued to service their routes took one of three courses. Some purchased the route they had been driving already and continued to work on their own. These distributors might also hire helpers to assist them in driving and delivering product. Other distributors continued to drive themselves but added territory **[*9]** and hired additional drivers whom they paid to service the new routes. A few stopped driving altogether and acquired multiple routes which they serviced by hiring drivers. As distributors left or retired, they sold their routes to new distributors who serviced the routes in one of the three manners described above. In some cases, Flowers Foods took back a route and sold it to a new distributor itself.

III. Substantive Legal Issues

Plaintiffs allege that Defendants violated the FLSA and Vermont law by misclassifying distributors as independent contractors rather than employees. Both the FLSA and Vermont employment law have developed tests or legal standards to determine whether a worker is properly classified as an independent contractor or an employee.

A. FLSA Economic Realities Test

The FLSA defines an employee as "any individual employed by an employer." *29 U.S.C. § 203(e)(1)*. To employ is defined as "to suffer or permit to work." *Id.* at *§ 203(g)*. Given the circularity of these definitions, courts have developed the "economic reality test" to provide substantive criteria for distinguishing between employees and independent contractors. *Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988)* (citing *United States v. Silk, 331 U.S. 704, 716, 67 S. Ct. 1463, 91 L. Ed. 1757, 1947-2 C.B. 167 (1947)*). In applying the test, courts consider the following factors:

> (1) the **[*10]** degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Id. No single factor controls the determination, and the list of factors is non-exclusive. *Id. at 1059*. Rather, the economic reality test calls for the court to consider the relationship between the worker and the employer as a whole. *Salem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 140 (2d Cir. 2017)*. "The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Brock, 840 F.2d at 1059; accord Saleem, 854 F.3d at 139*.

B. Vermont Statutory Test

For purposes of Vermont law, whether a worker is an employee or an independent contractor for overtime purposes is determined by the "ABC" test, which appears at *21 V.S.A. § 341(1)*:

> (1) "Employee" means a person who has entered into the employment of an employer, where the employer is unable to show that:
>
> > (A) the individual has been and will continue to be free from control or direction over the **[*11]** performance of such services, both under the contract of service and in fact; and
> > (B) the service is either outside all the usual course of business for which such service is performed, or outside all the places of business of the enterprise for which such service is performed; and
> > (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business.

The ABC test is "concomitant," which means that the party seeking to establish independent contractor status for a worker must prove all three factors. *Bluto v. Dept. of Emp't Sec., 135 Vt. 205, 207, 373 A.2d 518 (1977)*. Unless all three factors are present, a worker is presumed to be an employee. *Price v. Dep't of Emp't & Training, 150 Vt. 78, 78, 549 A.2d 641 (1988)*.

ANALYSIS

Although the criteria for certifying collective or class litigation are similar under the FLSA and *Rule 23 of the Federal Rules of Civil Procedure*, they require separate consideration. The FLSA authorizes collective actions if the employees are "similarly situated." *29 U.S.C. § 216(b)*. The meaning of the phrase "similarly situated" has developed through case law. Only the claims of employees who choose to "opt-in" after receiving notice may be adjudicated. The collective resolution of similar claims arising in the workplace plays an important role in furthering the "broad remedial goal of the statute [which] should be **[*12]** enforced to the full extent of its terms." *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*.

In contrast, class certification under *Rule 23* requires the application of rules-based, multi-factorial tests which apply equally to many forms of class actions. Analysis begins with the four prerequisites listed at *Rule 23(a)* and requires consideration of the three types of class actions described at *Rule 23(b)*.

The court will consider the certification issues separately under the FLSA and *Rule 23*. The two classes differ in their membership and in the legal test governing the determination of whether the drivers are employees or independent contractors. The court will start with the FLSA because the FLSA claims are made on behalf of a much larger group of Plaintiffs and because Congress specifically authorized collective adjudication of disputes arising under the FLSA. The court will then consider certification of the Vermont claims only under *Rule 23*.

I. Collective Litigation Under the FLSA

Courts within the Second Circuit commonly follow a two-step approach to certification of a collective action under *§ 216(b) of the FLSA*. "The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect **[*13]** to whether a FLSA violation has occurred." *Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010)*. The second step requires the court to review fuller record and determine whether the plaintiffs who have chosen to opt in "are in fact 'similarly situated' to the named plaintiffs. The action may be 'de-certified' if the record reveals that they are not, and the opt-in plaintiffs' claims may be dismissed without prejudice." *Id.* This two-step approach is followed by federal courts around the United States. *See, e.g., Rehberg, 2015 U.S. Dist. LEXIS 36929, 2015 WL 1346125, at *14*; *Coyle, 2016 U.S. Dist. LEXIS 116422, 2016 WL 4529872, at *2*.

Plaintiffs bear the burden of proving that members

of the proposed class are similarly situated. *Zivali v. AT & T Mobility, LLC, 784 F. Supp. 2d 456, 460 (S.D.N.Y. 2011)*. While the court's inquiry on a motion for decertification is more exacting than at the preliminary conditional stage, "[a]ll that is required is a persuasive showing that the original and opt-in plaintiffs were common victims of a FLSA violation pursuant to a systematically-applied company policy or practice such that there exist common questions of law and fact that justify representational litigation." *McGlone v. Contract Callers, Inc., 49 F. Supp. 3d 364, 367 (S.D.N.Y. 2014)* (quoting *Pefanis v. Westway Diner, Inc., No. 08 Civ. 002 (DLC), 2010 U.S. Dist. LEXIS 93180, 2010 WL 3564426, at *4 (S.D.N.Y. Sept. 7, 2010)*).

The factors which a trial court considers in determining whether plaintiffs are "similarly situated" for purposes of the FLSA are most commonly:

- the factual and employment settings of the individual plaintiffs;

- **[*14]** the various defenses available to the defendant which appear to be individual to each plaintiff; and

- fairness and procedural considerations.

Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260-61, n.38 (11th Cir. 2008); *accord Monroe v. FTS USA, LLC, 860 F.3d 389, 397 (6th Cir. 2017), cert. denied, 138 S. Ct. 980, 200 L. Ed. 2d 248 (2018)*; *Campbell v. City of Los Angeles, 903 F.3d 1090, 1113 (9th Cir. 2018)*; *see also Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 226 (3d Cir. 2016)*. Although the Second Circuit has not expressly adopted this three-step standard, it is commonly applied by other trial courts within this circuit and across the United States. *See, e.g., Laroque v. Domino's Pizza, LLC, 557 F. Supp. 2d 346, 352 (E.D.N.Y. 2008)*; *Zivali, 784 F. Supp. 2d at 460*; *Tracy v. NVR, Inc., 293 F.R.D. 395, 397 (W.D.N.Y. 2013), aff'd sub nom. Gavin v. NVR, Inc., 604 F. App'x 87 (2d Cir. 2015)*. Both sides in this case have followed this three point analysis with respect to the current decertification motion. (Doc. 251 at 11; Doc. 260 at 24.)

A. Factual and Employment Settings of the Individual Plaintiffs

In many respects, the relationships between individual Plaintiffs and Flowers Foods are very similar. When Flowers Foods introduced its business model of self-employed distributors, it required Plaintiffs to sign identical Distributor Agreements. All Plaintiffs have the same core job responsibilities, which are delivering bread and snacks, straightening up the store displays, and removing stale product. All use the same handheld computer devices to track their orders and deliveries. All are subject to direction and discipline from sales managers and staff employed by Flowers Foods. All exercise **[*15]** some discretion in adjusting orders to best meet customer requirements. Although most accounts at large stores and supermarkets are credit accounts, many, if not all, distributors have some smaller cash accounts and exercise greater autonomy in how they bill and collect from these businesses. Under the terms of their Distributor Agreements, all Plaintiffs are paid the same way: a piece rate for each item delivered with an adjustment for returns of unsold product.

The differences among Plaintiffs are almost entirely due to features of the distributor position introduced by Flower Foods, specifically the ability to acquire multiple routes and subcontract delivery work to helpers. A number of Plaintiffs operate multiple routes through helpers. (*See, e.g.*, Doc. 25-10 at 3-7.) A few have sought to operate multiple routes without driving themselves, although it became clear at the hearing that such arrangements were few in number and not necessarily long-lived. In addition, the defense notes that distributors perceive their autonomy and discretion differently. Some distributors believe they have substantial control over their daily operations. Others believe that Flowers Foods controls their **[*16]** delivery

work in all important respects.

In weighing the areas of similarity and difference, the court is not making a decision on the merits about whether the distributors are employees. Rather, the court is seeking to determine whether the evidence can be applied to the substantive factors that comprise the economic reality test in a manner that generates a collective answer. *See Hernandez v. Fresh Diet, Inc., No. 12-CV-4339 (ALC) (JLC), 2014 U.S. Dist. LEXIS 139069, 2014 WL 5039431, at *4 (S.D.N.Y. Sept. 29, 2014)* ("Plaintiffs must demonstrate at this stage that they are similar in 'relevant respects,' i.e., with respect to the factors relevant to this Court's determination of whether they are employees or independent contractors under the FLSA . . . ."). Put another way, the court is asking if the differences among distributors are so great that the factfinder cannot apply the factors in a consistent manner to all distributors. Answering this question requires the court to return to the factors themselves.

(1) Degree of control exercised by the employer over the worker

The information before the court at this point indicates that the evidence concerning control is similar. All distributors are subject to the same Distributor Agreement. Their performance is monitored by the same national sales staff and is governed **[*17]** on the ground by the same handheld devices. Their tasks throughout the day are similar. The process of putting bread on the shelf in accordance with the store's plan and removing the stale product does not vary among distributors.

Defendants point to a number of variations among individual Plaintiffs' testimony regarding their daily operations, including whether they hired helpers, adjusted suggested product orders, altered suggested product placements, set their own delivery schedule and route, were disciplined by sales managers, or chose to wear a uniform. (Doc. 251 at 16-24.) These variations in distributors' daily work activities have little bearing on whether original and opt-in Plaintiffs are similarly situated. *See Scholtisek v. Eldre Corp., 229 F.R.D. 381, 390 (W.D.N.Y. 2005)* ("That these employees may have had different duties and performed different types of work is not particularly relevant to whether they are similarly situated with respect to plaintiffs claims."). The relevant consideration is that Plaintiffs were subject to Defendants' common policy of classifying distributors as independent contractors, allegedly in violation of the FLSA, under the business model introduced by Flower Foods. Proof that distributors were properly **[*18]** classified as independent contractors may include evidence that this common policy allowed variations in distributors' behavior. But to the extent that variations in behavior are relevant to determining Defendants' degree of control over Plaintiffs, these issues may be resolved using common proof of distributors' alleged independence and economic freedom. *Cf. Scovil v. FedEx Ground Package Sys., Inc., 886 F. Supp. 2d 45, 54 (D. Me. 2012)* ("[W]hile there may be a *lot* of evidence to present to show variety [among workers' behavior], that is not the same as showing that common evidence does not predominate.").

There is a difference in the case of distributors who hire helpers. Obviously it is the helper who must service the stores and follow the rules. However, because "the definition of 'employ' in the FLSA cannot be reduced to formal control over the physical performance of another's work," Plaintiffs who hire helpers to perform day-to-day operations may still be employees if Defendants exercise functional control over the conditions of distributors' work. *Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 70 (2d Cir. 2003)*; *see also Noll, 2019 U.S. Dist. LEXIS 6868, 2019 WL 206084, at *4 n. 3* ("A distributor could hire 'helpers' and still be an employee."). Since the Distributor Agreement provides that the distributor who owns a particular route is subject to discipline for a helper's **[*19]** mistakes (*see* Doc. 251-2 at 13-12), this difference among Plaintiffs does not weigh heavily in favor of a series of individualized determinations of degree

of control. Similar evidence may be used to establish the degree of control Defendants exercise over distributors, regardless of whether Plaintiffs chose to personally service their territories.

(2) Opportunity for profit or loss and the employees' investment

The evidence before the court shows that all distributors have similar opportunities to acquire their route or add multiple routes. All are required to make an investment in the purchase of the route and in buying or leasing a delivery truck. The difference is that some drivers choose to acquire multiple routes or hire helpers and, in doing so, make a larger investment. But the evidence concerning the relationship between Flowers Foods and each distributor in this area is very similar.

(3) Degree of skill and independent initiative

The evidence before the court makes it clear that there are far more similarities in the operation of delivery routes than there are differences. The skills include driving a commercial vehicle, organizing and delivering the right mix of product to the **[*20]** right stores, removing the old product and straightening up the display, and doing all of this fast enough to complete the entire route in a reasonable period of time. It is not an easy job, but it is one which requires skills many people are able to develop. Individual distributors may be better or worse at these skills, but there is little difference in the type of skills which each brings to the delivery work.

Whether distributors' work required independent initiative may also be determined using common evidence. While Defendants contend that some distributors display more sales initiative and entrepreneurship than others, these "different tactics and attitudes" suggest variations in individual distributors' personal style, not their job requirements. (Doc. 251 at 27-29.) All distributors were instructed to carry out their jobs according to the Distributor Agreement. These requirements do not vary between individual Plaintiffs.

(4) Permanence and duration

The working relationship between Plaintiffs and Flowers Foods is governed by the Distributor Agreement. Under the terms of the Distributor Agreement and as owners of their routes, all distributors serve indefinitely, subject to potential **[*21]** termination. (Doc. 251-2 at 12.) The evidence will be the same for all.

(5) Extent to which the work is an integral part of the employer's business

This factor seeks to distinguish contractors who might perform an incidental service, such as window washing or tax accounting, from those whose work is at the core of the enterprise. *See Brock, 840 F.2d at 1059*. Defendants concede that the extent to which distributors' work is integral to Flower Foods's business "does not lend itself to a consideration of differences among the Plaintiffs." (Doc. 251 at 11 n. 24.) The court agrees. The evidence concerning the importance of "last mile" delivery to Flowers Foods will be the same for each distributor.

***

For the reasons discussed above, the court concludes that most of the evidence which the parties will submit on the economic reality test is similar from one distributor to the next. There is an important distinction between distributors with multiple routes and those who service only one route themselves. But this difference is one which can be developed before the factfinder without great difficulty or inconvenience to the court or the parties. Some distributors have taken advantage of the opportunity to acquire **[*22]** additional routes and others have chosen not to. This distinction is one difference among many common elements of evidence and does not require an individual lawsuit

and hearing for each distributor.

B. Collective Evidence Concerning Defenses

The court turns to the question of whether the defenses asserted by Defendants can be determined on the basis of common evidence in a collective action. The defenses at issue are:

- Individual Plaintiffs lack standing to sue because they operate their business through corporations;
- Plaintiffs are exempt from the overtime provisions of the FLSA through operation of the Federal Motor Carrier Act;
- Plaintiffs are exempt from overtime by operation of the "outside sales exemption" in the FLSA; and
- Plaintiffs cannot establish their damages through commonly-applicable proof.

(1) Standing

Defendants argue that the individual Plaintiffs lack standing to sue because they operate through corporations. (Doc. 251 at 34.) These corporations entered into Distributor Agreements with Defendants. In Defendants' view, the individual plaintiffs have "no direct relationship with any Defendant, much less an employee/employer relationship." (*Id.* at 35.) Defendants argue that the assertion of claims **[*23]** by individual distributors would require detailed inquiry into whether each distributor complied with corporate formalities. (*See id.*) Plaintiffs respond that courts have uniformly rejected arguments that employees who are required to incorporate cannot sue in their independent capacity under the FLSA. (Doc. 260 at 42.)

From the court's perspective, the standing argument raises a legal issue that may be determined on the basis of common evidence. It is undisputed that the distribution agreement required former employees to form corporations and that all Plaintiffs did so. Whether different distributors comply to a greater or lesser extent with corporate formalities is irrelevant. It is highly likely that there is substantial variation in the keeping of minutes, the appointment of officers, and the filing of reports with the various Secretary of State offices. But Defendants do not suggest that a distributor who is lax in these matters has an increased likelihood of being permitted to sue as an individual. Nor do Defendants suggest that a distributor who meticulously maintains corporate formalities has a reduced likelihood of being permitted to sue as an individual. Rather, the Defendants' **[*24]** argument is that *all* distributors who do business with Defendants as corporations cannot sue as individuals. The court makes no ruling on the merits but concludes that the factual record necessary to answer this question is largely the same for all drivers, including those who neglect their corporate minutes or fail to hold annual meetings.

(2) Motor Carrier Act Exemption

Defendants seek to defeat all claims for overtime payment on the ground that, as a motor earner, Flowers Foods is exempt from the FLSA. (*See* Doc. 251 at 36.) In order to avoid duplicative regulation of motor carriers by the FLSA and the Department of Transportation ("DOT"), *29 U.S.C. § 213(b)(1)* provides that the FLSA does not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of *section 31502* of Title 49." The parties agree that distributors operating traditional bread trucks are subject to DOT regulation due to the gross weight of these vehicles. (*See* Doc. 251 at 36; Doc. 260 at 44.) In 2008, Congress narrowed the exemption by providing that overtime compensation would be available to "covered employees" whose duties "in whole or **[*25]** in part" included both work subject to DOT regulation and "duties on motor vehicles weighing 10,000 pounds or less." SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, §

306, 122 Stat. 1572, 1621 (2008).

In this case, Plaintiffs argue the motor carrier exemption does not apply because they visit stores to clean up displays ("pullups") in their personal cars on days when they are not delivering bread in bulk. (Doc. 260 at 44.) This issue has both a factual and a legal dimension. There is some factual dispute between the two sides about how frequently drivers use their own cars to visit stores. There is disagreement as well about whether as a matter of law such mixed use of large and small vehicles defeats the motor carrier exemption.

The limited question at this stage is whether common questions of law and fact exist that justify representational litigation. *McGlone, 49 F. Supp. 3d at 367*. Defendants argue that "the individualized nature of this defense supports decertification because it impedes the efficient resolution of claims on a collective basis." (Doc. 251 at 37.) Because the motor carrier exemption "depends . . . upon the activities of the individual employees," an employer "must present evidence as to 'the character of the activities involved in the performance' of each plaintiff's job in **[*26]** order to determine whether [the defendant] owes individual employees overtime compensation." *Masson v. Ecolab, Inc., No. 04 CIV. 4488 (MBM), 2005 U.S. Dist. LEXIS 18022, 2005 WL 2000133, at *6 (S.D.N.Y. Aug. 17, 2005)* (quoting *Goldberg v. Faber Indus., Inc., 291 F.2d 232, 235 (7th Cir. 1961)*). However, the court is not persuaded that the motor carrier exemption defense requires decertification. Evidence that Plaintiffs are similarly situated does not require absolute uniformity of behavior. Just as there may be distributors who work 40 hours or less and are not due overtime, there may be distributors who always use the large vehicle and are subject to the exemption. But this inquiry is relatively simple and does not justify creating multiple lawsuits to reach an answer.

Moreover, the motor carrier exemption defense is not unique to a specific plaintiff. Defendants raise the motor carrier exemption defense against all Plaintiffs. (Doc. 251 at 34-35 n. 149). A collective forum will not prevent Defendants from asserting the defense. *Andrako v. U.S. Steel Corp., 788 F. Supp. 2d 372, 382 (W.D. Pa. 2011)*. And while its application might require specific factual inquiries about each Plaintiffs personal vehicle use, similar factual inquiries apply to each Plaintiff. Decertification would only require the court to apply the motor carrier defense in over 70 separate trials, which would "hardly promote[] efficiency." *Id.* Accordingly, common questions **[*27]** of law and fact justify collectively litigating whether the motor carrier exemption applies to Plaintiffs. *See Snively v. Peak Pressure Control, LLC, 314 F. Supp. 3d 734, 741 (W.D. Tex. 2018)* ([M]any of the specific fact questions cited by Defendants apply to each Plaintiff—i.e. Defendants raise the same defenses [including the motor carrier exemption] against most, if not all, Plaintiffs. This lends support to the notion that Plaintiffs are similarly situated.").

Harrison v. Delguerico 's Wrecking & Salvage, Inc., a case cited by Defendants to support their argument, helps illustrate this point. *Civil Action No. 13-5353, 2016 U.S. Dist. LEXIS 27514, 2016 WL 826824, at *7 (E.D. Pa. Mar. 2, 2016)*. In *Harrison*, the court granted decertification, in part, because the defendants raised employee exemptions as an affirmative defense. *2016 U.S. Dist. LEXIS 27514, [WL] at *7*. The *Harrison* court found that the alleged employee exemptions indicated the original and opt-in plaintiffs were not similarly situated, reasoning that there were "various job duties among Plaintiffs, which results in numerous possible exemptions." *Id.* By contrast, it is undisputed in this case that Plaintiffs' job duties include driving bread trucks, and Defendants specifically raise motor carrier exemption defenses against every Plaintiff. *Cf. id.* (distinguishing *Moss v. Crawford & Co., 201 F.R.D. 398, 410-11 (W.D. Pa. 2000)*, which "was dealing with an exemption that would more efficiently be **[*28]** determined since all opt-in plaintiffs had substantially similar job duties."). The court therefore finds that the

motor earner defense asserted by Defendants does not warrant decertification.

(3) Outside Sales Exemption

Defendants invoke the "outside sales exemption" set forth at *29 U.S.C. § 213(a)(1)* which excludes any employee engaged "in the capacity of outside salesman." Regulations further defining the term "outside salesman" appear at *29 C.F.R. §§ 541-500-541.504*. These regulations limit the exemption to individuals whose "primary duty is: making sales . . . or obtaining orders or contracts for services for the use of facilities for which a consideration will be paid by the client or customer; and who is customarily and regularly engaged away from the employer's place of business in performing such primary duty." *29 C.F.R. § 541.500(a)*.

Whether distributors' primary duty in making sales is readily resolved through common evidence. Distributors' duties are set forth in identical Distributor Agreements. It is clear—even at this early stage of the litigation—that hauling bread to stores and putting it on the shelves are the principal tasks. These tasks cannot reasonably be described as making sales. The defense identifies no distributor who is primarily **[*29]** engaged in making sales.[3] For purposes of certification, the claim that some distributors are primarily salesmen and not delivery workers can be resolved through common evidence about the terms of the parties' agreement and the nature of the work.

(4) Evidence of hours worked

Defendants argue that the absence of company time records makes it impossible for plaintiffs to prove their overtime claims. (Doc. 251 at 38.) Plaintiffs respond that the law places the burden of missing information on the employer, not the employee. (Doc. 260 at 39.)

The determination of individual overtime awards (if due) has to be an individualized inquiry since no two drivers work the same schedule. However, "individualized inquiries into damages do not warrant decertification." *McGlone, 49 F. Supp. 3d at 369*. If such inquiries were an obstacle to collective resolution in FLS A overtime cases, few cases could ever be decided on a collective basis.[4] Moreover, Plaintiffs challenge the company-wide policy of classifying distributors as independent contractors, not individualized instances of failure to pay overtime. As discussed above, whether distributers are improperly classified as independent contractors—and therefore entitled to overtime **[*30]** pay—is subject to generalized proof.

In the event of a determination that the drivers are employees, it will be necessary to develop an individualized method of determining the amount of individual wage awards. This process will be based on the discovery already provided by the drivers and a hearing process if settlement cannot be reached. But this is not a sufficient reason to hold individual trials on all issues.

C. Fairness and Procedural Considerations

As the preceding discussion indicates, the factual issues concerning the supervision, autonomy, work practices and contractual relationship of the

[3] The defense quotes a distributor named Louis Perciballi who testified in part, "So if you don't know business and how to distribute the bread you're not going to make no money." (Doc. 251 at 27 (citing Perciballi Dep. 52:12-53:24.) That testimony falls short of identifying Mr. Perciballi as primarily engaged in sales work. Defendants identify other actions by a distributor intended to increase sales, such as being meticulous about the shelf display (Michael Fitzgerald) or negotiating for extra display space (Robert Gasior). (*Id.* at 28.) These activities demonstrate that distributors' work *may* involve good salesmanship. It does not establish that generating sales is their primary responsibility.

[4] *Cf. Mendez v. Radec Corp., 232 F.R.D. 78, 92-93 (W.D.N.Y. 2005)*, *adhered to sub nom. Mendez v. The Radec Corp., 260 F.R.D. 38 (W.D.N.Y. 2009)*) ("In almost any class action in which there are claims for damages . . . each plaintiff must establish his entitlement to damages and the extent of those damages. That alone does not mean that a class should not be certified.").

distributors and Flowers Foods are broadly similar across the territories and routes served by Plaintiffs in this case. The likelihood that individual distributors could effectively present their claims against defendants in multiple, individual federal lawsuits is extremely small. Factors of expense and the time demands on counsel make it impossible to file and prepare close to 100 lawsuits with individual claims of modest size. The parties have already pursued a hybrid form of case preparation in which all Plaintiffs have answered interrogatories (and those who have **[*31]** not face dismissal) but depositions have gone forward on a representative basis. The court has confidence in the skills of experienced counsel on both sides to cooperate in developing a trial process which reflects the same practicality and pragmatism. Some issues, such as the amount of a particular distributor's wage award, will require an individual determination. But the majority of issues, including the elements of Plaintiffs' case-in-chief and the likely defenses, can be resolved using evidence applicable to most distributors. The defense will receive latitude in introducing evidence of the experience of outliers and any other employees who require special consideration. But the record before the court at this stage strongly suggests that the requirements and execution of the distributors' job have far more in common from one distributor to the next than differences. The court is satisfied that broad concerns of fairness favor a collective resolution of the FLSA claims.

II. Class Certification Under *Rule 23*

Plaintiffs have moved to certify a class of Vermont distributors pursuant to *Fed. R. Civ. P. 23*. (Doc. 252.) Plaintiffs claim that their misclassification as independent contractors resulted in unlawful **[*32]** deductions in violation of the *Vermont Employment Practices Law ("VEPL"), 21 V.S.A. § 341 et seq.*, as well as the *Consumer Protection Act ("CPA"), 9 V.S.A. § 2453*.

Plaintiffs bear the burden of demonstrating that the proposed class meets the requirements of numerosity, commonality, typicality, and adequacy under *Rule 23(a)*. They also bear the burden of demonstrating under *Rule 23(b)(3)* that common issues of fact and law predominate and that a class action is superior to other methods of resolving the controversy. Alternatively, Plaintiffs must demonstrate that Defendants have acted in a manner that applies generally to the class so as to make injunctive relief appropriate for the class as a whole. The Second Circuit has also recognized that *Rule 23* contains an implied threshold requirement of ascertainability, "which demands that a class be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" *In re Petrobras Sec., 862 F.3d 250, 260 (2d Cir. 2017)* (quoting *Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015)*).

Plaintiffs' VEPL claim depends upon application of the "ABC test" discussed above. The Consumer Protection Act claim turns largely upon legal issues. The Act has not been applied in Vermont to employment relations disputes. A motion to dismiss is likely to resolve the claim on legal grounds in favor of the defense. If the Consumer Protection **[*33]** claim survives the motion, the court will consider whether it is appropriate for resolution as part of the class action.

A. Ascertainability

To satisfy the threshold ascertainability requirement, a class must "be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Sec., 862 F.3d at 264*. Here, the proposed class consists of Flowers Foods distributors working in Vermont who have been classified as independent contractors. These criteria—Flowers Foods workers identified by position, classification, and location are objective and sufficiently definite. Prospective class members can be identified using Defendants' business records to determine whether they delivered

Defendants' products in Vermont under Distribution Agreements. The court therefore finds the proposed class satisfies the ascertainability requirement.

B. *Rule 23(a)* Factors

Plaintiffs must establish that the proposed class meets the four prerequisites listed under *Rule 23(a)*: "(i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 119 (2d Cir.)*, *as amended* (Nov. 12, 2014) (citing *Fed. R. Civ. Pro. 23(a)(1)—(4)* and *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 201-02 (2d Cir. 2008)*).

(1) Numerosity

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Thirty-three Vermont distributors **[*34]** have joined in this action. This is seven less than the 40 plaintiffs for whom numerosity is presumed. *Pa. Pub. Sch. Emps.' Ret. Sys., 772 F.3d at 120*. "However, the numerosity inquiry is not strictly mathematical but must take into account the context of the particular case," particularly the following factors: "(i) judicial economy, (ii) geographic dispersion, (iii) the financial resources of class members, (iv) their ability to sue separately, and (v) requests for injunctive relief that would involve future class members." *Id.* (citing *Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)*).

Many of these factors support the conclusion that joinder is impracticable in this case. The purpose of the numerosity requirement is to ensure that the benefit of avoiding the burden on the court and the parties of hearing the cases individually justifies the time and difficulty inherent in the class action process. A class of two or three would save no time or effort. Thirty-three cases would represent a considerable burden to the court and to the parties to prepare and try as individual lawsuits. Plaintiffs seek injunctive relief enjoining Defendants from classifying distributors as independent contractors, which would affect all potential class members. Based on the totality of the circumstances, **[*35]** the court is satisfied that the numerosity requirement is met.

(2) Common questions of law or fact

"A 'question[ ] of law or fact [is] common to the class' if the question is 'capable of classwide resolution—which means that its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015)* (first quoting *Fed. R. Civ. P. 23 (a)(2)*, then quoting *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes, 564 U.S. at 349-50* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*). "The claims for relief need not be identical for them to be common; rather, *Rule 23(a)(2)* simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." *Johnson, 780 F.3d at 137*. Although "this inquiry may sometimes overlap with merits issues, . . . the proponent of class certification need not show that the common questions 'will be answered, on the merits, in favor of the class.'" *Id. at 138* (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 459, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*).

The court finds that Plaintiffs' VEPL claims present common questions of law and fact that can be resolved in a single stroke. The outcome of these claims depends on the application of the three factors composing the "ABC test": (1) freedom from control and direction by defendants; **[*36]** (2) activities outside the usual course of the defendants' business; and (3) an independently established

trade. *21 V.S.A. § 341(1)*. These factors all present common issues of law and fact. The distributors perform very similar assignments: delivering bread to stores on schedule. They are all subject to a similar degree of centralized control through Defendants' sales staff The extent to which bread delivery is a usual aspect of the bakery business can be argued either way—but these arguments rest on the same facts concerning the nature of that business in general and the Flowers Foods business in particular. Whether "bakery route driver" is an independent trade like that of plumbers or physicians can also be argued both ways—but the history and facts concerning the trade are common to each distributor.

The court recognizes that distributors vary in the scale of their operations, in their employment of sub-contractors, and, to some extent, in their willingness to pursue additional sales and other business opportunities. But these differences are minor compared to the common facts and legal principles which the court must resolve under the ABC test. The court therefore concludes that the commonality requirement **[*37]** is satisfied.

(3) Typicality of claims and defenses

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. "This requirement 'is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010)* (quoting *Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)*).

Here, the class representatives all present the same claim for unauthorized deductions.[5] The amount allegedly owed to each distributor varies, but the claims have the same elements: the ABC test is not satisfied, and the employer made unlawful deductions. The claims of the named Plaintiffs are no different from those of the other distributors and therefore meet the test for typicality.

Defendants contend that the named Plaintiffs' claims are not typical of the putative class because Plaintiff Neff owns only one territory that he services himself while Plaintiff McCrea has acquired multiple territories and hired helpers. However, these differences do not show that the named Plaintiffs' claims are atypical of the class. Each prospective class member's claim arises from the same course of events: Defendants' **[*38]** uniform policies of classifying distributors as independent contractors and deducting administrative and warehouse fees from distributors' weekly pay. All prospective class members were subject to these policies after signing Distribution Agreements that classify distributors as independent contractors, regardless of differences in the scale of their business operations. The court therefore finds that the typicality requirement is satisfied.

(4) Adequate representation

"The adequacy requirement is that 'the representative parties will fairly and adequately protect the interests of the class.'" *Brown, 609 F.3d at 475* (quoting *Fed. R. Civ. P. 23(a)(4)*). "Adequacy 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiffs attorneys are qualified, experienced and able to conduct the litigation.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009)* (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000)*).

There are no conflicts among the class members or their representatives. Due to the "opt-in" nature of the FLSA class which includes the Vermont distributors, all class members have made the decision to assert labor law claims. Counsel for

[5] The Vermont drivers' overtime claims are made in the FLSA cause of action.

Plaintiffs is experienced and capable. There is no reason why the named Plaintiffs and Plaintiffs' counsel cannot **[*39]** adequately represent the class.

C. *Rule 23(b)(3)* Factors

A court may certify a class under *Rule 23(b)(3)* if "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "*Rule 23(b)(3)* also lists four factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—which courts should consider in making these determinations." *Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 82 (2d Cir. 2015)* (citing *Fed. R. Civ. P. 23(b)(3)(A)—(D)*). "However, while these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry." *Id.* (citing *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1278 (11th Cir. 2009)*).

(1) Predominance of common issues of law and fact

The *Rule 23(b)(3)* predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Langan v. Johnson & Johnson Consumer Companies, Inc., 897 F.3d 88, 97 (2d Cir. 2018)* (quoting *Mazzei v. Money Store, 829 F.3d 260, 272 (2d Cir. 2016)*). "The predominance requirement is satisfied if 'resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof,' and 'these particular issues are more substantial than the issues subject only to individualized proof.'" *Id.* ***[*40]*** (quoting *Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015)*.

The court has addressed the issue of common issues of law and fact at some length in the FLSA portion of this ruling. The same analysis that led the court to conclude that the FLSA test for employment status could be resolved through common evidence applies equally to the ABC test. It is undisputed that all distributors were employees for purposes of the ABC test prior to the acquisition of LePage by Flowers Foods. It is also undisputed that Flowers Foods sought to apply a new business model to all distributors and required them to enter into the same distributor agreement to continue working for the company. Since the acquisition, Defendants exercise the same type of control over all distributors. The nature of each distributor's profession and its role in Defendants' operation are the same.

The differences between distributors that Defendants present as sufficient to defeat class certification concern distributors' different responses to one primary factor: the opportunity to acquire multiple routes. This opportunity was not available prior to the acquisition. It has resulted in differences in the scale and nature of the distributors' work. Some drive themselves. Others **[*41]** hire a few helpers. Some have put together multiple routes with multiple subcontractors.

None of these differences are fatal to the common resolution of the factual and legal issues presented by the ABC test. A distributor with multiple routes is still subject to the same type of supervision as a distributor with only one. Whether this supervision is sufficiently comprehensive as to render the distributor an employee is a merits question which the court is not addressing at this stage. But the type and degree of supervision are the same among all drivers. Similarly, the role of delivery driving in Defendants' business (the B prong) and the status of "distributor" as a traditional form of self-employment (the C prong) are similar across routes and distributors.

Defendants also argue that individual issues predominate because any damages owed for the

alleged improper deductions must be determined on an individual basis. While such individual issues are "factor[s] that [courts] must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues," *Johnson, 780 F.3d at 138*, the Second Circuit has held that "individualized damages determinations alone cannot preclude certification **[*42]** under *Rule 23(b)(3)*," *Roach, 778 F.3d at 409* (citing *Seijas v. Republic of Argentina, 606 F.3d 53, 58 (2d Cir. 2010)*). In this case, the issues central to establishing Defendants liability may be determined using common evidence. The court therefore finds that similarities between the proposed class members predominate over any differences.

(2) Superiority of a class action

Generally, "*Rule 23(b)(3)* class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery." *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 130-31 (2d Cir. 2013)* (citing *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*). A class action is a superior method of adjudicating claims when "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *Id.* (citing *Fed. R. Civ. P. 23* advisory committee's notes.) To assess the superiority of a class action in this case, the court turns to the four final factors set out in *Rule 23(b)(3)*. *See Sykes, 780 F.3d at 82*.

(a) Class members' interest in individually controlling the litigation

All class members purposefully "opted-in" to the FLSA cause of action. This is a strong indication that they have no interest in pursuing this litigation as individuals.

*(b) **[*43]** Existing litigation*

The court has previously excluded Maine from this lawsuit because there is a similar action already pending. (Doc. 56 at 2, 7-8.) Otherwise, there is no existing litigation known to the court within the geographical area at issue.

(c) Desirability of concentrating the claims in the particular forum

This factor does not seem relevant.

(d) Likely difficulties in managing the litigation

"[M]anageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication." *Sykes, 780 F.3d at 82* (quoting 2 William B. Rubenstein, *Newberg on Class Actions §* 4.72 (5th ed. West 2014)). Defendants maintain that collectively litigating the prospective class members' claims will be unmanageable "given the amount of individualized testimony the Court would need to hear from Defendants to rebut Plaintiffs' claims." (Doc. 259 at 42.) The court, however, is optimistic that this will be a manageable action. The class size is at the low end of the numerosity range. The individual aspects of the case, particularly the amount of any single claim for unlawful deductions, can be determined in days, not weeks. Counsel on both sides are experienced and cooperative **[*44]** with one another and the court. The history of these cases in other districts is that they tend to settle. If this case does not, the court has every reason to believe that counsel and the judge can develop a factual record which will permit a decision on the ABC elements and, if needed, a series of damage awards without undue difficulty.

D. Injunctive Relief Under *Rule 23(b)(2)*

Under *Rule 23(b)(2)*, a court may certify a class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In the event that Plaintiffs succeed in their damages claim, the same application of the ABC test will govern their claim for prospective relief in the form of an order enjoining Defendants from making the unauthorized deductions in the future. This relief would be issued on the basis that Defendants have acted in a manner that violates the rights of all employees for the same reasons. The claim for injunctive relief falls easily within the scope of *Rule 23(b)(2)*.

CONCLUSION

The court DENIES the motion for decertification of the FLSA class (Doc. 251) and GRANTS the motion for certification **[*45]** of the Vermont labor law claims (Doc. 252).

Dated at Rutland, in the District of Vermont, this 16 day of May, 2019.

/s/ Geoffrey W. Crawford

Geoffrey W. Crawford, Chief Judge

United States District Court

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Exhibit 12

Rehberg v. Flowers Foods, Inc.

United States District Court for the Western District of North Carolina, Charlotte Division

March 22, 2013, Decided; March 22, 2013, Filed

3:12cv596

Reporter
2013 U.S. Dist. LEXIS 40337 *; 20 Wage & Hour Cas. 2d (BNA) 755; 2013 WL 1190290

SCOTT REHBERG, WILLARD ALLEN RILEY, and MARIO RONCHETTI, On Behalf of Themselves and Others Similarly Situated, Plaintiffs, Vs. FLOWERS FOODS, INC. and FLOWERS BAKING CO. OF JAMESTOWN, LLC., Defendants.

Subsequent History: Summary judgment denied by *Riley v. Flowers Baking Co. of Jamestown, LLC, 2014 U.S. Dist. LEXIS 100187 (W.D.N.C., July 23, 2014)*

Magistrate's recommendation at *Rehberg v. Flowers Foods, Inc., 2014 U.S. Dist. LEXIS 112107 (W.D.N.C., July 25, 2014)*

Class certification granted by, Motion denied by *Rehberg v. Flowers Baking Co. of Jamestown, LLC, 2015 U.S. Dist. LEXIS 36929 (W.D.N.C., Mar. 23, 2015)*

Motion granted by, in part, Motion denied by, in part *Riley v. Flowers Baking Co., LLC, 2015 U.S. Dist. LEXIS 90597 (W.D.N.C., July 13, 2015)*

Summary judgment granted, in part, summary judgment denied, in part by, Motion to strike granted by, in part, Motion to strike denied by, in part *Rehberg v. Flowers Baking Co. of Jamestown, LLC, 162 F. Supp. 3d 490, 2016 U.S. Dist. LEXIS 18465 (W.D.N.C., Feb. 12, 2016)*

Related proceeding at *Neff v. Flowers Foods, Inc., 2016 U.S. Dist. LEXIS 183025 (D. Vt., Nov. 7, 2016)*

Related proceeding at *Carr v. Flowers Foods, Inc., 2017 U.S. Dist. LEXIS 11347 (E.D. Pa., Jan. 9, 2017)*

Related proceeding at *Schucker v. Flowers Foods, Inc., 2017 U.S. Dist. LEXIS 136178 (S.D.N.Y., Aug. 24, 2017)*

Related proceeding at *In re Flowers Foods, Inc. Sec. Litig., 2018 U.S. Dist. LEXIS 48048 (M.D. Ga., Mar. 23, 2018)*

Related proceeding at *Ludlow v. Flowers Foods, Inc., 2018 U.S. Dist. LEXIS 121928 (S.D. Cal., July 20, 2018)*

Counsel: **[*1]** For Scott Rehberg, Mario Ronchetti, Willard Allen Riley, Plaintiffs: Bryce Matthew Miller, Shawn Justin Wanta, LEAD ATTORNEYS, PRO HAC VICE, Baillon Thome Jozwiak Miller & Wanta, LLP, Minneapolis, MN; Ann Groninger, Charlotte, NC.

For Flowers Foods, Inc., Flowers Baking Company of Jamestown, LLC, Defendants: Anthony Craig Cleland, Kevin Patrick Hishta, Margaret Santen Hanrahan, LEAD ATTORNEYS, PRO HAC VICE, Ogletree Deakins Nash Smoak & Stewart, P.C., Atlanta, GA; Gregory Phillip McGuire, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, Raleigh, NC.

Judges: Max O. Cogburn Jr., United States District Judge.

Opinion by: Max O. Cogburn Jr.

Opinion

ORDER

THIS MATTER is before the court on plaintiff's Motion for Conditional Certification and Judicial notice. Having considered the parties' briefs and oral arguments made on February 20, 2013, as well as the record and applicable law, and for the reasons set forth in this Order, plaintiffs' motion (#28) is granted.

I. Procedural Background

Plaintiffs, a group of bakery product distributors for defendant Flowers Baking Co. of Jamestown, a wholly owned subsidiary of defendant Flowers Foods, Inc. (together "defendants"), filed suit on September 11, 2012 alleging violations **[*2]** of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201, et seq.*, and the North Carolina Wage and Hour Act, *N.C. Gen. Stat. §§ 95-25.1, et seq.* Plaintiffs allege they are misclassified by defendants as independent contractors, as opposed to full employees, and are therefore entitled to certain benefits, namely, time-and-a-half pay for hours worked in excess of forty (40) per week. They now move for conditional certification as a collective action under *§ 216(b)* of the FLSA on behalf of themselves and other current and former distributors. In support of their motion, plaintiffs allege that distributors have "substantially similar job requirements, pay provisions, and are subject to Defendants' common practice, policy, or plan of controlling their daily job functions." Compl. 4, Sept. 12, 2012, ECF No. 1.

II. Factual Background

The distributor position entails picking up Flowers bakery products from one of 24 defendant-owned warehouses in North Carolina, South Carolina, Virginia, and West Virginia, and delivering them to customers in a defined geographic territory. Def.'s Memm. Opp. Conditional Certification 3, January 4, 2013, ECF No. 33. The orders are first delivered to defendants' **[*3]** Jamestown, N.C. baking factory and then shipped to the respective warehouses where they are picked up for distribution and sale by distributors to customers. Paul Holshouser Aff. ¶ 5, January 4, 2013, ECF No. 32-2. Each warehouse is managed by a Sales Manager responsible for the oversight of the territories within their respective branch. Holshouser Aff. ¶ 3.

Distributors purchase or are otherwise granted distribution rights to certain product brands within a defined geographic territory. Holshouser Aff. ¶ 8. Plaintiffs allege that a distributor's route is pre-determined by defendant. Scott Rehberg Decl. ¶ 6, November 20, 2012, ECF No. 28-2. Five days of the week distributors restock shelves with fresh product and remove stale product, on the other two days, distributors organize shelves but do not deliver fresh product. Rehberg Decl. ¶ 6. Pursuant to defendant's contract with each distributor, each distributor is responsible for purchasing their vehicles and some of their own equipment. Id.

According to defendant, it is the distributor alone, not defendant, who determines the type of product and quantity that is delivered to a particular customer. Def.'s Memm. 5. The quantity to be **[*4]** delivered to each customer is based upon a four week average, to which distributors can make adjustments based upon the customers' needs, as well as other variables such as weather and holidays. Id. at 5. According to plaintiffs, however, defendants reserve the right to change the quantity of a particular order and the distributor is required to deliver that amount, even if the distributor disagrees. Rehberg Decl. ¶ 6. Distributors are compensated on a "piece rate" basis in that defendants pay them based upon the quantity of product sold by customers. Id. While distributors can pursue additional cash accounts, plaintiffs contend that defendants retain exclusive control over Flowers products. Rehberg Decl. ¶ 8.

Distributors service both cash accounts and charge accounts, each type having distinct service requirements. Def. Memm. 7; Willard Riley Dep. 129:13-16, Dec. 18, 2012, ECF. No. 32-5. For cash accounts, distributors are apparently granted a certain amount of autonomy, including determining how long to spend servicing each customer; the ability to extend credit to the customer; and more discretion in certain other areas such as with marketing, product mix, and displays. Def. Memm. **[*5]** 7. In contrast, charge, or national, accounts are apparently governed by a stricter set of contractual requirements negotiated between the customer and defendants. Id. Such requirements include hours of service requirements, certain service procedures, and other regimented marketing programs. Id. While the number of cash and charge accounts each distributor services varies, the nature of the distributor position while servicing each type of account appears from the briefs to be substantially similar.

III. Conditional Certification Under the FLSA

The FLSA's collective action mechanism serves the dual purpose of lowering litigation costs for individual plaintiffs, and decreasing the burden on the courts through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. "These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." Id. Thus, the district court "has a managerial responsibility to oversee the joinder of additional **[*6]** parties to assure that the task is accomplished in an efficient and proper way." *Id., at 170-71*.

Having carefully considered the Motion for Conditional Class Certification under FLSA *§ 216(b)*, the court finds that plaintiffs have shown that the putative class members were together the probable victims of a single decision, policy or plan. The named plaintiffs have brought forth substantial sworn allegations to meet the conditional class certification standard and which support the allegations as set forth in the Complaint. More specifically, plaintiffs have presented evidence that, in their employment as distributors of Flowers products, they are similarly situated inasmuch as: (1) plaintiffs have the same job duties; and (2) are subject to the same policies and standards determining their compensation and performance requirements. The court will therefore, conditionally certify and order notice be sent to the class.

ORDER

IT IS, THEREFORE, ORDERED that plaintiffs' Motion for Conditional Class Certification (#28) is **ALLOWED**, as follows:

1. conditional class certification regarding plaintiffs' claims under *§ 216(b)* of the FLSA is **GRANTED** for the following class: all those employees who **[*7]** are or were working as distributors for defendants at any time from September 12, 2009 to the entry of this order;

2. the notice and consent form submitted jointly by the parties to the court is **APPROVED**. Plaintiffs shall file an electronic copy with the court through the ECF within five (5) days of the entry of this order;
3. plaintiffs shall disseminate notice to class members via first class mail and email.
4. defendant shall post the notice to prospective class members at each of its warehouses in an area regularly and routinely available for review by distributors;
5. within fourteen (14) days of the entry of the order, defendants shall provide to counsel for plaintiffs a list of all potential class members set forth in paragraph one (1) above with their names, last known addresses, dates of employment, job title, respective warehouse,

phone numbers, last four digits of their Social Security numbers, and email addresses in an agreeable format for mailing. Counsel for plaintiffs may secure a full Social Security number fom any plaintiff who consents to participate in this action.

Signed: March 22, 2013

/s/ Max O. Cogburn Jr.

Max O. Cogburn Jr.

United States District Judge

End of Document

Exhibit 13

Delgado v. Ortho-McNeil, Inc.

United States District Court for the Central District of California

August 6, 2007, Decided; August 6, 2007, Filed

Case No. SACV 07-263 CJC (MLGx)

Reporter
2007 U.S. Dist. LEXIS 74731 *; 2007 WL 2847238

FELIPE DELGADO, et al. v. ORTHO-MCNEIL, INC., et al.

Subsequent History: Summary judgment granted by, Motion denied by *Delgado v. Ortho-McNeil, Inc., 2009 U.S. Dist. LEXIS 28810 (C.D. Cal., Feb. 6, 2009)*

Prior History: *Yacoubian v. Ortho-Mcneil Pharm., Inc., 2007 U.S. Dist. LEXIS 105679 (C.D. Cal., Mar. 23, 2007)*

LexisNexis® Headnotes

Labor & Employment Law > Wage & Hour Laws > Statutory Application > General Overview

HN1 **Wage & Hour Laws, Statutory Application**

District courts have discretion, in appropriate cases, to implement the collective action provisions of *§ 216(b)* by facilitating notice to potential plaintiffs. Under *29 U.S.C.S. § 216(b)*, a plaintiff may proceed with a collective action where the complaining employees are similarly situated. The Fair Labor Standards Act does not define similarly situated, and there is little circuit case law on the subject. In determining whether employees are similarly situated, courts have typically proceeded on an ad hoc case-by-case basis utilizing a two-stage inquiry. The court first makes an initial notice stage determination of whether plaintiffs are similarly situated. In doing so, a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan. However, unsupported assertions of widespread violations will not suffice to satisfy the plaintiff's burden of showing substantial similarity. Given the limited amount of evidence generally available at this stage, the court will generally apply a fairly lenient standard. At the notice stage, conditional certification is commonly granted.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2 **Class Actions, Prerequisites for Class Action**

After a plaintiff has made an initial showing that the proposed class consists of similarly situated individuals and the class is conditionally certified, the court directs the distribution of notice to potential class members. After the opt-in period is closed and discovery has been concluded, the court then makes a second determination employing a stricter similarly situated standard. During this second stage analysis, a court reviews several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3)

fairness and other procedural considerations.

Governments > Courts > Rule Application & Interpretation

HN3[] **Courts, Rule Application & Interpretation**

In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.

Labor & Employment Law > Discrimination > Disparate Treatment > Statute of Limitations

HN4[] **Disparate Treatment, Statute of Limitations**

Normally, the statute of limitations for an Fair Labor Standards Act violation claim is two years, but if the violation is willful the statute of limitations is extended to three years.

Labor & Employment Law > Wage & Hour Laws > Statute of Limitations

HN5[] **Wage & Hour Laws, Statute of Limitations**

Under the Fair Labor Standards Act, individual plaintiffs in a collective action must file a valid consent to opt-in within the applicable statute of limitations. *29 U.S.C.S. § 256(b)*. Equitable tolling is extended sparingly and only where claimants exercise diligence in preserving their legal rights. Courts will typically grant equitable tolling in two limited circumstances: (1) where the plaintiffs actively pursued their legal remedies by filing defective pleadings within the statutory period, or (2) where the defendant's misconduct induces failure to meet the deadline.

Counsel: **[*1]** For Felipe Delgado, an individual behalf of himself and on behalf of all others similarly situated, Quinton Bickley, an individual on behalf of himself and on behalf of all others similarly situated, Plaintiffs: Aashish Y Desai, LEAD ATTORNEY, Mower Carreon & Desai, Irvine, CA; Christopher M. Heikaus Weaver, LEAD ATTORNEY, Rutan and Tucker, Costa Mesa, CA; Jeffrey Wertheimer, LEAD ATTORNEY, Rutan & Tucker, Costa Mesa, CA.

For Ortho-McNeil Inc, a New Jersey corporation, Janssen Ortho-McNeil Primary Care Inc, a New Jersey corporation, Janssen LP, Defendants: Jill Ann Porcaro, John S Battenfeld, LEAD ATTORNEYS, Morgan Lewis and Bockius, Los Angeles, CA.

Judges: PRESENT: HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CORMAC J. CARNEY

Opinion

CIVIL MINUTES -- GENERAL

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION [filed 06/08/07]

Plaintiffs Felipe Delgado and Quinton Bickley (collectively, "Plaintiffs") seek conditional certification of a nationwide opt-in class of sales representatives under the Fair Labor Standards Act, *29 U.S.C. §§ 201 et seq.* ("FLSA"). Defendants Ortho-McNeil, Inc., Janssen Ortho-McNeil Primary Care, Inc., and Janssen, L.P. (collectively, **[*2]** "Defendants") object to any certification, arguing that the jobs performed by the putative class members are each individually unique. For the following reasons, the Court GRANTS conditional

certification in this action. However, there were certain defects with the proposed notice that prevent the Court from approving it at this time.

HN1[⬆] District courts have discretion, in appropriate cases, to implement the collective action provisions of *§ 216(b)* by facilitating notice to potential plaintiffs. *Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. Under *§ 216(b)*, a plaintiff may proceed with a collective action where the complaining employees are similarly situated. *29 U.S.C. § 216(b)*; *Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)*. The FLSA does not define "similarly situated," and there is little circuit case law on the subject. *Thiessen, 267 F.3d at 1102*; *Pfohl v. Farmers Ins. Group, No. CV 03-3080 DT (RCx), 2004 U.S. Dist. LEXIS 6447, 2004 WL 554834 at *2 (C.D. Cal. Mar. 1, 2004)*. In determining whether employees are similarly situated, courts have typically proceeded on an *ad hoc* case-by-case basis utilizing a two-stage inquiry. *Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213 (5th Cir. 1995)*. **[*3]** The court first makes an initial "notice stage" determination of whether plaintiffs are similarly situated. *Thiessen, 267 F.3d at 1102*. "In doing so, a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Id.* (internal quotations omitted). However, unsupported assertions of widespread violations will not suffice to satisfy the plaintiff's burden of showing substantial similarity. *Freeman v. Wal-Mart Stores, Inc., 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003)*. Given the limited amount of evidence generally available at this stage, the court will generally apply a fairly lenient standard. *Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006)*. At the notice stage, conditional certification is commonly granted. *Id.*

HN2[⬆] After a plaintiff has made an initial showing that the proposed class consists of similarly situated individuals and the class is conditionally certified, the court directs the distribution of notice to potential class members. After the opt-in period is closed and discovery has been concluded, the court then makes a second determination employing a stricter similarly **[*4]** situated standard. *Thiessen, 267 F.3d at 1102-03*. During this "second stage" analysis, a court reviews several factors, including (1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and other procedural considerations. *Id. at 1103*.

Defendants argue that Plaintiffs are required to show more at the notice stage than that the members of the proposed class are similarly situated. Relying on case law from the Eleventh Circuit, Defendants argue that conditional certification is not available unless a plaintiff makes an affirmative showing that there are other individuals who desire to opt in to the class. *See Dybach v. Fla. Dep't of Corr., 942 F.2d 1562, 1567-68 (11th Cir. 1991)*; *MacKenzie v. Kindred Hosps. E., LLC, 276 F. Supp. 2d 1211 (M.D. Fla. 2003)*; *Davis v. Charoen Pokphand (USA), Inc., 303 F. Supp. 2d 1272 (M.D. Ala. 2004)*. However, this additional requirement at the notice stage has almost never been applied outside of the Eleventh Circuit, and has never been applied in the Ninth Circuit. *See, e.g., Edwards, supra* (only discussing similarly situated **[*5]** requirement); *Leuthold v. Destination Am., Inc., 224 F.R.D. 462 (N.D. Cal. 2004)* (same). Indeed, at least one district court has identified the language in *Dybach* as "dicta" and criticized it for "conflict[ing] with [the] United States Supreme Court's position that the [FLSA] should be liberally 'applied to the furthest reaches consistent with congressional direction.'" *Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 629 (D. Colo. 2002) (quoting Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985))*. The *Dybach* court provided no explanation for requiring plaintiffs to show that other class members desire to opt in, nor does the County indicate why this Court should adopt such a rule. The Court finds the *Dybach* rule inappropriate

at the "notice stage." Conditional certification at this stage is designed to provide notice to potential plaintiffs specifically because they might not yet be informed of the action or their ability to participate in it. Accordingly, the Court will not require Plaintiffs to demonstrate at this stage that other sales representatives from Ortho-McNeil and Janssen seek to participate in this action.

Plaintiffs' FLSA claim alleges that Defendants improperly classified **[*6]** all of their sales representatives as exempt for purposes of overtime compensation. They allege that Defendants made this classification regardless of the actual individual job duties of any given employee; rather, there was a blanket policy at both Ortho-McNeil and Janssen to classify all sales representatives as exempt. Defendants, on the other hand, argue that the jobs performed by their sales representatives are not substantially similar, but differ from individual to individual in a variety of material respects. In support of this argument, they submitted several declarations from current sales representatives and field sales directors (the sales representatives' supervisors) detailing the unique feature of each employee's job.

At the notice stage, Plaintiffs need not show that their positions were identical to the putative class members' positions. *Freeman, 256 F. Supp. 2d at 945*. Instead, it is sufficient if they can show that their position was "similar to those of the absent class members." *Id.* Here, the allegations of the complaint and the evidence submitted by both Plaintiffs and Defendants establish that the job duties of sales representatives are sufficiently similar to **[*7]** warrant conditional certification at the notice stage. [1] First and foremost, Plaintiffs have argued, and Defendants do not dispute, that Defendants had a custom, policy, or practice of classifying all sales representatives as exempt without performing any individualized analysis of their job duties. Thus, Defendants have found sufficient similarity in the job duties of their sales representatives that they treat them as one homogenous group for purposes of the FLSA. *Cf. Tierno v. Rite Aid Corp., 2006 U.S. Dist. LEXIS 66436, 2006 WL 2535056 at *9 (N.D. Cal. Aug. 31, 2006)*. It is somewhat disingenuous, then, for Defendants to argue that they should be permitted to treat all sales representatives as one group for purposes of classifying them as exempt, but that this Court can only determine the validity of that classification by looking to the specific job duties of each individual sales representative. *Cf. Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 613 (C.D. Cal. 2005)* ("Defendant cannot, on the one hand, argue that *all* reporters and account executives are exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job duties of each reporter and account executive in order **[*8]** to determine whether that individual is 'exempt.'") (emphasis added).

Moreover, while the jobs of the various sales representatives are not identical, they bear sufficient similarity to warrant conditional certification for the purpose of distributing notice. First, Plaintiffs submitted a sample of job postings from several states, all of which use identical language to describe the sales representative position. Second, the duties described by Defendants' employees in their declarations demonstrate substantial similarity in the essential functions of their jobs; namely, all sales representatives visit medical care providers to promote certain Ortho-McNeil and/or Janssen products. Defendants point to certain differences, such as size of sales region, differences in sales pitches, differences in products sold, and differences in specific clients. However, these differences are immaterial to whether or not the sales representatives are properly classified **[*9]** as exempt employees. At this stage, Plaintiffs have made a sufficient showing that the propriety of exempt status can be determined on a class-wide basis.

[1] The Court sustains Defendants' objections to the deposition testimony of Robert Gibney and Russell Stough submitted, for the first time, on reply. Thus, the Court does not consider that testimony in reaching its decision on this motion.

As part of their motion, Plaintiffs ask the Court to approve the proposed Notice to be distributed to the class. Defendant objects to the proposed Notice on several grounds. Plaintiffs have acceded to some of the objections raised by Defendants, but the parties continue to dispute several provisions. The Court finds that the proposed notice needs modification, and orders the parties to meet and confer over the content of the notice. In order to help facilitate the joint crafting of an acceptable notice, the Court will address some of the points of contention.

Plaintiffs request that the Court order Defendants to provide the names, addresses, telephone numbers, email addresses, and social security numbers for each potential plaintiff in the collective action. Defendant argues that it should not be required to do so on the grounds that it would violate the privacy rights of its employees. However, the Supreme Court has expressly authorized production of names and addresses of potential plaintiffs for notice purposes in a class action. **[*10]** *See, e.g.*, *Hoffman-LaRoche, 493 U.S. at 170*. Accordingly, the Court finds that production of the names and addresses of potential class members to Plaintiffs is appropriate. However, the Court agrees with Defendants that production of telephone numbers, email addresses, and social security numbers is inappropriate. Notice will be distributed by mail only, and counsel may gather the necessary contact information from anyone who elects to participate in the action by responding to the mailed notice.

Defendants next argue that Plaintiffs' proposed notice does not properly respect judicial neutrality. They argue that even providing the case caption at the top of the notice improperly indicates judicial authorization for the notice. Defendants also argue that the proposed notice gives short shrift to their defenses in this action, thus overstating the merits of Plaintiffs' claim. ***HN3***[↑] "In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Hoffman-LaRoche, 493 U.S. at 174*. The Court finds **[*11]** that the appearance of the caption at the top of the notice does not violate judicial neutrality. However, the notice must include conspicuous language, immediately below the caption, that the Court has not taken any position on the merits of the case and that the mere distribution of notice does not necessarily mean that the plaintiff class will ultimately prevail. This language should also advise potential class members not to contact the Court with any questions about the litigation. As to the statement of the case, the Court expects that, through the meet and confer process, the parties will be able to craft a statement that is acceptable to each side.

Plaintiffs propose a 120-day deadline for potential plaintiffs to file the form consent to join, while Defendants suggest that a 60-day deadline would be more appropriate. Plaintiffs have not articulated a sufficient basis for providing putative class members four months in which to opt-in to the action. Sixty days is sufficient time for a class member to receive the notice, ask any questions of Plaintiffs or their counsel, and make an informed choice as to whether or not they wish to participate.

Defendants dispute the four-year statute **[*12]** of limitations referred to by Plaintiffs in their notice. ***HN4***[↑] Normally, the statute of limitations for an FLSA violation claim is two years, but if the violation is willful the statute of limitations is extended to three years. *See* *29 U.S.C. § 255(a)*. However, Plaintiffs argue that California's Unfair Competition Law ("UCL") provides the appropriate statute of limitations, which is four years. This argument is unfounded. Plaintiffs are distributing notice to an opt-in class seeking statutory relief under the FLSA. They are not, at this time, seeking certification of a class for a UCL cause of action. This cause of action is entirely separate from and unrelated to any UCL cause of action, and as such, it would be inappropriate to adopt the UCL statute of limitations, particularly when Congress has set forth a clear limitations period in the text of the FLSA. The Court finds that the limitations period

should be three years, at least for purposes of notice. Plaintiffs have alleged that Defendants' conduct was willful, and at this stage, there is not sufficient evidence to show that such an allegation would fail as a matter of law. [2]

Finally, Plaintiffs argue that the statute of limitations should be equitably tolled from the filing of the initial complaint, or at least the filing of the amended complaint that first asserted the FLSA cause of action. ***HN5***[↑] Under the FLSA, individual plaintiffs in a collective action must file a valid consent to opt-in within the applicable statute of limitations. *See* *29 U.S.C § 256(b)*. Equitable tolling is extended sparingly and only where claimants exercise diligence in preserving their legal rights. *See* *Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)* (citing *Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984))*. Courts will typically grant equitable tolling in two limited circumstances: (1) where the plaintiffs actively pursued their legal remedies by filing defective pleadings within the statutory period, or (2) where the defendant's misconduct induces failure to meet the deadline. *See* *Irwin, 498 U.S. at 96*. Plaintiffs **[*14]** argue that Defendants' failure to provide them with the contact information for potential class members is sufficient misconduct to warrant equitable tolling as of the date of the filing of the Complaint. However, Plaintiffs did not request this information from Defendants until July 20, 2007, over six weeks *after* the certification motion was initially filed. Moreover, Plaintiffs waited more than five months after filing their original complaint before seeking to add an FLSA cause of action. Thus, the Court finds that neither of the two *Irwin* circumstances is present in this case, and further equitable tolling would be inappropriate. Accordingly, consistent with the Court's prior order tolling the limitations period from July 2 through August 6, notice may be distributed to current and former employees whose claims arose on or later than July 3, 2004.

The other points of contention between Plaintiffs and Defendants are relatively minor, and the Court expects that the parties can resolve these through meaningful use of the meet and confer process. The parties are thus directed to meet and confer on a proposed notice, and submit such notice to the Court within 20 days of the date of this **[*15]** order. This notice should be consistent with the Court's rulings above.

End of Document

[2] Defendants are of course free to contest the willfulness **[*13]** of their conduct, either through a dispositive motion at the appropriate time, or at trial, or both. If Defendants' conduct is found not to have been willful, the two-year limitations period will apply to limit Plaintiffs' ultimate potential relief.

BLANCHARD | WALKER PLLC
ATTORNEYS AND COUNSELORS

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Ann Arbor, MI 48104
Phone: (734) 929-4313

July 14, 2021

Exhibit 14

Sent Via E-mail Only to:
pperla@vaughanbaio.com
jstarr@starrbutler.com
wthomas@starrbutler.com

Peter P. Perla, Jr
Vaughan Baio & Partners
317 George St, Ste. 320
New Brunswick, NJ 08901

Joseph A. Starr
William R. Thomas
Starr, Butler, Alexopoulos & Stoner PLLC
20700 Civic Center Dr., Ste 290
Southfield, MI 48076

Re: Notification of Arbitration Opt-Out

Dear Counsel for SCI:

Raynard Hurst has no specific recollection of an agreement to arbitrate. However, we understand it is SCI's policy that its owner/operators "may opt-out of the Arbitration provisions within the Owner Operator agreement by notifying SCI in writing." To the extent Mr. Hurst's consent to join this action is not sufficiently clear written notice of his decision to opt-out of any Arbitration agreement, and out of an abundance of caution, please accept this letter as his election to opt-out of any Arbitration provision.

If you have any questions, please feel free to contact me at blanchard@bwlawonline.com or (734) 929-4313. Thank you.

Sincerely yours,
BLANCHARD & WALKER PLLC

/s/ *David M. Blanchard*

David M. Blanchard

Exhibit 15

Anderson v. P.F. Chang's China Bistro, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

August 23, 2017, Decided; August 23, 2017, Filed

CASE NO. 16-14182

Reporter
2017 U.S. Dist. LEXIS 134523 *; 2017 WL 3616475

JEREMY ANDERSON, Plaintiff, v. P.F. CHANG'S CHINA BISTRO, INC., DOES #1-10, Defendants.

Counsel: [*1] For JEREMY ANDERSON, Plaintiff: Willliam C. Rand, Law Offices of William Coudert Rand, New York, NY; Sergei Lemberg, Lemberg Law, LLC, Wilton, CT.

For P.F. CHANG'S CHINA BISTRO, Defendant: Christopher Parlo, Daniel Kadish, Melissa C. Rodriguez, Morgan, Lewis & Bockius LLP, New York, NY; Stephanie L. Sweitzer, Morgan, Lewis & Bockius LLP, Chicago, IL.

For INC., DOES #1-10, Defendant: Daniel Kadish, Melissa C. Rodriguez, Morgan, Lewis & Bockius LLP, New York, NY; Stephanie L. Sweitzer, Morgan, Lewis & Bockius LLP, Chicago, IL.

For P.F. CHANG'S CHINA BISTRO, INC., Counter Claimant: Stephanie L. Sweitzer, Morgan, Lewis & Bockius LLP, Chicago, IL.

For JEREMY ANDERSON, Counter Defendant: Sergei Lemberg, Lemberg Law, LLC, Wilton, CT.

Judges: HON. Denise Page Hood, Chief United States District Judge.

Opinion by: Denise Page Hood

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS [#14], AND DENYING PLAINTIFF'S MOTION FOR COLLECTIVE ACTION CERTIFICATION [#17] WITHOUT PREJUDICE

BACKGROUND

On November 29, 2016, Plaintiff Jeremy Anderson ("Anderson") filed this case against Defendants P.F. Chang's China Bistro, Inc. ("P.F. Chang's") and John Does # 1-10 alleging violations of the *Fair Labor Standards Act ("FLSA")*, Michigan **[*2]** labor law, and North Carolina labor law. (Doc # 1) Anderson seeks to prosecute his claims as a collective action on behalf of all persons who are or were formerly employed by Defendants as sous chef employees or similar positions with different titles who were non-exempt employees within the meaning of the FLSA and who were not paid minimum wage for hours worked and/or were not paid overtime for hours worked over 40 hours in a work week during the three years prior to the filing on this case.

On February 1, 2017, P.F. Chang's filed an Answer and Counterclaims against Anderson alleging accounting and offset/recoupment, breach of contract, breach of good faith and fair dealing, unjust enrichment and restitution, and faithless servant. (Doc # 8) On March 8, 2017, Anderson filed a Motion to Dismiss P.F. Chang's Counterclaims. (Doc # 14) P.F. Chang's filed a Response on March 29, 2017. (Doc # 19) Anderson filed a Reply on May 12, 2017. (Doc # 25) On March 27, 2017, Anderson filed a Motion for Collective Action Certification. (Doc # 17) P.F.

Chang's filed a Response on May 30, 2017. (Doc # 27) Anderson filed a Reply on June 12, 2017. (Doc # 29) The Court held a hearing on the Motions on June **[*3]** 21, 2017.

Anderson began working for P.F. Chang's, an Asian-themed restaurant chain, in 2008 as a Line Cook in the Beachwood, Ohio restaurant. As a Line Cook, Anderson was paid by the hour. Anderson worked at this Ohio restaurant until about June 2013. Starting in or about August 2013, Anderson became a Sous Chef at the P.F. Chang's restaurant in Northville, Michigan. He worked at the Michigan restaurant until about September 2014. From about September 2014 to about March 2015, Anderson worked as a Sous Chef at the P.F. Chang's restaurant in Charlotte, North Carolina.

Anderson asserts that, as a Sous Chef in the Michigan and North Carolina restaurants, he was a non-exempt employee within the meaning of the FLSA. He claims that he is entitled to back wages for work performed for which P.F. Chang's did not pay him the legal minimum wage or overtime wages. According to Anderson, he worked four days a week, for approximately 66.5 to 70.5 hours per week at the Michigan restaurant. He claims he worked five days a week, for approximately 55 hours per week at the North Carolina restaurant.

Anderson alleges that, as a Sous Chef in the Michigan and North Carolina restaurants, he spent over 90 percent **[*4]** of his time cooking and preparing food. Anderson alleges that he did the same work as hourly Line Cooks except that he worked longer hours as a Sous Chef and was not paid any overtime premium for hours worked over 40 hours in a week. Anderson claims that he did not get any breaks and was not permitted to leave the kitchen at either the Michigan restaurant or the North Carolina restaurant. He alleges that his duties as a Sous Chef did not include managerial responsibilities or the exercise of independent business judgment. Anderson further alleges that he did not customarily direct the work of two or more employees, review or approve employee hours, or prepare schedules. According to the Complaint, Anderson did not have authority to and did not hire, fire, or discipline employees (except on one occasion when Anderson wrote up an employee as a result of the direct instruction to do so by the Chef at the Michigan restaurant).

From about March 2015 to about June 2016, Anderson worked as an hourly Line Cook back at the P.F. Chang's restaurant in Ohio. From about August 2016 to about October 2016, Anderson worked as an hourly Line Cook at the P.F. Chang's restaurant in Palm Gardens, Florida. **[*5]** Anderson alleges that he observed Sous Chefs at the Ohio and Florida restaurants performing the same duties as Line Cooks, except that Sous Chefs worked weekly shifts that were over 40 hours and were not paid time and one half for their overtime.

According to P.F. Chang's, Line Cooks are hourly, non-exempt employees who are responsible for preparing food for customers; Sous Chefs, on the other hand, receive salaries and are exempt employees not entitled to overtime compensation. P.F. Chang's alleges in its Counterclaims that the Sous Chef position entails additional pay and benefits, not available to hourly cooks, in exchange for the regular performance of managerial and other exempt duties.

P.F. Chang's points to the Sous Chef Position Description that was applicable at the Ohio restaurant at the time that Anderson was being considered for the promotion from Line Cook to Sous Chef. This Position Description states that the Sous Chef position is a management position designed to manage and execute all kitchen functions. (Doc # 8-2) It describes the essential functions of the position to include: supervising, assigning, delegating tasks, and giving direction to the kitchen staff; ensuring **[*6]** proper timing and production of all food orders; preparing work schedules for all kitchen staff; supervising and facilitating training of all food preparation and execution of all menu items, procedure, and recipes; maintaining all product quality standards;

completing prep lists; completing ordering guides; assisting with interviewing, hiring, and discharging employees; assisting in providing feedback to staff; handling disciplinary activities and recognition of staff; holding "front of the house" staff accountable for dress code standards; being accountable for following safety and sanitation guidelines; completing and costing all food inventories; completing opening and closing checklists; and managing the P.F. Chang's Message. *Id.* The Position Description also states: "The largest percentage of a Sous Chef['s] work day is spent directing and supervising the employees on that shift. S/he operates with a great deal of independent decision-making and discretionary authority. . . . In the absence of the Culinary Partner, the Sous Chef is the back of the house lead." *Id.*

According to P.F. Chang's, after learning of the aforementioned Sous Chef Position requirements, Anderson agreed to **[*7]** go through a "weeks' long" Manager in Training ("MIT") formal training program. Anderson acknowledged and signed P.F. Chang's' Management Fraternization Policy, which prohibits managers from dating non-management employees. (Doc # 8-3) Anderson also acknowledged and signed P.F. Chang's' Immigration Policy and I-9 Compliance Plan, agreeing that he understood his "responsibility as a member of management to follow proper hiring and immigration-related procedures." (Doc # 8-4) P.F. Chang's claims that Anderson was trained on managerial duties and received a copy of the Position Description.

The Counterclaim alleges that Anderson was expected to, and did, instruct team members on best practices so that they could most effectively complete their own tasks and allow him the flexibility to supervise and support each station in the back of the house. P.F. Chang's claims that Anderson conducted one-on-one coaching and counseling sessions with employees, and he was not required to seek approval from any other member of management to do so. P.F. Chang's claims that Anderson provided formal and informal performance reviews to employees he managed, and he was required to draw on his observations **[*8]** while managing employees and exercise his independent judgment in determining whether employees were exceeding, meeting, or not meeting expectations. According to P.F. Chang's, Anderson also helped conduct interviews and hire new employees, and he could end a candidate's application process if, using his independent judgment, he did not feel the candidate was a good fit. The Counterclaim alleges that Anderson was expected to, and did, use his judgment when completing inventory for his specific restaurant, and after conducting an analysis of his particular restaurant's needs at any given moment, forecast what food and supplies to place in upcoming orders. According to P.F. Chang's, the Operating Partners and/or Culinary Partners at the Michigan and North Carolina restaurants observed Anderson perform hiring, training, coaching, scheduling, and disciplining of "back of the house" employees.

P.F. Chang's claims that, as a Sous Chef, Anderson received a salary for all hours of work and was an exempt employee not entitled to overtime compensation. According to Anderson's Complaint, he received an annual salary of about $41,000.00. According to the Counterclaim, as a Sous Chef, Anderson received **[*9]** and accepted an annual salary of $41,000.00, which was thereafter increased to $42,000.00 and subsequently increased to $43,000.00. The Counterclaim further alleges that Anderson received and accepted paid vacation time, eligibility for health insurance benefits, long-term disability benefits, and short-term disability benefits—which are only provided to management and not to hourly employees.

P.F. Chang's maintains that, to the extent Anderson is found to have regularly performed primarily non-exempt duties (as Anderson alleges in his Complaint) during any time he held the position of Sous Chef, he has materially breached his agreement to primarily perform exempt duties, and P.F. Chang's has suffered damages as a result of compensating Anderson for the performance of

managerial duties which he agreed to, but allegedly did not, perform. P.F. Chang's further asserts that Anderson acted in bad faith by accepting a promotion to Sous Chef and accepting higher pay and additional benefits in exchange for the performance of managerial and exempt duties, and then performing primarily non-exempt duties without informing P.F. Chang's about it.

II. MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

A. [*10] Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal for lack of jurisdiction over the subject matter. *Fed. R. Civ. P. 12(b)(1)*. Motions under *Rule 12(b)(1)* fall into two general categories: facial attacks and factual attacks. *See RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134 (6th Cir. 1996)*. A facial attack challenges the pleading itself. In considering this type of attack, the court must take all material allegations in the complaint as true, and construe them in the light most favorable to the non-moving party. *Id.* Where subject matter jurisdiction is factually attacked, the plaintiff bears the burden of proving jurisdiction to survive the motion, and "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* In a factual attack of subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

B. Subject Matter Jurisdiction

Anderson argues that the Court lacks subject matter jurisdiction over P.F. Chang's' state-law Counterclaims because there is no original federal jurisdiction; the Counterclaims are not compulsory; the Counterclaims do not derive **[*11]** from a common nucleus of operative facts with Anderson's claims; and public policy weighs against allowing in the retaliatory Counterclaims.

P.F. Chang's responds that the Counterclaims are compulsory because they arise out of the exact same transaction or occurrence as Anderson's claims. P.F. Chang's also argues that, even if the Court were to determine that the Counterclaims are not compulsory, the Counterclaims are permissive, and no facts or allegations exist to warrant declining supplemental jurisdiction.

Anderson facially attacks the Counterclaims, so the Court takes the allegations in the Counterclaims as true and construes them in the light most favorable to P.F. Chang's. *See RMI Titanium Co., 78 F.3d at 1134*. The Counterclaims raise questions of state law, and do not raise federal questions. P.F. Chang's fails to allege the amount in controversy, which does not appear to meet the $75,000.00 minimum for diversity jurisdiction. Accordingly, there is no original federal jurisdiction, and the Court must decide whether to exercise supplemental jurisdiction over P.F. Chang's' Counterclaims.

28 U.S.C. § 1367 gives the Court discretion to exercise supplemental jurisdiction over state law claims "that are so related to claims in the **[*12]** action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C. § 1367*. "Claims form part of the same case or controversy when they derive from a common nucleus of operative facts." *Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 209 (6th Cir. 2004)* (internal quotations and citation omitted). *Section 1367* further guides a court in determining whether supplemental jurisdiction should be exercised:

> The district courts may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* if—
>
> (1) the claim raises a novel or complex

> issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

Rule 13 of the Federal Rules of Civil Procedure defines two types of counterclaims: (1) compulsory counterclaims, which arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim" and do "not require adding another party over whom the court cannot acquire jurisdiction;" and (2) permissive counterclaims, which are any counterclaims that are not compulsory. *Fed. R. Civ. P. 13*. A counterclaim arises **[*13]** out of the same transaction or occurrence as the original claim if the issues of law and fact raised by the claims are largely the same or if substantially the same evidence would support or refute both claims. *Sanders v. First Nat'l Bank & Trust Co. in Great Bend, 936 F.2d 273, 277 (6th Cir. 1991)*.

In this case, the parties' claims involve different laws and evidence. Anderson's labor claims focus on how many hours he worked, how much he was paid, and whether, as a Sous Chef, he was an exempt or non-exempt employee under the FLSA. P.F. Chang's' Counterclaims, on the other hand, involve questions of whether the parties had a contract (P.F. Chang's does not include any written contract signed by the parties), what any contract required, whether Anderson breached any contract, whether Anderson was unjustly overpaid for work he performed, whether Anderson engaged in misconduct or grossly mismanaged P.F. Chang's' affairs, and to what extent, if any, P.F. Chang's was damaged. The Court finds that P.F. Chang's' Counterclaims are not compulsory because they do not arise from the same transaction or occurrence as Anderson's claims. *See Sneed v. Wireless PCS Ohio #1, LLC, No. 1:16CV1875, 2017 U.S. Dist. LEXIS 31279, 2017 WL 879591, at *2 (N.D. Ohio Mar. 6, 2017)*; *Wagoner v. N.Y.N.Y., Inc., No. 1:14-CV-480, 2015 U.S. Dist. LEXIS 40679, 2015 WL 1468526, at *3 (S.D. Ohio Mar. 30, 2015)* ("Though the outcome of the minimum wage determination **[*14]** may also impact Defendant's breach of contract counterclaim, that breach of contract counterclaim seeks affirmative relief and will require investigation into the validity of the contract Plaintiff entered into with Defendant and whether Plaintiff breached that contract."); *Morris v. Blue Sky Mgmt., LLC, No. 11-00979-CV-DGK, 2012 U.S. Dist. LEXIS 19731, 2012 WL 527936, at *3-4 (W.D. Mo. Feb. 16, 2012)* (holding that counterclaims for breach of contract, breach of fiduciary duty, breach of duty of loyalty, and unjust enrichment did not share a common nucleus of operative fact with the plaintiff's FLSA claim even though the question of whether the plaintiff was an exempt worker as defined by the FLSA was pertinent to both claims).[1]

Having found that P.F. Chang's' Counterclaims are permissive, the Court next turns to determining whether to exercise supplemental jurisdiction under *28 U.S.C. § 1367*. The Counterclaims are not so related to Anderson's claims that they form part of the same case or controversy because they do not derive from a common nucleus of operative facts.

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[1] P.F. Chang's relies heavily on *Doe v. Cin-Lan, Inc.* in support of its argument that its Counterclaims are compulsory. *See Doe v. Cin-Lan, Inc., No. 08-CV-12719, 2010 U.S. Dist. LEXIS 16447, 2010 WL 726710, at *5 (E.D. Mich. Feb. 24, 2010)*. However, Anderson correctly notes that *Cin-Lan* did not concern a challenge to subject matter jurisdiction. Rather, the court's analysis centered on whether the law permits a contingent counterclaim, and whether the defendant had suffered any harm sufficient to state a breach of contract counterclaim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. *See id.*; *see also Wagoner, 2015 U.S. Dist. LEXIS 40679, 2015 WL 1468526, at *4* (acknowledging *Cin-Lan* in footnote 2, while collecting cases that held that state law counterclaims based on breach of contract or other state common laws do not arise out of the same occurrence as claims for statutory minimum wage).

The accounting and offset/recoupment, breach of contract, unjust enrichment and restitution, and faithless servant Counterclaims arise under state law not implicated **[*15]** in Anderson's claims. Although there would be some evidentiary overlap regarding the type of duties that Anderson performed as a Sous Chef, the Counterclaims would involve a substantial amount of additional evidence that would not be necessary to prove or defend Anderson's claim. *See* *Sneed, 2017 U.S. Dist. LEXIS 31279, 2017 WL 879591, at *3*; *Coronado v. D. N.W. Houston, Inc., No. CIV.A. H-13-2179, 2014 U.S. Dist. LEXIS 83763, 2014 WL 2779548, at *4 (S.D. Tex. June 19, 2014)* (holding that the proposed counterclaims did not form part of the same case or controversy as the FLSA claim because the FLSA claims turned on the economic realities of the relationship between the parties, while the proposed counterclaims turned on contract language and issues of consideration, conscionability, and the defendant's damages).

Even if P.F. Chang's' Counterclaims derived from a common nucleus of operative facts with Anderson's claims, the Court declines to exercise supplemental jurisdiction over the Counterclaims because of the concern that the Counterclaims would change the nature of this lawsuit and substantially predominate over Anderson's statutory wage claims. P.F. Chang's' Counterclaims outnumber Anderson's claims, are distinct from Anderson's claims, and involve proof that is not needed to establish or defend Anderson's claims. **[*16]** *See* *Sneed, 2017 U.S. Dist. LEXIS 31279, 2017 WL 879591, at *3*. Many federal courts have also noted that counterclaims in FLSA litigation should be disfavored because they could be viewed as retaliation for an employee bringing an FLSA claim against the employer. *Id.*; *Morris, 2012 U.S. Dist. LEXIS 19731, 2012 WL 527936, at *4-5*. As the Fifth Circuit has noted,

> The FLSA decrees a minimum unconditional payment and the commands of that Act are not to be vitiated by an employer, either acting alone or through the agency of a federal court. The federal courts were not designated by the FLSA to be either collection agents or arbitrators for an employee's creditors. Their sole function and duty under the Act is to assure to the employees of a covered company a minimum level of wages. Arguments and disputations over claims against those wages are foreign to the genesis, history, interpretation, and philosophy of the Act. The only economic feud contemplated by the FLSA involves the employer's obedience to minimum wage and overtime standards. To clutter these proceedings with the minutiae of other employer-employee relationships would be antithetical to the purpose of the Act. Set-offs against back pay awards deprive the employee of the "cash in hand" contemplated by the Act, and are therefore inappropriate **[*17]** in any proceeding brought to enforce the FLSA minimum wage and overtime provisions, whether the suit is initiated by the individual employees or by the Secretary of Labor.

Brennan v. Heard, 491 F.2d 1, 4 (5th Cir. 1974), *overruled on other grounds*, *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)*.[2]

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[2] The Court notes that P.F. Chang's seeks more than a defensive offset in its Counterclaims as permitted under the FLSA. P.F. Chang's seeks affirmative relief for damages arising from Anderson asserting the statutory right to be properly classified and compensated under the FLSA and other labor statutes. As the court noted in *Wagoner*, "[t]he statutory scheme of the FLSA provides for certain offsets and credits when appropriate, and no separate affirmative common law counterclaim is necessary to adjudicate those issues." *2015 U.S. Dist. LEXIS 40679, 2015 WL 1468526, at *5*. P.F. Chang's has pled offset as an affirmative defense. "As such, counterclaims raising other minutiae of employer-employee relationships are contrary to the purposes of the statutory provisions." *Id.*; *see also* *Coronado, 2014 U.S. Dist. LEXIS 83763, 2014 WL 2779548, at *3* (finding that the proposed setoff counterclaim was not compulsory because it had not yet matured). The Court further notes, as was observed in *Sneed*, that "[n]othing stops defendants from suing plaintiff for damages in state court. A state court judgment could be used as a set off to any judgment plaintiff obtains in this case. But these practical concerns don't give rise to federal jurisdiction." *2017 U.S. Dist. LEXIS 31279, 2017 WL 879591, at *3 n.6*. The Court acknowledges that P.F. Chang's has

The Court declines to exercise supplemental jurisdiction over the Counterclaims in this case. The Court dismisses without prejudice P.F. Chang's' Counterclaims for lack of subject matter jurisdiction. Because the Court lacks subject matter jurisdiction over the Counterclaims, the Court need not reach the parties' remaining arguments under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

III. MOTION FOR COLLECTIVE ACTION CERTIFICATION

A. Standard of Review

Anderson seeks conditional class certification and judicial notice of a collective action as permitted under *Section 216(b) of the FLSA*:

> An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees *similarly situated*. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

Unlike class actions **[*18]** under *Rule 23 of the Federal Rules of Civil Procedure*, collective actions under the FLSA require putative class members to opt into the class, and these opt-in employees are party plaintiffs, unlike absent class members in a *Rule 23* class action. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*; *Fisher v. Michigan Bell Tel. Co., 665 F. Supp. 2d 819, 824 (E.D. Mich. 2009)*.

Section 216(b) of the FLSA establishes two requirements for a collective action: (1) the plaintiffs must actually be similarly situated; and (2) all plaintiffs must signal in writing their affirmative consent to participate in the action. *Comer, 454 F.3d at 546*. The district court's first task is to "consider whether the plaintiffs have shown that the employees to be notified [of the collective action] are, in fact, 'similarly situated.'" *Id.* If the plaintiffs meet their burden, then the district court may exercise its discretion to authorize notification of similarly situated employees to allow them to opt into the lawsuit. *Id.*

In order to determine whether the plaintiffs are similarly situated, district courts generally follow a two-stage certification process. *Id.*; *Fisher, 665 F. Supp. 2d at 825*.

> The first stage of *§ 216(b)* certification, also known as the "notice stage," takes place early in the litigation; i.e., at the beginning of discovery. It is here where the court determines whether the suit should be "conditionally certified" as a collective action so that potential **[*19]** opt-in plaintiffs can be notified of the suit's existence and of their right to participate. The second stage occurs much later; after all of the opt-in forms have been received and discovery has been concluded.

At the second stage, the court has much more information and employs a stricter standard to decide whether particular members of the class are, in fact, similarly situated. *Comer, 454 F.3d at 547*. "The action may be 'de-certified' if the record reveals that they are not, and the opt-in plaintiffs' claims may be dismissed without prejudice." *Shipes v. Amurcon Corp., No. 10-14943, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995362, at *4 (E.D. Mich. Mar. 23, 2012)* (internal quotation marks and citation omitted).

Through the instant Motion, Anderson seeks only conditional certification at the notice stage, not

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cited some case law that supports its argument that the Court should exercise supplemental jurisdiction over its Counterclaims for reasons of judicial economy and efficiency; however, this Court finds the cases cited above to be more persuasive for the reasons set forth above.

final certification. "District courts use a fairly lenient standard that typically results in conditional certification of a representative class when determining whether plaintiffs are similarly situated during the first stage of the class certification process." *White v. Baptist Mem'l Health Care Corp., 699 F.3d 869, 877 (6th Cir. 2012)* (internal quotations and citations omitted). "The plaintiff must show only that his position is similar, not identical, to the positions held by the putative class members." *Comer, 454 F.3d at 546-47* (internal quotations and citations omitted). "[A] named plaintiff can show that **[*20]** the potential claimants are similarly situated by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Olivo v. GMAC Mortg. Corp., 374 F. Supp. 2d 545, 548 (E.D. Mich. 2004)*.

"Although the standard for granting conditional certification is lenient, it is not non-existent." *Cason v. Vibra Healthcare, No. 10-10642, 2011 U.S. Dist. LEXIS 47160, 2011 WL 1659381, at *3 (E.D. Mich. May 3, 2011)*. At this stage, courts consider factors such as whether potential plaintiffs have been identified; whether affidavits of potential plaintiffs have been submitted; and whether evidence of a widespread unlawful policy or plan has been submitted. *Olivo, 374 F. Supp. 2d at 548*.

At this first stage of conditional certification, the court "does not resolve factual disputes, decide substantive issues on the merits, or make credibility determinations." *Fisher, 665 F. Supp. 2d at 826*. Additionally, the plaintiff's evidence on a motion for conditional certification "is not required to meet the same evidentiary standards applicable to motions for summary judgment because to require more at this stage of the litigation would defeat the purpose of the two-stage analysis under *Section 216(b)*," and would fail to take into account that the plaintiff "has not yet been afforded an opportunity, through discovery, to test fully the factual basis of his case." *Id.* ***[*21]*** (internal quotations and citations omitted). Nevertheless, affidavits submitted at the notice stage must still be based on the personal knowledge of the affiant. *White v. MPW Indus. Servs., Inc., 236 F.R.D. 363, 369 (E.D. Tenn. 2006)*.

B. Whether Anderson Has Sufficiently Shown That A Class of Similarly Situated Potential Sous Chef Plaintiffs Exists

Anderson argues that the Court should grant conditional certification of a collective action class consisting of current and former employees of P.F. Chang's who worked as food preparation employees with the title "Sous Chef" or in other similar non-managerial, non-administrative positions on or after November 20, 2013. Anderson argues that courts have consistently granted collective action certification to sous chefs under the FLSA. Anderson further argues that courts have granted collective action certification where employees were misclassified. In support of his Motion, Anderson includes his own declaration as well as a declaration from Patrick Stancil ("Stancil"), a former P.F. Chang's employee. Anderson argues that the two declarations demonstrate that P.F. Chang's adopted and adhered to a policy requiring their cooks with the title "Sous Chef" to work a double shift in excess of 40 hours per week and paid **[*22]** them a salary but failed to pay them overtime compensation in violation of the FLSA.

P.F. Chang's argues that Anderson cannot meet his burden of demonstrating the appropriateness of conditional certification based solely on his conclusory declarations that his and Stancil's experiences are similar to those of the approximately 900 other Sous Chefs across over 200 P.F. Chang's locations. P.F. Chang's further argues that uniform classification does not demonstrate that Sous Chefs are similarly situated. According to P.F. Chang's, Anderson has not offered sufficient evidence to show a nationwide *de facto* illegal policy pursuant to which Sous Chefs are assigned duties that render inappropriate P.F.

Chang's exempt classification of the Sous Chef position. In support of its position, P.F. Chang's includes declarations from twelve individuals who work/worked as Sous Chefs in sixteen different P.F. Chang's restaurants. P.F. Chang's also points to Anderson's deposition testimony indicating that he had some exempt duties as Sous Chef, and indicating that he lacks personal knowledge regarding the duties carried out by any other Sous Chef.

Anderson replies that the declarations submitted by P.F. **[*23]** Chang's have little evidentiary value at the conditional certification notice stage. Anderson notes that he has not had the opportunity to depose the employees of P.F. Chang's who submitted declarations on P.F. Chang's' behalf, and that these witnesses were not disclosed in the *Rule 26* disclosure or interrogatory responses. Anderson asserts that these declarants have been cherry-picked by P.F. Chang's and are under P.F. Chang's' control and potentially subject to coercion.

A named plaintiff is not similarly situated to a proposed plaintiff simply because they share exempt status. *Shipes, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995362, at *9*. In misclassification cases, "similarly situated" must be analyzed in terms of the nature of the job duties performed by each class member, as the ultimate issue to be determined is whether each employee was properly classified as exempt. . . . A collective action is only appropriate where the plaintiffs make a modest factual showing that the nature of the work performed by all class members is at least similar to their own. *2012 U.S. Dist. LEXIS 39794, [WL] at *10*.

> To certify a class covering all of defendant's locations, plaintiffs do not need to allege facts or present other evidence for each of those locations. Nonetheless, plaintiffs must provide sufficient **[*24]** evidence of a company-wide practice through declarations of present and former employees at other locations to justify sending notice to similarly situated employees at all locations at issue in the litigation.

*Cobus v. DuHadway, Kendall & Assocs., No. 13-CV-14940, 2014 U.S. Dist. LEXIS 116403, 2014 WL 4181991, at *5 (E.D. Mich. Aug. 21, 2014)*.

The Court turns to the factual showing put forth by Anderson. As noted before and according to Anderson's declaration, as a P.F. Chang's Sous Chef during the relevant time period, he worked for approximately 66.5 to 70.5 hours per week at the Michigan restaurant, and approximately 55 hours per work at the North Carolina restaurant. He spent over 90 percent of his time cooking and preparing food, and he did the same work as hourly Line Cooks except that he worked longer hours as a Sous Chef and was not paid any overtime premium for hours worked over 40 hours in a week. He did not get any breaks and was not permitted to leave the kitchen. His duties as a Sous Chef did not include managerial responsibilities or the exercise of independent business judgment. He did not customarily direct the work of two or more employees, review or approve employee hours, or prepare schedules. He did not have authority to and did not hire, fire, or discipline employees (except on one occasion when **[*25]** Anderson wrote up an employee as a result of the direct instruction to do so by the Chef at the Michigan restaurant). Anderson's declaration further states that, at the Ohio restaurant and Florida restaurant where he worked as a Line Cook, he observed the Sous Chefs performing the same duties as the Line Cooks, except that they worked weekly shifts that were over 40 hours in a week and were not paid overtime. Anderson's Reply Declaration states that, during 2016, P.F. Chang's changed their policy and divided Sous Chefs into two categories: regular "Sous Chefs" who cook and are paid hourly including overtime, and "Senior Sous Chefs" who are paid a salary and are not paid overtime and are prohibited from performing any cooking work. (Doc # 29-3, Pg ID 529-28)

Anderson does not make any specific allegations regarding the *primary* duties of Sous Chefs at the

Ohio or Florida restaurants, or regarding the percentage of time the Sous Chefs spent on "Line Cook" duties versus any other duties. Notably, Anderson makes no allegations regarding other Sous Chefs who worked in the Michigan or North Carolina restaurants at the same time as him. During his deposition, Anderson could not recall duties **[*26]** performed by any other P.F. Chang's Sous Chefs, even at locations where he worked. Anderson further testified that, outside of speculation and talk around the restaurants where he worked about Sous Chefs being "glorified cooks," he has no personal knowledge of the duties of any other Sous Chefs.

The Court takes note that parts of Anderson's deposition testimony seem to contradict his own declaration. For example, his declaration states that his duties did not include any managerial responsibilities. However, Anderson testified at his deposition that there were times when he was the person in charge of the kitchen, overseeing kitchen staff. He testified that he had the authority to direct staff to complete tasks. He testified that if a Line Cook prepared a dish incorrectly, it would come back to him as Sous Chef. He testified that if something went wrong, the issue would come to the manager or to him as Sous Chef, and not to the Line Cooks.

The Court next turns to Stancil's declaration, the only other declaration that Anderson has put forth to support conditional certification. Stancil declares that he worked as a P.F. Chang's Sous Chef during the relevant time period in the Stamford, **[*27]** Connecticut restaurant. According to Stancil, his duties as a Sous Chef did not include managerial responsibilities or the exercise of independent business judgment. He did not customarily direct the work of two or more employees, or review or approve employee hours. He did not have authority to and did not hire, fire, or discipline employees. Stancil declares that he often worked 60-75 hours per week, and that he spent 50-60% of his time cooking on the line. Most of the remainder of his time was spent on food-preparation tasks. He spent some time checking whether orders were correct before going out, keeping times of the tickets and checks, 1-2 hours per week drafting schedules for approval, and 1-2 hours per week ordering inventory. The Court also notes that Stancil has not opted into this proposed collective action and cannot do so.

Stancil's declaration states that he worked with two other Sous Chefs at the Stamford restaurant, Amilcar Huyhua ("Huyhua") and Omar Vega. Stancil also talked to Lamar and Andrew who work at the P.F. Chang's in Farmington, Connecticut. Stancil talked to Jose and Fransciso who work as Sous Chefs at the P.F. Chang's in White Plains, New York. Stancil talked **[*28]** to Jaime, a Sous Chef at the P.F. Chang's in Albany, New York. Stancil talked to Vance, a former P.F. Chang's Sous Chef who worked at the restaurant in Syracuse, New York. And Stancil talked to Greg who works as a Sous Chef at the P.F. Chang's in Nanuet, New York. The declaration includes no description of the duties that these nine individuals performed as Sous Chefs, and no statement regarding whether the duties were exempt, non-exempt, or some combination. The declaration simply states that Stancil knows, based on an unknown number of conversations on unknown dates, that these people had "the same job" as Stancil, worked much more than 40 hours per week, were paid a salary, and were not paid overtime premium pay. The Court notes that none of these individuals have opted into this proposed collective action.

Anderson also attaches a complaint from another action to his Reply to add to his factual showing. This action was brought by Stancil and Huyhua against P.F. Chang's in the District of Connecticut in July 2015. Defendants assert that this action was voluntarily dismissed. A review of this complaint shows that the allegations as to Stancil are the same as what he states in his **[*29]** declaration discussed above. The allegations as to Huyhua are very similar, although no declaration or sworn testimony from Huyhua has been submitted to this Court. Huyhua has not opted into this proposed collective

action either.

P.F. Chang's, on the other hand, has put forth the declarations of (1) Angie Adler, Director of HR Field Operations at P.F. Chang's; (2) Moria Saunders, Sous Chef at the P.F. Chang's in Boca Raton, Florida; (3) Paul Duco, Sous Chef at the P.F. Chang's in Sherman Oaks, California; (4) Carey Ball, Culinary Partner at the P.F. Chang's in Raleigh, North Carolina (and former Sous Chef at this same restaurant); (5) Michael Smalley, Sous Chef at the P.F. Chang's in Miami, Florida (and previously Sous Chef at the P.F. Chang's in Boca Raton, Florida, and Culinary Partner at the P.F. Chang's in Palm Beach, Florida); (6) Nick Lucas, Sous Chef at the P.F. Chang's in Austin, Texas; (7) Jaime Hoffman, Sous Chef at the P.F. Chang's in Albany, New York; (8) Nhat Le, Culinary Partner at the P.F. Chang's in Durham, North Carolina (and previously Sous Chef at the P.F. Chang's in Ashville, North Carolina, as well as the P.F. Chang's in Greensboro, North Carolina; (9) Edward Dunham, **[*30]** Operating Partner at the P.F. Chang's in Towson, Maryland (and previously Sous Chef at the P.F. Chang's in Chevy Chase, Maryland); (10) Keith Bussue, Senior Sous Chef at the P.F. Chang's in Galleria Mall, Ft. Lauderdale, Florida (and previously Sous Chef at the P.F. Chang's in Falls Mall and also Dolphin Mall—both in Miami, Florida); (11) Ben Delgado, Senior Sous Chef at the P.F. Chang's in Chattanooga, Tennessee; (12) Gerry Heim, Sous Chef at the P.F. Chang's in Northville, Michigan; and (13) John Lopez, Sous Chef at the P.F. Chang's in The Falls, Miami, Florida. A review of these declarations indicates that, as Sous Chefs, these individuals spent a varying percentage of time on exempt managerial tasks, seemingly based on the needs of the company in different locations at different times, and the varying preferences of different Culinary Partners. Each of them declared that they spent the majority of their time, as P.F. Chang's Sous Chefs, on managerial duties.

The Court takes note that one of P.F. Chang's' declarations is from one of the Sous Chefs named in Stancil's declaration (the only declaration that Anderson put forth besides his own). Stancil declared that he talked to a Sous **[*31]** Chef named Jaime from Albany, New York who had "the same job" as Stancil and was not paid overtime. Jaime Hoffman's ("Hoffman") declaration, however, states as follows.

> I understand that the individuals who filed this lawsuit included my name in the suit and that they have stated that I am similarly situated, in some respects at least, to those individuals. However, at no point did I consent for my name or experience to be used in this lawsuit in any way. I did travel to the Stamford, CT location to help train employees there, but I do not in any way agree with the claims alleged in this lawsuit. I believe that as a manager, which sous chefs are, it is our responsibility to do whatever it takes to ensure the restaurants are profitable. Indeed, it is my understanding that this accountability is a basis for paying sous chefs higher salaries and expecting them to be able to effectively and independently respond to any problems in the kitchen without supervision.

(Doc # 27-9, Pg ID 433)

One of P.F. Chang's' declarations is from an individual who works as Sous Chef in the same restaurant in Northville, Michigan as Anderson did. Gerry Heim's ("Heim") declaration states that his primary day-to-day **[*32]** job responsibility is managing and being accountable for the daily operations of the kitchen. Heim declares that his duties include preparing schedules, monitoring labor needs, monitoring and ordering food inventory, overseeing the work of kitchen staff, recruiting staff, interviewing applicants, negotiating pay rate with applicants, conducting new hire orientations, disciplining and terminating employees, and recommending employees for raises or promotions. Before Heim became Sous Chef, he was supervised by Plaintiff Anderson for a period of time:

> For about four to six months while I worked as a Pantry Cook, Jeremy Anderson was also

> employed at the Northville restaurant. During this time, Anderson was a Sous Chef, and therefore was one of my supervisors when we worked the same shifts. I recall that during such shifts, Anderson oversaw the Pantry station at which I worked and conducted a nightly review of my station. Anderson had to approve that all tasks associated with my station were timely and satisfactorily completed before I could end my shift.
>
> I also recall that Anderson reprimanded me once because, in his mind, I took too much time in the bathroom and was not working. As a result, **[*33]** Anderson instructed me to end my shift for the day.

(Doc # 27-14, Pg ID 464)

The Court finds that Anderson has not met his burden, even under the "fairly lenient" standard, for conditional collective action certification. Although not dispositive, one factor that the Court considers is that no other plaintiff has opted into this proposed collective action—not even any individual identified in Stancil's declaration. While Anderson's declaration and Stancil's declaration contain some detail regarding their duties as Sous Chefs, these two declarations are contradicted in part by Anderson's own deposition testimony, Hoffman's declaration, and Heim's declaration. Although the Court does not engage in credibility determinations at this stage, and although the Court agrees with Anderson that the declarations submitted by P.F. Chang's are of limited evidentiary value at this stage, the Court notes that Anderson has not put forth any other affidavit or declaration describing the duties of any other Sous Chef besides himself and Stancil (an individual who cannot opt into the proposed collective action). P.F. Chang's' declarations, on the other hand, significantly outnumber Anderson's declarations **[*34]** and contain more detail regarding the declarants' duties as Sous Chefs. Anderson has also admitted in his deposition testimony that he has no personal knowledge of what any other P.F. Chang's Sous Chefs does. Under these circumstances, it cannot be said that Anderson has made a modest factual showing sufficient to demonstrate that he and potential plaintiffs together were victims of a widespread, unlawful *de facto* policy or plan of P.F. Chang's.[3]

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[3] Anderson fails to cite a case in which any court in our circuit granted conditional certification of a nationwide class based solely on two declarations that are vague as to any other employee's experience. *See, e.g.*, *Kim v. 511 E. 5th St., LLC, 985 F. Supp. 2d 439, 444, 447 (S.D.N.Y. 2013)* (finding, based on two declarations describing kitchen employees' duties at one restaurant location, that the plaintiff had only shown that he and kitchen staff members in that one restaurant location were victims of a common unlawful policy); *Baez v. Ocean One Rest. Grp., LLC, No. 08-21709-CIV, 2009 U.S. Dist. LEXIS 21240, 2009 WL 712050, at *2 (S.D. Fla. Mar. 17, 2009)* (conditionally certifying collective action seeking that notice be sent to one restaurant location based on six declarations); *Casalez v. Mercadito Miami, LLC, No. 13-22208-CIV, 2014 U.S. Dist. LEXIS 193084, 2014 WL 11881026, at *1-2 (S.D. Fla. Jan. 30, 2014)* (denying the defendant's motion for summary judgment in an FLSA action in which the plaintiff did not seek conditional certification of a collective action); *Clark v. Royal Transp. Co., No. 15-13243, 2016 U.S. Dist. LEXIS 67807, 2016 WL 2983900, at *3 (E.D. Mich. May 24, 2016)* (conditionally certifying collective action of allegedly misclassified shuttle bus drivers based on five affidavits and signed consent forms from nine additional opt-in plaintiffs who all worked out of the same location); *Lee v. Gab Telecom, Inc., No. 12-CV-14104, 2013 U.S. Dist. LEXIS 54494, 2013 WL 1632552, at *1-2 (E.D. Mich. Apr. 16, 2013)* (conditionally certifying collective action of allegedly misclassified technicians based on affidavits and supplemental affidavits of three former technicians who were named plaintiffs in the action, which had a total of four named plaintiffs who all worked at the same location); *Fisher, 665 F. Supp. 2d at 826* (conditionally certifying collective action of allegedly misclassified call center employees based on declarations from 67 opt-in plaintiffs and deposition testimony from eight opt-in plaintiffs); *Wlotkowski v. Michigan Bell Tel. Co., 267 F.R.D. 213, 214-15 (E.D. Mich. 2010)* (conditionally certifying collective action of allegedly misclassified employees in an action with eleven named plaintiffs and 60 opt-in plaintiffs, based on declarations from 35 named and opt-in plaintiffs); *Brown v. AK Lawncare, Inc., No. 14-14158, 2015 U.S. Dist. LEXIS 139399, 2015 WL 5954811, at *4 (E.D. Mich. Oct. 14, 2015)* (conditionally certifying collective action, specifically noting that the affidavits and declarations submitted by the three named plaintiffs were equal in number and weight to the ones submitted by the defendants); *Myers v. Marietta Mem'l Hosp., 201 F. Supp. 3d 884, 887, 889, 892 (S.D. Ohio 2016)* (conditionally certifying collective action based on affidavits from three named plaintiffs in an action with at least one other opt-in plaintiff involving a single worksite); *Lacy v. Reddy Elec. Co., No. 3:11-CV-52, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842, at *4-5 (S.D. Ohio Dec. 9, 2011)* (conditionally certifying collective action based on deposition testimony from two named plaintiffs in an action involving one location); *Penley v. NPC Int'l,*

See, e.g., *Cason, 2011 U.S. Dist. LEXIS 47160, 2011 WL 1659381, at *2-3*; *Lankford v. CWL Invs., LLC, No. 13-CV-14441, 2014 U.S. Dist. LEXIS 111929, 2014 WL 3956184, at *5-6 (E.D. Mich. Aug. 13, 2014)*; *Arrington v. Mich. Bell Tel. Co., No. 10-10975, 2011 U.S. Dist. LEXIS 84234, 2011 WL 3319691, at *6 (E.D. Mich. Aug. 1, 2011)*. The Court concludes that Anderson has not met his burden of showing that the putative class is similarly situated. The Court denies Anderson's Motion for Collective Action Certification without prejudice. *See* *Shipes, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995362, at *12* ("[W]hen courts deny such motions at this stage of the proceedings, the court still may permit discovery to provide plaintiffs a second opportunity to obtain sufficient evidence of a collective to warrant conditional certification and notice to opt in."); *Arrington, 2011 U.S. Dist. LEXIS 84234, 2011 WL 3319691, at *6*. Anderson may ask the Court to revisit the issue of conditional certification after additional discovery if appropriate.

III. CONCLUSION

For the reasons set **[*35]** forth above,

IT IS HEREBY ORDERED that Plaintiff Jeremy Anderson's Motion to Dismiss P.F. Chang's Counterclaims (Doc # 14) is GRANTED.

IT IS FURTHER ORDERED that Defendant P.F. Chang's' Counterclaims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff Jeremy Anderson's Motion for Collective Action Certification (Doc # 17) is DENIED WITHOUT PREJUDICE.

Dated: August 23, 2017

/s/ Denise Page Hood

Chief, U.S. District Court

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*Inc., No. 13-1031, 2016 U.S. Dist. LEXIS 172055, 2016 WL 7228901, at *5-8 (W.D. Tenn. Dec. 13, 2016)* (conditionally certifying nationwide collective action with two named plaintiffs and 56 opt-in plaintiffs, based on 40 declarations); *Bradford v. Logan's Roadhouse, Inc., 137 F. Supp. 3d 1064, 1073, 1078 (M.D. Tenn. 2015)* (conditionally certifying nationwide collective action with two named plaintiffs and approximately 100 opt-in plaintiffs, based on approximately 100 declarations); *Smith v. Pizza Hut, Inc., No. 09-CV-01632-CMA-BNB, 2012 U.S. Dist. LEXIS 56987, 2012 WL 1414325, at *1 n.1, 5 (D. Colo. Apr. 21, 2012)* (conditionally certifying collective action based on several declarations from opt-in plaintiffs, which were "numerous," and deposition testimony from one of the defendant's executives).

Exhibit 16

Neville v. Nelson Tree Serv., LLC

United States District Court for the Southern District of Ohio, Western Division

April 18, 2019, Decided; April 18, 2019, Filed

Case No. 3:18-cv-368

Reporter
2019 U.S. Dist. LEXIS 66446 *; 2019 WL 1723599

JOSEPH NEVILLE, On behalf of himself and all others similarly situated, Plaintiff, v. NELSON TREE SERVICE, LLC, Defendant.

Subsequent History: Settled by, Dismissed by *Neville v. Nelson Tree Serv., LLC, 2020 U.S. Dist. LEXIS 2288 (S.D. Ohio, Jan. 2, 2020)*

Counsel: **[*1]** For Joseph Neville, Plaintiff: Robi J Baishnab, LEAD ATTORNEY, Nilges Draher LLC, Columbus, OH; Shannon Marie Draher, LEAD ATTORNEY, Hans A Nilges, Nilges Draher LLC, Massillon, OH.

For Nelson Tree Service, LLC, Defendant: Timothy S Anderson, LEAD ATTORNEY, Littler Mendelson, P.C., Cleveland, OH; Alexander R. Frondorf, Cleveland, OH; Amy Ryder Wentz, Littler Mendelson, PC, Cleveland, OH.

Judges: WALTER H. RICE, UNITED STATES DISTRICT JUDGE.

Opinion by: WALTER H. RICE

Opinion

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART MOTION TO CONDITIONALLY CERTIFY AN FLSA COLLECTIVE ACTION AND TO AUTHORIZE NOTICE OF PLAINTIFF JOSEPH NEVILLE, ON BEHALF OF HIMSELF AND THOSE SIMILARLY SITUATED (DOC.#12); WITHIN 14 DAYS FROM DATE OF FILING OF THIS DECISION AND ENTRY DEFENDANT TO PROVIDE PLAINTIFF INFORMATION AND A LIST AS SET FORTH HEREIN OF PUTATIVE CLASS MEMBERS; WITHIN 21 DAYS OF DATE OF FILING OF THIS DECISION AND ENTRY COUNSEL TO SUBMIT DETAILED PROPOSED NOTICE OF COLLECTIVE ACTION FOR JUDICIAL APPROVAL WITH PROCEDURES AND CONSENT FORM AS SET FORTH HEREIN

Plaintiff, Joseph Neville ("Neville"), on behalf of himself and others similarly situated, filed suit against his former employer, Nelson Tree Service, LLC ("Nelson **[*2]** Tree" or "Defendant"). The suit alleges certain violations of the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.*, due to Defendant's failure to pay their employees for time spent traveling to jobsites in which an overnight stay was required when such travel resulted in overtime. Doc. #1, PAGEID#1. Plaintiff has filed, pursuant to *29 U.S.C. § 216(b)*, a Motion for Conditional Certification and Court-Authorized Notice ("Motion"). Doc. #12. Nelson Tree has filed a Brief in Opposition and an Evidentiary Appendix, consisting of 45 declarations of current employees of Nelson Tree,[1] Doc. #15, and Neville has filed a Reply. Doc. #18.

[1] Also included in the Evidentiary Appendix are the following four declarations: Jeffrey Jones, President of Nelson Tree; Plaintiff, Joseph Neville; and former employees of Nelson Tree, Terry Bretz and Eric J. Neville. Doc. 16-1, PAGEID#118; Doc. #16-47, PAGEID#234; Doc. #16-48, PAGEID#235 and Doc. #16-49, PAGEID#236. The declarations of Neville, Terry Bretz and Eric J. Neville are also attached to Neville's Motion Doc #12-1 PAGEID##71, 72 and 73.

The proposed FLSA Collective Class ("Collective") of Neville is as follows: "All of Defendant's current or former hourly employees who have not been paid for time spent traveling to jobsites in which an overnight stay was required when such travel resulted in a workweek in excess of 40 hours at any time during the three-year preceding the filing of the Complaint to the present." Doc. #12, PAGEID#61.

For the reasons set forth below, the Motion is sustained in part and overruled in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Nelson Tree provides distribution and transmission line clearance **[*3]** and related services to utility companies, as well as to other public and private entities, in both urban and rural areas. Doc. #16-1, PAGEID#118. These services are provided by Defendant's hourly non-exempt employees who work in 21 different states and operate in seven different regions. *Id.* The employees of Nelson Tree include three different classifications of tree trimmers, equipment operators and foremen. *Id.* Many employees are union members with the terms and conditions of employment governed by 17 different collective bargaining agreements some of which address travel time and some of which do not. *Id.*

Nelson Tree avers that their employees work on three types of jobs: local jobs, storm work jobs and remote jobs. *Id.* PAGEID#119. Because local jobs do not require an overnight stay and because Nelson Tree has averred that it always pays its employees who do storm work jobs for their travel time regardless of whether an overnight stay is required, Neville's Motion does not include claims for current or former employees of Nelson Tree who have worked either of these two types of jobs. Doc. #18, PAGEID##242 and 243; Doc. #15, PAGEID#92. Neville contends, however, that current or former **[*4]** Nelson Tree employees who have worked remote jobs are included in the putative class, if the remote job included an overnight stay and travel time to and from the jobsite that cuts across the employee's workday and resulted in a workweek in excess of 40 hours. Doc. #18, PAGEID##242 and 243. Neville contends that the failure of Defendant to pay overtime to these employees who worked remote jobs violates *29 C.F.R. § 785.39*.

According to the allegations in the Complaint, Nelson Tree employed Neville and "similarly situated individuals as non-exempt laborers" to perform line clearance work and paid them on an hourly basis. *Id.* Neville and the other non-exempt laborers typically worked at least forty (40) hours per workweek, in multiple-day shifts, away from their home communities. *Id.* As a result of the location of the worksites, Neville and these other non-exempt laborers "typically stayed overnight in hotels during the scheduled work shifts" and "spent most of the day before and after their shifts driving hundreds of miles to and from the jobsites. *Id*, PAGEID#4. "This travel cut across laborers' normal working hours during both regular working days and nonworking days." *Id.* The Complaint further alleges **[*5]** that Nelson Tree "did not count time spent traveling as hours worked for purposes of determining overtime eligibility." *Id.*

In his declaration attached to the Motion, Neville has averred that as an hourly laborer at Nelson Tree from January 2018 to September 2018, his "normal work hours were typically from 6:30 a.m. to 6:00 p.m." and he "frequently" worked more than 40 hours per workweek. Doc. #12-1, PAGEID#71. As an hourly employee, Neville was also "frequently required" to travel to jobs for Nelson Tree that were away from his home and to stay overnight in a hotel. *Id.* Neville stated that he would travel from his home to the out-of-town jobs "many times on Sunday" during his regular work hours, and that "[M]ost times, I would travel back from these out-of-town jobs to my home during my normal work hours on Friday." *Id.* Neville stated that he was not paid by Nelson Tree for traveling to and from his home community to the jobs that required him to

stay overnight and that Defendant did not count his travel time as hours worked. *Id.* Neville's declaration also averred that his co-workers similarly traveled to and from their home communities for these out-of-town jobs and would also stay **[*6]** overnight in hotels. *Id.*

Neville seeks conditional certification of a class consisting of the following:

> All of Defendant's current or former hourly employees who have not been paid for time spent traveling to jobsites in which an overnight stay was required when such travel resulted in a workweek in excess of 40 hours at any time during the three-year preceding the filing of the Complaint [November 8, 2015] to the present.

Doc. #12, PAGEID#61.

Also attached to the Motion are declarations of two other former employees of Nelson Tree, Terry Bretz ("Bretz") and Eric Jason Neville ("Eric Neville"). Doc.#12-1, PAGEID##72 and 73. Other than stating that their dates of employment and normal work hours were different than Neville's, the declarations of Bretz and Eric Neville are essentially the same as Neville's declaration. Specifically, Bretz and Eric Neville aver that they "frequently" worked more than 40 hours a week, traveled to jobs away from their homes and stayed overnight in a hotel. Bretz stated that "sometimes" he would "travel from his home to these out-of-town jobs on Sundays during [his] normal work hours" and "most times" he would "travel back to [his] home at the end of the workweek **[*7]** during [his] normal work hours." Doc. #12-1, PAGEID#72. Eric Neville averred that "most times" he would travel from his home "to these out-of-town jobs on Sunday during [his] normal work hours" and "most times" he would "travel back from these out-of- town jobs to [his] home at the end of the workweek during [his] normal work hours." Doc. #12-1, PAGEID#73. Both Bretz and Eric Neville also stated in their respective declarations that their co-workers traveled to and from their home communities and the out-of-town jobs during normal work hours. *Id.*, PAGEID##72 and 73.

With respect to the remote jobs, Nelson Tree admits that it does not pay travel time for these jobs. "It is our expectation and understanding that these individuals travel to these remote work locations on Monday mornings prior to the start of their first shift of the week and return home the night of their last shift of the week." Doc. #16-1, PAGEID#119. Moreover, Nelson Tree, also admits that it does not keep records of the employees who traveled for an overnight stay or when they did so for remote jobs.

> Nelson Tree does not maintain records showing which employees traveled for an overnight stay or when they traveled to **[*8]** remote work locations, but it does keep records of per diem payments to employees, which normally correlate with an overnight stay during the workweek. Nelson Tree, however, does not separately track payments for travel time, as opposed to regular working hours. For instance, when an employee performs storm work, they are paid for their travel to and from the remote work location, but that time is recorded as regular working hours, indistinguishable from travel time.

Id., PAGEID#119.

Since November 8, 2015, the date that Neville filed this lawsuit, "Nelson Tree employed 4,146 non-exempt employees who received a per diem, signifying an overnight stay in connection with their work..." Doc. #16-1, PAGEID#118.

In addition to alleging a violation of the FLSA for failing to pay overtime to Nelson Tree employees who worked in excess of 40 hours per week and traveled to remote jobs during their normal worktime, the Complaint also alleges that this failure to pay was willful. Finally, Neville alleges that Nelson Tree violated § 516 by failing to make, keep and preserve sufficient records to determine the wages, hours and other conditions and practices

of employment.

As required by 5216(b), Neville, **[*9]** Bretz and Eric Neville have filed notices of consent to join in this collective action. The consents to join were filed on November 8, 2018, January 8, 2019 and January 25, 2019, respectively. Doc.##1,8 and 10.

II. LEGAL STANDARD

The FLSA requires covered employers to pay non-exempt employees not less than the applicable minimum wage for each hour worked, and one and one-half times the employee's regular rate of pay for each hour worked in excess of forty hours per week. *29 U.S.C. §§ 206-207*. Employers who violate these provisions are liable for the unpaid wages, plus an additional amount as liquidated damages, reasonable attorneys' fees and costs. *29 U.S.C. § 216(b)*. Under the FLSA, a collective action may be filed by one or more employees on behalf of themselves and other "similarly situated" employees. *Id.* However, unlike a typical class action lawsuit, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

The certification process in an FLSA collective action typically proceeds in two phases. Because the statute of limitations for an FLSA claim continues to run until written **[*10]** consent is filed with the court, it is important that notice of the collective action be given to all potential opt-in plaintiffs as soon as practicable so they can decide whether to participate in the lawsuit. *Lewis v. Huntington Nat'l Bank, 789 F. Supp. 2d 863, 867 (S.D. Ohio 2011)* (Marbley, J.) (mortgage loan officers entitled to conditional nationwide class certification before defense on the merits is ripe since time is of the essence due to statute of limitations not tolling for plaintiffs who have failed to opt-in).

Before authorizing the plaintiffs to send the notice, however, the Court must first determine whether they have shown "that the employees to be notified are, in fact 'similarly situated.'" *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*. Because this determination is generally made before discovery is conducted, plaintiffs need make only a "modest showing" at this initial stage of the litigation. *Lewis, 789 F. Supp.2d at 867*. While "similarly situated" is not defined in the FLSA, employees are generally considered to be similarly situated if their "causes of action accrued in approximately the same manner as those of the named plaintiffs." *Id. at 868*. "Plaintiffs can show they are similarly situated by showing that 'their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of **[*11]** these theories are inevitably individualized and distinct.'" *Swigart v. Fifth Third Bank, 276 F.R.D. 210, 213* (quoting *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584-85 (6th Cir. 2009)*, *abrogated on other grounds by Campbell-Ewald Co. v. Gomez, U.S. , 136 S.Ct. 663, 193 L.Ed.2d 571 (2016))*. The "'similarly situated' requirement is less stringent than that for joinder under *Rule 20(a)* or for separate trials under *Rule 42(b)*[,] . . . [and] is considerably less stringent than the requirement of *Rule 23(b)(3)* that common questions 'predominate[.]'" *Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)*. Application of this "fairly lenient standard . . . typically results in conditional certification." *Comer, 454 F.3d at 547*. At no point in resolving the conditional certification issue, however, does the Court opine on, or even consider, the merits of plaintiffs' claims. *Lacy v. Reddy Elec. Co., No. 3:11-cv-52, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842, at *7 (S.D. Ohio Dec. 9, 2011)* (Rice, J) (citing *Creely v. HCR ManorCare, Inc., 789 F. Supp. 2d 819 (N.D. Ohio 2011))*. Factors to be considered in a motion for conditional class certification include: "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; whether evidence of a widespread discriminatory plan was submitted, and whether as a matter of sound class management, a

manageable class exists." *Lewis, 789 F. Supp. 2d at 868* (quotations and citations omitted).

III. NEVILLE HAS MET HIS BURDEN FOR CONDITIONAL CERTIFICATION SUBJECT TO MODIFICATIONS FOR NON-EXEMPT EMPLOYEES AND ANY APPLICABLE COLLECTIVE BARGAINING [*12] AGREEMENTS

Based on the three declarations filed by Neville, as well as the declaration of Neville's President, Jeffery Jones, Neville argues that Defendant has a companywide policy of not paying their employees for time spent traveling to remote jobs that require an overnight stay.[2] Neville requests the Court conditionally certify the following Collective: "All of Defendant's current or former hourly employees who have not been paid for time spent traveling to jobsites in which an overnight stay was required when such travel resulted in a workweek in excess of 40 hours at any time during the three-year preceding the filing of the Complaint to the present." Doc.#12, PAGEID#61 (citing *29 U.S.C. § 216(b)*). Neville claims that the regulations of the Department of Labor require that Nelson Tree compensate their employees for time spent traveling away from their home communities.

> **Travel away from home community**.
>
> Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working **[*13]** hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days.

29 C.F.R. § 785.39

Nelson Tree argues that the declarations of Neville, Bretz and Eric Neville fail to establish a "common FLSA-violating policy" throughout Nelson Tree, that the claims require individualized determinations that render a collective class unmanageable and that Neville lacks evidence that he is similarly situated. Doc. #15, PAGEID##11-14,17-22 and 23-25. The Court will address each of these arguments.

A. Common FLSA-Violating Policy

Nelson Tree argues that the declarations submitted by Neville do not include certain critical information. Doc. #15, PAGEIE#101. For example, Defendant contends that the declarations should provide, among other things, the names of the affected co-workers, their supervisors, the state or region the co-workers worked in, and their normal working hours. Defendant also argues that statements in the declarations such as "frequently," "sometimes," "most times" and "many times" fail to establish any FSLA violation. Although **[*14]** the issues raised by Nelson Tree are relevant, as well as "'whether evidence of a widespread discriminatory plan was submitted, and whether as a matter of sound class management, a manageable class exists,'" *Lewis, 789 F. Supp 2d at 868* (citations omitted), the Court finds that a sufficient factual basis of an FSLA violation has been provided by Neville.

Evidence exists from the declarations of Neville, Bretz, and Eric Neville that travel time to job sites for remote jobs was not included in any overtime calculation even though the travel cut across the normal work hours. Although the declarations submitted by Neville do not provide specifics as to when the alleged FSLA violations occurred, he is not required, at this early stage, to show that the travel time for the remote jobs that necessitated an

[2] It is conceded that Nelson Tree pays for all travel time for storm work jobs. Doc # 16-1 PAGEID#119; Doc.#18, PAGEID#243.

overnight always cut across normal work hours. "Plaintiff is not required to show that he and other security officers worked through every lunch in order to prove an FLSA violation or to support conditional certification." *Hamm v. Southern Ohio Medical Center, 275 F. Supp. 3d 863, 870* (emphasis in original), citing *Gessele v. Jack in the Box, Inc., No. 3:10-cv-960, 2013 U.S. Dist. LEXIS 51941, 2013 WL 1326563 at *24, (D. Ore. Jan 28, 2013)* (conditional certification permitted notwithstanding statements of employees that they "occasionally," "sometimes" **[*15]** and *"a* whole lot of times" were forced to return early from lunch).

Moreover, the declaration from Jeffery Jones, president of Nelson Tree supports that travel time was not included for remote jobs since it was Defendant's "expectation and understanding that these individuals travel to these remote work locations on Monday mornings prior to the start of their first shift of the week and return home the night of their last shift of the week." Doc. #16-1, PAGEID#119. This "expectation and understanding," of Nelson Tree, however, appears to be at odds with what was occurring in practice as demonstrated by the declarations filed by Neville. Finally, although Nelson Tree has provided 45 declarations from across their company, many of these declarations involve the payment of travel time for storm work jobs, which is not at issue, and also involved local jobs, for which no overnight stays were required and where any travel time is not an issue in this matter. Because "[T]he named plaintiff 'need only show that his position is similar, not identical, to the positions held by the putative class members,'" *Hawkins v. Extended Life Home Care Ltd., No. 2:18-cv-344, 2019 U.S. Dist. LEXIS 30887, 2019 WL 952737 (S.D. Ohio, E.D. Marbley, J.)*, citing *Lewis, 789 F. Supp. 2d at 867-68 (S.D. Ohio 2011)* (alteration omitted); **[*16]** see also *Comer, 454 F.3d at 546-547*, Neville has produced sufficient evidence supporting his allegation that the putative class was subject to a common policy.

B. Individualized Determinations and Unmanageable Class

Defendant's next argue that the "putative collective is not similarly situated" and that this is proven by the 45 declarations of Nelson Tree employees who are "individuals falling within the proposed class definition [but] did not experience the alleged FLSA violations asserted by Plaintiff." Doc. #15, PAGEID#102. Lacking any "common evidence upon which liability can be determined, "individualized determinations will be necessary" for each putative class member for each week that they worked" and that as result, the proposed Collective is unmanageable. *Id.* PAGEID##102-103. Nelson Tree contends that the members of this nationwide putative class will need to prove what their regular working hours were, what time of day did the alleged travel occur, how long was the travel and how many hours were worked each week. *Id.* 103-104.

Neville argues, however, that the 45 declarations submitted by Nelson Tree do not fall within his proposed Collective action, since they include employees who are paid for storm work jobs **[*17]** as well as declarations from employees who have worked only local jobs where overnight stay and travel time are never an issue. Doc. #18, PAGEID##244 and 250. Neville submits, based on the declarations he has submitted as well as the declaration of Nelson Tree's president, that the claims of the employees who have worked remote jobs are unified by the common theory of Nelson Tree's alleged failure to pay overtime for travel occurring during an employee's normal working hours. *Swigart v. Fifth Third Bank, 276 F.R.D. at 213*. Moreover, "[If] discovery later shows the claims in this case to be so individualized as to render a collective action unmanageable, the defendant may move to decertify the collective action at the second stage of certification proceedings." *Hamm v. Southern Ohio Medical Center, 275 F. Supp. 3d at 877*. Because the putative class will be limited to only remote jobs where travel cut across the normal work hours and

resulted in a work week in excess of 40 hours, the class is manageable.

C. Similarly Situated

Nelson Tree's final argument, that Neville lacks evidence that he is similarly situated, is based, again, on the 45 declarations filed in Defendant's Evidentiary Appendix, Doc. #16, PAGEID#114. Specifically, Nelson Tree argues that there are collective bargaining agreements **[*18]** that may affect claims for reimbursement of travel time by the Collective that Neville seeks to represent, as well as the fact that many Nelson Tree employees are exempt from overtime since they hold CDLs or drive bucket trucks and are overtime exempt under the *Motor Carrier Act*, *29 U.S.C § 213(b)(1)*. While Defendant's argument does not require a denial of Neville's Motion, the concerns raised by Nelson Tree do, in this Court's opinion, require that the proposed class be modified in order to exclude the former and present hourly employees who are exempt from overtime under the Motor Carrier Act, *29 U.S.C § 213(b)(1)*, as well as the former and present employees who are subject to a collective bargaining agreement that otherwise addresses reimbursement for travel time. Accordingly, the Collective conditionally certified is as follows:

> All current or former hourly non-exempt employees of Defendant who (1) were required, due to the distance from their home community to a jobsite, to stay overnight; (2) have not been paid for time spent traveling to jobsites; (3) are not subject to a collective bargaining agreement that addresses payment of travel time; and (4) as a result of the travel time to the remote job, worked over 40 hours **[*19]** in any workweek beginning November 8, 2015, and continuing through the date of the final disposition of this case.

In granting this conditional certification, however, the parties are reminded that

> [C]onditional certification is meant only to aid in identifying similarly situated employees. It is not a final determination that the case may proceed as a collective action. After the opt-in forms have been filed and discovery is complete, a defendant may file a motion for decertification. At that point, the court examines with much stricter scrutiny the question of whether these other employees are, in fact, similarly situated.

Comer, 454 F.3d at 546-47, as cited in *Lacy, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842 *2*

IV. NOTICE AUTHORIZED UNDER THE FOLLOWING PARAMETERS

Within 14 days of the date of this Decision and Entry, Nelson Tree shall provide to Neville's counsel a list, in electronic and importable format, of the names, job titles, last known addresses, telephone numbers, e-mail addresses, and dates of employment, of the following individuals:

> All current or former hourly non-exempt employees of Defendant who (1) were required, due to the distance from their home community to a jobsite, to stay overnight; (2) have not been paid for time spent traveling to jobsites; **[*20]** (3) are not subject to a collective bargaining agreement that addresses payment of travel time; and (4) as a result of the travel time to the remote job site, worked over 40 hours in any workweek beginning November 8, 2015, and continuing through the date of the final disposition of this case.

Also within 21 days of this Decision and Entry, counsel for Neville and counsel for Nelson Tree shall submit to this Court a detailed proposed Notice of Collective Action for judicial approval, with a consent form, and specifying all methods for communication of the Notice to the putative class.

V. CONCLUSION

For the foregoing reasons, the Court SUSTAINS in

part and OVERRULES in part Neville's Motion to Conditionally Certify an FLSA Collective Action and to Authorize Notice, Doc. #12. The Court orders the following:

1. The following collective is conditionally certified: all current or former hourly non-exempt employees of Defendant who (1) were required, due to the distance from their home community to a jobsite, to stay overnight; (2) have not been paid for time spent traveling to jobsites; (3) are not subject to a collective bargaining agreement that addresses payment of travel time; and (4) as **[*21]** a result of the travel time to the remote job, worked over 40 hours in any workweek beginning November 8, 2015, and continuing through the date of the final disposition of this case;

2. Defendant shall provide to Plaintiff's counsel, within 14 days of the date of this Decision and Entry, a list, in electronic and importable format, of the names, job titles, last known addresses, telephone numbers, e-mail addresses, and dates of employment, of the all putative collective members; and

3. Counsel for Plaintiff and counsel for Defendant shall submit to this Court, within 21 days of this Decision and Entry, a detailed proposed Notice of Collective Action for judicial approval, with a consent form, and specifying all methods for communication of the Notice and consent form to the putative class.

Date: April 18, 2019

/s/ Walter H. Rice

WALTER H. RICE

UNITED STATES DISTRICT JUDGE

End of Document

Exhibit 17

Bradford v. Team Pizza, Inc.

United States District Court for the Southern District of Ohio, Western Division

June 29, 2020, Decided; June 29, 2020, Filed

Case No. 1:20-cv-60

Reporter
2020 U.S. Dist. LEXIS 113681 *; 2020 WL 3496150

MICHAEL BRADFORD, On behalf of himself and those similarly situated, Plaintiff, vs. TEAM PIZZA, INC., et al., Defendants.

Subsequent History: Adopted by, Motion granted by, in part, Motion denied by, in part, Objection overruled by *Bradford v. Team Pizza, 2020 U.S. Dist. LEXIS 188404, 2020 WL 5987840 (S.D. Ohio, Oct. 9, 2020)*

Magistrate's recommendation at *Bradford v. Team Pizza, 2021 U.S. Dist. LEXIS 99413 (S.D. Ohio, May 26, 2021)*

Counsel: **[*1]** For Michael Bradford, Plaintiff: Andrew Biller, LEAD ATTORNEY, Biller & Kimble, LLC, Columbus, OH; Louise Malbin Roselle, LEAD ATTORNEY, Biller & Kimble, LLC, Cincinnati, OH; Nathan B Spencer, LEAD ATTORNEY, Biller & Kimble, LLC, Cincinnati, OH; Philip J. Krzeski, LEAD ATTORNEY, Biller & Kimble, LLC Of Counsel, Cincinnati, OH; Andrew P Kimble, Biller & Kimble, LLC, Cincinnati, OH.

For Team Pizza, Inc., Chris Short, Defendants: Mathew A. Parker, LEAD ATTORNEY, Fisher & Phillips LLP, Columbus, OH; Kathleen McLeod Caminiti, PRO HAC VICE, Fisher & Phillips LLP, Murray Hill,, NJ.

Judges: Karen L. Litkovitz, United States Magistrate Judge. Barrett, J.

Opinion by: Karen L. Litkovitz

Opinion

REPORT AND RECOMMENDATION

This matter is before the Court on plaintiff's motion to conditionally certify a *Fair Labor Standards Act ("FLSA")* Collective Action and to Authorize Notice (Doc. 5), defendants' response in opposition (Doc. 13), and plaintiff's reply memorandum (Doc. 14).

I. Background

Plaintiff Michael Bradford initiated this action in January 2020 on behalf of pizza delivery drivers who work or worked at defendants' Domino's Pizza stores around the country. (Doc. 1). Plaintiff brings federal and state law claims against the following **[*2]** defendants: (1) Team Pizza, Inc., a corporation that allegedly owns and operates Domino's Pizza stores in Ohio, Kentucky, Indiana, and other states and maintains its principal office in Mason, Ohio; (2) Chris Short, the owner of Team Pizza, Inc.; (3) "Doe Corporation 1-10," which allegedly are entities and/or limited liability companies that also comprise part of the Team Pizza Domino's stores; and (4) "John Doe 1-10," who allegedly are managers and business partners that entered into co-owner relationships with defendant Chris Short. Plaintiff alleges that defendants violated the minimum wage provision of the FLSA and Ohio law by (1) failing to properly

claim a tip credit from the wages of pizza delivery drivers "because plaintiff and the FLSA collective were paid at a wage rate lower than Defendants informed them that they would be paid"; and (2) requiring delivery drivers to pay for automobile expenses and other job-related expenses out of pocket and not properly reimbursing them for these expenses. (Doc. 1 at ¶¶ 127, 129).

II. Legal Standard

The FLSA requires employers to pay the federal minimum wage and overtime pay to employees covered by the Act's overtime provisions. *See* 29 U.S.C. §§ 206(a), 207(a). **[*3]** Employers who violate these provisions may be subject to a collective action by similarly situated employees who affirmatively consent in writing to participate in the action. 29 U.S.C. § 216(b).

FLSA lawsuits typically proceed in two stages. At the first stage, the Court determines whether to conditionally certify the collective class and send notice of the lawsuit to putative class members. *Hamm v. S. Ohio Med. Ctr., 275 F. Supp. 3d 863, 874 (S.D. Ohio 2017)* (citing *Swigart v. Fifth Third Bank, 276 F.R.D. 210, 213 (S.D. Ohio 2011)*). "At the second stage, the defendant may file a motion to decertify the class if appropriate to do so based on the individualized nature of the plaintiffs' claims." *Id.*

In deciding whether to conditionally certify a collective class during the first stage, the Court must determine whether the plaintiff has shown that the class of employees he seeks to represent are "similarly situated." *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)* (citing *Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 594 (S.D. Ohio 2002)*). Because this determination is made at or before the beginning of discovery, the standard is "fairly lenient," and a plaintiff need only make a "modest showing" that he is similarly situated to the putative class members. *Hamm, 275 F. Supp. 3d at 874*; *Lewis v. Huntington Nat. Bank, 789 F. Supp. 2d 863, 867 (S.D. Ohio 2011)*. "A plaintiff can make this showing by demonstrating that he and the other putative class members suffer from a single, FLSA-violating policy or [that] their claims are unified by common theories **[*4]** of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Hall v. U.S. Cargo & Courier Serv., LLC, 299 F. Supp. 3d 888, 894-95 (S.D. Ohio 2018)* (citations and internal quotation marks omitted). Once the FLSA class is conditionally certified, "notice is distributed to the class, putative class members return the opt-in forms sent to them, and the parties conduct discovery." *Id. at 895* (quoting *Atkinson v. TeleTech Holdings, Inc., No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *2, (S.D. Ohio Feb. 26, 2015)*).

Unlike the first stage, which occurs at the beginning of discovery, the second stage of the certification process takes place after discovery has concluded, and courts will examine more closely the question of whether particular members of a class are, in fact, "similarly situated." *Comer, 454 F.3d at 546-47*. Because the Court has much more information at the second stage, the issue is viewed with "greater scrutiny." *Hall, 299 F. Supp. 3d at 895*.

III. Conditional Certification

Plaintiff moves to conditionally certify the following FLSA collective class: "All current and former Domino's Pizza delivery drivers who worked at any location nationwide owned/ operated by Defendants Team Pizza, Inc. and/or Chris Short within three years prior to the filing of this Class Action Complaint and the date of final judgment in this matter." **[*5]** (Doc. 5 at 1). Plaintiff argues that he has met his burden of proof at the first stage to conditionally certify the collective action. Plaintiff cites a number of cases from this Court and other courts around the country that have granted conditional FLSA collective action certification in

pizza delivery cases involving similar claims. (*Id.* at 8-9).

At the first stage, the plaintiff "must show only that his position is similar, not identical, to the positions held by the putative class members." *Comer, 454 F.3d at 547* (internal quotations and citations omitted). "Plaintiffs are similarly situated 'when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs.'" *Myers v. Marietta Mem'l Hosp., 201 F. Supp. 3d 884, 890 (S.D. Ohio 2016)* (quoting *O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567, 584 (6th Cir. 2009)*, *abrogated on other grounds by Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016)*). At this juncture of the proceedings, the Court "does not generally consider the merits of the claims, resolve factual disputes, or evaluate credibility." *Id.* (quoting *Waggoner v. U.S. Bancorp, 110 F. Supp. 3d 759, 765 (N.D. Ohio 2015)*). In determining the similarly situated question, the Court considers the following non-exclusive factors: "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; whether evidence of a widespread **[*6]** discriminatory plan was submitted; and whether as a matter of sound class management, a manageable class exists." *Brandenburg v. Cousin Vinny's Pizza, LLC, No. 3:16-cv-516, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *2 (S.D. Ohio Aug. 15, 2017)* (quoting *Lewis, 789 F. Supp. 2d at 868*).

In support of his motion, plaintiff submits a single declaration in which he declares that he worked as a delivery driver at Team Pizza's Domino's Pizza store in Akron, Ohio from June 2017 to January 2020. (Bradford Declaration, Doc. 5-1 at ¶ 3). Plaintiff states that he was paid at a tipped wage rate for all hours worked outside the Domino's Pizza store while making deliveries, which amounted to around $5.50 or $6.00 per hour. (*Id.* at ¶ 5). Plaintiff received tips during the hours spent on the road making deliveries. (*Id.* at ¶ 8). Plaintiff was required to provide his own car while completing deliveries for Team Pizza, and he was required to maintain and pay for a safe, legally operable, insured vehicle for use while delivering food. (*Id.* at ¶¶ 12-13). Plaintiff was required to incur costs for gasoline, vehicle parts and fluids, vehicle repair and maintenance, servicing, registration costs, financing, insurance, cell phone and data charges, finance charges, and depreciation. (*Id.*). Team Pizza neither **[*7]** collected records of expenses that he incurred while making deliveries nor asked him to provide any records of expenses. (*Id.* at ¶ 14). While completing deliveries, plaintiff was reimbursed $.28 per mile until the end of 2019 and $.58 per mile beginning in January 2020. (*Id.* at ¶ 16).

Plaintiff states he learned from his co-workers and managers that other delivery drivers were also paid minimum wage minus a tip credit for all hours worked while completing deliveries, were required by Team Pizza to provide their own cars for use while completing deliveries, and were required to incur costs for vehicle maintenance. (*Id.* at ¶¶ 11-13). Plaintiff never observed other delivery drivers provide records of the expenses they incurred while making deliveries, nor did he see defendants request records of delivery expenses from other delivery drivers when these drivers cashed out at the end of the night. (*Id.* at ¶ 15). Like plaintiff, other delivery drivers were also reimbursed at $.28 per mile until the end of 2019 and at $.58 per mile beginning in January 2020. (*Id.* at ¶ 18). Plaintiff states that these coworkers-including "Chad, Tim, Brandon, Donna and others"-completed the same job duties as **[*8]** him and checked out at the end of their shifts in the same manner as him. (*Id.* at ¶ 19). In addition, manager Chris Hatfield told plaintiff that all delivery drivers were subject to the same terms of employment. (*Id.*).

Based on the information provided in plaintiff's declaration, the Court finds that plaintiff has made a modest factual showing to support certification of a conditional class of delivery drivers at the Akron, Ohio Team Pizza-owned store only. The Court

agrees with defendants that the scope of plaintiff's proposed class is too broad, especially given that plaintiff's declaration puts forth no facts establishing he has first-hand knowledge about any other Team Pizza locations or policies. Plaintiff has not made a sufficient factual showing to support certification of a conditional class "at any location nationwide owned/operated by Defendants Team Pizza, Inc. and/or Chris Short." To demonstrate that similarly situated employees exist, "a plaintiff's declaration must at least allege facts sufficient to support an inference that [he] has *actual knowledge* about other employees' job duties, pay structures, hours worked, and whether they were paid for overtime hours." *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *3* (quoting **[*9]** *O'Neal v. Emery Fed. Credit Union, No. 1:13-cv-22, 2013 U.S. Dist. LEXIS 110383, 2013 WL 4013167 (S.D. Ohio Aug. 6, 2013)*). Plaintiff's declaration fails to support an inference that he has actual knowledge about the job duties and conditions of employment of delivery drivers outside of the Akron store.

The facts set forth in plaintiff's declaration are limited to the conditions and pay of delivery drivers at the Akron store. There are no affidavits from delivery drivers of any other Team Pizza store around the state or the country, nor has plaintiff alleged facts showing an across-the-board policy concerning pay structures that applies to the Akron and other Team Pizza stores. *See Engel v. Burlington Coat Factory Direct Corp., No. 1:11-cv-759, 2013 U.S. Dist. LEXIS 77506, 2013 WL 2417979, at *4 (S.D. Ohio June 3, 2013)* (Barrett, J.) (denying motion for conditional certification on the ground that plaintiffs failed to submit evidence to support a conditional class outside of Ohio). *See also Conklin v. 1-800 Flowers.com, Inc., No. 2:16-cv-675, 2017 U.S. Dist. LEXIS 126733, 2017 WL 3437564, at *5 (S.D. Ohio Aug. 10, 2017)* (holding that plaintiffs failed to present sufficient evidence to justify the conditional certification of a nationwide class because the three declarations supporting plaintiff's motion only contained information about employees at one of defendant's locations). Although a plaintiff need **[*10]** only make a "modest" showing that putative class members are similarly situated, the standard is not toothless and requires a factual showing justifying the conditional approval of a nationwide class. *See, e.g., Cowan v. Nationwide Mut. Ins. Co., No. 2:19-cv-1225, 2019 U.S. Dist. LEXIS 164312, 2019 WL 4667497, at *9 (S.D. Ohio Sept. 25, 2019)* (approving nationwide conditional class based on plaintiff's submission of declarations from nine current and former employees from four different locations in four different states); *Waggoner, 110 F. Supp. 3d at 771* (approving nationwide class based on declarations from five plaintiffs who worked in three different states, as well as job postings to demonstrate that plaintiffs and potential opt-in plaintiffs were similarly situated); *Rosenbohm v. Cellco P'ship, No. 2:17-cv-731, 2018 U.S. Dist. LEXIS 158030, 2018 WL 4405836, at *3 (S.D. Ohio Sept. 17, 2018)* (granting conditional certification of a proposed nationwide class based on plaintiff's declaration indicating that he and the putative opt-in plaintiffs were similarly situated, in addition to 23 declarations of putative opt-in plaintiffs). Plaintiff has alleged no factual basis to permit the Court to infer that plaintiff has any actual knowledge about the duties, pay structures, policies, or practices that apply to delivery drivers outside of the Akron Domino's store. His first-hand **[*11]** knowledge is limited to his own experience and those of his co-workers at the Akron store. (Doc. 5-1 at ¶¶ 10, 11, 12, 13, 15, 18-19).

Plaintiff is correct that a single declaration may, at times, provide sufficient factual support to certify a conditional, nationwide class; however, plaintiff's declaration falls short. Plaintiff's declaration is therefore distinguishable from the single declarations presented in other cases where conditional certification was granted to more than one store location. *See, e.g., Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *4* (conditional certification granted to class of delivery drivers in the Greater Dayton, Ohio area where the plaintiff's declaration "set forth specific

facts regarding manager training, delivery drivers working at multiple Cousin Vinny's locations, and uniform promotional, management, employment and payroll practices across all Cousin Vinny's locations"). *Cf.* *Honaker v. Wright Bros. Pizza, No. 2:18-cv-1528, 2020 U.S. Dist. LEXIS 5181, 2020 WL 134137, at *2 (S.D. Ohio Jan. 13, 2020)* (conditional certification granted based on declarations of husband and wife stating they "knew other drivers were subject to the same rules with respect to wages delivery reimbursements because they worked in multiple locations under the same terms, spoke to other delivery **[*12]** drivers about how they were paid, and saw them receive their reimbursements"). Therefore, plaintiff has failed to show that drivers other than those located at the Akron store are similarly situated. For these reasons, the Court concludes that conditional certification of a class consisting of delivery drivers at the Akron store only is warranted. The Court notes that plaintiff may renew his motion for conditional certification if discovery reveals support for expanding the conditional class. *See* *Engel, 2013 U.S. Dist. LEXIS 77506, 2013 WL 2417979, at *4* (internal citation omitted).

In their memorandum in opposition, defendants argue that plaintiff has failed to meet the threshold for conditional certification for other reasons as well. As explained below, the Court is not persuaded that these arguments preclude conditional certification as it relates to the Akron store.

Defendants argue that plaintiff has failed to plausibly demonstrate a tip credit claim or minimum wage claim in support of his motion for conditional certification. (Doc. 13 at 6-9). Defendants argue that their alleged failure to reimburse actual vehicle expenses or at the IRS standard business mileage rate (which they dispute) is insufficient to demonstrate an FLSA violation. **[*13]** (*Id.* at 7). Rather, they argue that "Plaintiff must sufficiently demonstrate that his wage rate, inclusive of any tips, fell below the FLSA minimum wage to warrant conditional certification." (*Id.* at 7-8, citing *Shell v. Pie Kingz, LLC, 415 F. Supp. 3d 769, 772 (N.D. Ohio 2019)* (denying conditional certification to proposed class of pizza delivery drivers, in part, because named plaintiff failed to establish he received an "average tip of $2.29/hour" which would make up the shortfall of the federal minimum wage obligation)).

Plaintiff asserts that defendants' position ignores Congress's mandate that employers pay tipped employees at least $2.13 per hour, and employers cannot use an employee's tips to reduce an employer's wage obligations under the FLSA. (*See* Doc. 14 at 8-12 and numerous cases cited therein).[1]

Whether or not defendants failed to pay the necessary minimum wage in this case goes to the merits of plaintiff's claims. The Court declines to employ the assumptions utilized by defendants (and the *Shell* court) to conclude there is no plausible violation of the minimum wage laws in this case. Resolution of plaintiff's claims on the merits is inappropriate at the conditional certification stage. *See* *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *2* ("At no point in resolving **[*14]** the conditional certification issue does the Court opine on, or even consider, the merits of plaintiffs' claims."); *Creely v. HCR*

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[1] *See, e.g.*, *Romero v. Top-Tier Colorado LLC, 849 F.3d 1281, 1285-86 (10th Cir. 2017)* ("But if the defendants' interpretation of *§ 206(a)* is correct, then an employer can pay a tipped employee nothing at all, so long as that employee's weekly tips-when divided by the number of hours he or she worked-average at least $7.25 an hour. We find this reading of *§ 206(a)* impossible to square with *§ 203(m)*'s plain language: the latter explicitly requires employers to pay their tipped employees *something*, regardless of how much those employees receive in tips. *See* *§ 203(m)(1)* ('[T]he cash wage paid such employee . . . shall be not less than [$2.13 an hour.]'); *see also* *Schaefer v. Walker Bros. Enters., 829 F.3d 551, 553 (7th Cir. 2016)* (noting that FLSA 'require[s] some cash payment from the employer . . . no matter how much a worker receives in tips'); *cf.* *Doty v. Elias, 733 F.2d 720, 722, 724 (10th Cir. 1984)* (rejecting, under previous version of *§ 203(m)*, defendant's argument that 'an employer who allows employees to keep their tips complies with *[§ 206(a)]* so long as the employees make at least as much in tips as they would if they received only the minimum hourly wage'; such interpretation would 'do[ ] violence to the language of *§ 203(m)* and . . . render much of that section superfluous')."

ManorCare, Inc., 789 F. Supp. 2d 819, 826 (N.D. Ohio 2011) (noting that the Court's analysis at the conditional certification stage is whether the proposed class is "similarly situated" and "does not touch upon the merits of plaintiffs' claims").

Finally, defendants argue that plaintiff has failed to show that he and the putative class are "similarly situated" because many Team Pizza delivery drivers are subject to arbitration agreements while plaintiff is not. (Doc. 13 at 9-12). Defendants attach a declaration from defendant Chris Short, who attests that 324 current or former delivery drivers executed arbitration agreements and agreed to arbitrate certain claims on an individual basis, including compensation and reimbursement-related claims. (Doc. 13-1 at ¶ 11). Defendants also attach a true and accurate copy of an example of an executed uniform arbitration agreement. (Exh. A., Doc. 13-1 at 3-7).

"District courts have consistently held that the existence of arbitration agreements is irrelevant to collective action approval because it raises a merits-based determination." *Thomas, 2019 U.S. Dist. LEXIS 171728, 2019 WL 4743637, at *3* (internal citation and quotation marks omitted). *See also* ***[*15]*** *Clark v. Pizza Baker, Inc., No. 2:18-cv-157, 2019 U.S. Dist. LEXIS 161623, 2019 WL 4601930, at *7 (S.D. Ohio Sept. 23, 2019)* ("Several courts have found that the presence of arbitration agreements does not defeat a motion for conditional certification") (collecting cases); *Crosby v. Stage Stores, Inc., 348 F. Supp. 3d 742, 752 (M.D. Tenn. 2018)* (holding that it is inappropriate to consider an arbitration agreement at the conditional certification stage of a FLSA collective action). The Sixth Circuit has not directly decided the issue of whether district courts may conditionally authorize notice of an FLSA collective action where opt-in putative class members may be subject to arbitration agreements. Nevertheless, the Fifth and Seventh Circuit Courts of Appeals have held that district courts may not send notice of a collective action when the employer demonstrates by a preponderance of the evidence the existence of a valid arbitration agreement for that employee. *In re JPMorgan Chase & Co., 916 F.3d 494, 502-03 (5th Cir. 2019)* ("an employer that seeks to avoid a collective action, as to a particular employee, has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for that employee"); *Bigger v. Facebook, Inc., 947 F.3d 1043, 1047 (7th Cir. 2020)* ("when a defendant opposing the issuance of notice alleges that proposed recipients entered arbitration agreements waiving the right to participate in the action, **[*16]** a court may authorize notice to those individuals unless (1) no plaintiff contests the existence or validity of the alleged arbitration agreements, or (2) after the court allows discovery on the alleged agreements' existence and validity, the defendant establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice.").

The Court declines to determine at the conditional certification stage whether certain employees of the proposed collective class are subject to a valid arbitration agreement. While defendants have provided evidence in the form of a sample arbitration agreement and a declaration stating that 324 current or former Team Pizza delivery drivers executed such an agreement, there are insufficient facts at this stage regarding the validity of these agreements as to *each* delivery driver defendants seek to exclude from receiving notice of this collective action. *See JPMorgan Chase, 916 F.3d at 503*; *Bigger, 947 F.3d at 1047*. Moreover, given that none of these delivery drivers have joined this suit and defendants cannot presume that drivers with arbitration agreements will ultimately opt-in to this suit, it is premature for the Court consider the **[*17]** arbitration agreements at the conditional certification stage. *See Clark, 2019 U.S. Dist. LEXIS 161623, 2019 WL 4601930, at *7* (holding that it was premature for the Court to stay proceedings based on arbitration agreements with plaintiffs who have yet to join the suit). Therefore, the Court declines to consider any arbitration

agreements at this stage.

Based on the foregoing, plaintiff's motion for conditional certification (Doc. 5) should be **GRANTED** to the extent that it seeks conditional certification of a class of delivery drivers in the Akron, Ohio Team Pizza location.

IV. Notice Requirements

Given that the Court has determined that conditional certification is warranted for the Akron, Ohio Domino's Pizza location only, the Court now turns to the form and manner of plaintiff's proposed notice. By "monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative." *Honaker, 2020 U.S. Dist. LEXIS 5181, 2020 WL 134137, at *3* (quoting *Hall, 299 F. Supp. 3d at 897-98* (in turn quoting *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 172, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*). The Court may facilitate notice to the putative class "so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits." *Id.* (quoting *Swigart, 276 F.R.D. at 214*). The Court has "discretion in deciding how notice is disseminated." *Id.* (quoting **[*18]** *Staggs v. Fuyao Glass Am., Inc., No. 3:17-cv-191, 2018 U.S. Dist. LEXIS 19775, 2018 WL 840178, at *2 (S.D. Ohio Feb. 8, 2018)* and citing *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *5)*. Plaintiff asks for authorization to send the notice attached as Exhibit 2. (Doc. 5-2). Defendants argue that plaintiff's proposed notice class, form of notice, period of notice, method of response, and consent form are defective and should not be approved. (Doc. 13 at 14). As described below, the Court approves the notice, subject to the below requirements and modifications that were raised in the briefings.

1. Scope of the Class

Defendants first argue that the notice should be limited to exclude employees subject to arbitration agreements and employees outside of the Akron location. (*Id.*). As explained above, the Court agrees that the proposed class should be limited to the Akron Domino's Pizza location and therefore only these employees or former employees should receive notice of the collective action. However, the Court disagrees that employees who may be subject to arbitration agreements must be excluded from receiving notice and therefore rejects defendants' argument in this regard.

The parties also dispute the temporal scope of the notice, i.e., whether the notice should be sent to employees who worked for the defendant **[*19]** three years prior to the date of the filing of the lawsuit or three years prior to the date of any decision conditionally certifying the class.[2] While "courts in th[e] [Sixth] Circuit have mixed results in determining when the statute of limitations begins to run for opt-in plaintiffs," *Adams v. Wenco Ashland, Inc., No. 1:19-cv-1544, 2020 U.S. Dist. LEXIS 90856, 2020 WL 2615514, at *7 (N.D. Ohio May 22, 2020)* (collecting cases), the weight of authority within the Southern District of Ohio indicates the class period should run from the date of an Order granting conditional certification and not the filing of this lawsuit. *See Rosenbohm, 2018 U.S. Dist. LEXIS 158030, 2018 WL 4405836, at *3*; *Hamm, 275 F. Supp. 3d at 878*[3]; *Myers, 201 F.*

[2] The statute of limitations for FLSA claim is two years, or in the case of a willful violation, three years. *See Lewis, 789 F. Supp. 2d at 867* ("Under *29 U.S.C. § 255(a)*, *[a] § 216(b)* action may be commenced within two years after the cause of action accrued, or within three years if the cause of action arises out of a willful violation.") (citation and internal quotation marks omitted).

[3] In *Hamm*, the Court found the three year period prior to the filing of the complaint was not warranted and reasoned:

> A cause of action under the FLSA accrues on the date that payment is owed. *Atkinson v. TeleTech Holdings, Inc., No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234 at *7 (S.D. Ohio Feb. 26, 2015)* (Rice, J). In a collective action, a *named* plaintiff's claim is considered to be filed on the date the complaint is filed and he or she files a written consent to join the collective action. *Id.* However, if a party is not named in the complaint, the claim is not considered to be filed until he or she

Supp. 3d at 897 n. 5 (citing *Crescenzo v. O-Tex Pumping, LLC, No. 1:15-cv-2851, 2016 U.S. Dist. LEXIS 78012, 2016 WL 3277226, at *5 (S.D. Ohio June 15, 2016)*; *Atkinson, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *3*)). Therefore, the notice to putative class members should run from the date of any order adopting the undersigned's recommendation.[4]

2. Proposed Period of Notice

The parties disagree on the proposed notice opt-in period. Plaintiff argues that a 90-day notice period is appropriate given the size of the class and the likelihood that many mailed notices will be returned as undeliverable. (Doc. 14 at 17). Defendants counter that a 45-day opt-in period is sufficient. (Doc. 13 at 15). Given that the Court has limited the proposed putative class to the Akron, Ohio Domino's location and the class size will likely be far less than nationwide class number estimated by plaintiff ("well over 1,000 people"), the Court finds that a 90-day opt-in period is unnecessary. Consistent with this Court's reasoning in *Thomas v. Papa John's Int'l, Inc.*, which involved similar claims and multiple store locations, the Court finds that a 45-day notice period is adequate in this case. *Thomas, 2019 U.S. Dist. LEXIS 171728, 2019 WL 4743637, at *5 (Barrett, J)*.

3. Plaintiff's Proposed Notice

The parties disagree on the content of plaintiff's proposed notice. Defendants present several modifications to the proposed notice and plaintiff objects to many of these modifications. (Doc. 13 at 15-18; Doc. 14 at 17-20).

a. Caption

The caption in the proposed notice **[*21]** reads in large bold letters: "Notice of Opportunity to Join Unpaid Wage Lawsuit." (Doc 5-2 at 2). Directly below, the notice states, "A Federal Court authorized this Notice. It is not a solicitation from a lawyer." (*Id.*). The proposed notice caption then lists the case caption, case number, and United States District Court for the Southern District of Ohio. (*Id.*).

Defendants argue that the "caption" of the proposed notice should be removed "because its inclusion gives an unwarranted 'appearance of judicial endorsement.'" (Doc. 13 at 15-16) (quoting *Hoffmann-La Roche Inc., 493 U.S. at 174*). Defendants propose replacing the caption-like language with "To: All delivery drivers. . . ." and "Re: A collective action lawsuit brought against Team Pizza, Inc., and Chris Short, pursuant to the *Fair Labor Standards Act* for alleged improper compensation." (Doc. 13 at 16 n.11).

The Court overrules these objections. Including the case caption is not misleading nor a judicial endorsement of the lawsuit. *See Colley v. Scherzinger Corp., 176 F. Supp. 3d 730, 735 (S.D. Ohio 2016)*. Moreover, as plaintiff represents, this case caption has been approved in similar pizza

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files notice **[*20]** of written consent to become a party plaintiff. *2015 U.S. Dist. LEXIS 23630, [WL] at *7* (citing *29 U.S.C. § 256*).

275 F. Supp. 3d at 878 (emphasis in the original). The opt-in mechanism of the FLSA inherently involves some delay in adding putative members of the class to the lawsuit, and "Congress chose not to automatically toll the statute of limitations from the date the collective action was filed." *Atkinson, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *7*. As notice to join the suit cannot occur until conditional certification, the date the Court conditionally certifies the class is the operative date from which to run the three-year period.

[4] In the event the claims of opt-in class members may be subject to equitable tolling, the Court may later decide whether equitable tolling is warranted for these putative class members. *See Struck v. PNC Bank N.A., 931 F. Supp. 2d 842 (S.D. Ohio 2013)* (considering motion for equitable tolling of limitations period for putative class members whose claims would otherwise be time-barred after the putative class was conditionally certified); *Engel, 2013 U.S. Dist. LEXIS 77506, 2013 WL 5177184, at *1* (same). Equitable tolling is an issue to be determined on a case-by-case basis after the putative class member has filed written consent to join the action. *See Brittmon v. Upreach, LLC, 285 F. Supp. 3d 1033, 1046 (S.D. Ohio 2018)* (and cases cited therein).

delivery driver cases. *See, e.g.*, *Waters v. Pizza to You, LLC, No. 3:19-cv-372, 2020 U.S. Dist. LEXIS 39913, 2020 WL 1129357, at *3 (S.D. Ohio Mar. 9, 2020)*. Therefore, the case caption as currently written in the proposed **[*22]** notice is sufficient.

b. Good Faith Language

Under Section 2 of the proposed notice, entitled "What is this Case About," defendants propose adding the following statement: "Defendants deny the allegations and claim that they did not violate any wage and hour law. Defendants believe that they fully complied with the FLSA in good faith." (Doc. 13 at 16 n.12). Plaintiff does not object to this inclusion. (Doc. 14 at 18). Therefore, the proposed notice should be amended to include this statement.

c. Potential consequences and responsibilities of joining the lawsuit

Defendants argue that the proposed notice "fails to adequately inform putative opt-ins of the potential consequences and responsibilities of joining the lawsuit, including paying court costs and fees if Defendants prevail, and being potentially subject to participate in discovery and/or appear at a deposition/trial." (Doc. 13 at 17). Defendants propose adding a separate paragraph in Section 3 of the proposed notice, entitled "What are my options," reflecting these potential consequences and responsibilities. (*Id.* at 17 n.13). Plaintiff objects to the inclusion of this language because it "may deter an employee from participating, and that adverse effect is disproportionate **[*23]** to the burden they may face by joining the action." (Doc. 14 at 18 n.6) (citing cases where courts rejected such language).

Courts have approved notices that adequately describe the opt-in plaintiffs' potential discovery obligations in similar pizza delivery cases. In *Brandenburg v. Cousin Vinny's Pizza*, this Court approved a notice that included a statement that "opt-in plaintiffs may be required to participate in written discovery and that they may be required to appear for deposition and/or trial." *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *9*. The Court explained that the sentence "does nothing more than underscore the obligations that putative class members would have if they opt in as plaintiffs." *Id.* Based on *Brandenburg*, this Court also applied the same language in *Thomas v. Papa John's Int'l, Inc. 2019 U.S. Dist. LEXIS 171728, 2019 WL 4743637, at *6 (Barrett, J.)*. In accordance with the *Brandenburg* and *Thomas* cases, the Court concludes that this statement should be included in the notice.

d. Initial reference to plaintiff's counsel

Defendants argue that the initial reference to contacting plaintiff's counsel in Section 3 of the proposed notice, entitled "What are my options," should be modified. (Doc. 13 at 17). Defendants allege that the reference to plaintiff's counsel is unnecessary, superfluous, and "really is intended to **[*24]** draw unwarranted attention to Plaintiff's counsel." (*Id.*). If the reference stands, defendants ask the Court to modify the notice to notify putative class members of their right to select their own counsel. (*Id.* at 17 n.14).

The Court agrees that the reference in Section 3 to plaintiff's counsel is superfluous and repetitive. Section 6 of the proposed notice, entitled "The Attorneys Involved," clearly conveys information to putative class members about plaintiff's counsel and how to contact plaintiff's counsel "for free to obtain more information." (Doc. 5-2). This section also informs putative class members that they have the right to obtain their own counsel. The reference to plaintiff's counsel in Section 3, entitled "What are my options," should be removed.

e. Anti-retaliation language

Defendants argue that the anti-retaliation language included in Section 4 of the proposed notice,

entitled "Can My Employer Fire Me or Retaliate Against me if I Join the Lawsuit," should be modified to accurately reflect the possibility, and not the certainty, of damages in connection with any resulting retaliation. (Doc. 13 at 18). Defendants seek to remove the bold typeface in the first sentence and modify the second sentence to read: "Retaliation **[*25]** is illegal, and you *may be* entitled to additional money to the extent you suffer any adverse consequences." (*Id.*). Plaintiff does not object to the proposed change to the second sentence but states that the term "may be" should not be italicized. (Doc. 14 at 19). Plaintiff also maintains that the first sentence should be in bold print so putative class members are well-informed of their rights. (*Id.*).

To strike a proper balance between the parties' competing concerns, the Court approves the following language for Section 4 of the proposed notice:

> The law strictly forbids any employer from retaliating against you for participating in the Lawsuit or filing a Consent Form. Retaliation is illegal, and you may be entitled to additional money to the extent you suffer any adverse consequences. If you experience any retaliation, you should report it immediately to Plaintiffs' Attorneys or another attorney of your choice.

4. Electronic Signatures

Defendants object to allowing opt-in plaintiffs to electronically sign their opt-in consent forms. (Doc. 13 at 18). Defendants argue that courts typically only permit electronic signatures in "highly unusual circumstances." (*Id.*). Defendants' argument is unavailing. **[*26]** In permitting the use of electronic signatures for opt-in forms, the Northern District of Ohio recently stated:

> District courts in the Sixth Circuit regularly approve notice procedures in which potential opt-in plaintiffs may electronically sign and submit consent forms. *E.g.*, *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *8* ("[T]he Court will permit potential opt-in plaintiffs to sign their Consent to Join forms electronically via the DocuSign website if they so choose."); *Conklin v. 1-800 Flowers.com, Inc., No. 2:16-cv-675, 2017 U.S. Dist. LEXIS 126733, 2017 WL 3437564, at *6 (S.D. Ohio Aug. 10, 2017)*. These courts have typically found that forcing potential opt-in plaintiffs to print and sign their consent forms "force[s] potential opt-in plaintiffs to expend additional time and resources to join the instant lawsuit" and "serve[s] no purpose other than to discourage potential collective members from joining the litigation." *Brandenburg, 2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *8*; *Kim [v. Detroit Med. Informatics, LLC, No. CV 19-11185,] 2019 U.S. Dist. LEXIS 204014, 2019 WL 6307196, at *4 [E.D. Mich. Nov. 25, 2019)]*, ("Requiring individuals to print and sign their Consent to Join forms and then submit the forms via regular U.S. mail would only serve to discourage potential collective members from joining the litigation and thus would not advance the purposes of the FLSA."). Moreover, "[c]ourts have not found electronic signatures for the **[*27]** purposes of FLSA necessarily less secure, authentic, or reliable," and "have consistently found electronic signatures appropriate and reliable, without a special need." *Fitzgerald v. P.L. Mktg., Inc., No. 2:17-cv-2251-SHM-cgc, 2017 U.S. Dist. LEXIS 182426, at *4 (W.D. Tenn. Oct. 25, 2017)*.

*Kilmer v. Burntwood Tavern Holdings LLC, No. 1:19-cv-02660, 2020 U.S. Dist. LEXIS 74258, 2020 WL 2043335, at *4-5 (N.D. Ohio Apr. 28, 2020)*. Even though the proposed putative class is limited to the Akron Domino's location, the Court agrees that allowing opt-in plaintiffs in this case to electronically sign and submit consent forms is a practical and reliable method that fulfills the purposes of the FLSA. *See id.* (noting that the class need not be particularly large in order to justify the use of electronic signatures). Moreover, in

Brandenburg and *Thomas*, which involved similar claims brought by a collective class of pizza delivery drivers, this Court approved the use of electronic signatures for opt-in class members. *2017 U.S. Dist. LEXIS 129955, 2017 WL 3500411, at *5*; *2019 U.S. Dist. LEXIS 171728, 2019 WL 4743637, at *6 (Barrett, J.)*. Therefore, electronic signatures of opt-in consent forms are permitted.

5. Consent Form

The parties dispute whether to include certain language in the "consent to join" form. The "consent to join" form includes the following language in the last sentence: "In the event I am not permitted to go forward with this action (for example, **[*28]** if this action is conditionally certified and then decertified), I authorize Plaintiff's counsel to reuse this Consent Form to re-file my claims in a separate or related action against Defendants." (Doc. 5-2 at 5).

Defendants object to this language and argue that "it improperly purports to authorize Plaintiff's counsel to re-file and reuse the Consent Form 'in a separate or related action against Defendants.'" (Doc. 13 at 19). Defendants argue that consent applies only to this present action. (*Id.*). Plaintiff argues that this sentence should not be omitted as it is standard language routinely used by plaintiff's counsel and previously approved by this Court. (Doc. 14 at 20). Given that this language has previously been approved by this Court, the Court rejects defendants' argument. *See* *Waters, No. 3:19-cv-, 2020 U.S. Dist. LEXIS 39913* (Doc. 4-3 at 5), *2020 U.S. Dist. LEXIS 39913, 2020 WL 1129357*; *Thomas, No. 1:17-cv-411, 2019 U.S. Dist. LEXIS 171728* (Doc. 52-1 at 4), *2019 U.S. Dist. LEXIS 171728, 2019 WL 4743637*. In addition, the Court agrees with plaintiff that the consent form is an agreement between the employees and plaintiff's counsel; therefore, it is not within defendants' purview to challenge the consent language.

6. Requested Class Contact Information

Finally, defendants disagree with the requested class action contact **[*29]** information and specifically argue that plaintiff's request for telephone numbers is unwarranted. (Doc. 13 at 19). The Court agrees that plaintiff's request for contact information regarding putative class members outside of the Akron location is unwarranted for the reasons discussed above. However, the Court concludes that plaintiff's request for telephone numbers of the putative class members at the Akron location-even those who may be subject to arbitration agreements-is appropriate. The consent form allows opt-in plaintiffs to provide their own phone numbers whereas in the cases that defendants cite for purported privacy concerns, courts have held that *defendants* cannot be compelled to release contact information of employees upon a plaintiff's request. Accordingly, plaintiff may request contact information, including telephone numbers, from putative class members at the Akron location.

V. Conclusion

Based on the foregoing, it is **RECOMMENDED** that:

1. Plaintiff's Motion to Conditionally Certify a FLSA Collective Action and to Authorize Notice (Doc. 5) be **GRANTED** to the extent the proposed putative class is limited to delivery drivers at the Akron, Ohio Team Pizza location and **DENIED [*30]** to the extent it seeks to certify a conditional nationwide class; and
2. Plaintiff shall file an amended notice consistent with the Court's findings herein within fourteen (14) days of the entry of any Order adopting this Report and Recommendation, subject to any additional findings or conclusions of the District Judge.

IT IS SO RECOMMENDED.

Date: 6/29/2020

/s/ Karen L. Litkovitz

Karen L. Litkovitz

United States Magistrate Judge

End of Document

Exhibit 18

Cuevas v. Conam Mgmt. Corp.

United States District Court for the Southern District of California

October 21, 2019, Decided; October 21, 2019, Filed

Case No.: 18cv1189-GPC(LL)

Reporter
2019 U.S. Dist. LEXIS 181832 *; 2019 WL 5320544

ELIZABETH CUEVAS, as an individual and on behalf of all others similarly situated, Plaintiff, v. CONAM MANAGEMENT CORPORATION, a California corporation; and does 1 through10, inclusive, Defendants.

Prior History: *Cuevas v. ConAm Mgmt. Corp., 2019 U.S. Dist. LEXIS 41937 (S.D. Cal., Mar. 14, 2019)*

Counsel: **[*1]** For Elizabeth Cuevas, as an individual and on behalf of all others similarly situated, Plaintiff: Majed Dakak, LEAD ATTORNEY, Kesselman Brantly Stockinger LLP, Manhattan Beach, CA; Dennis Sangwon Hyun, Hyun Legal, Los Angeles, CA.

For ConAm Management Corporation, a California corporation, Defendant: Adam P. KohSweeney, LEAD ATTORNEY, O'Melveny & Meyers LLP, San Francisco, CA.

Judges: Hon. Gonzalo P. Curiel, United States District Judge.

Opinion by: Gonzalo P. Curiel

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PRODUCTION OF COLLECTIVE MEMBERS' CONTACT INFORMATION; AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S REQUEST FOR APPROVAL OF NOTICE TO THE MEMBERS OF THE COLLECTIVES

[Dkt. No. 37.]

Before the Court is Plaintiff Elizabeth Cuevas' motion for an order conditionally certifying the class as a collective action under the *Fair Labor Standards Act*, *29 U.S.C. § 216(b)*, (2) for production of collective members' contact information, and (3) for approval of notice to the members of the collectives. (Dkt. No. 37.) An opposition was filed by Defendant on September 27, 2019. (Dkt. No. 54.) A reply was filed by Plaintiff on October 4, 2019. (Dkt. No. 55.) **[*2]** Based on the reasoning below, the Court GRANTS Plaintiff's motion for conditional certification of collective action, GRANTS in part and DENIES in part Plaintiff's motion to direct Defendant to produce collective members' contact information, and GRANTS in part and DENIES in part Plaintiff's request for approval of notice to the members of the collectives.

Background

On September 6, 2019, Plaintiff Elizabeth Cuevas ("Plaintiff") filed the operative first amended complaint ("FAC") on behalf of herself and other similarly situated employees of Defendant ConAm Management Corporation ("Defendant" or "ConAm") alleging two causes of action for its failure to pay overtime pursuant to the *Fair Labor*

Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., and failure to timely pay overtime wages as required by *29 C.F.R. § 778.106*. (Dkt. No. 48, FAC.) Specifically, Plaintiff claims that Defendant failure to pay overtime is based on its failure to calculate and/or factor non-discretionary bonuses into her regular rate of pay in assessing overtime pay. Second, Plaintiff claims Defendant's Bonus Adjustment or true-up payment pays overtime payments late or not at all. ConAm is a property management and real estate investment company with properties **[*3]** located throughout the United States. (Id. ¶ 2.)

Plaintiff was employed by ConAm from about December 21, 2017[1] to about March 29, 2019 as a non-exempt leasing agent/professional at one of Defendant's properties located in Reno, Nevada. (Dkt. No. 37-3, Cuevas Decl. ¶¶ 2, 3.) In her position as a Leasing Professional, she, as well as other employees, received non-discretionary bonuses from the Lease and Renewal Bonus Program, also referred to as the "Winner's Circle" program. (Id. ¶ 4; Dkt. No. 54-1, Gillane Decl., Ex. A.) In her position as Leasing Professional, Plaintiff was only eligible for the Winner's Circle bonus. (Dkt. No. 54-1, Gillane Decl., Ex. A.) Other non-exempt employees, such as Community Managers and Business Managers are also subject to other non-discretionary bonuses. (Id.; Dkt. No. 57, Dadek Decl., Ex. B (UNDER SEAL).)

According to Defendant,

> The Winner's Circle bonus is based on outstanding achievement in two areas of property management: (1) new move-ins; and (2) lease renewals. In the first area, new move-ins, an employee's bonus is determined by the number of new apartment leases for which he or she is individually responsible in a calendar month. For each new move-in **[*4]** with a lease term of six months or more, the employee is eligible for a flat payment of $50. If the apartment is one which has undergone significant renovations, the employee is eligible for an additional premium, which may amount to a $75 flat payment or a different amount approved by the owner of the property. In the second area, lease renewals, bonus compensation is pooled. For each lease renewal with a term of six months or more, $50 (or an amount approved by the owner of the property) is contributed to a bonus pool. The total bonus pool is then split evenly among all eligible employees at the property based on the amount of time worked during that month. New move-ins and lease renewals are tracked on a monthly basis in the Move In Detail Report and Resident Activity Detail Report. At the end of each month, data from these two reports is manually entered into the Winner's Circle Bonus Worksheet ("WCB Worksheet"), which is used to determine each employee's eligibility for the Winner's Circle bonus and amount thereof.
>
> ConAm pays its employees twice monthly, on or about the 7th and 22nd days of each month. Generally speaking, the calculations on the WCB Worksheet are done by the 15th **[*5]** of the month (for the prior month's activity) and the employee, if eligible, receives any Winner's Circle bonus payment on the 22nd of the month. Thus, for example, if an employee earns $500 in Winner's Circle bonus compensation during July 2019, she will receive that bonus amount with her paycheck on August 22, 2019. Employees working overtime receive time-and-a-half for those overtime hours based on their hourly rate for the applicable pay period, but the Winner's Circle bonus is not factored into the employee's overtime rate during that pay period. Rather, the employee receives a "Bonus Adjustment" - essentially a true-up payment — in her next paycheck (on the 7th of the month), applying the Winners' Circle bonus payment to any overtime worked . . . . ConAm uses this "true up" method because, as stated above, the Winner's Circle bonus is determined after the

[1] According to ConAm, Plaintiff was hired around January 9, 2018. (Dkt. No. 24-1, Gillane Decl. ¶ 2.)

> end of a given month based upon leasing activity during that month. Accordingly, at the time overtime is paid ConAm simply doesn't know whether or not a Winner's Circle bonus has been earned. Similarly, the Bonus Adjustment cannot be calculated until both the Winner's Circle bonus is determined and all hours and compensation **[*6]** information has been fully processed by payroll, which by definition cannot happen until after the 22nd of the month when the Winner's Circle bonus is paid.

(Dkt. No. 54 at 9[2] (internal citations omitted).) Plaintiff claims ConAm's payroll policy violates the *FLSA* because it admittedly fails to calculate and/or factor non-discretionary bonuses into her regular rate of pay in assessing overtime pay and Defendant's stated Bonus Adjustment or true-up payment necessarily provides for late overtime payments.

Discussion

A. Legal Standard on Conditional Certification

The *Fair Labor Standards Act of 1938* was enacted for the purpose of protecting all covered workers from "substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*. *Section 16(b)* provides employees the right to bring a private cause of action on behalf of herself and other employees "similarly situated" for specified violations of the *FLSA* but requires that each employee "opt-in" by filing a consent to sue with the court. *29 U.S.C. § 216(b)*; *Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000)*. These suits are known as a "collective action" and allow aggrieved employees "the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution **[*7]** in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*.[3]

The district court has discretion in determining whether a collective action is appropriate. *Adams v. Inter-Con Sec. Sys., 242 F.R.D. 530, 535 (N.D. Cal. 2007)* (citing *Leuthold v. Destination America, Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004))*. The plaintiff bears the burden of showing that the putative collective action members are "similarly situated." *Id. at 535-36*; see *Harris v. Vector Mktg., Corp., 716 F. Supp. 2d 835, 837 (N.D. Cal. 2010)* (quoting *Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 470 (E.D. Cal. 2010))*.

Recently, the Ninth Circuit in *Campbell v. City of Los Angeles, 903 F.3d 1090, 1100, 1109 (9th Cir. 2018)*, adopted the two-tiered certification process, which developed as "a product of interstitial judicial lawmaking or ad hoc district court discretion"[4] , under the *FLSA*. First, at the pleading stage, plaintiffs will file a motion for preliminary certification and demonstrate the "similarly situated" requirement of *§ 216(b)* for purposes of providing notice to putative collective members. *Id. at 1109*. The notice advises the members that they must affirmatively opt-in to the litigation. Id. At this early stage, the district court's review is limited to the pleadings and may be "supplemented by declarations or other limited evidence", and the standard is "lenient." *Id.*; *Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009)*

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[2] Page numbers are based on the CM/ECF pagination.

[3] Although Hoffman-La Roche involved a claim under the *Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq.*, the *ADEA* incorporates the enforcement provisions of the *FLSA* including the "opt-in" provisions of *29 U.S.C. § 216(b)*.

[4] The Ninth Circuit noted that *29 U.S.C. § 216(b)* provides no guidance on how collective litigation should proceed. The statute only requires that a collective action may proceed if the workers are "similarly situated" and affirmatively opt in to the litigation in writing. *Campbell, 903 F.3d at 1100*.

("the standard for certification at this stage is a lenient one that typically results in certification."); *Leuthold v. Destination America, Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004)* (citations omitted) ("Because the court generally **[*8]** has a limited amount of evidence before it, the initial determination is usually made under a fairly lenient standard and typically results in conditional class certification.").

Where preliminary certification has been granted and once discovery has been completed or is near completion, the defendant may move for decertification on Plaintiff's failure to satisfy the "similarly situated" requirement in light of the evidence produced in discovery and the court takes a "more exacting look at the plaintiffs' allegations and the record." *Campbell, 903 F.3d at 1109*.

The court in Campbell also defined the meaning of "similarly situated" under the *FLSA*. Relying on the *FLSA*'s remedial purpose, the Ninth Circuit held that to be "similarly situated", "plaintiffs must be alike with regard to some *material* aspect of their litigation." *Id. at 1114* (emphasis in original). "[I]f the party plaintiffs' factual or legal similarities are material to the resolution of their case, dissimilarities in other respects should not defeat collective treatment." Id. "[W]hat matters is not just any similarity between party plaintiffs, but a legal or factual similarity material to the resolution of the party plaintiffs' claims, in the sense of having **[*9]** the potential to advance these claims, collectively, to some resolution." *Id. at 1115*. In other words, "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their *FLSA* claims." *Id. at 1117*.

B. Analysis

Plaintiff seeks conditional certification of two nationwide collectives. First, she seeks a collective class of:

> All persons who are or have been employed by the Company in the United States as non-exempt employees at any time from June 6, 2015, through the present, who received overtime pay and non-discretionary incentive pay, including without limitation, bonuses (the "Class").

Second, she seeks a subclass of individuals who receive non-discretionary bonuses from the same incentive program as Plaintiff to include:

> All persons who are or have been employed by the Company in the United States as non-exempt employees at any time from June 6, 2015, through the present, who received overtime pay and non-discretionary incentive pay from the bonus program referred to as the "Winner's Circle" bonus program (the "Winner's Circle Subclass").

(Dkt. No. 48, FAC ¶ 13.) Plaintiff argues that she is similarly situated **[*10]** to putative collective members because all are subject to ConAm's uniform payroll policy. In support, she presents Defendant's discovery responses. ConAm reports that over 1,000 current and former employees received compensation from the Winner's Circle program and it also paid about $183,143.78 in "true-up" compensation for Winner's Circle bonuses. (Dkt. No. 37-2, Dadak Decl., Ex. C, Interrog. Nos, 6, 8.) ConAm also admitted that it computes Winner's Circle compensation and true-up payments, that it controls its payroll, and that it does not pay the true-up payments in the same pay period that it pays the corresponding Winner's Circle bonus and overtime. (Id., Ex. D, RFA's Nos. 3, 4, 7, 8, 12, 15.) This demonstrates that ConAm has a uniform policy in calculating overtime pay and the timing of overtime pay for those receiving Winner's Circle bonuses.

Plaintiff also claims she is similarly situated to all non-exempt ConAm employees who receive other types of non-discretionary bonus. She explains that because Community Managers and Business Managers are subject to the Winner's Circle program, ConAm must also use the same payroll system. (Dkt. No. 54-1, Gillane Decl., Ex. A.)

Furthermore, **[*11]** Community Managers and Business Managers are considered non-exempt employees entitled to overtime pay and are subject to other non-discretionary bonus programs. (Dkt. No. 54-1, Gillane Decl., Ex. A ("Community/Business managers are also eligible for the Community/Business Manager Bonus Program").) Therefore, these employees are also subject to the same uniform payroll policy as the Winner's Circle bonuses.

Defendant first contends that Plaintiff has not demonstrated she is similarly situated to putative collective members in California who have agreed to arbitration because she is not subject to an arbitration agreement, and in the alternative, if the Court conditionally certifies a collective class, the Court should exclude employees subject to arbitration. Plaintiff responds that her inability to challenge the enforceability of other employees' arbitration agreements is not an issue because in a collective action, all opt-in plaintiffs will serve as co-equal party plaintiffs and therefore, any challenges may be raised by them. Further this "material difference" is not sufficient to defeat conditional certification.

District courts within the country are divided on whether notice of **[*12]** a *FLSA* collective action should be provided to employees who have signed arbitration agreements. *In re JPMorgan Chase & Co., 916 F.3d 494, 499 n. 6 (5th Cir. 2019)* (noting that district courts are "splintered" over this issue); *Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 2019 U.S. Dist. LEXIS 154650, 2019 WL 4280237, at *2 (D. Mass. Sept. 11, 2019)* ("District courts around the country have generated conflicting answers to the question of whether workers who signed arbitration agreements can receive notice of an *FLSA* collective action."); *Lijun Geng v. Shu Han Ju Rest. II Corp., 18cv12220 (PAE) (RWL), 2019 U.S. Dist. LEXIS 154246, 2019 WL 4493429, at *8 (S.D.N.Y. Sept. 9, 2019)* ("District courts generally have been divided as to whether notice of an *FLSA* collective action should be sent to employees who have agreed to arbitrate claims against their employer."). Recently, the Fifth Circuit, the only circuit to address this issue, held that a district court does not have discretion "to send or require notice of a pending *FLSA* collective action to employees who are unable to join the action because of binding arbitration agreements." *In re JPMorgan Chase., 916 F.3d at 504*. At the conditional certification stage, "if there is a genuine dispute as to the existence or validity of an arbitration agreement, an employer that seeks to avoid a collective action, as to a particular employee, has the burden to show, by a preponderance of **[*13]** the evidence, the existence of a valid arbitration agreement for that employee." *Id. at 502-03*. In the case, the parties did not dispute the existence or enforceability of the arbitration agreements. *Id. at 498*.

The Ninth Circuit has not yet ruled on this issue, and district courts in this circuit, even post In reJPMorgan Chase, have granted conditional certification providing notice to potential collective members and deferred the merits-based question of whether the arbitration agreements are valid and enforceable to the second stage. See *Monplaisir v. Integrated Tech Grp., LLC, No. C 19-1484 WHA, 2019 U.S. Dist. LEXIS 132887, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019)* (granting conditional certification and deferring issue of whether arbitration agreements are valid and enforceable to second stage of collective action process); *Gonzalez v. Diamond Resorts Int'l Mktg., Case No. 18cv979-APG-CWH, 2019 U.S. Dist. LEXIS 126434, 2019 WL 3430770, at *5 (D. Nev. July 29, 2019)* (same). As one district court noted in 2015, "[n]o district court in our circuit has denied conditional certification on the basis that some members of the proposed collective may be subject to valid and enforceable arbitration clauses. The decisions that have addressed that issue have all found that the issue of the enforceability of arbitration **[*14]** clauses related to the merits of the case and therefore should be dealt with in phase two." *Saravia v. Dynamex, Inc., 310 F.R.D. 412, 424 (N.D. Cal. 2015)* (citing *Shaia v. Harvest Mgmt. Sub LLC, 306 F.R.D. 268 (N.D. Cal. 2015)* (Chief

Judge Phyllis Hamilton); *Deatrick v. Securitas Sec. Servs. USA, No. 13-cv-05016, 2014 WL 5358723 (N.D. Cal., Oct. 20, 2014)* (Judge Jon Tigar); *Boyd v. Bank of Am. Corp., No. 13-cv-0561, 2013 U.S. Dist. LEXIS 175329, 2013 WL 6536751 (C.D. Cal. Dec. 11, 2013)* (Judge David Carter)); see also *Conde v. Open Door Mktg., LLC, 223 F. Supp. 3d 949, 968 (N.D. Cal. 2017)* (arbitration agreements do not preclude conditional certification). Even the weight of authority outside the Ninth Circuit favors handling the arbitration issue during stage two of the certification process. See *Greene v. Omni Limousine, Inc., Case No. 18cv1760-GMN-VCF, 2019 U.S. Dist. LEXIS 101094, 2019 WL 2503950, at *4 (D. Nev. June 15, 2019)* ("The weight of authority outside the Ninth Circuit similarly recognizes the issue of arbitrability as one best handled during stage two of the certification process."); *Lijun Geng, 2019 U.S. Dist. LEXIS 154246, 2019 WL 4493429, at *9 (S.D.N.Y. Sept. 9, 2019)* (following the greater weight of authority and allowing notice of collective action to potential opt-ins who may be subject to an arbitration agreement); *Guzman v. Three Amigos SJL Inc., 117 F. Supp. 3d 516, 526 (S.D.N.Y. 2015)* ("[T]he fact that some of the contracts have arbitration provisions . . . [does not] create any differences between plaintiffs and other [potential plaintiffs] with respect to whether defendants violated the *FLSA*."); *Romero v. La Revise Assocs., L.L.C., 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013)* ("[C]ourts have consistently held that the existence of arbitration agreements is irrelevant to **[*15]** collective action approval because it raises a merits-based determination.").

Therefore, Defendant's reliance on *In re JPMorgan Chase* to support its position is not persuasive and the Court follows the district courts in this circuit and concludes that conditional certification is not defeated because certain California employees signed arbitration agreements.

Second, Defendant argues that Plaintiff is not similarly situated to some employees who receive "true-up" payments later than others. Defendant reports that it has a regular practice of paying employees a true-up payment in a particular pay period but that it occasionally misses that payment and makes the payment later. Plaintiff contends that Defendant wants to defeat conditional certification based on a few occasions its conduct is even worse than she alleges. She argues that on conditional certification, collective members need not be identical in all respects but just in some material way.

Here, differences between employees based on the timing of receiving "true-up" payments do not defeat a finding that collective members are "similarly situated." Plaintiff argues that ConAm failed to timely pay her overtime. According to Plaintiff, **[*16]** "true-up" payments as described by Defendant constitutes an admission that it does not timely pay employees' overtime. Whether the "true-up" payments are paid one month later, two months later, or not at all, all those payments are in violation of the *FLSA*. Accordingly, the Court disagrees with Defendant's argument.

Finally, Defendant argues that the Court should limit the putative collective to those employees who received Winner's Circle bonus payments, and not employees subject to other bonus programs. ConAm argues that not only does Plaintiff have no standing to pursue claims on a bonus program she was not subject to but she is also not "similarly situated" to employees subject to the other bonus programs. Plaintiff replies that Defendant administers its payroll the same with respect to all employees based on a single policy and she is similarly situated to all employees who receive non-discretionary bonus payments.

On a motion for conditional certification, the Court looks at whether the plaintiff is "similarly situated" to other employees. As described by the Ninth Circuit in Campbell, a putative collective class differs from a *Rule 23* class because the *FLSA* leaves no doubt that "every **[*17]** plaintiff who opts in to a collective action has party status." *Campbell, 903 F.3d at 1104*. The only consequence

of conditional certification is "the sending of court-approved written notice" to workers who may wish to join the litigation as individuals; there is no gatekeeping role as required by *Rule 23*'s class certification. *Id. at 1101*.

Defendant has not provided any legal support for its standing argument. The one relevant case Defendant cites alleging violations of the *FLSA* held, on summary judgment, that the named plaintiff, himself, did not have *FLSA* standing to challenge the legality of the policy, not that the named plaintiff had no standing to pursue collective class that includes additional policies he or she was not subject to. See *Stein v. Rousseau, No. CV 05-264-FVS, 2006 U.S. Dist. LEXIS 6020, 2006 WL 224043, at *2-3 (W.D. Wash. Jan. 30, 2006)*.

Because opt-in plaintiffs each become a party to the action, a requirement that the named plaintiff have standing for each opt-in plaintiffs' claims is not persuasive. Plaintiff alleges that ConAm maintains a single policy that fails to properly include non-discretionary bonuses in calculating overtime pay and it pays portions of overtime payment late or not at all. Leasing Professionals, Business Managers and Community Managers are all subject to the Winner's **[*18]** Circle program. (Dkt. No. 54-1, Gillane Decl., Ex. A.) Moreover, Community Managers and Business Managers are also subject to other non-discretionary bonus programs. (Dkt. No. 57, Dadek Decl., Ex. B (UNDER SEAL).) Because Plaintiff has plausibly demonstrated that ConAm handles its payroll uniformly as to non-discretionary bonuses, the lenient standard has been met. See *Campbell, 903 F.3d at 1109* ("'lenient'" standard . . . sometimes articulated as requiring 'substantial allegations,' sometimes as turning on a 'reasonable basis,' but in any event loosely akin to a plausibility standard, commensurate with the stage of the proceedings."). If discovery reveals that the collective members are not "similarly situated," ConAm may move to decertify the collective class.

Accordingly, the Court GRANTS Plaintiff's motion to conditionally certify two collective classes under the *FLSA*.

B. Proposed Method and Form of Notice

Once a collective class has been conditionally certified, potential *FLSA* class members are entitled to "accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions as to whether to participate." *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. The Court has authority and discretion to **[*19]** monitor the preparation and distribution of the notice, to "ensure that it is timely, accurate, and informative." *Id. at 172*

In her motion, Plaintiff requests that the Court direct Defendant to provide her counsel with the names, job titles, dates of employment, last known mailing and email addresses and phone numbers of the class members in order to assist with issuing the notice. If any collective members' mail is returned by the post office, Plaintiff asks that Defendant should be ordered to provide additional identifying information such as dates of birth and/or social security numbers to help with effectuating notice. Defendant objects to requiring it to provide birthdates and social security numbers for collective members as improper.

Courts routinely allow the production of employees' mail and email addresses and telephone numbers. *Knight v. Concentrix Corp., Case No. 18cv7101-KAW 2019 U.S. Dist. LEXIS 129026, 2019 WL 3503052, at *5 (N.D. Cal. Aug. 1, 2019)* (quoting *Benedict v. Hewlett-Packard Co., No. 13cv1119-LHK, 2014 U.S. Dist. LEXIS 18594, 2014 WL 587135, at *14 (N.D. Cal. Feb. 13, 2014)* ("Courts routinely approve the production of email addresses and telephone numbers with other contact information to ensure that notice is effectuated. . . .")). As to birthdates and social security numbers, while some courts grant such unopposed requests by **[*20]** plaintiffs, see *Wong v. HSBC Mortg. Corp. (USA), No. C-07-2446 MMC, 2008 WL*

753889, at *4 (N.D. Cal. Mar. 19, 2008) (granting the plaintiffs' unopposed request for last four digits of employees' social security number); Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1130 (N.D. Cal. 2009), other courts decline granting such requests as they would violate an employee's privacy rights, see Russell v. Swick Mining Servs. USA, No. CV 16-2887 PHX, JJT, 2017 U.S. Dist. LEXIS 57516, 2017 WL 1365081, at *5 (D. Ariz. Apr. 14, 2017) (denying the plaintiff's request for employees' social security numbers and birth dates); Delgado v. Ortho-McNeil, Inc., No. SACV 07-263 CJCMLGX, 2007 U.S. Dist. LEXIS 74731, 2007 WL 2847238, at *3 (C.D. Cal. Aug. 7, 2007)). In this case, the Court has concerns regarding the production of employees' birthdates and social security numbers for privacy reasons without Plaintiff providing sufficient reasons for their disclosure. Accordingly, the Court GRANTS Plaintiff's request to direct Defendant to provide her counsel with names, job titles, dates of employment, last known mailing and email addresses and phone numbers of the class members and DENIES her request for production of their birthdates and social security numbers.

Next, Plaintiff asks the Court to allow her counsel to send a follow-up postcard to any class members who have not responded within 30 days after the mailing of the initial notice. She **[*21]** argues that it is common practice for courts to direct a follow-up notice as it assists with the dissemination of notice to similarly situated employees. ConAm objects to permitting Plaintiff's counsel to send a follow-up notice because courts in other districts have concluded that reminder notices could be interpreted as the Court encouraging a lawsuit and Plaintiff has not demonstrated why the initial notice would not be sufficient.

District courts in this circuit routinely approve reminder notices 30 days prior to the end of the opt-in period. See Benedict v. Hewlett-Packard Co., Case No. 13cv119-LHK, 2014 U.S. Dist. LEXIS 18594, 2014 WL 587135, at *14 (N.D. Cal. Feb. 13, 2014) (courts commonly approve reminder notices); Helton v. Factor 5, Inc., No. C 10-4927 SBA, 2012 U.S. Dist. LEXIS 88440, 2012 WL 2428219, at *7 (N.D. Cal. June 26, 2012) (allowing a reminder postcard to potential plaintiffs); Sandoval v. Tharaldson Emple. Mgmt., No. EDCV 08-00482-VAP(OPx), 2009 U.S. Dist. LEXIS 111320, 2009 WL 3877203, at *11 (C.D. Cal. Nov. 17, 2009) (allowing additional notice before granting court approval). Thus, following the district courts in this circuit, the Court grants Plaintiff's request for a follow-up postcard to those class members who have not responded within 30 days after the mailing of the initial notice.

Finally, Plaintiff requests that the Court order Defendant to post **[*22]** the notice at all of Defendant's worksites in the same areas in which it is required to post FLSA requirements in order to assist with dissemination of the notice. ConAm objects arguing that courts in this circuit often deny these requests.

"First class mail is ordinarily sufficient to notify class members who have been identified." Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 492-93 (E.D. Cal. 2006). But there is no bar to posting in Defendant's workplace as courts have approved this method of notice. Id. at 493. Posting at the defendant's workplace provides notice to current employees and courts have concluded that a defendant most likely has the most current contact information of its employees, and therefore have denied the plaintiff's request to post the notice at the worksite. See Litvinova v. City & County of San Francisco, Case No. 18cv1494-RS, 2019 U.S. Dist. LEXIS 79540, 2019 WL 1975438, at *5 (N.D. Cal. Jan. 3, 2019) (noting plaintiff had not explained why posting notice in the workplace is necessary in light of sending the notice by mail, email, sending reminder postcards and supplementation by production of telephone numbers); Russell v. Wells Fargo & Co., No. C 07-3993 CW, 2008 U.S. Dist. LEXIS 78771, 2008 WL 4104212, at *5 (N.D. Cal. Sept. 3, 2008) ("Defendant, however, is unlikely to have obsolete contact information for its current employees, and posting **[*23]** notice in the

workplace or distributing it via the payroll system will do nothing to notify those class members who are no longer employed by Defendant"); *Guy v. Casal Inst. of Nev., LLC, No. 13cv2263-APG, 2014 U.S. Dist. LEXIS 65056, 2014 WL 1899006, at *7 (D. Nev. May 12, 2014)* (denying request to post notices in the defendant's workplace because there was no indication that the defendants are unable to provide current mailing and email addresses of the collective members).

Here, Plaintiff has not provided any reason why mailing or emailing the notice to collective members as well as a reminder notice would not be sufficient to inform current employees. Moreover, as a current employer, ConAm most likely has the most current contact information for current employees who are potential collective members. As such, the Court denies Plaintiff's request to order ConAm to post the notice at its worksites.

Next, ConAm argues that Plaintiff's proposed 90-day opt-in period should be 60 days because Plaintiff has not stated why she needs that much time to notify potential collective members. Plaintiff opposes arguing that shortening the time to 60 days will place an unnecessary obstacle in reaching former employees who need to be located.

For purposes of a deadline to **[*24]** opt-in, "timeframes of sixty to ninety days appear to have become the presumptive standard in this district." *Ramirez v. Ghilotti Bros. Inc., 941 F. Supp. 2d 1197, 1207 (N.D. Cal. 2013)* (quoting *Sanchez v. Sephora USA, Inc., No. 11-03396-SBA, 2012 U.S. Dist. LEXIS 99924, 2012 WL 2945753, at *6 (N.D. Cal. July 18, 2012))*; *Benedict, 2014 U.S. Dist. LEXIS 18594, 2014 WL 587135, at *13* (granting ninety days to opt-in).

In this case, Plaintiff will have to locate former employees of ConAm, and in the event a former employee is unable to be located, additional time will be necessary to locate these individuals. Therefore, 90 days should be reasonable to address any potential issues in locating former employees. Accordingly, the Court approves a 90-day opt-in period.

Lastly, ConAm objects to Plaintiff designating herself as the agent for those who opt-in and her counsel as the legal representative for members of the collective who join. It asserts that collective members should be informed of their right to retain their own counsel. Plaintiff, in her reply, merely argue that adequacy of representation is not required under the *FLSA* without addressing opt-in plaintiffs' right to choose their own representation.

The proposed notice states that opt-in plaintiffs will be represented by Plaintiff's counsel and that Cuevas will be the opt-in plaintiffs' agent. (Dkt. No. 37-1, Ex. A.) There is no provision that opt-in **[*25]** plaintiffs may retain their own counsel. In a collective action, as noted by Plaintiff in her motion, each opt-in plaintiff joins as "co-equal party plaintiffs." (See Dkt. No. 55 at 6.) Therefore, proposed plaintiffs should be notified that they have a choice to either retain their own counsel or be represented by named plaintiff's counsel. See *Senne v. Kan. City Royals Baseball Corp., Case No. 14cv608-JCS, 2015 U.S. Dist. LEXIS 143011, 2015 WL 6152476, at *19 (N.D. Cal. Oct. 20, 2015)* (providing notice that "If you choose to join this suit, you may retain your own counsel (at your own expense) or choose to be represented by the attorneys who represent the Named Plaintiffs and any players who consent to join this suit."); *Heaps v. Safelite Solutions, LLC, No. 10cv729, 2011 U.S. Dist. LEXIS 40089, 2011 WL 1325207, at *9 (S.D. Ohio Apr. 5, 2011)* ("the notice shall contain a statement indicating that the opt-in plaintiffs are entitled to be represented by the named Plaintiffs' counsel or by counsel of his or her own choosing."); *Walterscheid v. City of El Monte, 2018 U.S. Dist. LEXIS 227291, 2018 WL 6321645, at *4 (C.D. Cal. Sept. 6, 2018)* (no reason why the notice should not contain information about retaining one's own attorney and "the only reason the Court can guess as to why Plaintiffs contest this proposal is the desire of Plaintiffs' counsel to maximize their own recovery in the case.").

Accordingly, the Court directs that Plaintiff revise the **[*26]** notice to include language that opt-in plaintiffs may appear by themselves or choose the named Plaintiff to be their agent and may retain their own counsel or choose to be represented by the named Plaintiff's attorney.

Conclusion

The Court GRANTS Plaintiff's motion for conditional certification of collective action for the following classes,

> All persons who are or have been employed by the Company in the United States as non-exempt employees at any time from June 6, 2015, through the present, who received overtime pay and non-discretionary incentive pay, including without limitation, bonuses (the "Class").
>
> and
>
> All persons who are or have been employed by the Company in the United States as non-exempt employees at any time from June 6, 2015, through the present, who received overtime pay and non-discretionary incentive pay from the bonus program referred to as the "Winner's Circle" bonus program (the "Winner's Circle Subclass").

The Court DIRECTS Defendant to produce potential class members' names, job titles, dates of employment, last known mailing and email addresses and phone numbers to Plaintiff's counsel no later than fourteen (14) days after the entry of this Order. Plaintiff shall **[*27]** incorporate the aforementioned changes into her proposed Notice, and the parties shall meet and confer and submit a joint proposed final Notice and Consent to Join form to the Court within seven (7) days of filed date of this Order.

The hearing set on October 25, 2019 shall be **vacated**.

IT IS SO ORDERED.

Dated: October 21, 2019

/s/ Gonzalo P. Curiel

Hon. Gonzalo P. Curiel

United States District Judge

End of Document

Exhibit 19

Mode v. S-L Distrib. Co., LLC

United States District Court for the Western District of North Carolina, Charlotte Division

March 14, 2019, Decided; March 15, 2019, Filed

3:18-cv-00150-RJC-DSC

Reporter
2019 U.S. Dist. LEXIS 42143 *; 2019 WL 1232855

JARED MODE, on behalf of himself and all others similarly situated, Plaintiffs, vs. S-L DISTRIBUTION COMPANY, LLC, S-L DISTRIBUTION COMPANY, INC., and S-L ROUTES, LLC, Defendants.

Prior History: *Mode v. S-L Distrib. Co., LLC, 2018 U.S. Dist. LEXIS 222559, 2018 WL 8577924 (W.D.N.C., July 20, 2018)*

Counsel: [*1] For Jared Mode, on behalf of himself and all others similarly situated, Plaintiff: J. Chadwick Hatmaker, LEAD ATTORNEY, PRO HAC VICE, John Keith Coates, Jr., Woolf, McClane, Bright, Allen & Carpenter, PLLC, Knoxville, TN; Mark Justin Gottesfeld, LEAD ATTORNEY, PRO HAC VICE, Winebrake & Santillo, LLC, Dresher, PA; Peter Winebrake, LEAD ATTORNEY, Winebrake & Santillo, LLC, Dresher, PA.

For S-L Distribution Company, LLC, S-L Distribution Company, Inc., S-L Routes, LLC, Defendants, Counter Claimants: Bridget Villacorta Warren, Robert Reed Marcus, LEAD ATTORNEYS, Bradley Arant Boult Cummings LLP, Charlotte, NC; Matthew A. Russell, LEAD ATTORNEY, PRO HAC VICE, Morgan Lewis & Bockius, Chicago, IL; Paul C. Evans, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Philadelphia, PA; Sari M. Alamuddin, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Chicago, IL.

For R.A. Distributors LLC, MBS Distribution LLC, Sturino Distributing LLC, McAlister Distributing Inc., Mason Snacks LLC, Defendants: Robert Reed Marcus, LEAD ATTORNEY, Bradley Arant Boult Cummings LLP, Charlotte, NC.

For Jared Mode, Counter Defendant: J. Chadwick Hatmaker, LEAD ATTORNEY, PRO HAC VICE, John Keith Coates, **[*2]** Jr., Woolf, McClane, Bright, Allen & Carpenter, PLLC, Knoxville, TN; Mark Justin Gottesfeld, LEAD ATTORNEY, PRO HAC VICE, Winebrake & Santillo, LLC, Dresher, PA; Peter Winebrake, LEAD ATTORNEY, Winebrake & Santillo, LLC, Dresher, PA.

For S-L Distribution Company, LLC, ThirdParty Plaintiff: Bridget Villacorta Warren, Robert Reed Marcus, LEAD ATTORNEYS, Bradley Arant Boult Cummings LLP, Charlotte, NC; Matthew A. Russell, LEAD ATTORNEY, PRO HAC VICE, Morgan Lewis & Bockius, Chicago, IL; Paul C. Evans, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Philadelphia, PA; Sari M. Alamuddin, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Chicago, IL.

For M&M Imports, Inc., ThirdParty Defendant: John Keith Coates, Jr., Woolf, McClane, Bright, Allen & Carpenter, PLLC, Knoxville, TN.

Judges: Robert J. Conrad, Jr., United States District Judge.

Opinion by: Robert J. Conrad, Jr.

Opinion

ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Conditional Certification, (Doc. No. 109), and the parties' associated briefs and exhibits, (Doc. Nos. 109-10, 136-37, 140-41).

I. BACKGROUND

This is a class/collective action lawsuit centering on Plaintiff Jared Mode's ("Plaintiff") allegation that Defendants S-L **[*3]** Distribution Company, LLC, S-L Distribution Company, Inc., and S-L Rouse, LLC (collectively, "Defendants" or "S-L") intentionally misclassified him and a putative class of Defendants' distributors as independent contractors in violation of federal wage and hour laws.

S-L collectively manufactures and distributes snack foods to retail stores in North Carolina and other states. (Doc. No. 1 ¶ 10). Plaintiff Jared Mode is a member of J&M Mode Distribution, LLC ("J&M"), a North Carolina limited liability company, and worked as an "Independent Business Operator" ("IBOs"). (Id. ¶ 12; Doc. No. 26 ¶ 2). S-L entered into similar Distributor Agreements ("Agreements") with various distribution companies of which the putative class are principals, officers, and/or employees. (See, e.g., Doc. No. 23-1: Distributor Agreement between S-L and J&M). These Agreements expressly state that the Distribution Companies are independent contractors and further provide that in the event a court finds the parties did not have an independent contractor relationship, either party would be entitled to declare the Agreements null and void. (Id. at 2; id. at Art. 2A).

Pursuant to these Agreements, S-L granted the Distribution **[*4]** Companies rights for its snack food products. Under the Agreements, the Distribution Companies would purchase the products at wholesale from S-L and then sell the products to various stores at a higher price. The Distribution Companies were responsible for ordering, selling, distributing, and merchandising S-L's products to customers in their respective geographic territories. (Id. at Arts. 3-5, 9). The Distribution Companies also agreed to be financially responsible for certain aspects of the distributorship, including the costs associated with stale products and product delivery. (Id. at Arts. 3-4, 9). The Agreements provide that the Distribution Companies control the schedule, hours, and operations of their businesses, claim tax deductions for the expenses associated with running their businesses, and are allowed to distribute other products in addition to S-L's snack foods. (Id. at Arts. 2, 4-5). The Distribution Companies also agreed to comply with all federal, state, and local laws including wage, overtime and benefit provisions for their employees. (Id. at Art. 2E). The Agreements also contain indemnification provisions. (Id. at Art. 19).

On March 22, 2018, Plaintiff Jared Mode **[*5]** filed this action alleging that he and a putative class of Defendants' distributors are actually employees and thus are entitled to various protections under the *Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq.*, and *North Carolina's Wage and Hour Act ("NCHWA"), N.C. Gen. Stat. §§ 95-25 et seq.* (Doc. No. 1). Plaintiff alleges that Defendants violated these wage and hour laws by failing to pay minimum wage and overtime pay under the FLSA and by making illegal wage deductions under the NCWHA. (Doc. No. 1 ¶¶ 27-39). In response, S-L (i.e., "Third-Party Plaintiff") filed an Answer and Counterclaim of unjust enrichment against Plaintiffs in the event that the Court determines that (1) Plaintiffs and/or their Distribution Companies were misclassified as independent contractors and (2) the Agreements are voided. (Doc. No. 25 ¶¶ 68-73). Additionally, S-L filed Third-Party Complaints stating claims for indemnification and unjust enrichment against the Distribution Companies (i.e, "Third-Party Defendants"). (Doc. Nos. 26-47, 52-56).

On March 6, 2019, the Court dismissed the

NCWHA claim and denied Plaintiffs and Third-Party Defendants' respective motions to dismiss S-L's counterclaim and Third-Party Complaint. (Doc. No. 141). Therefore, Plaintiffs **[*6]** now only have FLSA claims pending before this Court. On August 14, 2018, Plaintiffs filed a Motion for Conditional Certification under the FLSA, (Doc. No. 109). The Court has reviewed the parties' briefs and exhibits, (Doc. Nos. 109-10, 136-37, 140-41), and the matter is ripe for adjudication.

II. FLSA CONDITIONAL CERTIFICATION STANDARD

The FLSA, *29 U.S.C. § 201 et seq.*, "embodies a federal legislative scheme to protect covered employees from prohibited employer conduct." *Houston v. URS Corp., 591 F. Supp.2d 827, 831 (E.D. Va. 2008)*. The FLSA allows a plaintiff alleging a violation of the statute to bring suit on his own behalf or on behalf of other employees who are similarly situated. *29 U.S.C. § 216(b)*. *Section 216(b) of the FLSA* expressly provides for the procedure for collective actions as follows:

> An action to recover the liability prescribed [under the FLSA] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Id. Thus, there are two general requirements for **[*7]** the certification of a FLSA collective action: (1) the members of the proposed class must be "similarly situated," and (2) the class members must "opt-in" by filing their consent to suit. Id.; see also *Romero v. Mountaire Farms, Inc., 796 F. Supp.2d 700, 705 (E.D.N.C. 2011)*.

The term "similarly situated" is not defined in the FLSA and the Fourth Circuit has not provided guidance on how "similarly situated" requirement of *§ 216(b)* should be applied. *Holland v. Fulenwider Enters., No. 1:17-CV-48, 2018 U.S. Dist. LEXIS 17483, 2018 WL 700801, at *2 (W.D.N.C. Feb. 2, 2018)*. However, federal district courts in the Fourth Circuit typically follow a two-step approach when deciding whether the named plaintiffs are similarly situated to potential plaintiffs for the purposes of certifying the collective action. See, e.g., *Butler v. DirectSAT USA, LLC, 876 F. Supp. 2d 560, 566 (D. Md. 2012)*; *Romero, 796 F. Supp.2d at 705*; *Choimbol v. Fairfield Resorts, Inc., 475 F. Supp.2d 557, 562-63 (E.D. Va. 2006)*.

At the first stage, the court makes a preliminary determination whether to conditionally certify the class based upon the limited record before the court. *Romero, 796 F. Supp. 2d at 705*. "Consistent with the underlying purpose of the FLSA's collective action procedure, this initial inquiry proceeds under a 'fairly lenient standard' and requires only 'minimal evidence.'" Id. (quoting *Choimbol, 475 F. Supp. 2d at 562*); see also *Romero, 796 F. Supp. 2d at 705* ("The standard for conditional certification is fairly lenient and requires nothing more than substantial allegations that the putative class members **[*8]** were together the victims of a single decision, policy, or plan."). The primary focus in this inquiry is whether the potential plaintiffs are "similarly situated with respect to the legal and, to a lesser extent, the factual issues to be determined." De Luna—*De Jesus De Luna-Guerrero v. North Carolina Grower's Ass'n, 338 F. Supp. 2d 649, 654 (E.D.N.C.2004)* (quoting Ellen C. Kearns, The Fair Labor Standards Act, § 18.IV.D.3, at 1167 (1999)). Several courts have reasoned that "conditional certification is not really a certification. It is actually the district court's exercise of its discretionary power, upheld in Hoffmann—La Roche . . . to facilitate the sending of notice to potential class members, and it is neither necessary nor sufficient for the existence of a representative action under the FLSA." *Zavala v. Wal Mart Stores*

Inc., 691 F.3d 527, 536 (3d Cir. 2012). Once conditionally certified, the court may authorize plaintiffs' counsel to provide the putative class members with notice of the lawsuit and their right to opt-in. *Romero, 796 F. Supp. 2d at 705*.

After discovery is virtually complete, and if the defendant files a motion for decertification, the court proceeds to stage two. *Choimbol, 475 F. Supp. 2d at 563*. At this stage of the litigation, courts apply a heightened, more fact-specific standard to the "similarly situated" analysis. Id. Once plaintiffs establish the burden of proving that they are "similarly **[*9]** situated," the collective action may proceed to trial. Id. Otherwise, if the court determines that the plaintiffs are not "similarly situated," the class is decertified. Id. The original plaintiffs may then proceed on their individual claims. Id.

III. DISCUSSION

A. Conditional Certification Under *29 U.S.C. § 216(b)*

Here, Plaintiffs seek to conditionally certify the following class:

> All individuals who, during any time within the past three years, worked pursuant to a Distributor Agreement with S-L Distribution Company, Inc. or any related company other than individuals covered by: (i) the class/collective action settlement in *Tavares v. S-L Distribution Co., Inc., 1:13-cv-01313-JEJ, 2014 U.S. Dist. LEXIS 146414 (M.D. Pa.)*; (ii) the class/collective action settlement in Roxberry v. S-L Distribution Company, Inc., 1:16-cv-02009-JEJ (M.D. Pa.); or (iii) the class action settlement in Bankalter v. S-L Distribution Company, Inc., 2017-SU-000549 (Pa. Common Pleas, York County).

(Doc. No. 110 at 1). Plaintiffs allege that S-L misclassified Plaintiffs and their putative class as independent contractors to avoid paying them overtime and minimum wages under the FLSA. To support their contention that they were similarly situated, Plaintiffs have **[*10]** presented evidence that they and their putative class all (1) were intentionally classified as independent contractors by S-L rather than employees; (2) signed and worked pursuant to similar Distributor Agreements; (3) were paid under a common pay policy implemented by S-L; (4) operated under S-L's Suggested Operating Guidelines; (5) shared the same basic characteristics and job tasks; and (6) could be terminated and subject to discipline for failing to comply with S-L's rules and expectations. Plaintiffs have submitted thirty-two declarations showing that IBOs share common characteristics regarding their job duties and work relationship with S-L. (See Doc. Nos. 109-2, 109-3).

In response, S-L argues that the Court should not conditionally certify the class because it contends that, to resolve Plaintiffs' claims, the Court will have to perform individualized, fact-specific inquiries of how each distributor carried out his business, rendering this case unwieldy for class adjudication. S-L highlights factual differences, asserting that significant variability exists as to how IBOs operate. Additionally, S-L makes various arguments based on the merits of the case and the credibility of **[*11]** Plaintiffs. Although the Court notes that Defendants have made strong arguments as to why Plaintiffs were not employees entitled to FLSA protections, the Court finds that these arguments are best left to the second stage of class certification. *Rosinbaum v. Flowers Foods, Inc., 238 F. Supp. 3d 738, 746 (E.D.N.C. Mar. 1, 2017)*. In Rosinbaum v. Flowers Foods, Inc., an analogous case involving allegations by bread distributors that they had been misclassified as independent contractors by the defendant, the court noted that "although any of the foregoing issues may be relevant under Schultz[1] in determining finally

[1] In *Schultz v. Capital International Security, Inc., 466 F.3d 298, 304 (4th Cir. 2006)*, the Fourth Circuit annunciated six factors that are instructive in understanding the economic realities for a given

plaintiffs' employee status on the merits, plaintiffs have introduced sufficient contrary evidence as set forth above to warrant a threshold finding that members of the class are similarly situated employees." Id.

As in *Rosinbaum*, the Court finds that Plaintiffs have presented sufficient evidence to overcome the "fairly lenient standard"—that requires only "minimal evidence"—establishing that Plaintiffs were similarly situated under *29 U.S.C. § 216(b)*. *Long v. CPI Security Systems, Inc., 292 F.R.D. 296, 298 (W.D.N.C. 2013)* (quoting *Choimbol, 475 F. Supp. 2d at 562*). Having considered the Motion for Conditional Class Certification under *§ 216(b)*, the Court **GRANTS** Plaintiff's Motion for Conditional Certification.

B. Appropriate Recipients of Court-Approved Notice

S-L argues that, if the Court finds that some contingent of the putative collective should receive **[*12]** court-approved notice, it should exclude those who have already waived participation in this or any collective action. Some distributors in the proposed class signed Distributor Agreements containing provisions that waived the distributors' right to bring a collective action; instead, these distributors agreed to arbitrate their claims with S-L on an individual basis.[2] Thus, S-L asks this Court to exclude court-facilitated notice to those who have already signed arbitration agreements in their Distributor Agreements. But, S-L's argument ignores what it asks this Court to do in its Counterclaim and Third-Party Complaints against Plaintiffs and their entities:

> The Court should find that some or all of the Counterclaim-Defendants (or their entities) have been properly classified as independent contractors and not employees of Counterclaim-Plaintiffs. In the alternative, if the Court concludes that some or all of the Counterclaim-Defendants (or their entities) should have been classified as employees of Counterclaim-Plaintiffs, *it should then conclude that the Counterclaim-Defendants' Distributor Agreements are void and/or that Counterclaim-Defendants are and were not governed by the terms* ***[*13]*** *of the Distributor Agreement*.

(Doc. No. 25 ¶ 72 (emphasis added); see e.g., Doc. No. 26 ¶ 32). It makes little sense to ask the Court to uphold the validity and applicability of some of the Distributor Agreements' arbitration provisions while simultaneously asking the Court to void the Distributor Agreements and/or determine that Plaintiffs were not governed by the Distributor Agreements' provisions in another instance. Because the Court could find at a later stage that the Distributor Agreements between Plaintiffs and S-L were null and void, it is premature—and would be prejudicial—to preclude potential plaintiffs from participating in this lawsuit solely based on arbitration provisions in their Distributor Agreements when those very provisions might ultimately be declared void. Therefore, the Court declines to preclude those distributors who have arbitration agreements in their Distributor Agreements from receiving notice under *§ 216(b)*.[3]

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relationship between a worker and a business: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. "No single factor is dispositive[.]" *Schultz, 466 F.3d at 304*.

[2] See, e.g., Doc. No. 25-3: Siempre Avanti LLC Agmt. Art. 24, at 23-29; Doc. No. 25-6: Auch Distributions, Inc. Agmt. Art. 24, at 23-29; Doc. No. 25-13: BK3 Distributors, LLC Agmt., Art. 24, at 23-29.

[3] This decision is consistent with the recent precedential ruling the Fifth Circuit issued that addressed whether a district court should order notice at the conditional certification stage to employees who have already entered into valid arbitration agreements. *In re: JPMorgan Chase & Co., No. 18-20825, 916 F.3d 494, 2019 U.S. App. LEXIS 5155 (5th Cir. Feb. 21, 2019)* (Attached to Defs.' Notice of Supplemental Authority in Opp'n to Pls.' Mot. for Conditional Certification: Doc. No. 140-1). There, the Fifth Circuit held that

IV. CONCLUSION

S-L's concerns regarding the certification of Plaintiffs' purported class are better addressed in the later stages of this litigation under a more fact-intensive inquiry. For now, Plaintiffs **[*14]** have met the lenient standard of providing minimal evidence to show that potential Plaintiffs are similarly situated.

IT IS THEREFORE ORDERED that:

1. Plaintiffs' Motion for Conditional Certification, (Doc. No. 109), is **GRANTED**. Specifically, the Court conditionally certifies the following FLSA collective:

> All individuals who, during any time within the past three years, worked pursuant to a Distributor Agreement with S-L Distribution Company, Inc. or any related company other than individuals covered by: (i) the class/collective action settlement in *Tavares v. S-L Distribution Co., Inc., 1:13-cv-01313-JEJ, 2014 U.S. Dist. LEXIS 146414 (M.D. Pa.)*; (ii) the class/collective action settlement in Roxberry v. S-L Distribution Company, Inc., 1:16-cv-02009-JEJ (M.D. Pa.); or (iii) the class action settlement in Bankalter v. S-L Distribution Company, Inc., 2017-SU-000549 (Pa. Common Pleas, York County).

2. S-L shall provide Plaintiffs' counsel the last known names, mailing addresses, and email addresses of all putative collective members; and
3. The Parties shall promptly agree upon appropriate notice and opt-in forms for submission to the Court for approval.

Signed: March 14, 2019

/s/ Robert J. Conrad, Jr.

Robert J. Conrad, **[*15]** Jr.

United States District Judge

End of Document

"[w]here a preponderance of the evidence shows that the employee has entered into a valid arbitration agreement, it is error for a district court to order notice to be sent to that employee as part of any sort of certification." Id.; (Doc. No. 140-1 at 12). Whereas here, when the Court has yet to determine whether Plaintiffs are employees or whether the Distributor Agreements will be upheld, it would be improper to preclude sending notice to those potential plaintiffs whose Distributor Agreements contained arbitration provisions. Additionally, the Court notes that, in In Re JP Morgan, the putative plaintiffs have already been classified as the defendant's employees from the instigation of that suit. Therefore, the crucial issue which the instant suit turns on—whether S-L intentionally misclassified Plaintiffs as independent contractors to circumvent FLSA requirements—is nonexistent in *In re: JP Morgan Chase & Co.*

Exhibit 20

Friscia v. Panera Bread Co.

United States District Court for the District of New Jersey

June 26, 2018, Filed

Civil Action No. 16-3754 (ES) (SCM)

Reporter
2018 U.S. Dist. LEXIS 106446 *; 2018 WL 3122330

JACQUELINE FRISCIA, and all other persons similarly situated, Plaintiff, v. PANERA BREAD COMPANY, and PANERA, LLC, Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *Friscia v. Panera Bread Co., 2017 U.S. Dist. LEXIS 226101 (D.N.J., Sept. 1, 2017)*

Counsel: **[*1]** For JACQUELINE FRISCIA, And all other persons similarly situated, Plaintiff: ANDREW I. GLENN, LEAD ATTORNEY, JODI J. JAFFE, JAFFE GLENN LAW GROUP PA, PRINCETON, NJ; KARA SUE MILLER, LEAD ATTORNEY, MICHELE A. MORENO, VIRGINIA & AMBINDER LLP, NEW YORK, NY; LLOYD R. AMBINDER, VIRGINIA & AMBINDER, LLP, NEW YORK, NY.

For PANERA BREAD COMPANY, PANERA, LLC, Defendants: HOWARD MARK WEXLER, LEAD ATTORNEY, SEYFARTH SHAW LLP, NEW YORK, NY.

Judges: Esther Salas, United States District Judge.

Opinion by: Esther Salas

Opinion

SALAS, DISTRICT JUDGE

Plaintiff Jacqueline Friscia brings this putative collective and class action against Defendants Panera Bread Company and Panera, LLC (together, "Panera") under the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.* and the *New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. 34:11-56a, et seq.* Friscia, a former Panera assistant manager, alleges that Panera misclassified her and other assistant store managers as "exempt" under the FLSA and therefore failed to pay them overtime wages.

Pending before the Court are (i) Friscia's motion for conditional certification of a proposed collective action under *Section 216(b) of the FLSA* (D.E. No. 38); and (ii) Panera's motion to strike Friscia's motion and supporting declarations (D.E. No. 55). The Court has subject-matter **[*2]** jurisdiction over Friscia's FLSA claims under *28 U.S.C. § 1331* and Friscia's NJWHL claims under *28 U.S.C. § 1367*. The Court has considered the parties' submissions regarding the pending motions and decides these matters without oral argument. *See Fed. R. Civ. P. 78(b)*. For the following reasons, the Court GRANTS-in-part and DENIES-in-part Friscia's motion for conditional certification and DENIES *without prejudice* Panera's motion to strike.

I. Background

Friscia worked as a full-time assistant manager at Panera's Woodbridge, New Jersey location from August 2012 to January 2015. (D.E. No. 36, Second Amended Collective and Class Action Complaint ¶ 11). She alleges that her "primary job duty was to perform manual, non-managerial tasks which included making coffee, taking food orders, making sandwiches, cleaning the store, working the cash register, and washing dishes." (*Id.* ¶ 34).

According to Friscia, her "primary job duty was not managing the enterprise, or managing a customarily recognized department or subdivision of the restaurant." (*Id.* ¶ 33). She seeks conditional certification of the following proposed collective:

> Plaintiff and all other individuals who currently or formerly worked for Panera Bread Company and/or Panera, LLC as assistant **[*3]** managers in New Jersey, New York, or Massachusetts from February 1, 2014 to the present and did not receive overtime compensation for hours worked over 40 in a work week.

(D.E. No. 39 at 2).

II. Legal Standard

"The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract." *Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 69, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)*. In *Section 216(b), the FLSA* grants employees the right to bring suit on behalf of "themselves and other employees similarly situated." *29 U.S.C. § 216(b)*; *see Symczyk, 569 U.S. at 69*. Such an FLSA suit—not to be confused with a class action under *Federal Rule of Civil Procedure 23*—is known as a "collective action." *See Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169-70, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. "A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Id. at 170*. To become parties to an FLSA collective action, employees "must affirmatively opt-in by filing written consents with the court." *Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 242-43 (3d Cir. 2013)* (citing *29 U.S.C. § 216(b)*). "This feature distinguishes the collective-action mechanism under *Section 216(b)* from the class-action mechanism under *Rule 23*, where, once the class is certified, those not wishing to be included in the class must affirmatively opt-out." *Id. at 243*.

Courts approach collective-action certification under the FLSA through a two-step process. *Id.* The first step is deciding whether to grant "conditional **[*4]** certification"—the type of certification at issue here. *Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 192 (3d Cir. 2011)*, *rev'd on other grounds*, *569 U.S. 66, 133 S. Ct. 1523, 185 L. Ed. 2d 636*. Applying a "fairly lenient standard," courts make a preliminary determination on whether the named plaintiff has made a "modest factual showing" that the employees identified in their complaint are "similarly situated." *Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 536 & n.4 (3d Cir. 2012)*. "Being similarly situated" means that members of a collective action are "subjected to some common employer practice that, if proved, would help demonstrate a violation of the FLSA." *Id. at 538*. "Under the modest factual showing standard, a plaintiff must produce some evidence, beyond pure speculation, of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Symczyk, 656 F.3d at 193* (internal quotation marks and citations omitted).

A court's grant of conditional certification is an exercise of its "discretionary power, upheld in *Hoffmann-La Roche*, to facilitate the sending of notice to potential class members, and is neither necessary nor sufficient for the existence of a representative action under FLSA." *Id. at 194* (internal quotation marks and citations omitted). Upon a court's preliminary determination that the plaintiff has successfully **[*5]** produced some evidence of similarly situated employees, notice of the suit is sent to this class of employees, who may join the action by returning a signed consent form to the court. *Camesi, 729 F.3d at 242-43* (citing *29 U.S.C. § 216(b)*).

The second step is deciding whether to grant final certification. *Symczyk, 656 F.3d at 192*. During this step, the plaintiffs must satisfy a preponderance-of-the-evidence standard. *Zavala, 691 F.3d at 537*. That is, they will have to show it is "more likely than not" that "plaintiffs who have opted in are in

fact similarly situated to the named plaintiff[]." *Id.* (internal quotation marks and citations omitted).

III. Discussion

A. Friscia's Motion for Conditional Certification under *§ 216(b) of the FLSA*

1. Friscia's Evidence

Friscia supports her motion with two declarations—one from her and one from Diana Manrique, a former Panera assistant manager, general manager, and training manager. (D.E. Nos. 40-1 ("Friscia Decl.") & 40-2 ("Manrique Decl.")). Friscia testifies that she "routinely worked five (5) days a week" and "was scheduled to work forty-five (45) hours per week, but actually worked approximately fifty-five (55) to sixty (60) hours per week." (Friscia Decl. ¶¶ 11-12). She says she "was paid $800 per week, and [] sometimes received a minimal quarterly bonus," **[*6]** but was not paid overtime compensation. (*Id.* ¶¶ 10, 8). She also says she "was directed by management, several times a week, to stay before [her] shift and/or work after [her] shift to take over the duties of other workers so the company could avoid paying the other employees their wages and overtime pay." (*Id.* ¶ 9). According to Friscia, "Assistant managers like [her] did not hire or fire other employees. It was company policy that only store managers at each location could hire and fire employees." (*Id.* ¶ 5). She adds, "All training manuals, policies and procedures came from corporate and were required to be followed by me and all other assistant managers at Panera locations nationwide." (*Id.* ¶ 15).

Friscia "attended training sessions in several of Panera's restaurant locations throughout New Jersey with employees who worked at many different Panera restaurant locations." (*Id.* ¶ 14). Friscia states that the "other assistant managers present at these training sessions" came "from the Edison, North Brunswick, East Brunswick, Manalapan, and Old Bridge stores, as well as other stores . . . ." (*Id.* ¶ 16). Friscia attests that these other assistant managers "discussed their day to day duties, **[*7]** which were the same as [hers]." (*Id.*). Friscia recounts that "[t]hese meetings were run by managers that instructed [her] and all other assistant managers present on our day to day tasks and duties, and on Panera's corporate time and pay policies . . . ." (*Id.* ¶ 14). She explains that "[i]t did not matter what restaurant location [they] worked at—[they] were all told the same thing and expected to follow the same training, rules and procedures." (*Id.*). Friscia also says that, "[w]hile at these other locations, [she] personally observed assistant managers performing the same manual tasks that assistant managers performed at the Woodbridge location where [she] worked." (*Id.* ¶ 16).

Friscia's supporting witness, Diana Manrique, worked at Panera's Woodbridge, New Jersey location from approximately 2005 to 2014. (Manrique Decl. ¶ 2). Manrique testifies that she "was hired as an assistant manager and spent approximately 4 months in that position," after which she was "promoted to a general manager." (*Id.*). Manrique "also worked as a training manager, where [she] trained general managers who worked at corporate Panera locations throughout New Jersey, New York, and Massachusetts." (*Id.*). To **[*8]** become a training manager, Manrique "was required to be trained in all restaurant positions, including the assistant manager position." (*Id.* ¶ 3). She therefore "received training about the [assistant manager] position, and trained others about the job duties of the assistant manager and their role at the restaurant." (*Id.*).

Manrique testifies that the "assistant manager primarily performed the same job duties as associates. Assistant managers and associates spent their work day making coffee, sandwiches and other food, cleaning[,] and taking orders from customers as a cashier." (*Id.* ¶ 9). She explains that "[a]ssistant managers were placed on the schedule

with the same shifts and job duties as Associates, such as morning shift — cashier, afternoon shift — sandwiches, etc." (*Id.*). Manrique also describes Panera's "Deployment Charts," which "mapped out every employee in a specific position." (*Id.*). "If you weren't the manager in charge ("MIC") of the shift then you were placed in a position, [e.g.,] cashier, expeditor, barista, etc." (*Id.*).

According to Manrique, the "assistant manager spent approximately 5-10 hours a week on additional tasks helping the general manager, such as helping **[*9]** with the schedule, training if needed, cash management, and help with inventory and placing food orders." (*Id.* ¶ 10). She explains that "[a]ssistant managers were not required to clock in and out and there was no system keeping track of their time spent working." (*Id.* ¶ 12). She also states that "[a]ssistant managers would routinely work at least 45 hours a week, but their paychecks would list 40 hours on it as a default because their time was not tracked." (*Id.*).

In her role as general manager, Manrique "attended monthly meetings at other corporate Panera locations." (*Id.* ¶ 4). She recalls going to Panera locations "in Princeton, Edison, Old Bridge, and Manalapan, New Jersey," among others. (*See id.*). She states that "[f]rom 2004-2014, [she] probably went to these locations a total of 36 to 40 times." (*Id.*). And she says that "[w]hile at these other locations, [she] personally observed assistant managers performing the same tasks that assistant managers performed at the Woodbridge location where [she] worked." (*Id.*).

Manrique testifies that "[a]ll training manuals, policies and procedures came from corporate and were required to be followed by [her] and all other managers at Panera **[*10]** locations nationwide." (*Id.* ¶ 5). According to Manrique, "[t]hese policies and procedures are sent down from corporate, to district managers, and then to general managers at each store location." (*Id.*).

Finally, Manrique attests that "[a]ll assistant managers, regardless of the Panera location where they worked, would have spent the vast majority of their time as a cashier, making sandwiches, or performing the other types of tasks performed by associates." (*Id.* ¶ 13). She adds, "[t]his is how [she] was trained, how [she] trained [her] associates, how [she] trained other general managers, and what [she] personally observed at all the Panera locations [she] visited." (*Id.*).

2. Panera's Opposition

Panera mounts a robust opposition to Friscia's motion. To start, Panera argues that Friscia "falls woefully short of the requisite factual showing that she and the former salaried Assistant Managers she seeks to represent are sufficiently similarly situated to warrant converting this from a single-plaintiff case into a case involving hundreds of plaintiffs." (D.E. No. 45 at 2). Panera emphasizes that Friscia worked in only one Panera location and for only a fraction of the relevant timeframe. (**[*11]** *See id.* at 4). Panera challenges Friscia's declaration as "self-serving," "riddled with inadmissible hearsay," and "devoid of basic detailed facts." (*Id.* at 2). And Panera contends that Friscia "establishes nothing about the day-to-day duties of the limited group of Assistant Managers she may have attended [training sessions] with, much less the hundreds more she purports to represent." (*Id.* at 5).

Panera also challenges Friscia's reliance on Manrique. Panera points out that Manrique is Friscia's aunt, who "was terminated after allowing an associate to work 'off the clock,' in violation of Panera policy and the very laws Plaintiff places at issue." (*Id.* at 16). Panera says Manrique's "biased testimony does little to help Plaintiff's case." (*Id.*). Generally, Panera characterizes Manrique's declaration as "(i) inaccurate, (ii) inconsistent with lessons others took from her, and (iii) irrelevant to the actual day-to-day duties Assistant Managers performed across the three-state area during 2014, 2015, and 2016." (*Id.* at 2).

Panera says it has "developed overwhelming evidence confirming that the putative collective

cannot be bound together in ways that matter for the conditional certification inquiry." (*Id.* at 3). To that end, Panera submits **[*12]** fourteen declarations from various Panera employees, managers, executives, and partners. (*See* D.E. Nos. 45-2 through 45-15). Panera uses this testimony, for example, to distinguish the various cafes within the proposed collective, arguing that they differ in their *location* ("An Assistant Manager who managed a cafe with a large dining room had a different operation to manage than another who manages a food court cafe with no dining room at all." (D.E. No. 45 at 10)); *services* ("Some cafes feature 'kiosk order,' 'rapid pickup,' drive-thru service, delivery, a mix of these services, or none at all." (*id.*)); *hourly staff makeup* ("Even within the same market, associates per cafe could range from as few as 25 or 30, to as many as 90." (*id.* at 11)); *business volume* ("Even within a single market, cafes differed by tens of thousands of dollars in weekly revenue, from $25,000 per week to $90,000 or more." (*id.*)); and *variations in GM style* ("Some GMs are regularly involved in the day-to-day running of the cafe, while others take a more 'hands off' approach." (*id.* at 12)). Panera also argues that about half the proposed collective is covered by an arbitration agreement (which Panera implemented in June 2016), **[*13]** further distinguishing at least those potential plaintiffs from Friscia. (*See id.* at 2, 22, 33).

Finally, Panera argues that if the Court conditionally certifies the proposed collective, the parties should "work together to draft a notice and opt-in form." (*Id.* at 33). Panera complains that Friscia's proposed documents are "misleading and confusing." (*Id.*). Among other things, Panera points out that "the notice contains the case caption, which implies the case is endorsed by the Court." (*Id.* at 33-34) (citing *Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982)*). Panera details its objections to Friscia's proposed documents in its Notice of Objections. (*See* D.E. No. 45-1).

B. Panera's Motion to Strike Friscia's Motion and Supporting Declarations

Four months after the parties briefed Friscia's motion to conditionally certify the proposed collective, Panera moved to strike Friscia's motion and supporting declarations. (D.E. No. 55). Panera's motion stems from its depositions of Friscia and Manrique, which, according to Panera, establish that "the declarations are, in fact, a sham." (D.E. No. 55-5 at 2). Panera argues that Friscia's and Manrique's deposition "testimony confirms that critical portions of their earlier declarations, which [Friscia] solely relied on in support of **[*14]** her Motion for Notice, are untrue and/or based on guesswork, not personal knowledge." (*Id.*). Panera identifies five general areas where Friscia's or Manrique's declarations purportedly proffer inconsistent, inaccurate, or purely speculative testimony: (i) common corporate training manuals, policies, and procedures; (ii) assistant managers' authority to hire or fire other employees; (iii) day-to-day job duties of assistant managers; (iv) amount of time devoted to managerial duties; and (v) Friscia's discussions with and observations of other assistant managers. (*See id.* at 5-10).

In opposition, Friscia lodges two threshold arguments before attacking the merits of Panera's motion. *First*, Friscia argues that Panera's motion "should be denied as an impermissible sur-reply, and nothing more than a transparent attempt to take a second bite at the apple with respect to Plaintiff's Conditional Certification Motion." (D.E. No. 59 at 3). *Second*, Friscia argues that Panera erroneously invokes the sham affidavit doctrine, which is limited to the summary-judgment context. (*See id.* at 7). As another court in this District explained: "[T]he sham affidavit doctrine states that 'a party may not create a material issue **[*15]** of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict.'" *In re Front Loading Washing Mach. Class Action Litig., No. 08-0051, 2013 U.S. Dist. LEXIS 96070, 2013 WL 3466821, at *9 (D.N.J.*

July 10, 2013) (quoting *Baer v. Chase, 392 F.3d 609, 624 (3d Cir. 2004)*).

Turning to the merits of Panera's motion, Friscia argues that even if the sham affidavit doctrine does apply, "the challenged declarations would not constitute a 'sham.'" (D.E. No. 59 at 11). She contends that neither she nor Manrique lack personal knowledge of their declarations, and that neither declaration is so outlandish as to be facially false. (*See id.* at 11-22). She also argues that "independent evidence in the record—namely, the testimony of [Panera's] own witnesses—corroborates the declarations that [Panera] now challenge[s]." (*Id.* at 23). Finally, Friscia argues that Panera's motion is inappropriate at the first stage of conditional certification, where the Court does not weigh the claims' merits or assess witness credibility. (*See id.* at 28). Friscia notes that Panera "will ultimately have opportunities to challenge credibility and merits issues *after* discovery—at the second stage of collective certification, upon a motion for decertification, or upon summary judgment motion." (*Id.* at 32).

Panera counters that its motion to strike "is plainly **[*16]** a permissible motion to strike brought in good faith based on the falsities and mischaracterizations revealed in Plaintiff's and Manrique's declarations by their own sworn deposition testimony." (D.E. No. 61 at 2). Panera also argues that its motion "is not premised on the 'sham affidavit doctrine" itself, but rather on "the seemingly basic notion that a party should not benefit from baseless and self-contradicted sworn testimony." (*Id.* at 4). And Panera seizes on Friscia's arguments about independent corroborating evidence and suggests that, if the Court considers the "newly proffered 'evidence' and arguments," it should apply a heightened standard to Friscia's motion. (*Id.* at 1-2) (citing *Sloane v. Gulf Interstate Field Servs., Inc., 2017 U.S. Dist. LEXIS 43088, 2017 WL 1105236, at *6 (M.D. Pa. 2017)* ("[D]istrict courts in this circuit have applied an intermediate standard . . . if the parties have already engaged in discovery.")).

C. Panera's Motion to Strike is Denied

The Court declines at this time to strike Friscia's motion for conditional certification or the supporting declarations. In the Court's view, Panera's arguments are better suited for the second stage of the certification process. *See, e.g., Meals v. Keane Frac GP LLC, No. 16-1674, 2017 U.S. Dist. LEXIS 86149, 2017 WL 2445199, at *4 (W.D. Pa. June 6, 2017)* (denying without prejudice defendants' motion to strike plaintiffs' brief and affidavits in FLSA stage-one **[*17]** context and rejecting defendants' "requests that [the court] make credibility determinations" because defendants "will have another opportunity to object to class certification following further discovery"); *Viscomi v. Diner, No. 13-4720, 2016 U.S. Dist. LEXIS 43375, 2016 WL 1255713, at *5 (E.D. Pa. Mar. 31, 2016)* ("To the extent that defendants invite the Court to evaluate the credibility of the affiants or the merits of their claims, it is more properly considered at the second stage of the certification inquiry or on a motion for summary judgment.") (citation, internal quotation marks, and alterations omitted); *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig., No. 09-0210, 2010 U.S. Dist. LEXIS 82961, 2010 WL 3447783, at *21 (W.D. Pa. Aug. 13, 2010)* ("At the initial assessment stage, before discovery is completed, the court does not resolve factual disputes, decide substantive issues going to the ultimate merits or make credibility determinations.") (citation and internal quotation marks omitted).

To be sure, Panera cites only a handful of cases in the FLSA stage-one context, and not one involves a separate—let alone successful—motion to strike. (*See* D.E. No. 55-5 at 13-14).[1] Instead, Panera

[1] (Citing *Postiglione v. Crossmark, Inc., No. 11-0960, 2012 U.S. Dist. LEXIS 163615, 2012 WL 5829793, at *6 (E.D. Pa. Nov. 15, 2012)*; *Valcho v. Dallas Cty. Hosp. Dist., 574 F. Supp. 2d 618, 623 (N.D. Tex. 2008)*; *Trinh v. JP Morgan Chase & Co., No. 07-1666, 2008 U.S. Dist. LEXIS 33016, 2008 WL 1860161, at *4 (S.D. Cal. Apr. 22, 2008)*; *Prizmic v. Armour, Inc., No. 05-2503, 2006 U.S. Dist. LEXIS 42627, 2006 WL 1662614, at *3 (E.D.N.Y. June 12,*

relies on cases where the court denied motions for conditional certification because the plaintiffs failed to make the "modest factual showing" that the proposed plaintiffs were similarly situated. (*See id.*). And in support of Panera's **[*18]** claim that "this Court has routinely disregarded declarations offering assertions not based upon personal knowledge" (*id.* at 14), Panera cites cases outside the FLSA context (*see id.* at 14-15).[2]

Accordingly, the Court denies *without prejudice* Panera's motion to strike Friscia's motion for conditional certification and supporting declarations. Panera may raise these arguments at stage two of the certification process. *See Bowe v. Enviropro Basement Sys., No. 12-2099, 2013 U.S. Dist. LEXIS 170796, 2013 WL 6280873, at *4 (D.N.J. Dec. 4, 2013)* ("Importantly, it is possible for a class to be certified at stage one but fail certification at stage two. Granting a conditional certification in stage one is not a final or permanent decision.") (citation, internal quotation marks, and alteration omitted).

D. Friscia's Motion for Conditional Certification is Granted-in-Part and Denied-in-Part

The Court will grant-in-part and deny-in-part Friscia's motion to conditionally certify the proposed collective. Specifically, the Court finds that Friscia has made a "modest factual showing" of a factual nexus between the manner in which Panera's alleged unlawful policy affected her and the manner in which it affected other assistant managers at Panera locations in New Jersey—but not New York or Massachusetts—during the proposed time **[*19]** period. The Court will therefore conditionally certify the following collective:

> Plaintiff and all other individuals who currently or formerly worked for Panera Bread Company and/or Panera, LLC as assistant managers in New Jersey from February 1, 2014 to the present and did not receive overtime compensation for hours worked over 40 in a work week.

Friscia testified that when she was an assistant manager at Panera's Woodbridge, New Jersey location, she primarily performed manual, non-managerial tasks. (Friscia Decl. ¶¶ 3, 19). She also testified that she attended training sessions "throughout New Jersey," where Panera managers instructed her and "all other assistant managers present" on their day-to-day job duties. (*Id.* ¶ 14). Further, she personally observed assistant managers at other New Jersey Panera locations "performing the same manual tasks that assistant managers performed at the Woodbridge location . . . ." (*Id.* ¶ 16).

Manrique, a former Panera training manager, testified that she attended monthly meetings at various Panera locations—including Princeton, Edison, Old Bridge, and Manalapan, New Jersey—where she "personally observed assistant managers performing the same tasks that **[*20]** assistant managers performed at the Woodbridge location . . . ." (Manrique Decl. ¶ 4). Like Friscia, Manrique explained that these tasks included "making coffee, sandwiches and other food, cleaning[,] and taking orders from customers as a cashier." (*Id.* ¶ 9); (*see also* Friscia Decl. ¶¶ 3, 19).

As for working overtime, Friscia testified that she worked approximately fifty-five to sixty hours per week and was not required to clock in and out for any part of the workday. (Friscia Decl. ¶¶ 12-13).

2006)).

[2] (Citing *Supernus Pharm., Inc. v. Actavis, Inc., No. 13-4740, 2014 U.S. Dist. LEXIS 162054, 2014 WL 6474039 (D.N.J. Nov. 18, 2014)* (denying motion to seal); *Younes v. 7-Eleven, Inc., No. 13-3500, 2014 U.S. Dist. LEXIS 67143, 2014 WL 1959246 (D.N.J. May 15, 2014)* (denying motion to seal); *Brennan v. Elizabeth Bd. of Educ., No. 07-0329, 2008 U.S. Dist. LEXIS 21609, 2008 WL 756117 (D.N.J. Mar. 19, 2008)* (denying motion to disqualify attorneys); *Dewey v. Volkswagen AG, 558 F. Supp. 2d 505, 510 (D.N.J. 2008)* (granting-in-part and denying-in-part *Rule 12(b)(6)* motion to dismiss); *Contr. Drilling, Inc., 63 F. Supp. 2d 509 (D.N.J. 1999)* (granting motion to strike, in non-FLSA context, portions of a declaration that were "supported only by the complaint" in a separate action)).

Friscia also testified that, during the training sessions in New Jersey, Panera managers discussed "Panera's corporate time and pay policies . . . ." (*Id.* ¶ 14). Similarly, Manrique testified that assistant managers "would routinely work at least 45 hours a week" and "were not required to clock in and out," as "there was no system keeping track of their time spent working." (Manrique Decl. ¶ 12).

This evidence is sufficient to satisfy Friscia's lenient burden to conditionally certify a collective.[3] *See, e.g.*, *Essex v. Children's Place, Inc., No. 15-5621, 2016 U.S. Dist. LEXIS 108853, 2016 WL 4435675, at *5 (D.N.J. Aug. 16, 2016)* (conditionally certifying a collective of assistant managers); *Goodman v. Burlington Coat Factory, No. 11-4395, 2012 U.S. Dist. LEXIS 166910, 2012 WL 5944000, at *5-6 (D.N.J. Nov. 20, 2012)* (same); *Stillman v. Staples, Inc., No. 07-0849, 2008 U.S. Dist. LEXIS 32853, 2008 WL 1843998, at *4 (D.N.J. Apr. 22, 2008)* (same).[4] The Court reiterates that at this stage, Friscia needs to show only that "similarly situated plaintiffs do **[*21]** in fact exist." *See Zavala, 691 F.3d at 536 n.4* (citation omitted). And Friscia is "not required to show that [her] position[] is identical to the position of other potential class members." *Essex, 2016 U.S. Dist. LEXIS 108853, 2016 WL 4435675, at *5*. Moreover, the Court's role at this stage is not to evaluate the merits of Friscia's claim that Panera misclassified assistant managers as "exempt." *See Goodman, 2012 U.S. Dist. LEXIS 166910, 2012 WL 5944000, at *5*. After notice in this case issues, at the second stage, the Court will address "whether the plaintiffs who have opted in are in fact similarly situated to" Friscia. *See Zavala, 691 F.3d at 536 n.4* (citation omitted).

As noted above, the Court will limit the collective to assistant managers who worked in Panera locations *in New Jersey* during the proposed time period. *See, e.g.*, *Robels v. Vornado Realty Tr., No. 15-1406, 2015 U.S. Dist. LEXIS 111038, 2015 WL 5012597, at *4 (D.N.J. Aug. 21, 2015)* (conditionally certifying only certain subclasses of the proposed collective). Put simply, Friscia has not produced sufficient evidence to show that she is similarly situated to assistant managers in New York or Massachusetts. Nowhere in Friscia's declaration does she specifically reference New York or Massachusetts. And Manrique references New York and Massachusetts only once: "I also worked as a training manager, where I trained general managers who worked at corporate Panera locations throughout New Jersey, New York, **[*22]** and Massachusetts." (Manrique Decl. ¶ 2). Indeed, all of Friscia's and Manrique's specific personal observations occurred in New Jersey. (*See, e.g.*, Friscia Decl. ¶¶ 14, 16; Manrique Decl. ¶ 4).

Panera's arguments in opposition are largely unavailing for purposes of the notice stage. To start, the Court declines to consider the fourteen declarations Panera submitted to show individual differences among the assistant managers' actual duties. As another court in this District explained, "this inquiry necessarily addresses the merits of Plaintiff['s] claim and is therefore premature." *Goodman, 2012 U.S. Dist. LEXIS 166910, 2012 WL 5944000, at *6* (declining to consider thirty-eight declarations submitted in opposition to a motion for conditional certification); *see also Kis, 2018 U.S. Dist. LEXIS 82557, 2018 WL 2227782, at *2* ("[T]he fact that Defendant Covelli has produced evidence that contradicts the Plaintiffs' declarations is irrelevant. That evidence speaks to the credibility of Plaintiffs' evidence, which is not relevant at the conditional certification stage.").

Panera argues that Friscia's failure to identify—"much less present testimony from"—any other

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[3] The Court notes Panera's arguments regarding inadmissible hearsay in Friscia's declaration. (*See* D.E. No. 45 at 25) (referencing Friscia Decl. ¶¶ 16, 18). The Court need not reach these arguments because it finds that, even if it disregards these statements in Friscia's declaration, Friscia has still satisfied her burden for conditional certification.

[4] Another district court recently conditionally certified a nationwide collective comprising assistant managers who worked in certain Panera franchises. *Kis v. Covelli Enters., Inc., No. 18-0054, 2018 U.S. Dist. LEXIS 82557, 2018 WL 2227782 (N.D. Ohio May 16, 2018)*.

potential plaintiffs underscores the inappropriateness of the collective action. (*See* D.E. No. 45 at 2). The Court finds this argument unpersuasive. **[*23]** For one, Friscia is not required to produce additional plaintiffs at the notice stage. *See, e.g.*, *Essex, 2016 U.S. Dist. LEXIS 108853, 2016 WL 4435676, at *6* (noting that "courts have certified national classes based on allegations and deposition testimony from a single plaintiff") (citing *Ferreira v. Modell's Sporting Goods, Inc., No. 11-2395, 2012 U.S. Dist. LEXIS 100820, 2012 WL 2952922, at *3 (S.D.N.Y. July 16, 2012)*). And Panera's authority in support of this proposition is inapposite. (*See* D.E. No. 45 at 2) (citing *Tahir v. Avis Budget Grp., Inc., 2011 U.S. Dist. LEXIS 37279, 2011 WL 1327861, at *4 n.1 (D.N.J. Apr. 6, 2011)*). In *Tahir*, the plaintiff moved for conditional certification after fact discovery closed, so the court adopted a heightened standard in analyzing his motion. *See 2011 U.S. Dist. LEXIS 37279, 2011 WL 1327861, at *2*. Here, Friscia moved before the close of fact discovery, and the Court is applying the traditional stage-one standard.

Panera also argues that approximately half the proposed collective is covered by binding arbitration agreements, further distinguishing at least those potential plaintiffs from Friscia. (*See* D.E. No. 45 at 2, 22, 33). This argument is inappropriate at the notice stage, however, because it goes to Panera's merits defenses. *See, e.g.*, *Romero v. La Revise Assocs., L.L.C., 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013)* ("[C]ourts have consistently held that the existence of arbitration agreements is 'irrelevant' to collective action approval 'because it raises a merits-based determination.'") (quoting *D'Antuono v. C & G of Groton, Inc., No. 11-0033, 2011 U.S. Dist. LEXIS 135402, 2011 WL 5878045, at *4 (D. Conn. Nov. 23, 2011)* (collecting cases)).

In sum, the Court finds that Friscia has **[*24]** satisfied her lenient burden to make a "modest factual showing" of a factual nexus between the manner in which Panera's alleged unlawful policy affected her and the manner in which it affected other assistant managers at Panera locations in New Jersey during the proposed time period.

E. Friscia's Proposed Form of Notice

Friscia submitted a proposed Notice of Lawsuit and Consent to Join Lawsuit forms to notify potential collective-action members of this case. (D.E. Nos. 40-3 & 40-4). As noted above, Panera objects to Friscia's proposed forms. (D.E. No. 45-1). "The Supreme Court has instructed, 'in exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.'" *Herring v. Hewit Assocs., Inc., No. 06-0267, 2007 U.S. Dist. LEXIS 53278, 2007 WL 2121693, at *9 (D.N.J. July 24, 2007)* (quoting *Hoffman-LaRoche, 493 U.S. at 174*).

The Court instructs the parties to meet and confer about Friscia's proposed forms and then submit agreed-upon proposed forms—along with details regarding the method and timing of notification—to the Hon. Steven C. Mannion, U.S.M.J., within fifteen days of the date of this Court's accompanying Order. *See id.* This process will **[*25]** ensure that timely notice is provided to the potential collective-action members. *See id.* If the parties are unable to agree on proposed forms, each party shall submit to Magistrate Judge Mannion, within twenty days of the date of the accompanying Order, its own proposed forms—along with a letter brief (not to exceed three single-spaced pages) in support of its proposed forms—and details regarding the method and timing of notification. *See Bowe, 2013 U.S. Dist. LEXIS 170796, 2013 WL 6280873, at *7*.[5]

[5] In light of this expedited meet-and-confer process, the Court declines to toll the claims of potential collective-action members. (*See* D.E. No. 46 at 15).

IV. Conclusion

For the foregoing reasons, the Court GRANTS-in-part and DENIES-in-part Friscia's motion for conditional certification and DENIES *without prejudice* Panera's motion to strike. An appropriate Order accompanies this Opinion.

/s/ Esther Salas

Esther Salas, U.S.D.J.

ORDER

SALAS, DISTRICT JUDGE

Pending before the Court are Plaintiff Jacqueline Friscia's motion for conditional certification of a proposed collective action under *Section 216(b)* of the Fair Labor Standards Act ("FLSA") (D.E. No. 38) and Defendants Panera Bread Company and Panera, LLC's ("Panera") motion to strike Plaintiff's motion and supporting declarations (D.E. No. 55); and the Court having considered the parties' submissions in support of and in opposition to the pending motions and having **[*26]** decided the matters without oral argument, *see Fed. R. Civ. P. 78(b)*; and for the reasons set forth in the Court's accompanying Opinion; and for other good cause shown,

IT IS on this 26th day June 2018,

ORDERED that Plaintiff's motion for conditional certification under Section 216(b) of the FLSA (D.E. No. 38) is GRANTED-in-part and DENIED-in-part; and it is further

ORDERED that Panera's motion to strike (D.E. No. 55) is DENIED *without prejudice*; and it is further

ORDERED that the Court will conditionally certify the following collective:

> Plaintiff and all other individuals who currently or formerly worked for Panera Bread Company and/or Panera, LLC as assistant managers in New Jersey from February 1, 2014 to the present and did not receive overtime compensation for hours worked over 40 in a work week;

and it is further

ORDERED that the parties shall meet and confer about Plaintiff's proposed Notice of Lawsuit and Consent to Join Lawsuit forms and then submit agreed-upon proposed forms—along with details regarding the method and timing of notification—to the Hon. Steven C. Mannion, U.S.M.J., within fifteen days of the date of this Order; and it is further

ORDERED that if the parties are unable to agree on proposed forms, each party shall **[*27]** submit to Magistrate Judge Mannion, within twenty days of the date of this Order, its own proposed forms—along with a letter brief (not to exceed three single-spaced pages) in support of its proposed forms—and details regarding the method and timing of notification; and it is further

ORDERED that, in light of this expedited meet-and-confer process, Plaintiff's request to toll the claims of potential collective-action members is DENIED; and it is further

ORDERED that within fifteen days of the date of this Order, Panera shall furnish to Plaintiff's counsel a list—in electronic form and to be treated by the parties as confidential—containing the names and last known address of all individuals comprising the above-defined collective; and it is further

ORDERED that the Clerk of Court shall TERMINATE docket entries 38 and 55.

/s/ Esther Salas

Esther Salas, U.S.D.J.

End of Document

Exhibit 21

Ansoralli v. CVS Pharm., Inc.

United States District Court for the Eastern District of New York

February 13, 2017, Decided; February 13, 2017, Filed

16-CV-1506 (CBA) (RER)

Reporter
2017 U.S. Dist. LEXIS 20075 *; 2017 WL 570767

MOMINNA ANSORALLI and ZAIRE LAMAR-ARRUZ,[1] on behalf of themselves and all other similarly situated employees, Plaintiffs, - against - CVS PHARMACY, INC., Defendant.

Subsequent History: Objection sustained by *Mominna Ansoralli & Zaire Lamar-Arruz v. Cvs Pharm., 2017 U.S. Dist. LEXIS 233793 (E.D.N.Y., July 24, 2017)*

Magistrate's recommendation at *Ansoralli v. CVS Pharm., Inc., 2017 U.S. Dist. LEXIS 208709 (E.D.N.Y., Dec. 15, 2017)*

Counsel: **[*1]** For Mominna Ansoralli, on behalf of herself and all other similarly-situated employees, Sheree Steele, on behalf of herself and all other similarly-situated employees, Plaintiffs: Kenneth D. Sommer, Michael John Willemin, David Evan Gottlieb, Wigdor LLP, New York, NY.

For CVS Pharmacy, Inc., Defendant: Jason A Nagi, LEAD ATTORNEY, Polsinelli Shughart PC, New York, NY; Alexander J. Bartko, James J. Swartz, Stephanie D. Delatorre, PRO HAC VICE, Polsinelli PC, Atlanta, GA; Teeka K. Harrison, PRO HAC VICE, Atlanta, GA.

Judges: Ramon E. Reyes, Jr., United States Magistrate Judge.

Opinion by: Ramon E. Reyes, Jr.

Opinion

MEMORANDUM & ORDER

RAMON E. REYES, JR., U.S.M.J.:

Plaintiffs Mominna Ansoralli ("Ansoralli") and Zaire Lamarr-Arruz ("Lamarr-Arruz") bring this action on behalf of themselves and other similarly situated current and former employees of defendant CVS Pharmacy, Inc. ("CVS"), alleging violations of the *Fair Labor Standards Act, 29 U.S.C. §§ 201-219* ("FLSA") and New York Labor Law ("NYLL"). Plaintiffs have moved to conditionally certify a collective action and to distribute notice to putative members of the collective action pursuant to *FLSA § 216(b)*. Defendant opposes the motion. The reader's familiarity with the claims, defenses, and arguments **[*2]** is presumed. For the following reasons, the motion is granted, and the proposed notice to putative members of the collective action is approved with modifications.

A. *Conditional Certification*

Section 216 of the FLSA allows an employee to assert claims on behalf of "other employees similarly situated." The Second Circuit has endorsed a two-step process to determine whether to certify a collective action. *Myers v. Hertz Corp., 624 F.3d 537, 554-55 (2d Cir. 2010)*. Generally, the Court examines "whether putative plaintiffs are similarly situated at an early 'notice stage' and then again after discovery is largely complete."

[1] When this action was filed, Lamarr-Arruz's legal name was Sheree Steele. The caption will be changed accordingly.

McGlone v. Contract Callers, Inc., 867 F. Supp. 2d 438, 442 (S.D.N.Y. 2012) (citation omitted). Here, Plaintiffs move for conditional certification and judicial notice at the early "notice stage."

At this preliminary stage, the court makes "an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiff[] with respect to whether a FLSA violation has occurred." *Myers, 624 F.3d at 555* (citations omitted). Because the evidence is generally limited at this stage in the litigation, plaintiffs need only "make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." *Id.* (citation and quotation marks omitted). **[*3]** The factual showing for conditional certification is a "lenient one" but "even if modest, must still be based on some substance." *McGlone, 867 F. Supp. 2d at 443* (citations omitted); *see also Myers, 624 F.3d at 555* ("The 'modest factual showing' cannot be satisfied simply by 'unsupported assertions,' but it should remain a low standard of proof because the purpose of this first stage is merely to determine whether 'similarly situated' plaintiffs do in fact exist.") (citations omitted). "The Court does not resolve factual disputes or decide substantive issues at this stage, but rather examines the pleadings and affidavits to determine whether the named plaintiff and putative class members are similarly situated." *Ali v. New York City Health and Hosps. Corp., No. 11-CV-6393 (PAC), 2013 U.S. Dist. LEXIS 44091, 2013 WL 1245543, at *1 (S.D.N.Y. Mar. 27, 2013)* (citation omitted).

Plaintiffs have submitted declarations from themselves and five other former CVS employees who worked as market investigators under the supervision of regional loss prevention managers Anthony Salvatore and Abdul Saliu. These declarations aver that Salvatore and Saliu required market investigators to work "off-the-clock," performing various tasks, and that such work resulted in unpaid overtime. (Dkt. Nos. 44-50.) The off-the-clock tasks included: responding to work-related telephone calls, emails and text **[*4]** messages from Salvatore and Saliu, attending meetings with other market investigators, completing paperwork and communicating with police about shoplifting suspects "caught" while on-the-clock, and performing surveillance of shoplifting suspects even after having "clocked-out" (*Id.*) These allegations are sufficient to meet plaintiffs' modest burden on a motion for conditional certification.

CVS opposes conditional certification on two main bases. First, CVS contends that Plaintiffs' complaint and declarations fall short of establishing the existence of a formal, uniform companywide policy to require employees to work "off-the-clock" and not pay overtime wages. (Dkt. No. 51 at 7-10.) CVS argues that at most Plaintiffs have alleged merely "unlawful actions by individual, anomalous managers", which are not subject to collective action certification. (*Id.* at 10.) Second, CVS argues that Plaintiffs are not similarly situated to the putative collective action members because the factual allegations regarding the terms and conditions of employment in the complaint and Plaintiffs' declarations are "entirely different" than those of the five other former CVS employees. (*Id.* at 10.) CVS's arguments are misplaced. **[*5]**

As to CVS's first argument, the FLSA does not require that a plaintiff identify a formal, facially unlawful policy before obtaining conditional certification of a collective action. *See Bijoux v. Amerigroup N.Y. LLC, No. 14-cv-3891 (RJD) (VVP), 2015 U.S. Dist. LEXIS 122669, 2015 WL 5444944, * 3 (E.D.N.Y. Sept. 15, 2015)*. Rather, is it sufficient to show that a defendant's managers implemented a facially lawful policy in an unlawful manner, resulting in a pattern or practice of FLSA violations. *Amador v. Morgan Stanley & Co. LLC, No. 11 Civ. 4326, 2013 U.S. Dist. LEXIS 19103, 2013 WL 494020, at *6 (S.D.N.Y. Feb. 7, 2013)* (quoting *Winfield v. Citibank, N.A., 843 F.Supp.2d 397, 405 (S.D.N.Y. 2012)* and citing *Hernandez v. Merrill Lynch & Co., No. 11 Civ. 8472, 2012 U.S. Dist. LEXIS 49822, 2012 WL 1193836, at *45*

(S.D.N.Y. Apr. 6, 2012)). To hold otherwise would allow employers to avoid FLSA collective action certification simply by promulgating compliant handbooks and policies, while letting their managers run roughshod over the FLSA's requirements. Therefore, CVS cannot defeat Plaintiffs' motion on this basis.

With regard to CVS's second argument, at this stage it is immaterial that there may be factual differences between the complaint and the various declarations in support of the motion for conditional certification.[2] There is nothing in the FLSA that requires complete symmetry in employment between the plaintiffs and the collective before the collective is conditionally certified. *Cf.* Alvarez v. IBM Restaurants, Inc., 839 F.Supp.2d 580, 584 (E.D.N.Y. 2012) (FLSA and its implementing regulations do not define "similarly situated"). All that is necessary **[*6]** is "'some identifiable factual nexus which binds the named plaintiffs and potential class members together as victims' of a particular practice." Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (quoting Heagney v. European American Bank, 122 F.R.D. 125, 127 (E.D.N.Y. 1988)). Suffice it to say, Plaintiffs and the putative collective are sufficiently similar in that they were all required to work off-the-clock and were not paid for that time.[3] Indeed, courts routinely grant conditional certification despite factual variances between the plaintiff and the putative collective. *See e.g.*, Chen v. XpresSpa at Term. 4 JFL, LLC, No. 15-cv-1347 (CBA) (CLP), 2016 U.S. Dist. LEXIS 130645, 2016 WL 5338536, *5 (E.D.N.Y. Sept. 23, 2016); Lynch v. United Services Auto. Ass'n, 491 F. Supp. 2d 357, 369 (S.D.N.Y. 2007).

B. *Content of the Notice*

CVS objects to several aspects of the proposed collective action notice: (1) distribution by first-class mail, email, text message and posting at stores; (2) the six-year limitation period running from when the motion was filed; (3) failure to include a statement of (a) CVS's defenses to the action, (b) opt-ins' discovery and trial obligations, and (c) opt-ins' responsibility to pay costs and fees if they do not prevail; (4) references to state and federal laws other than the FLSA; (5) filing of opt-in forms with plaintiffs' counsel rather than the Clerk of the Court; and (6) failure to include contact information for **[*7]** defense counsel. (Dkt. No. 51 at 17-25.)

District courts have discretion to determine what constitutes adequate notice to a putative collective under the FLSA. Laroque v. Domino's Pizza, LLC, 557 F.Supp.2d 346, 356 (E.D.N.Y. 2008). "Courts consider the overarching policies of the collective suit provisions and whether the proposed notice provides accurate and timely notice concerning the pendency of the collective action, so that [an individual receiving the notice] can make an informed decision about whether to participate." Delaney v. Geisha NYC, LLC, 261 F.R.D. 55 (S.D.N.Y. 2009).

Notice by first-class mail and email is appropriate here. Given the relatively limited nature of the putative collective - market investigators under the supervision of Salvatore and Saliu, rather than all market investigators in CVS's employ - posting at all CVS stores in New York City is inappropriate. Accordingly, Plaintiffs and CVS shall meet and confer on the wording of the email and raise any disputes with the Court within seven business days.

The notice period shall be six years from the date the motion for conditional certification was served on CVS, which was August 30, 2016. (Dkt. No. 31). *See also* Winfield v. Citibank, N.A., 843

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[2] CVS's contention that the factual allegations in the complaint regarding Plaintiffs' declarations and would-be opt-ins "are *entirely* different" is simply wrong. (Dkt. No. 51 at 10 (emphasis added)). There is much similarity in the allegations, even if not complete symmetry. Again, complete symmetry is not required at this early stage.

[3] For similar reasons, CVS's arguments regarding timeliness, preclusive effect of arbitration agreements, and the *de minimis* exception to the FLSA are irrelevant. These are issues to be raised in the decertification phase, after discovery has been completed.

F.Supp.2d 397, 410-11 (S.D.N.Y. 2012) (finding it permissible to extend notice period to six years for class members employed in New York that may have NYLL claims); **[*8]** *Schwerdtfeger v. Demarchelier Mgmt., Inc., No. 10 Civ. 7557, 2011 U.S. Dist. LEXIS 60338, 2011 WL 2207517, at *3 (S.D.N.Y. June 6, 2011)* (noting that there may be a number of employees with both timely FLSA and state law claims, and the total number of potential plaintiffs does not appear to be so large that requiring the defendants to provide information for employees dating back six years would be unduly burdensome; also noting that "responses by any former employees who have potential claims under New York law, but not under the FLSA, may be relevant to a subsequent determination as to whether a class should be certified under New York law") (internal citations and quotations omitted); *Klimchak v. Cardrona, Inc., 09-cv-4311, 2011 U.S. Dist. LEXIS 30652, 2011 WL 1120463, at *7 (E.D.N.Y. Mar. 24, 2011)* ("...it is appropriate to permit plaintiffs to provide notice to potential opt-in plaintiffs who may have viable state law claims within the six (6) year statute of limitations period, even if those plaintiffs' FLSA claims might be time-barred."); *Pineda v. Jim-Mar Consultants, Inc., 741 F. Supp. 2d 403, 404 (E.D.N.Y. 2010)* (finding it appropriate and in the interest of judicial economy to allow a six-year period to apply where claims under the FLSA and New York Labor Law were alleged, even if some recipients of the notice would have claims that are time-barred under the FLSA) (internal quotations and citations omitted); *Kumar Realite v. Ark Restaurants Corp., 7 F.Supp.2d 303, 308 (S.D.N.Y. 1998)* (Sotomayor, J.) (authorizing the plaintiffs **[*9]** in collective action to provide notice to employees who worked at defendants' New York restaurants within the last six years of the pendency of the lawsuit as "[i]t will then be up to those individuals to decide whether they wish to opt-in to this action"). In this regard, it is also appropriate for the notice to include the phrase "which is one of the laws under which this action was commenced." (Dkt. No. 51 at 21.) *See also* *Guzman v. VLM, Inc., No. 07-cv-1126 (JG)(RER), 2007 U.S. Dist. LEXIS 75817, 2007 WL 2994278, *7 (E.D.N.Y. Oct. 11, 2007)*.

There shall be no reference in the notice to opt-ins' discovery and trial obligations or their responsibility to pay costs or fees if they do not prevail. *2007 U.S. Dist. LEXIS 75817, [WL] at *7-8*. The notice shall, however, include a general denial of liability in the introductory section as per *Anjum v. J.C. Penney Co., No. 13-cv-460 (RJD)(RER), 2015 U.S. Dist. LEXIS 73820, 2015 WL 36030973, at *15 (E.D.N.Y. June 5, 2015)*, and list defendant's counsel as well. *Guzman, 2007 U.S. Dist. LEXIS 75817, 2007 WL 2994278, at *8*.

Finally, opt-in forms shall be filed with the Clerk of the Court, not plaintiffs' counsel. *Lujan v. Cabana Mgmt., Inc., 10-cv-755 (ILG), 2011 U.S. Dist. LEXIS 9542, 2011 WL 317984, at *13 (E.D.N.Y. Feb. 1, 2011)*; *Bowens v. Atl. Maint. Corp., 546 F. Supp. 2d 55, 84-85 (E.D.N.Y. 2008)*; *Guzman, 2007 U.S. Dist. LEXIS 75817, 2007 WL 2994278, at *9*. Such a measure will safeguard against the possibility that opt-in plaintiffs would be discouraged from seeking outside counsel.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for conditional certification of a collective action is granted.

SO ORDERED. **[*10]**

/s/ Ramon E. Reyes, Jr.

Ramon E. Reyes, Jr.

Ramon E. Reyes, Jr.

United States Magistrate Judge

Dated: February 13, 2017

Brooklyn, New York

End of Document

Exhibit 22

Sylvester v. Wintrust Fin. Corp.

United States District Court for the Northern District of Illinois, Eastern Division

September 30, 2013, Decided; September 30, 2013, Filed

No. 12 C 01899

Reporter
2013 U.S. Dist. LEXIS 140381 *; 2013 WL 5433593

DAVID A. SYLVESTER, Plaintiff, v. WINTRUST FINANCIAL CORPORATION, et al., Defendants.

Subsequent History: Motion denied by *Sylvester v. Wintrust Fin. Corp., 2013 U.S. Dist. LEXIS 188394 (N.D. Ill., Oct. 22, 2013)*

Motion denied by, Stay granted by *Sylvester v. Wintrust Fin. Corp., 2014 U.S. Dist. LEXIS 135907 (N.D. Ill., Sept. 26, 2014)*

Counsel: [*1] For David Sylvester, Plaintiff: Matthew R. Crimmins, LEAD ATTORNEY, Walters Bender Strohbehn & Vaughan, P.C., Kansas City, MO; Kenneth C. Apicella, Apicella Law Firm, LLC, Palatine, IL.

For Wintrust Financial Corporation, Barrington Bank & Trust Company, N.A., Wintrust Mortgage Corporation, Defendants: Kathryn Montgomery Moran, LEAD ATTORNEY, Jeffrey L Rudd, Sean C. Herring, Jackson Lewis LLP, Chicago, IL;.

Judges: John J. Tharp, Jr., United States District Judge.

Opinion by: John J. Tharp, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

This is an action for violations of the Fair Labor Standard Act ("FLSA") requirements that employers pay minimum wage and overtime to non-exempt employees who work more than 40 hours in a workweek. The plaintiffs are or were employed as loan originators by Wintrust Financial Corporation, Barrington Bank & Trust Company, N.A., and Wintrust Mortgage Corporation. They allege that the defendants improperly classified all of their loan originator employees as exempt from FLSA requirements based on the "outside sales" exemption, failed to pay them a minimum wage and overtime when they worked more than 40 hours in a workweek, and failed to maintain FLSA-mandated records.

Pending before the Court **[*2]** are three motions. The plaintiffs move to conditionally certify their lawsuit as a collective action on the grounds that all of Wintrust's loan originators are or were similarly situated and subjected to the same unlawful policy, and seek authorization to issue notice to prospective class members. They also move to extend the FLSA tolling period. The defendants move to dismiss or stay the action as to two plaintiffs pending arbitration. For the reasons stated below, the Court grants the plaintiffs' motion for conditional certification and court-authorized notice, grants the defendants' motion to stay pending arbitration, and continues the plaintiffs' motion to extend the tolling of the statute of limitations pending further briefing.

BACKGROUND

The named plaintiff, David Sylvester, worked from March 17, 2009 until January 17, 2011, as a home mortgage loan originator for Wintrust Mortgage,

which originated and purchased residential mortgages for sale into the secondary market. Sylvester's work required him to communicate with potential customers, collect and input customers' information into loan applications, and forward applications to underwriters for loan approval decisions. First **[*3]** Am. Compl., Dkt. 23, ¶¶ 8, 11-12. According to Sylvester, loan originators, who were compensated mainly by commission, primarily conducted their work in business or home offices. *Id.* ¶¶ 11, 15.

Wintrust Mortgage merged into and now operates as a division of Barrington Bank, a wholly-owned subsidiary of Wintrust Financial Corporation. *See* Dkt. 38 at 1 & n.1. On March 15, 2012, Sylvester filed suit against all three entities (henceforth collectively referred to as "Wintrust"), to recover unpaid overtime and minimum wages under the FLSA, *29 U.S.C. §§ 206-207*. Sylvester alleges that because he and similarly situated loan originators were misclassified as exempt from the FLSA minimum wage and overtime requirements, they worked hours for which they did not receive the minimum wage and regularly worked in excess of forty hours per week without overtime pay. First Am. Compl., Dkt. 23, *Id.* ¶¶ 16-17, 27; Pls.' Mot., Dkt. 38, at 2. Additionally, he alleges that Wintrust did not require loan originators to track their time worked and failed to maintain accurate time records. *Id.* ¶ 18.

Prior to January 2012, most Wintrust loan originators were paid on a commission-only basis. Defs.' Resp., Dkt. 67, **[*4]** at 3. Both parties note that in late 2011, Wintrust surveyed its loan originators about how their work was conducted. Pls.' Mot., Dkt. 38, at 10; Defs.' Resp., Dkt. 67, at 3-4. Following the survey, Wintrust reclassified its loan originators into one of three categories: "Outside Residential Loan Originators," "Inside Retail Loan Originators," or "Inside Senior Loan Originators." Defs.' Resp., Dkt. 67, at 3-4. Those in the first category are required to perform most of their work outside the office and are paid on a commission-only basis. *Id.* at 4. Those in the latter two categories must now track their hours: Inside Retail Loan Originators are guaranteed a minimum wage for forty hours a week and overtime with prior approval, and Inside Senior Loan Originators are guaranteed fifty hours a week. *Id.* at 4-5. In or around January 2012, Wintrust's loan originators signed new employment contracts to reflect their newly assigned classification; these contracts also included provisions requiring loan originators to submit any employment-related disputes to binding arbitration. *Id.*

Wintrust's 2012 reclassification appears to have been the catalyst for this lawsuit. Following the reclassification, **[*5]** Sylvester filed suit, and five additional people have signed forms indicating their consent to join in a collective action as plaintiffs: Philip J. Benz, Thomas J. Heniff, Patrick J. McCormick, Martin Quinn, and John J. Furlong. *See* Dkts. 5, 37, 45, 71. They together seek to proceed as a collective action under *29 U.S.C. § 216(b)*, which would enable additional loan originators to "opt in" to this suit as plaintiffs. They seek an order instructing the defendants to give the plaintiffs a list of those employees and their contact information and authorization to send notice of this action to "all current and former loan originators employed by Wintrust within the past three years." Pls.' Mot., Dkt. 38, at 15. Citing the two- or three-year statute of limitations for FLSA actions, they also request that the Court extend the tolling of the statute of limitations for potential class members who have yet to opt in. Pls.' Mot., Dkt. 76. In addition to opposing the plaintiffs' motions, Wintrust moves to dismiss or stay the case as to McCormick and Heniff pursuant to the arbitration clauses in their employment agreements. Defs.' Mot., Dkt. 46, at 2.

DISCUSSION

FLSA requires that employers "pay **[*6]** overtime to employees working on an hourly basis." *Kennedy v. Commonwealth Edison Co., 410 F.3d 365, 369 (7th Cir. 2005)*; *29 U.S.C. § 207(a)(1)*

(requiring one and a half times one's regular wage for every hour worked beyond forty in a week). It also requires that employees who are "engaged in commerce or in the production of goods for commerce" be paid a statutory minimum wage. *29 U.S.C. § 206(a)*. Alleging that Wintrust willfully failed to meet these requirements, the plaintiffs seek to expand the reach of this suit by having the Court conditionally certify a collective action, authorize notice to possible class members, and extend the FLSA tolling period. The defendants maintain that their loan originators were "outside salesmen" and therefore exempt from the FLSA minimum wage and overtime requirements. *See 29 U.S.C. § 213(a)(1)* (authorizing Secretary of Labor to "define and delimit" the outside sales and other *§213* exemptions); *29 C.F.R. §§ 541.500-.502* (defining the limits of the outside sales exemption). The defendants request that the Court dismiss or stay the case pending arbitration as to two individuals who have already consented to join the case as plaintiffs.

I. Plaintiffs' [*7] Motion for Conditional Certification and Court-Authorized Notice

FLSA permits plaintiffs to bring a collective action to recover unpaid overtime compensation and minimum wages on behalf of themselves "and other employees similarly situated." *29 U.S.C. § 216(b)*. Additional would-be plaintiffs to FLSA collective actions must opt in to the lawsuit if the court conditionally certifies a class. *Alvarez v. City of Chicago, 605 F.3d 445, 448 (7th Cir. 2010)*. Neither Congress nor the Seventh Circuit has set forth criteria for deciding conditional certification and notice issues, but district courts have "wide discretion" to manage collective actions. *Rottman v. Old Second Bancorp, Inc., 735 F. Supp. 2d 988, 991 (N.D. Ill. 2010)* (citing *Alvarez, 605 F.3d at 448*). Courts in this district have settled on a two-step process for conditional certification. *See Rottman, 735 F. Supp. 2d at 990-91* (citing *Hundt v. DirectSat USA, LLC, No. 08 C 7238, 2010 U.S. Dist. LEXIS 51116, 2010 WL 2079585, at *2 (N.D. Ill. May 24, 2010))*.

First, the plaintiffs have the burden of showing that there are other similarly situated employees who are potential claimants. *Rottman, 735 F. Supp. 2d at 991*; *Russell v. Illinois Bell Tel. Co., 575 F. Supp. 2d 930, 933 (N.D. Ill. 2008)*. **[*8]** To do this, the plaintiffs "need only make a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Rottman, 735 F. Supp. 2d at 991* (quoting *Smallwood v. Illinois Bell Telephone Co., 710 F. Supp. 2d 746, 750 (N.D. Ill.2010))*. Courts interpret the "similarly situated" requirement "leniently." *Anyere v. Wells Fargo, Co., Inc., No. 09 C 2769, 2010 U.S. Dist. LEXIS 35599, 2010 WL 1542180, at *2 (N.D. Ill. April 12, 2010)*; *see also Jirak v. Abbott Labs., Inc., 566 F. Supp. 2d 845, 848 (N.D. Ill. 2008)*. If the plaintiffs are able to make a modest factual showing that other potential plaintiffs are similarly situated, the court may conditionally certify the case as a collective action and allow the plaintiffs to send notice of the case to the similarly situated employees who may then opt in as plaintiffs. *Heckler v. DK Funding, LLC, 502 F. Supp. 2d 777, 779 (N.D. Ill. 2007)*.

The second, more stringent, step of the collective action certification process follows the completion of the opt-in process and discovery. "Once it is known which employees will be part of the class, the Court must reevaluate the conditional certification **[*9]** to determine whether there is sufficient similarity between the named and opt-in plaintiffs to allow the matter to proceed to trial on a collective basis." *Jirak, 566 F. Supp. 2d at 848* (quotation marks and citation omitted). If the court finds insufficient similarities during the second step, it may revoke conditional certification or divide the class into subclasses. *Nehmelman v. Penn Nat. Gaming, Inc., 822 F. Supp. 2d 745, 751 (N.D. Ill. 2011)*; *Russell, 575 F. Supp. 2d at 933*.

A. Plaintiffs' Showing that the Loan Originators

Were Similarly Situated and Subject to a Common Policy or Practice that Violates the Law

This case is currently at the first step. The plaintiffs claim that they have satisfied their burden for conditional certification. Wintrust argues not only that the plaintiffs have failed to meet their burden but also that the Court should apply an "intermediate" level of scrutiny in its analysis. Some courts have employed a heightened standard to motions for conditional certification where parties had completed significant discovery. *See, e.g.*, *Hawkins v. Alorica, Inc., 287 F.R.D. 431, 439 (S.D. Ind. 2012)* (applying intermediate scrutiny where "substantial discovery" had **[*10]** taken place); *Bunyan v. Spectrum Brands, Inc., 07-CV-0089-MJR, 2008 U.S. Dist. LEXIS 59278, 2008 WL 2959932, at *4 (S.D. Ill. July 31, 2008)* (adopting an "intermediate approach" where substantial discovery had taken place); *Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000)* (raising standard where more than one hundred plaintiffs had opted in and discovery was complete). Here, the Court finds that such an approach has little to recommend it given the conditional nature of this motion and the fact that the parties have not completed discovery. *See Molina v. First Line Solutions LLC, 566 F. Supp. 2d 770, 786 (N.D. Ill. 2007)* (declining to skip the first step where parties did not yet have all the information that would be available to them once they knew who would opt in to the case); *see also Gieseke v. First Horizon Home Loan Corp., 408 F. Supp. 2d 1164, 1167 (D. Kan. 2006)* ("[T]he court cannot conclude that the evidence is representative of what plaintiffs would present given further discovery.").

The Court will therefore apply the ordinary first-step standard to this motion, which requires a "modest factual showing" to support that members of the proposed class were or are similarly **[*11]** situated and subjected to a common policy that violates the law. Although the first-step inquiry is "undemanding," the Court is not obligated, as it would be on a motion to dismiss, to accept the plaintiff's allegations as true. *Rottman, 735 F. Supp. 2d at 990* (quoting *Hundt, 2010 U.S. Dist. LEXIS 51116, 2010 WL 2079585, at *2)*. Instead, the Court "evaluates the record before it, including the defendant's oppositional affidavits, to determine whether the plaintiffs are similarly situated to other putative class members." The plaintiffs need only overcome such contrary evidence with their own showing. *See Molina, 566 F. Supp. 2d at 786*.

To show that members of the proposed class are similarly situated, the plaintiffs have submitted numerous exhibits to support that they shared the same job duties and were uniformly classified as exempt from the relevant FLSA requirements. A Wintrust corporate representative stated that the job duties of loan originators were "the same." Pls.' Ex. 1, Dkt. 38-1, at 205-06. They were to "sell mortgage loan products," which, according to numerous Wintrust employees, required them to use Wintrust's software to enter information into loan applications. *See, e.g.*, Defs.' Resp., Dkt. 67, **[*12]** at 2; Pls.' Ex. 4, Dkt. 38-4, ¶¶ 20-21; Pls.' Ex. 5, Dkt. 38-5, ¶ 16. The software, "essential" for a loan originator's work, generally requires an office-type environment for its use, and therefore several Wintrust employees report that loan originators primarily work in an office setting, whether at a Wintrust location or at home. *See, e.g.*, Pls.' Ex. 1, Dkt. 38-1, at 112, 123; Pls.' Ex. 4, Dkt. 38-4, ¶ 20; Pls.' Ex. 7, Dkt. 38-7, ¶ 6. Multiple loan originators and a Wintrust manager confirm that loan originators routinely worked in excess of forty hours per week. *See, e.g.*, Pls.' Ex. 4, Dkt. 38-4, ¶¶ 14-15; Pls.' Ex. 5, Dkt. 38-5, ¶¶ 10-11. The plaintiffs estimate that the class would potentially include approximately seven hundred people employed as Wintrust loan originators since 2009. *See* Pls.' Mot., Dkt. 38, at 4.

Wintrust argues that to prove that the members of the putative class are similarly situated will involve an inquiry that is too highly individualized to warrant class treatment, but at this step in the process, "[p]laintiffs do not have to show that the

potential class members have identical positions for conditional certification to be granted." *Jirak, 566 F. Supp. 2d at 848-49*. **[*13]** It is only at step two that the Court considers "whether the plaintiffs share similar or disparate employment settings." *Id. at 848* (citing *Mielke v. Laidlaw Transit, Inc., 313 F. Supp. 2d 759, 762 (N.D. Ill. 2004)*). It may be, as Wintrust asserts, that every loan originator had "their own way of doing business" and that one or more Wintrust managers encouraged loan originators to stay out of the office. *See* Defs.' Ex. F, Dkt. 67-6, at 63, 66. But this showing is not enough, in light of the record before the Court, to establish that the plaintiffs have failed to show that the members of the putative class are similarly situated. *See Perry v. Nat'l City Mortgage, Inc., 05-CV-891 DRH, 2007 U.S. Dist. LEXIS 45115, 2007 WL 1810472, at *3 (S.D. Ill. June 21, 2007)* (conditionally certifying a class even though defendants offered evidence that loan originators' day-to-day practices varied). For this initial step of the conditional certification process, they show that the members of the putative class were similarly situated enough to warrant notice.

To show that the defendants subjected the proposed class to a common policy of misclassifying them as exempt in violation of the FLSA, the plaintiffs have submitted evidence, **[*14]** including the deposition of a Wintrust corporate representative, that prior to 2012, Wintrust loan originators were uniformly classified as exempt from FLSA minimum wage and overtime requirements. *See* Pls.' Ex. 1, Dkt. 38-1, at 203; Pls.' Ex. 4, Dkt. 38-4, ¶¶ 9-10. Some loan originators continue to be. Defs.' Resp., Dkt. 67, at 4-5. The exemption Wintrust relies on, the "outside sales" exemption, applies to employees whose primary duties are to make sales and who are "customarily and regularly engaged away from the employer's place or places of business." *See 29 C.F.R. § 541.500*. To show that loan originators were misclassified, they offer declarations and screenshots of Wintrust documentation and software that show loan originators need to be logged into Wintrust's software to discuss loans or input information into loan applications. *See, e.g.*, Pls.' Ex. 1, Dkt. 38-1, at 130; Pls.' Ex. 9, Dkt. 38-9; Pls.' Ex. 10, Dkt. 38-10. They also offer evidence that in part as a result of their constant need for automated tools, loan originators spend the majority of their time working in Wintrust bank offices or home offices. *See, e.g.*, Pls.' Ex. 4, Dkt. 38-4, ¶¶ 20-21.

Wintrust primarily relies **[*15]** on a legal argument to oppose the plaintiffs' showing. Wintrust's position is that because classifying loan originators as exempt is not *per se* illegal, the plaintiffs have failed to meet their burden because the Court would need to conduct individualized analysis in order to determine the exemption's applicability. But again, it is only at step two that the Court considers "whether affirmative defenses raised by the defendant would have to be individually applied to each plaintiff." *Jirak, 566 F. Supp. 2d at 848* (citing *Mielke, 313 F. Supp. 2d at 762*). "The employer bears the burden to establish that an exemption from the FLSA applies." *Kellar v. Summit Seating Inc., 664 F.3d 169, 173 (7th Cir. 2011)* (citing *Corning Glass Works v. Brennan, 417 U.S. 188, 196-97, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974)*). It would therefore be inappropriate for the Court to require, in this early motion for conditional certification, that the plaintiffs definitively prove that Wintrust misapplied the exemption. While Wintrust also cites evidence that indicates Sylvester spent at least some of his time working outside an office setting, *see* Defs.' Ex. D, Dkt. 67-1, at 104-05, 132, this showing is defeated for the purposes of this motion **[*16]** by the plaintiffs' evidence indicating that loan originators primarily worked in offices.

Furthermore, the Court does not agree with Wintrust that determining whether the exemption rightly applies will necessarily require individualized determinations. It is just as possible that the exemption determination can be made categorically for subgroups of those plaintiffs who eventually opt in. *See Molina, 566 F. Supp. 2d at 786* (noting that subclasses or separate lawsuits can be utilized in later stages of litigation). In fact,

Wintrust identifies one potential source of information regarding potential subgroups by citing its own survey of its loan originators' work conditions. *See, e.g.*, Defs.' Resp, Dkt. 67, at 16. For the purposes of conditional certification, the plaintiffs adequately show that by being universally classified as exempt while working under conditions not aligned with the requirements of the exemption, members of the proposed class were subject to a common illegal policy.

Wintrust also argues that the proposed collective definition is unfair. [1] The plaintiffs propose that the class scope should encompass "[a]ll current and former retail mortgage loan originators employed **[*17]** by Wintrust and/or its affiliates/subsidiaries/predecessors within the previous three years that were not paid overtime or a guaranteed minimum wage for all hours worked." Pls.' Mot., Dkt. 38, at 10. Wintrust argues that including "and/or its affiliates/subsidiaries/predecessors" is overbroad because these entities are unidentified and the suit should not extend to any entities beyond the three defendants already party to the case. The plaintiffs have not identified information that implicates entities other than the defendants or a reason to retain the "affiliates/subsidiaries/predecessors" language, so on this point the Court agrees with Wintrust; the class will not extend beyond the three parties identified as defendants.

If the evidence produced at the second step warrants, the collective can be narrowed to include only certain loan originators if all are not similarly situated. Wintrust **[*18]** will have an opportunity to move to decertify if post-notice discovery reveals that no common policy existed that violates the law. The plaintiffs have otherwise met their burden to satisfy step one, therefore their motion for conditional certification is granted.

B. Applicable Statute of Limitations

The parties disagree whether a two-year or three-year statute of limitations applies here. FLSA claims are generally subject to a two-year statute of limitations, but the period is extended to three years for "cause[s] of action arising out of a willful violation." *29 U.S.C. § 255(a)*. A FLSA violation is "willful" if the defendant either knows he is committing or is reckless about whether he is committing a violation. *EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 585 (7th Cir. 1987)*. The plaintiffs here allege a willful violation, without stating facts that show that Wintrust's violations were knowing or reckless. Courts have held that a conclusory willfulness allegation is sufficient to justify providing notice to the putative class on the basis of the potentially applicable three-year period. *See Rosario v. Valentine Ave. Discount Store, Co., Inc., 828 F. Supp. 2d 508, 519 (E.D.N.Y. 2011)* **[*19]** (explaining that statute of limitations issues can be addressed after notice and discovery); *Gambrell v. Weber Carpet, Inc., No. 10-2131, 2010 U.S. Dist. LEXIS 134095, 2010 WL 5288173, *2 (D. Kan. Dec. 17, 2010)* (approving notice on basis of three-year statute of limitations where plaintiff made only conclusory allegation of willfulness); *North v. Bd. of Trustees of Ill. State Univ., 676 F. Supp. 2d 690, 696 n.8 (C.D. Ill. 2009)* (where plaintiff alleges willfulness, "the three year statute of limitations can be assumed to apply until the Court determines whether the violation was 'willful'"). In line with these cases, notice should be sent to all potential class members who may have valid claims if Wintrust acted willfully. This ruling should not be interpreted as a finding that Wintrust in fact did act willfully, or that a three-year statute of limitations will govern the case; those determinations will be made after notice and discovery.

C. Plaintiffs' Request for Employee Information

[1] *See Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 771 (7th Cir. 2013)*. Unlike many cases asserting collective actions under *§ 216* of the FLSA, this case does not include parallel class action claims, so the putative group of plaintiffs here can only appropriately be referred to as a "collective."

In light of the relevant period for notice being set and conditional certification being granted, the Court also grants the plaintiffs' request for an order instructing the defendants to produce certain employee information to facilitate **[*20]** notice. In accordance with the above definition of the collective, the defendants should produce the names, unique employee ID numbers, addresses, and telephone numbers of all potential opt-in class members to the plaintiffs' counsel. The defendants should produce this information within 14 days of the issuance of this ruling, by October 15, 2013.

D. Plaintiffs' Proposed Notice

Wintrust objects to the plaintiffs' proposed notice and suggests that the Court approve its own version instead. *See* Defs.' Ex. G, Dkt. 67-1; Pls.' Ex. 22, Dkt. 38-22. "Absent reasonable objections by either the defendant or the Court, plaintiffs should be allowed to use the language of their choice in drafting the notice." *Kelly v. Bank of Am., N.A., 10 C 5332, 2011 U.S. Dist. LEXIS 157763, 2011 WL 7718421 (N.D. Ill. Sept. 23, 2011)* (quoting *King v. ITT Continental Baking Co., No. 84 C 3410, 1986 U.S. Dist. LEXIS 29321, 1986 WL 2628, at *3 (N.D. Ill. Feb. 13, 1986)* (Rovner, J.)). "The Court has both the power and the duty to ensure that the notice is fair and accurate, [but] that power should not be used to alter plaintiffs' proposed notice unless such alteration is necessary." *Heitmann v. City of Chicago, 04 C 3304, 2004 U.S. Dist. LEXIS 14669, 2004 WL 1718420, at *3 (N.D. Ill. July 30, 2004)* (quoting **[*21]** *King, 986 U.S. Dist. LEXIS 29321, 1986 WL 2628, at *3)*.

Wintrust's proposed notice differs from the plaintiffs' in several respects, including specifying a period for notice and opt in of 45 instead of 90 days, removal of the plaintiffs' counsels' name and contact information under the heading "Who will represent me if I join this lawsuit?," and removal of information regarding what will happen if people opt not to join the lawsuit. While these changes may have a slight effect on the reader of the notice, the "only thing that matters to the Court is that the notice of lawsuit and consent form convey accurately and fairly all the necessary information at this stage." *Heitmann, 2004 U.S. Dist. LEXIS 14669, 2004 WL 1718420, at *3*. Wintrust has not identified any aspect of the plaintiffs' notice that portrays inaccurate or unfair information about this case. With the reminder that the class should be limited to those individuals employed by the three defendants in this case in accordance with the scope of the conditionally certified collective, the Court approves the plaintiffs' proposed notice. The plaintiffs are instructed to submit a final version to the Court within 14 days of the issuance of this ruling, by October 15, 2013.

II. Defendants' [*22] Motion to Dismiss or Stay Pending Arbitration

Of the six people that have thus far filed written consent to join this suit as plaintiffs, Wintrust argues that the claims of two should be dismissed pursuant to the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1-16*. The FAA reflects a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011)* (citations omitted). "[W]hen a contract contains an arbitration clause, a strong presumption in favor of arbitration exists and courts have no choice but to order arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *CK Witco Corp. v. Paper Allied Indus., 272 F.3d 419, 421-22 (7th Cir.2001)* (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986))*. Courts must enforce valid arbitration clauses, *see 9 U.S.C. § 4*, and the burden of proving that Congress intended to preclude arbitration of any statutory claims at issue lies with the party opposing arbitration, *see Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)* **[*23]** (citing *Gilmer*

v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Here, the plaintiffs fail to carry their burden.

Under the FAA, "arbitration may be compelled if the following three elements are shown: a written agreement to arbitrate, a dispute within the scope of the arbitration agreement, and a refusal to arbitrate." *Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682, 687 (7th Cir. 2005)* (citing *9 U.S.C. § 4*). Wintrust's exhibits show that McCormick and Heniff signed employment contracts containing arbitration provisions. Defs.' Mot. Exs. A-B, Dkt. 46. McCormick, who worked for Wintrust from December 1, 2010, through April 30, 2012, signed his agreement on January 10, 2012. Heniff, who worked for Wintrust from December 16, 2010, through October 16, 2012, signed his agreement on July 1, 2012. The arbitration clauses in their employment agreements provide that "any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration." *Id.* Additionally, the contracts state that "[s]uch arbitration may not be joined **[*24]** with or join or include any claims by any persons not party to this Agreement." *Id.*

The parties here do not contest that McCormick and Heniff signed the contracts containing the arbitration clause, nor do they contest that their overtime and minimum wage claims would fall within its scope. The plaintiffs instead make two arguments as to why the Court should find the clauses unenforceable in this case. First, they argue that the clause is unenforceable because it purports to waive the plaintiffs' federal statutory right to proceed collectively or in this particular suit—rights the plaintiffs argue may not be waived. Next, they argue that it would be unconscionable to enforce arbitration clauses that an employer had employees sign after being served with this very lawsuit because it would amount to those employees being asked to waive the right to participate in the collective action.

Although the Supreme Court and the Seventh Circuit have not addressed whether an employee's ability to proceed collectively under the FLSA can be waived in an arbitration agreement, numerous circuits have concluded that the FLSA does not preclude the waiver of collective action claims. *See Sutherland v. Ernst & Young LLP, 726 F.3d 290, 2013 WL 4033844 (2d Cir. 2013)*; **[*25]** *Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013)*; *Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004)*; *see also Vilches v. Travelers Co., 413 Fed. App'x 487, 494 n.4 (3d Cir. 2011)* (unpublished); *Horenstein v. Mortg. Market, Inc., 9 Fed. App'x 618, 619 (9th Cir. 2001)* (unpublished). This Court finds the reasoning underlying such a conclusion persuasive and similarly rejects the notion that a class member's inability to proceed collectively deprives them of substantive federal statutory rights available under the FLSA. As the Fifth Circuit has noted, the Supreme Court rejected similar arguments in *Gilmer*, despite the fact that the federal statute at issue in that case, the ADEA, "explicitly provides for class action suits." *Carter, 362 F.3d at 298* (citing *Gilmer, 500 U.S. at 32*). "What is more, the provision for class actions in the ADEA is the FLSA class action provision, which the ADEA expressly adopts." *Id.* (citing *29 U.S.C. § 626(b)*). In light of this weight of authority, this Court is not persuaded that enforcing this arbitration clause would amount to impermissible waiver of **[*26]** a federal right. Although plaintiffs who sign these agreements may as a result later lack the procedural right to proceed collectively, they nonetheless retain their substantive rights under the FLSA.

The plaintiffs argue that a collective action filed to improve the terms or conditions of employment is "concerted activity" protected by *§ 7* of the NLRA. *See Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011)*. They base their position on a 2012 decision by the National Labor Relations Board ("NLRB"), *In re D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274, *8 (2012)*. The NLRB held in *In re D.R. Horton* that because "concerted employment-related litigation by

employees" is protected by the Norris—LaGuardia Act and the NLRA, "an arbitration agreement imposed upon individual employees as a condition of employment cannot be held to prohibit employees from pursuing an employment-related class, collective, or joint action in a Federal or State court." *Id.* The plaintiffs argue that this Court should defer to the NLRB and find that an employment contract that purports to require employees to pursue employment-related claims individually in arbitration is a *per se* violation of the **[*27]** NLRA.

This premise has been rejected by myriad courts. *See, e.g.*, *Richards v. Ernst & Young, LLP, 11-17530, 734 F.3d 871, 2013 U.S. App. LEXIS 17488, 2013 WL 4437601 (9th Cir. Aug. 21, 2013)*; *Sutherland, 726 F.3d 290, 2013 WL 4033844, at *4 n.8*; *Owen, 702 F.3d at 1053*; *Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012)*; *LaVoice v. UBS Fin. Servs., Inc., 11 CIV. 2308 BSJ JLC, 2012 U.S. Dist. LEXIS 5277, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012)*. For several reasons, the Court rejects the argument here, as well. As an initial matter, and as the Eighth Circuit pointed out in *Owen*, an arbitration clause that does not prohibit all types of concerted action is distinguishable from the clause presented in *In re D.R. Horton*. *702 F.3d at 1053-54*. Here, Wintrust takes the position that the employment contract does not prohibit employees from all types of concerted action; employees may still file complaints before government agencies that may proceed on behalf of groups, such as the Department of Labor, the Equal Employment Opportunity Commission, or the NLRB. Defs.' Resp., Dkt. 65, at 7. Additionally, this Court owes no deference to the NLRB's interpretation of Supreme Court decisions, *see New York New York, LLC v. NLRB, 313 F.3d 585, 590, 354 U.S. App. D.C. 135 (D.C. Cir. 2002)*, **[*28]** and the *In re D.R. Horton* order "conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA]," *Richards, 2013 U.S. App. LEXIS 17488, 2013 WL 4437601, at *2*; *see also Owen, 702 F.3d at 1054* (collecting cases showing "more than two decades of pro-arbitration Supreme Court precedent"). Courts that do follow *In re D.R. Horton*, such as *Brown v. Citicorp Credit Servs., Inc., 1:12-CV-00062-BLW, 2013 U.S. Dist. LEXIS 24913, 2013 WL 645942 (D. Idaho Feb. 21, 2013)*, fail to resolve this conflict and fail to account for the fact that the FAA was reenacted after the NLRA. *See Delock, 883 F. Supp. 2d at 789* ("Congress . . . reenacted the [FAA] in 1947—after passing the Norris—LaGuardia Act and reenacting the NLRA."). Accordingly, this Court rejects the argument than an arbitration clause that waives FLSA collective litigation rights is void as a matter of law for violating the NLRA.

Turning to the plaintiffs' unconscionability argument, the Supreme Court has held that the FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Concepcion, 131 S. Ct. at 1745* (quoting *9 U.S.C. § 2*). Therefore, agreements to arbitrate **[*29]** may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id. at 1746*. The Wintrust employment contract specifies that the law of Illinois governs its construction. In Illinois, "a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both." *Kinkel v. Cingular Wireless, LLC, 223 Ill. 2d 1, 857 N.E.2d 250, 263, 306 Ill. Dec. 157 (Ill. 2006)*. Class-action waivers are evaluated for whether they are unconscionable on a case-by-case basis. *Id. at 278*. The Illinois Supreme Court has characterized procedural unconscionability as "impropriety during the process of forming the contract depriving a party of a meaningful choice." *Id. at 264* (quoting *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403, 410, 42 Ill. Dec. 25 (Ill. App. Ct. 1980)*). To determine if unconscionability is present, Illinois courts consider: (1) the manner of contract formation; (2) whether each party had a reasonable chance to understand the contract; and (3) whether key terms

were "hidden in a maze of fine print." *Frank's Maint. & Eng'g, 408 N.E.2d at 410*.

The plaintiffs are correct to note that unequal bargaining **[*30]** power alone does make an agreement unconscionable. *See Melena v. Anheuser-Busch, Inc., 219 Ill. 2d 135, 152, 847 N.E.2d 99, 109, 301 Ill. Dec. 440 (2006)* (rejecting appellate court's finding that an agreement offered on a "take it or leave it" basis was unenforceable). The plaintiffs argue instead that the contractual term requiring individual arbitration of employment-related claims is unconscionable because Wintrust had its employees sign the contract after being notified of the pendency of this suit. They characterize the arbitration provision as a "release" or "waiver" of the right to consent to join this lawsuit as plaintiffs. The plaintiffs argue that the party seeking to enforce a waiver of federal statutory rights bears the burden of proving knowing and voluntary consent. *See Pierce v. Atchison Topeka & Santa Fe Ry. Co., 110 F.3d 431, 438 (7th Cir. 1997)*.

The Court first notes that Heniff signed his agreement on July 1, 2012, after this suit was filed, but McCormick signed his on January 10, 2012, two months before Wintrust was served with this suit. The plaintiffs' waiver theory thus does not apply to his arbitration clause. As for the Heniff agreement, the Court finds that it too is not accurately **[*31]** characterized as a waiver. The Seventh Circuit case that the plaintiffs rely on is distinguishable. *Pierce* involved a waiver of substantive rights under the Age Discrimination in Employment Act ("ADEA"). *Id.* There, an employee agreed to release all claims against his employer in exchange for a severance package. In contrast, Heniff's contract does not prohibit him from pursuing FLSA claims against Wintrust in arbitration or before a government agency. He did not waive such claims when he signed.

To the extent that the plaintiffs rely on the collective action complaint or the motion for conditional certification having been filed before July to establish that Heniff's signature released a claim, their argument fails. The Supreme Court has indicated that even after conditional certification of a class—a step that had not yet occurred when Heniff signed his agreement—the class does not have "an independent legal status" and additional parties are not joined to the suit. *Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530, 185 L. Ed. 2d 636 (2013)*. Heniff had no stake in this suit until he consented to opt in on October 15, 2012. When he signed his employment agreement the previous July, he had no **[*32]** active personal claim to release or waive. The Court recognizes the plaintiffs' concern that similarly enforceable arbitration provisions may ultimately limit the number of people that may participate in this collective action, but absent any other allegations of fraud, misfeasance, or hidden terms, it is not convinced that the provision is unenforceable for being unconscionable.

Having found the arbitration provisions enforceable, the inquiry turns to whether a dismissal or stay is appropriate. "A district court should retain jurisdiction when a suit is referred to a separate forum for resolution of an issue." *Corrigan v. Domestic Linen Supply Co., Inc., 12 C 0575, 2012 U.S. Dist. LEXIS 100961, 2012 WL 2977262 (N.D. Ill. July 20, 2012)* (citing *Tice v. American Airlines, 288 F.3d 313, 318 (7th Cir.2002))*. *Section 3* of the FAA directs courts to stay proceedings that have been referred to arbitration until that arbitration has been completed. *9 U.S.C. § 3*. If arbitration of the dispute does not resolve all of the issues, the suit may resume. *See Tice, 288 F.3d at 318*. The defendants motion to stay this suit as to McCormick and Heniff's claims is granted.

Finally, the defendants argue that the collective should not **[*33]** include those individuals who have signed arbitration clauses. As the Court noted above, the enforceability of arbitration clauses are dealt with on a case-by-case basis. Without being presented with the circumstances surrounding the manner of formation of an actual agreement, it will

not pre-judge the enforceability of other arbitration clauses. The defendants' proposal to limit the class in this way is accordingly denied.

III. Plaintiffs' Motion to Extend the FLSA Statute of Limitations Tolling Period

The plaintiffs also move to extend the equitable tolling of the statute of limitations for putative collective members who have not yet received notice of this action and an opportunity to opt in. FLSA prescribes a statute of limitations period of two years, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." *29 U.S.C. § 255(a)*.

FLSA claims are particularly vulnerable to the running statute of limitations because the filing of a collective action suit does not toll the statute of limitations for putative collective members. *See 29 U.S.C. § 256(b)*. The Supreme Court has noted that the benefits of a FLSA **[*34]** opt-in collective action "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. Courts therefore often exercise their discretion to toll the FLSA limitations period when procedural delays would prejudice the claims of putative collective members. *See, e.g., Bergman v. Kindred Healthcare, Inc., 10 C 191, 949 F. Supp. 2d 852, 2013 U.S. Dist. LEXIS 82238, 2013 WL 2632596 (N.D. Ill. June 11, 2013)*; *Struck v. PNC Bank N.A., 2:11-CV-00982, 931 F. Supp. 2d 842, 2013 U.S. Dist. LEXIS 41666, 2013 WL 1142708 (S.D. Ohio Mar. 19, 2013)*; *Israel Antonio-Morales v. Bimbo's Best Produce, Inc., CIV.A.8:5105, 2009 U.S. Dist. LEXIS 51833, 2009 WL 1591172 (E.D. La. Apr. 20, 2009)*; *Beauperthuy v. 24 Hour Fitness USA, Inc., 06-0715SC, 2007 U.S. Dist. LEXIS 21315, 2007 WL 707475 (N.D. Cal. Mar. 6, 2007)*. In light of these concerns and earlier delays in this case, and the parties' joint motion to stay the case pending mediation, this Court had previously extended the tolling of the statute to February 15, 2013. Through no fault of the existing or potential plaintiffs, there has been further delay in ruling on the motion for conditional certification and court-authorized notice. **[*35]** By the date of this ruling, nearly one year will have passed since the plaintiffs filed their initial motion for conditional certification on October 19, 2012.

Wintrust makes two arguments in opposition to this motion. Wintrust argues that the absent collective action members have not diligently pursued their claims and have not been prevented from pursuing their claims by extraordinary circumstances. Additionally, Wintrust argues that this Court does not have jurisdiction to issue an order tolling the statute for absent collective action members. Wintrust's position in support of this latter argument is that because the absent collective members are not before the court, such an order would be an impermissible advisory opinion. Wintrust cites *United States v. Cook, 795 F.2d 987, 994 (Fed. Cir. 1986)*, in which the Federal Circuit vacated an order purporting to toll the statute of limitations for absent collective members who had yet to receive notice as prematurely issued.

It appears that despite the widespread pattern of district courts extending tolling in similar circumstances as presented in this case, only a few have considered this particular jurisdictional argument. *See Piekarski v. Amedisys Illinois, LLC, 12-CV-7346, 2013 U.S. Dist. LEXIS 74871, 2013 WL 2357536 (N.D. Ill. May 28, 2013)* **[*36]** (citing *Cook* and concluding that "it would be improper for the Court to toll the statute of limitations for prospective plaintiffs"); *Tidd v. Adecco USA, Inc., CIV.A. 07-11214-GAO, 2010 U.S. Dist. LEXIS 24785, 2010 WL 996769 (D. Mass. Mar. 16, 2010)* ("The plaintiffs' request for equitable tolling of the statute of limitations for potential class members is premature."). Even courts that have declined to extend the tolling of the statute of limitations implicitly suggest that they have the jurisdiction to

do so when the situation warrants. *See, e.g.*, *Muhammad v. GBJ, Inc., CIV.A. H-10-2816, 2011 U.S. Dist. LEXIS 23589, 2011 WL 863785 (S.D. Tex. Mar. 9, 2011)* (indicating that the decision of whether to extend tolling was driven by the presence or absence of "extraordinary circumstances"); *Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 479-80 (S.D.N.Y. 2008)* (considering whether counsel for the putative class presented arguments as to the potential opt-in plaintiffs' diligence). Recent Supreme Court precedent on collective actions, however, indicates a potential justiciability problem affecting this Court's ability to grant the plaintiffs' motion. *See* ***[*37]*** *Genesis Healthcare Corp., 133 S. Ct. 1523, 185 L. Ed. 2d 636*. In *Genesis*, the Court held that a collective action brought by a single employee on behalf of herself and all similarly situated employees was no longer justiciable when her individual claim became moot. *Id. at 1529*. The Court suggested that the interests of the collective are not before the court if they have not yet opted in, even once conditionally certified. *Id. at 1530* ("'[C]onditional certification' does not produce a class with an independent legal status, or join additional parties to the action.").

The Court notes that the plaintiffs have not replied to Wintrust's brief in opposition to extending tolling, and thus have not had an opportunity to offer their perspective on this particular issue. This motion will be continued until the plaintiffs have a chance to do so. The plaintiffs have seven days after the entry of this order to reply, or until October 7, 2013.

* * *

For the reasons set forth above, the plaintiffs' motion for conditional certification is granted as explained in this order. The defendants shall produce the specified employee information by October 15, 2013. The plaintiffs' proposed notice is approved; the final version **[*38]** shall be submitted to the Court by October 15, 2013. Defendants' motion to stay the claims of McCormick and Heniff is granted. The plaintiffs' motion to extend the tolling of the statute of limitations is continued; the plaintiffs have leave to file a reply by October 7, 2013.

/s/ John J. Tharp, Jr.

John J. Tharp, Jr.

United States District Judge

Date: September 30, 2013

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Exhibit 23

MARK ROSS, individually and on behalf of similarly situated persons,

Plaintiff,

v.

SUBCONTRACTING CONCEPTS, LLC, AUTO-WARES, LLC, and JOHN DOES 1-10.

Defendants.

Case No. 2:20-cv-12994

Hon. Linda V. Parker

Magistrate Judge David R. Grand

NOTICE OF PENDENCY OVERTIME LAWSUIT

TO: All individuals who contracted with SCI as last-mile delivery drivers using their own personal vehicles in the United States from three years prior to the filing of this Action who were classified as independent contractors.

The purpose of this Notice is to inform you of a collective action in which you are potentially "similarly situated" to the Named Plaintiff, to advise you of how your rights may be affected by this action, and to inform you of the procedure to make a claim if you choose to do so.

I. DESCRIPTION OF THE ACTION

The lawsuit alleges Defendants have failed to pay their last-mile delivery drivers misclassified as 1099 independent contractors overtime pay for hours worked over forty in a workweek, in violation of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 201 *et seq.* Plaintiff seeks recovery in the form of payment from Defendants for unpaid wages and an additional equal amount as liquidated damages, as well as attorneys' fees and costs.

The action was filed on November 6, 2020 against Defendants Subcontracting Concepts, LLC and Auto-Wares, LLC. Defendants deny Plaintiff's allegations and maintain that these employees were paid all wages to which they are entitled and do not have claims under the FLSA or state law. The Court has not made any decision on the merits of these claims or the defenses.

II. PERSONS ELIGIBLE TO RECEIVE THIS NOTICE

The United States District Court for the Eastern District of Michigan has ordered that FLSA Notice be distributed to: "All individuals who contracted with SCI as last-mile delivery drivers using their

own personal vehicles in the United States from three years prior to the filing of this Action who were classified as independent contractors (the 'FLSA Collective' or 'Collective')."

Defendants in this matter have identified you as a current or former independent contractor last-mile delivery driver who may have a claim in this lawsuit. You may join the claims in this action by returning the attached "Plaintiff Consent Form" to Plaintiff's Counsel, listed in Section VII below, for filing with the Court. The Plaintiff Consent Form must be received by Plaintiff's Counsel on or before [date].

III. EFFECT OF JOINING OR NOT JOINING THIS ACTION

If you choose to join this lawsuit, you and Defendants will be bound by any ruling, judgment or settlement, whether favorable or unfavorable. If you do not join this lawsuit, you are free to take action on your own or do nothing at all.

If you file a "Plaintiff Consent Form," your continued right to participate in this lawsuit may depend upon a later decision by the Court that you and the Named Plaintiff are "similarly situated" in accordance with applicable laws and that it is appropriate for this case to proceed as a col1ective action under the FLSA.

IV. STATUTE OF LIMITATIONS

The FLSA has a maximum statute of limitations of three years. If you choose to join this lawsuit, you may be able to recover money damages if you were improperly denied overtime payment wage for time you worked within three years of the date you file your Plaintiff Consent Form. If you choose not to join in this lawsuit or you file your own action, some or all of your potential claims may later be barred by the applicable statute of limitations.

V. NO RETALIATION PERMITTED

The law prohibits retaliation against employees for exercising their rights under the FLSA. Therefore, Defendants are prohibited from firing you or retaliating against you in any other manner because you choose to participate in this lawsuit.

VI. YOUR LEGAL REPRESENTATION IF YOU JOIN

If you choose to participate in this lawsuit by filing the attached Plaintiff Consent Form, your interests will be represented by Plaintiff's Counsel:

David M. Blanchard
Frances J. Hollander
BLANCHARD & WALKER PLLC
221 N Main St., Suite 300
Ann Arbor, MI 48104
(734) 929-4313

The attorneys are being paid on a contingency fee and/or statutory basis, which means that if there is no recovery there will be no attorneys' fees. You will not have to pay the attorneys out of your own pocket.

THIS NOTICE AND ITS CONTENT HAS BEEN AUTHORIZED BY THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, THE HONORABLE JUDGE LINDA V. PARKER THE COURT HAS MADE NO DECISION IN THIS CASE ABOUT THE MERITS OF PLAINTIFF'S CLAIMS OR OF DEFENDANTS' DEFENSES.

PLAINTIFF CONSENT FORM

1. I consent to make a claim under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* against my current/former employer(s), Subcontracting Concepts, LLC, Auto-Wares, LLC ("Defendants"), and any other related entities or affiliates, to recover overtime pay.

2. During the past three years, there were times when I worked over 40 hours per week for Defendants as a last-mile delivery driver classified as an independent contractor, or in a similar job title, and did not receive compensation for the overtime hours I worked.

3. If this case does not proceed collectively, then I also consent to join any subsequent action to assert these claims against Defendants, and any other related entities or affiliates.

Date: _____ _____
Signature

_____
Print Name

Information Below Will Be Redacted in Filings with the Court. Please Print or Type.

Address: _____

City, State Zip:_____

Best Phone Number(s): _____

Email: _____

Return this form by fax, email or mail to:

Blanchard & Walker PLLC, Attn: David M. Blanchard
Fax: (612) 215-6870
Email: _____@bwlawonline.com
Address: 221 N. Main St., Ste. 300, Ann Arbor, MI 48104
Web: _____

Exhibit 24

Benion v. LeCom, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

May 13, 2016, Decided; May 13, 2016, Filed

Case Number 15-14367

Reporter
2016 U.S. Dist. LEXIS 63210 *

HARRY BENION, ZACHARY GOODGALL, DAMON FRANKLIN, and LESLIE MORGAN, Plaintiffs, v. LECOM, INCORPORATED, and LECOM COMMUNICATIONS, INC., Defendants.

Subsequent History: Reconsideration denied by *Benion v. LeCom, Inc., 2016 U.S. Dist. LEXIS 76860 (E.D. Mich., June 14, 2016)*

Motion granted by, in part, Motion denied by, in part *Benion v. Lecom, Inc., 2016 U.S. Dist. LEXIS 198957 (E.D. Mich., Aug. 10, 2016)*

Motion denied by *Benion v. Lecom, Inc., 2016 U.S. Dist. LEXIS 162384 (E.D. Mich., Nov. 23, 2016)*

Motion granted by *Benion v. LeCom, Inc., 2017 U.S. Dist. LEXIS 150810 (E.D. Mich., Sept. 18, 2017)*

Magistrate's recommendation at, Costs and fees proceeding at *Benion v. LeCom, Inc., 2017 U.S. Dist. LEXIS 201656 (E.D. Mich., Nov. 2, 2017)*

Motion granted by, in part, Motion denied by, in part *Benion v. Lecom, Inc., 2018 U.S. Dist. LEXIS 226826 (E.D. Mich., Aug. 6, 2018)*

Partial summary judgment granted by, in part, Partial summary judgment denied by, in part, Summary judgment denied by, Summary judgment granted by, Dismissed by, in part *Benion v. LeCom, Inc., 336 F. Supp. 3d 829, 2018 U.S. Dist. LEXIS 169016 (E.D. Mich., Sept. 30, 2018)*

Settled by *Benion v. Lecom Communs., Inc., 2018 U.S. Dist. LEXIS 224728 (E.D. Mich., Dec. 7, 2018)*

Counsel: **[*1]** For Harry Benion, Zachary Goodgall, Damon Franklin, Leslie Morgan, Plaintiffs: Harold Lichten, Lichten & Liss-Riordan PC, Boston, MA; David M. Blanchard, Blanchard & Walker, PLLC, Ann Arbor, MI.

For LeCom, Incorporated, LeCom Communications, Inc., Defendants: James R. Andary, Andary, Andary, Mount Clemens, MI.

Judges: Honorable DAVID M. LAWSON, United States District Judge.

Opinion by: DAVID M. LAWSON

Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS, GRANTING PLAINTIFFS' MOTION FOR CONDITIONAL COLLECTIVE ACTION CERTIFICATION, AND APPROVING JUDICIAL NOTICE TO PUTATIVE CLASS MEMBERS

Harry Benion and three others commenced this action against LeCom, Incorporated and LeCom Communications, Inc. alleging that these companies misclassified them as independent contractors in order to avoid the minimum wage and overtime obligations established by the *Fair Labor Standards Act (FLSA)*, *29 U.S.C. § 201, et*

seq. The plaintiffs also make a claim for unjust enrichment under Michigan common law. The defendants have moved to dismiss the complaint under *Federal Rule of Civil Procedure 12(b)(6)*. Since the case was filed, one other plaintiff has opted in to the case, and the plaintiffs have moved to certify the case conditionally as a collective action under **[*2]** *29 U.S.C. § 216(b)*. The Court heard oral argument on the motions on May 10, 2016.

The facts that the plaintiffs have alleged in their complaint map comfortably onto the Sixth Circuit's discussion in *Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. 2015)*, which strongly favors the plaintiffs. Their complaint touches all the bases and pleads all the elements of an *FLSA* misclassification claim. The unjust enrichment claim, however, is not well pleaded. The motion to dismiss, therefore, will be granted on count II and denied in all other respects. The plaintiffs' pleadings and motion papers do not elaborate very well on the existence or number of other identifiable individuals that are similarly situated to them. However, the certification standard is "fairly lenient" at this stage of the proceedings, and the plaintiffs are required to make only "a modest factual showing." *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 547 (6th Cir. 2006)*. Therefore, the Court will grant the motion for conditional certification of the case as a collective action.

I. Factual Allegations

Because the focus of a motion to dismiss under *Rule 12(b)(6)* is on the facts stated in the complaint, the Court will summarize them here in detail. The defendants, LeCom Communications, Inc. and LeCom, Inc. (collectively "LeCom"), contract with Comcast Cable Company to perform **[*3]** telecommunication installations and repair services for Comcast's customers in Michigan. The plaintiffs allege that LeCom hires both employees and independent contractors, whose sole job responsibilities are to install and repair cable services. The plaintiffs allege that all of the cable installers perform the same type of work and are under LeCom's control and direction regardless of how LeCom classifies them. The plaintiffs contend that the defendants misclassified the plaintiffs as independent contractors, thus denying them the protections of employees under the *FLSA*, which includes overtime pay for hours worked in excess of 40 hours per week. Plaintiff Harry Benion alleges that he has worked as both an employee and an independent contractor for LeCom. Benion asserts that regardless of whether he was an employee or an independent contractor, he performed the same work, on the same number of days, and at the same level of direction by LeCom.

The plaintiffs allege that LeCom hires individuals as cable installation technicians and then misclassifies them as independent contractors. The plaintiffs maintain that in order to be hired, LeCom requires individuals to contract with one of **[*4]** five specific subcontractor companies at LeCom's direction. However, the plaintiffs allege that in reality it is LeCom, and not the subcontracting companies, that is employing, assigning work to, and directing each technician.

The plaintiffs allege that LeCom requires technicians to work six days a week, unless formal requests are made to LeCom. Technicians are not allowed to take any time off or work fewer than six days in a week without prior approval from LeCom. Plaintiff Benion alleges that he once asked LeCom for permission to work only five days a week, but LeCom denied his request and stated that he would be terminated if he did not report to work six days each week.

LeCom supervisors allegedly organize the daily list of job assignments into routes for each technician, and LeCom requires the technicians to report to its office every workday morning at approximately 7:00 a.m. to receive routes. Each route consists of a collection of telecommunication installation assignments at residences and businesses, and some routes require technicians to drive longer distances than other routes. The plaintiffs contend that it is

LeCom alone who decides which technician is assigned to which **[*5]** route, so the technicians have no choice about which job assignments they work each day.

LeCom allegedly provides all of the cables, boxes, fittings, and other similar equipment that technicians need to perform cable installation and repair work for LeCom's customers. LeCom also determines the order in which the technicians perform the job assignments in their routes each day, and LeCom sets time windows for when technicians must perform each assignment. Recently, LeCom began sending job assignments directly to the technicians via company-issued smart phones on a job-by-job basis, so that when a technician completes one job, the next job is automatically sent to that technician's phone. If a technician wishes to reject a job assignment, the technician must ask a LeCom supervisor for permission, but the plaintiffs allege that LeCom has the authority to deny permission for any reason. Once technicians complete their assigned routes each day, LeCom requires each technician to call LeCom's office and acquire a "clear code" before they are allowed to leave the field.

The plaintiffs allege that they regularly work well over forty hours each week, and as a result are unable to find time to **[*6]** perform the same type of work for any entities other than LeCom. And even if technicians were able to find additional work, the plaintiffs allege, LeCom prohibits its technicians from performing work for anyone other than LeCom as a matter of policy reflected in a non-compete agreement. The named plaintiffs allege that they regularly worked between 60 to 80 hours a week and sometimes more. The work days began at 7:00 a.m. and ended as late as 9:00 or 10:00 p.m. They maintain that they were not provided with any overtime compensation for hours worked in excess of 40 each week.

The plaintiffs allege that LeCom does not require technicians to have prior experience performing telecommunication installation work, and has hired technicians who had no prior experience. LeCom requires individuals with no prior experience to ride along with another technician to learn the job.

The plaintiffs also allege that LeCom directly supervises the manner in which the technicians complete their assigned work. Technicians regularly receive phone calls from LeCom employees throughout the day regarding the technicians' whereabouts and job performance, and to assign new jobs. According to the plaintiffs, LeCom **[*7]** controls the uniform and appearance of its technicians, and all of the technicians must wear a shirt bearing the Comcast logo, and are prohibited from wearing a hat unless it is one that the technicians purchased from LeCom bearing the LeCom logo. Technicians are also required to wear a badge with the LeCom logo while they are working.

The plaintiffs allege that they attend mandatory morning meetings once a week in which LeCom supervisors discuss the technicians' work performance, including job completion statistics, as well as specific examples from the past week of work that the technicians did correctly or incorrectly. Technicians may be suspended for failing to report for a mandatory weekly meeting. LeCom also allegedly "writes up" any technician who is found to not meet LeCom's detailed job performance specifications.

In their complaint, the plaintiffs describe LeCom's control of the technicians' daily conduct through the use of backcharges. According to the plaintiffs, if a customer reports signal loss for any reason, the technician must return to the job site; if they fail to do that, they will be penalized by not being compensated for the job. LeCom also unilaterally deducts **[*8]** money from the technicians' wages if LeCom believes, correctly or incorrectly, that a technician lost equipment that LeCom issued to the technician. Even if LeCom pays a technician for completing a job, LeCom may still retroactively apply backcharges if LeCom believes a job was billed incorrectly and resulted in overpayment.

Technicians are not allowed to challenge LeCom's decision to withhold pay, and LeCom has the authority to terminate any technician at any time, and for any reason.

The plaintiffs filed this putative collective action and putative class action on December 16, 2015. On February 23, 2016, the defendants filed their motion to dismiss and the plaintiffs filed a motion for conditional certification and judicial notice on March 14, 2016.

II. Motion to Dismiss

The defendants' motion is brought under *Federal Rule of Civil Procedure 12(b)(6)*. "The purpose of *Rule 12(b)(6)* is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true." *Rippy ex rel. Rippy v. Hattaway, 270 F.3d 416, 419 (6th Cir. 2001)* (citing *Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993)*). Under *Rule 12(b)(6)*, the Court views the complaint in the light most favorable to the plaintiff, the allegations of fact are accepted as true, and all reasonable inferences are drawn in favor **[*9]** of the plaintiff. *Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008)*. To survive a motion to dismiss under that rule, the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). Plausibility requires showing more than the 'sheer possibility' of relief but less than a 'probab[le]' entitlement to relief. *Ashcroft v. Iqbal, [556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868] (2009)*." *Fabian v. Fulmer Helmets, Inc., 628 F.3d 278, 280 (6th Cir. 2010)*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 557*).

Under the new regime ushered in by *Twombly* and *Iqbal*, pleaded facts must be accepted by the court, but conclusions may not be accepted unless they are plausibly supported by the pleaded facts. "[B]are assertions," such as those that "amount to nothing more than a 'formulaic recitation of the elements'" of a claim, can provide context to the factual allegations, but they are insufficient to state a claim for relief and must be disregarded. *Iqbal, 556 U.S. at 681* (quoting *Twombly, 550 U.S. at 555*). However, as long as a court can "'draw the reasonable inference that the defendant is liable for the misconduct alleged,' a plaintiff's claims must survive a motion to dismiss." *Fabian, 628 F.3d at 281* (quoting *Iqbal, 556 U.S. at 678*).

The defendants have attached a number of **[*10]** exhibits to their motion. However, consideration of a motion to dismiss under *Rule 12(b)(6)* is confined to the pleadings. *Jones v. City of Cincinnati, 521 F.3d 555, 562 (6th Cir. 2008)*. Assessment of the facial sufficiency of the complaint ordinarily must be undertaken without resort to matters outside the pleadings. *Wysocki v. Int'l Bus. Mach. Corp., 607 F.3d 1102, 1104 (6th Cir. 2010)*. Although documents attached to the pleadings become part of the pleadings and may be considered, affidavits and other testimonial papers generally fall outside the circle of permissible material. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 335 (6th Cir. 2007)* (citing *Fed. R. Civ. P. 10(c)*); *see also Koubriti v. Convertino, 593 F.3d 459, 463 n.1 (6th Cir. 2010)*. If a document is not attached to a complaint or answer, "when a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment." *Commercial Money Ctr., 508 F.3d at 335-36*. The plaintiffs' subcontractor agreements fall within that description.

A. *FLSA* Claim

The *Fair Labor Standards Act* requires employers to compensate employees who work more than 40 hours in a week at the premium rate of one and

one-half times their base rate of pay. *29 U.S.C. § 207(a)(1)*. Employers covered by the *FLSA* who fail to comply with its requirements "may be liable to their affected employees 'in the amount of their . . . unpaid overtime compensation' and 'in an additional equal amount as liquidated damages.'" *Moran v. Al Basit LLC, 788 F.3d 201, 204 (6th Cir. 2015)* (quoting **[*11]** *29 U.S.C. § 216(b)*).

To state a claim for an overtime violation, a plaintiff must plead facts that plausibly establish "(1) an employer-employee relationship, (2) that the employees are covered, (3) the employees worked more than forty hours, and (4) that overtime was not paid. *Anderson v. GCA Servs. Grp. of N. Carolina, Inc., No. 15-37, 2015 U.S. Dist. LEXIS 119742, 2015 WL 5299452, at *4 (W.D. Ky. Sept. 9, 2015)* (citing *29 U.S.C. § 207(a)*); *see also Manning v. Boston Med. Ctr. Corp., 725 F.3d 34, 43 (1st Cir. 2013)* (stating that "[t]he basic elements of a *FLSA* claim are that (1) plaintiffs must be employed by the defendants; (2) the work involved interstate activity; and . . . (3) plaintiffs 'performed work for which they were under-compensated'" (quoting *Pruell v. Caritas Christi, 678 F.3d 10, 12 (1st Cir. 2012)*)); *but see Bailey v. TitleMax of Georgia, Inc., 776 F.3d 797, 801 (11th Cir. 2015)* (holding that "[a]n unpaid-overtime claim has two elements: (1) an employee worked unpaid overtime, and (2) the employer knew or should have known of the overtime work").

The defendants' motion attacks the first element. They argue that the plaintiffs have not pleaded adequately that the defendants are their employer, and the plaintiffs, in fact, are independent contractors, and they are not employed by these defendants.

To begin, the defendants argue that LeCom Communications, Inc. is the only company that should be addressed in this lawsuit because LeCom, Inc. is a separate entity. Therefore, the defendants argue, LeCom Inc. should be dismissed from this case. That **[*12]** may turn out to be true; however, the present motion addresses the adequacy of the pleadings. The plaintiffs have alleged that they performed "telecommunications installation services . . . for Defendants LeCom Communications, Inc., and LeCom Inc. . . ." Compl. ¶ 1. Therefore, the complaint adequately identifies the appropriate defendants.

The defendants also insist that the plaintiffs are independent contractors, and there is no employer-employee relationship between the plaintiffs and the defendants that triggers any rights or obligations under the *FLSA*. That argument is largely fact-based, and the defendants make frequent reference to the exhibits attached to their brief. It bears repeating, however, that at this stage of the proceedings, the focus is on the complaint, and the legal question presented by the defendants' motion is whether the complaint contains facts that make out the elements of the plaintiffs' claims.

The defendants also concentrate a great deal of their argument on the fact that subcontractor agreements exist between the parties. However, contractual intention is not a dispositive consideration. *Keller, 781 F.3d at 808*. "'The reason is simple: The *FLSA* is designed to defeat rather than **[*13]** implement contractual arrangements.'" *Ibid.* (quoting *Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27 (6th Cir. 1998)* (table decision); *see also Real v. Driscoll Strawberry Assoc., 603 F.2d 748, 755 (9th Cir. 1979)* ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the *FLSA*."). The broad definition of "employee" under the *FLSA* "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992)*. The term "employee" under the *FLSA* "means any individual employed by an employer." *29 U.S.C. § 203(e)(1)*. Although the term "work" is not defined in the statute, the *FLSA* defines "employ" to mean "to suffer or permit to work." *29 U.S.C. § 203(g)*.

The parties agree that independent contractors are not entitled to the protection of the FLSA. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947). However, the Supreme Court has observed that the FLSA "'contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'" *Ibid.* (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 150, 67 S. Ct. 639, 91 L. Ed. 809 (1947)). "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Ibid.* (footnote omitted). **[*14]**

Independent contractor misclassification claims under the FLSA are examined using the "economic realites" test. Keller, 781 F.3d at 807. The *Keller* court suggested six non-exclusive factors to consider in applying that test. *Keller* provides considerable guidance here. In that case, the court considered whether satellite installation technicians for a satellite-Internet-dish installation company were independent contractors or employees. The plaintiff there, as here, worked for a subcontracting agency who contracted with a middleman satellite installation company that serviced a nationwide provider of satellite Internet systems and services. Keller, 781 F.3d at 805. However, in Keller, the plaintiff eventually left the subcontracting agency and began working for the middleman satellite installation company directly as an independent contractor. *Ibid.* The only significant difference between Keller and the present case is that there is an additional subcontracting agency separating LeCom and the plaintiffs. However, the defendants do not address this distinction in their motion to dismiss, and it does not affect *Keller*'s precedential guidance here. *Keller* also is different in that the case was appealed after summary judgment was granted, **[*15]** but that distinction does not diminish the case's usefulness here. The court of appeals reversed the dismissal, because fact issues remained on the question of the plaintiff's employment status.

The court of appeals identified these factors to use in applying the economic realities test:

> 1) the permanency of the relationship between the parties; 2) the degree of skill required for the rendering of the services; 3) the worker's investment in equipment or materials for the task; 4) the worker's opportunity for profit or loss, depending upon his skill; 5) the degree of the alleged employer's right to control the manner in which the work is performed; and 6) whether the service rendered is an integral part of the alleged employer's business.

Keller, 781 F.3d at 807 (quoting Donovan v. Brandel, 736 F.2d 1114, 1117 & n.5 (6th Cir. 1984) (internal quotation marks omitted). The Sixth Circuit has also considered whether "the business had 'authority to hire or fire the plaintiff,' and whether the defendant-company 'maintains the plaintiff's employment records.'" *Ibid.* (quoting Ellington v. City of E. Cleveland, 689 F.3d 549, 555 (6th Cir. 2012)). No one factor is controlling. Instead, the test under the FLSA "looks to whether the putative employee is economically dependent upon the principal or is instead in business for himself." Lilley v. BTM Corp., 958 F.2d 746, 750 (6th Cir. 1992); Keller, 781 F.3d at 807.

1. The permanency [*16] of the relationship between the parties

The plaintiffs allege that they worked for LeCom six days per week and were prohibited from working for anyone other than LeCom. "Generally, independent contractors have variable or impermanent working relationships with the principal company because they 'often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas "employees" usually work for only one employer and such relationship is continuous and indefinite in duration.'" Keller, 781 F.3d at 807 (quoting Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436,

1442 (10th Cir. 1998)). "If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor." *Ibid*. In *Keller*, the court reasoned that a jury could find that the plaintiff was an employee where he never turned down job assignments from the defendant, and he believed that he could be terminated for intransigence. *Id. at 808*. The court also noted that several aspects of the job were outside of his control, such as where the customers lived, when the customers were available, and the amount of time to drive to each customer's house. *Ibid*.

Here, the plaintiffs allege that they have worked for as much as a decade for LeCom. And **[*17]** like the plaintiff in *Keller*, the plaintiffs allege that they have no control over where the assignments will be, how long the jobs will take, and they are not allowed to turn down work for fear of termination. They further allege that they are not allowed to work for another company and are bound by a non-compete agreement. *See Swinney v. AMcomm Telecommunications, Inc., 30 F. Supp. 3d 629, 634 (E.D. Mich. 2014)* (noting that an independent contractor agreement contains a non-compete agreement, which in and of itself weighs in favor of viewing the plaintiffs as employees). This factor weighs in favor of the plaintiffs.

2. The degree of skill required for the rendering of the services

The defendants argue that the plaintiffs, as technicians, are part of a skilled trade akin to carpenters and electricians. The plaintiffs allege that the defendant does not require any previous experience performing cable installation and repair work, and has in fact hired technicians without any experience. "'Skills are not the monopoly of independent contractors'" *Keller, 781 F.3d at 809* (quoting *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987)*. The inquiry is focused on whether an individual's profits increased because of the "'initiative, judgment[,] or foresight of the typical independent contractor,' or whether his work 'was more like piecework.'" *Ibid*. ***[*18]*** (quoting *Rutherford, 331 U.S. at 730*). The Sixth Circuit noted that "[i]t is also important to ask how the worker acquired his skill." *Ibid*. (citing *Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1318 (11th Cir. 2013)*. An independent contractor is more likely to have gained the relevant skill though "formal education, an apprenticeship, or years of experience." *Ibid*. However, "if the worker's training period is short, or the company provides all workers with the skills necessary to perform the job," the worker is more likely an employee. *Ibid*.

Here, the plaintiffs allege that LeCom has hired individuals with no experience and has trained them by requiring them to ride along with other technicians to learn the job. The Sixth Circuit noted in *Keller* that although a satellite installation technician's skill may make them more efficient, the profession is not one that "rises or falls on the worker's special skill." *Ibid*. Certainly cable installation technicians are skilled workers. *See Herman v. Mid-Atl. Installation Servs., Inc., 164 F. Supp. 2d 667, 675 (D. Md. 2000)* (finding there is no question that cable installation is a skilled trade). But the plaintiffs allege that a lack of the relevant skill is not a barrier to work for LeCom. The *Keller* court contrasted technicians with carpenters, who have unique skills, craftsmanship, and artistic flourish. *Ibid.* Perhaps **[*19]** a carpenter is not the appropriate analog because it is not hard to imagine a highly skilled cable installation technician running cable and Internet service throughout a business much in the way an electrician installs wiring or a plumber installs pipes. Nonetheless, the plaintiffs' allegations suggest that their work is more like piecework because they pick up standard parts at the LeCom warehouse and drive to a job site to install those parts, rather than using highly specialized skills and exercising their own judgment on how to complete the tasks and what parts to use. Therefore, this factor tends to favor the plaintiffs.

3. The worker's investment in equipment or materials for the task

To determine whether a worker's capital investment shows evidence of economic independence, courts "must compare the worker's investment in the equipment to perform his job with the company's total investment, including office rental space, advertising, software, phone systems, or insurance." *Keller, 781 F.3d at 810*. "Investment in something like welding equipment signals a greater degree of economic independence because it is not a common item that most people use daily." *Ibid*. The defendants argue that this factor weighs **[*20]** in their favor because the plaintiffs provide their own vehicles, specialty tools, uniforms, and also pay their own insurance premiums and taxes. The plaintiffs counter that LeCom provides the office and warehouse out of which the plaintiffs operate, LeCom employs managers and dispatchers who oversee the plaintiffs' work, and LeCom supplies the plaintiffs with all of the cables, boxes, fittings, and other equipment that they need to perform cable installations and repair work for LeCom customers. The plaintiffs acknowledge that they own a vehicle, and the defendants require them to purchase uniforms, smart phones, and uniforms from LeCom.

The *Keller* court weighed the plaintiff's investments in a vehicle, tools, and parts against the defendant's investment in office space, telephones, and computers to schedule installation appointments. *Id. at 811*. The court discounted the investment in the plaintiff's vehicle, however, because the vehicle may also be used for personal purposes and is therefore an item used in everyday life. In *Keller*, the court held that a jury could find in favor of the plaintiff on this factor. *Ibid*. Here, the plaintiffs' allegations satisfy this factor because they allege **[*21]** that LeCom's investments in office space, a warehouse, and all of the parts needed for installation and repair outweighs the plaintiffs' investment in tools and vehicles.

4. The worker's opportunity for profit or loss, depending upon his skill

This factor questions whether workers "had an opportunity for greater profits based on [their] management and technical skills." *Id. at 812* (citing *Brandel, 736 F.2d at 1119*). The defendants argue that the plaintiffs can control their own profits and losses by agreeing to work more hours, or by improving their technique to service customers faster and gain more routes. The plaintiffs, on the other hand, argue that this factor weighs heavily in their favor because they were told when to report to LeCom's warehouse each morning, LeCom paid them on a piece-rate basis, and LeCom had complete discretion over the number of jobs the plaintiffs were required to complete each day. Based on the plaintiffs' allegations, it is fair to infer that they cannot unilaterally control how many customers they will service on a given day or how much they will be paid for each job, because LeCom sets the route and the price. The plaintiffs allege that LeCom required them to report for work at 7:00 a.m., **[*22]** and servicing a route may end as late as 10:00 p.m. on some days. The management portion of setting the routes is out of the plaintiffs' hands. And no matter how great a technician's skills are, those skills cannot make driving from job to job any more efficient. Moreover, profits may be diminished by LeCom's practice of making "chargebacks" to the plaintiffs when they are dissatisfied with a job at a later date. Therefore, as alleged, this factor weighs in the favor of the plaintiffs.

5. The degree of the alleged employer's right to control the manner in which the work is performed

"'Courts, in evaluating this factor, have considered such details as whether workers may choose how much and when to work, . . . whether they must wear uniforms, and how closely their work is monitored and controlled by the purported

employer.'" *Swinney v. AMcomm Telecommunications, Inc., 30 F. Supp. 3d 629, 638 (E.D. Mich. 2014)* (quoting *Scruggs v. Skylink, Ltd., No. CIV.A. 3:10-0789, 2011 U.S. Dist. LEXIS 138759, 2011 WL 6026152, at *3 (S.D.W. Va. Dec. 2, 2011)*).

According to the complaint, LeCom controls when the plaintiffs arrive to work and the number and order of jobs they will perform in a day, and requires them to receive a "clear code" before ending their day. The plaintiffs allege that they must use specific fittings and record certain codes on specific colors **[*23]** of tape at various types of job installations. The plaintiffs allege that failure to comply with LeCom's procedures results in disciplinary paperwork in their personnel file that LeCom maintains for each technician. Therefore, based on the plaintiffs' allegations, this factor also favors the plaintiffs.

6. Whether the service rendered is an integral part of the alleged employer's business

The plaintiffs are cable service installation and repair technicians. LeCom is a subcontractor for cable service installation and repair to a nationwide cable company. The defendants concede this factor, but argue it is the only factor that weighs in the favor of the plaintiffs. However, as noted above, all of the other factors weigh in the plaintiffs favor at the motion to dismiss phase of litigation.

7. Additional factors

The Sixth Circuit also considers whether "the business had 'authority to hire or fire the plaintiff,' and whether the defendant-company 'maintains the plaintiff's employment records.'" *Id. at 807* (quoting *Ellington, 689 F.3d at 555*). The plaintiffs allege that LeCom had the authority to terminate them and that it maintains personnel files for its technicians. Therefore, the additional factors also weigh in favor of the **[*24]** plaintiffs.

Because all of the economic reality factors tend to favor the plaintiffs, the plaintiffs have stated a plausible claim that they are employees rather than independent contractors under the *FLSA*. The defendants' motion to dismiss will be denied as to count I of the complaint.

B. Unjust Enrichment Claim

To plead a claim of unjust enrichment under Michigan law, a plaintiff must establish that the defendant has received and retained a benefit from the plaintiff and inequity has resulted. *Fodale v. Waste Mgmt. of Michigan, Inc., 271 Mich. App. 11, 36, 718 N.W.2d 827, 841 (2006)*. Michigan courts will then imply a contract to prevent unjust enrichment. *Ibid*. However, courts will not imply a contract where there is an express contract governing the same subject matter. *Ibid*. In count II of the complaint, the plaintiffs contend that they were deprived of compensation due to LeCom's deductions in their paychecks for chargebacks, as well as for use of uniforms, logos, and equipment that should have been provided and paid for by LeCom. Presumably, the plaintiffs' argument rests on the allegations that they are not independent contractors and therefore the subcontractor agreements are invalid.

The plaintiffs cite *Cork v. Applebee's of Michigan, Inc., 239 Mich. App. 311, 318, 608 N.W.2d 62 (Mich. Ct. App. 2000)*, as an example of Michigan courts allowing an unjust enrichment **[*25]** claim to proceed for waitresses alleging that a tip-sharing policy unjustly enriched their employers. However, in *Cork*, the validity of an unjust enrichment claim was not considered. The case was remanded because the trial court had dismissed all of the common law claims when it dismissed the Wages and Fringe Benefits Act claim for failing to exhaust administrative remedies. *Cork, 239 Mich. App. at 318, 608 N.W.2d at 65-66*. The merits of the unjust enrichment claim were not considered, therefore *Cork* is not instructive on this case.

The parties' relationship is governed either by subcontractor agreements or an oral contract of

employment. The parties bargained for subcontractor agreements and there are no allegations that LeCom breached those agreements. Even if the subcontractor agreements are found eventually to be void because the parties are employer and employee, that relationship will be governed by an employment agreement. If cost of the chargebacks and other costs cause the plaintiffs' wages to fall below minimum wage, then they can recover under the *FLSA*. Otherwise, the recovery must come under a breach of contract theory focusing on an employment contract. Therefore, because the subject matter of the plaintiffs' unjust **[*26]** enrichment claim is governed by an express contract, the Court will dismiss count II of the complaint for failure to state a claim.

III. Motion to Certify Collective Action

The *Fair Labor Standards Act* authorizes actions for recovery of unpaid overtime wages to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *29 U.S.C. § 216(b)*. The present plaintiffs have moved for an order conditionally certifying the action as a collective action to be brought on behalf of:

> All persons who, at any time since December 16, 2012 (1) have worked as cable installation technicians for LeCom Communications, Inc., and LeCom, Inc. within the state of Michigan; (2) have been classified as "independent contractors"; (3) have not been paid time-and-a-half for hours worked over forty in a workweek.

The defendants object to the motion, arguing that conditional certification is inappropriate because the plaintiffs' employment status has not been determined. They believe that a determination first must be made whether the plaintiffs are independent contractors or employees. The defendants also argue that the plaintiffs do not meet the criteria for conditional **[*27]** certification. Additionally, the defendants argue that the proposed notice by the plaintiffs is deficient.

The class-based litigation format authorized by *29 U.S.C. § 216(b)*, labeled a collective action, "serves an important remedial purpose" by allowing "a plaintiff who has suffered only small monetary harm [to] join a larger pool of similarly situated plaintiffs" in order to reduce individual litigation costs and employ judicial resources efficiently. *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 586 (6th Cir. 2009)* (citing *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*). Although both *Federal Rule of Civil Procedure 23* and the *FLSA* provide a vehicle for similar plaintiffs to proceed as a group against a defendant for similar harms, the Sixth Circuit has held that the two formats are different. *O'Brien, 575 F.3d at 584* ("While Congress could have imported the more stringent criteria for class certification under *Fed. R. Civ. P. 23*, it has not done so in the *FLSA*." (citing *Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)*; *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*. The rules applicable to class actions under *Federal Rule of Civil Procedure 23* present "a more stringent standard than is statutorily required" and do not apply to collective actions under the *FLSA*. *O'Brien, 575 F.3d at 584-85*; *see also id. at 586* ("[I]mposing any additional restrictions from *Rule 23* would be contrary to the broad remedial goals of the *FLSA*." (internal citations and quotation marks omitted)).

The statute sets out two requirements for collective actions: "1) the plaintiffs must actually **[*28]** be 'similarly situated,' and 2) all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer, 454 F.3d at 546*. The criteria in such cases generally are evaluated at various stages of the litigation. *Id. at 546-47*. If the plaintiff makes the minimal showing that other employees in the proposed class are similarly situated, the court will conditionally certify the case as a collective action, and then revisit that determination after additional discovery and the opt-in procedures have completed. *Ibid*. "Conditional certification is used to determine (1) the contour and size of the group of employees that may be represented in the action

so as to authorize a notice to possible collective members who may want to participate, and (2) if the members as described in the pleadings are 'similarly situated.'" 7B Wright, Miller, & Kane, Federal Practice & Procedure § 1807 (3d ed. 2005) at 488-89.

The *FLSA* does not define the term "similarly situated" for either the first or second analytical stage; the Sixth Circuit has not spoken extensively about this issue either, nor have the other circuits. *O'Brien, 575 F.3d at 584*. In *O'Brien*, the Sixth Circuit declined "to create comprehensive criteria for informing the similarly-situated **[*29]** analysis." *Id. at 585*. In *Comer*, the Sixth Circuit cited approvingly the idea that a "plaintiff must show only that 'his position is similar, not identical, to the positions held by the putative class members.'" *454 F.3d at 546-47* (quoting *Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 595 (S.D. Ohio 2002)*). Alternatively, plaintiffs may show that they were subject to a "single, *FLSA*-violating policy" or practice by the defendant and that "proof of that policy or of conduct in conformity with that policy [including by representative testimony] proves a violation as to all the plaintiffs." *O'Brien, 575 F.3d at 585*; 7B Wright, Miller, & Kane, Federal Practice & Procedure § 1807 (3d ed. 2005) at 489-90. In addition, the Sixth Circuit has held that plaintiffs were similarly situated where "their claims were unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien, 575 F.3d at 585*.

At this early stage, the courts generally employ "a fairly lenient standard" and may authorize notice on only "a modest factual showing." *Comer, 454 F.3d at 547* (quoting *Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000)*; *Pritchard, 210 F.R.D. at 596*); 7B Wright, Miller, & Kane, Federal Practice & Procedure § 1807 (3d ed. 2005) at 488. In general, courts do grant conditional certification on this analysis. *Morisky, 111 F. Supp. 2d at 497*; *see also* 7B Wright, Miller, & Kane, Federal Practice & Procedure **[*30]** § 1807 (3d ed. 2005) at 486-87 ("[I]n the pretrial stage of *FLSA* cases, courts have broad discretion to grant certification, to allow discovery, and to regulate notice." (footnote omitted)). The lead plaintiffs bear the burden of meeting this requirement at both the initial and final certification stages. *O'Brien, 575 F.3d at 584*.

There is no difficulty finding that the named plaintiffs are similarly situated. They each applied to LeCom to work as installation and repair technicians, were directed to subcontracting agencies, but were eventually approved by LeCom directly to work, and they allege nearly identical work responsibilities. The defendants argue that the plaintiffs have worked for varying amounts of time, but offer no authority to show that length of employment has any bearing on the similarity of each employee's situation. They also argue that plaintiff Benion is different from the others because he was a "lead" technician. However, that distinction merely means that he assisted other technicians (both employees and putative independent contractors) who needed help completing their installation or repair jobs. He was still engaged in the principal activity of conducting installation and repair work for LeCom. **[*31]** Moreover, the plaintiffs need only be similar, not identical, in their position. *Comer, 454 F.3d at 546-47*.

The defendants also argue that because this Court has yet to determine the relationship and status of the plaintiffs, conditional certification is inappropriate at this stage in the litigation. They rely on *Pfaahler v. Consultants for Architects, Inc., No. 99 C 6700, 2000 U.S. Dist. LEXIS 1772, 2000 WL 198888 (N.D. Ill. Feb. 8, 2000)*, and *Bamgbose v. Delta-T Grp., Inc., 684 F. Supp. 2d 660, 669 (E.D. Pa. 2010)*. In *Pfaahaler*, however, the plaintiff was only able to identify three other people who were potentially in the same position as he. *Pfaahaler, 2000 U.S. Dist. LEXIS 1772, 2000 WL 198888 at *2*. The rest of the 140 people whom the plaintiff identified were merely others who had

worked in excess of 40 hours in a week; the plaintiff provided no evidence that they were similarly situated to him. *Ibid.*

In *Bamgbose*, the defendant company was a temporary staffing agency for healthcare workers. *Bamgbose, 684 F. Supp. 2d at 669*. The *Bamgbose* court decided that conditional certification was not appropriate because it could not be shown that the 11,000 potential healthcare plaintiffs were similarly situated because the plaintiffs had a wide array of skills, responsibilities, and experiences with the defendant. *Ibid*. *Bamgbose* provides no guidance because the plaintiffs' proposed class consists of technicians performing nearly identical work for the defendants.

The weight of authority favors the **[*32]** position that conditional certification may be ordered before the employment relationship should be clarified, particularly in misclassification cases. *See e.g. Abdul-Rasheed v. KableLink Commc'ns, LLC, 2013 U.S. Dist. LEXIS 159632, 2013 WL 5954785, *6 (M.D. Fla. Nov. 7, 2013)* (conditionally certifying a collective action of cable installation technicians). The Sixth Circuit allows the certification criteria in *FLSA* cases to be evaluated at various stages of the litigation. *Comer, 454 F.3d at 546-47*. If the plaintiff makes the minimal showing that other employees in the proposed class are similarly situated, the court will conditionally certify the case as a collective action, and then revisit that determination after additional discovery and the opt-in procedures have been completed. *Ibid*. Waiting until after the close of discovery and clarifying the employment relationship in a motion for summary judgment, for example, would be contrary to the process envisioned in *Comer*.

The plaintiffs have not identified with any particularity the extent of the group they seek to notify of the present action. As this court has noted in an earlier case, "[a]lthough numbers are not dispositive, they are indicative of the likelihood that other employees classified as the plaintiffs believe that they might be similarly-situated." *Arrington v. Michigan Bell Tel. Co., No. 10 10975, 2011 U.S. Dist. LEXIS 84234, 2011 WL 3319691, at *5 (E.D. Mich. Aug. 1, 2011)*. Nonetheless, the **[*33]** plaintiffs have made a "modest showing" that there are other similarly-situated workers who deal with these defendants and who allegedly have been misclassified as independent contractors. In a declaration, plaintiff Harry Benion stated that "[i]n the time that I worked for LeCom, reporting to the LeCom office every morning and evening, I regularly saw many other technicians who were 'independent contractors' like me who also started work at 7:00 a.m., worked six days each week, and worked a similar number of hours each week." Pl.'s Mot. for Cond. Cert, Benion Decl. ¶ 7. Leslie Morgan stated that he saw "many other technicians who were also classified by LeCom as 'independent contractors' while picking up and returning equipment." Morgan Decl. ¶ 5. In addition, Leslie Morgan, Jason Lofton, Zachary Goodgall, and Gregory Booker each make reference to "technicians" other than themselves, although the plaintiffs have alleged that there are both employee and independent contractors working for LeCom as technicians. It is reasonable to infer from their statements, however, that the technicians they reference are independent contractors. *See* Morgan Decl. ¶¶ 7, 18-20; Lofton ¶¶ 18-20; Goodgall **[*34]** ¶¶ 6, 12-13, 17; Booker Decl. ¶ ¶ 8, 11, 13, 15-21.

The Court is satisfied that the plaintiffs have met the requirements for conditional certification at this early stage of the proceedings and may notify putative class members. The Supreme Court has held that court-supervised notice to a putative class in *FLSA* collective actions is proper in "appropriate cases [.]" *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. The defendants have objected to the plaintiffs' proposed notice on a few particular grounds, but they have not disputed the propriety of judicial notice generally, or the proposition that the Court has discretion "to authorize notification" of those individuals "to allow them to opt into the lawsuit." *Comer, 454 F.3d at 546*.

The defendants primarily object to including LeCom, Inc. as an identified defendant because that company has no relationship with the plaintiffs. However, that entity has been named by the plaintiffs as a putative employer subject to the *FLSA*, and naming it in the notice simply is an accurate description of the claims in the lawsuit. Next, the defendants object to the plaintiffs' request for a 90-day notice and opt-in provision. They suggest that if the plaintiffs are allowed to contact prospective plaintiffs by both regular **[*35]** mail and email, 60 days ought to be adequate. The defendants offer no other rationale for that proposition. One of the purposes of judicially supervised notice is to protect the claims of potential plaintiffs for unpaid overtime compensation by informing similarly-situated employees of the facts needed to make an informed decision whether to opt in. *Hoffmann-La Roche, 493 U.S. at 170*. That interest, of course, must be balanced with expeditious and prudent case management. The 90-day notice period proposed by the plaintiffs properly strikes that balance. The defendants also argue that the notice should not define the temporal class period of three years, because the *FLSA* statute of limitations is two years. However, an employer who commits a "willful violation" of the *FLSA* is subject to a three-year statute of limitations. *29 U.S.C.A. § 255(a)*. The plaintiffs have alleged that the defendants deliberately misclassified workers in the past to avoid paying overtime compensation, suggesting that the violations alleged here may be part of the same desire to avoid *FLSA* obligations. It is appropriate to allow a three-year look-back period in the notice where "[t]he absence of willful conduct is not established as a matter of law by the pleadings." **[*36]** *Colley v. Scherzinger Corp., No. 15-720, 2016 U.S. Dist. LEXIS 46296, 2016 WL 1388853, at *4 (S.D. Ohio Apr. 6, 2016)*.

The defendants point out that the plaintiffs' proposed notice contains the misstatement that "[t]he Court has made any determination of the plaintiffs' *FLSA* claims." Of course, the notice should read that the Court has *not* made such a determination. Otherwise, the notice is accurate, acceptable, and approved.

IV. Conclusion

The plaintiffs have stated a viable claim in count I of their complaint for violation of the *Fair Labor Standards Act* as to the named defendants. They have not stated a valid claim for unjust enrichment. The plaintiffs have established a right to conditional certification of the claim in count I as a collective action.

Accordingly, it is **ORDERED** that the defendants' motion to dismiss [dkt. #12] is **GRANTED IN PART AND DENIED IN PART**. Count II of the complaint is **DISMISSED WITH PREJUDICE**. The motion is **DENIED** in all other respects.

It s further **ORDERED** that the plaintiffs' motion for conditional certification of their *Fair Labor Standards Act* claim as a collective action [dkt. #16] is **GRANTED**.

It is further **ORDERED** that the defendants must furnish to counsel for the plaintiffs the last known post office and email addresses of the potential members of the described class **on [*37] or before June 3, 2016**.

It is further **ORDERED** that the plaintiffs shall modify their proposed notice to correct the language as noted above, and then deliver notice promptly to putative class members by United States mail, email, or both. The notice shall state that interested persons may opt in to this litigation **on or before September 2, 2016**, but not thereafter.

/s/ David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: May 13, 2016

End of Document

Exhibit 25

Smith v. Generations Healthcare Servs. LLC

United States District Court for the Southern District of Ohio, Eastern Division

July 11, 2017, Decided; July 11, 2017, Filed

Case No. 2:16-CV-807

Reporter
2017 U.S. Dist. LEXIS 106583 *; 2017 WL 2957741

DEANGELA SMITH, individually and on behalf of all similarly-situated individuals, Plaintiffs, v. GENERATIONS HEALTHCARE SERVICES LLC, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Smith v. Generations Healthcare Servs., LLC, 2018 U.S. Dist. LEXIS 196860 (S.D. Ohio, Nov. 19, 2018)*

Dismissed by, in part, Motion denied by, As moot *Smith v. Generations Healthcare Servs., LLC, 2019 U.S. Dist. LEXIS 92077 (S.D. Ohio, June 3, 2019)*

Counsel: **[*1]** For DeAngela Smith, Plaintiff: William Franklin Cash, III, LEAD ATTORNEY, Levin Papantonio Thomas Mitchell et al, Pensacola, FL; Jacob R. Rusch, PRO HAC VICE, St. Paul, MN.

For Generations Healthcare Services LLC, Generations Too, LLC., Defendants: Renny Joe Tyson, LEAD ATTORNEY, Renny J. Tyson Co., LPA - 2, Columbus, OH.

Judges: ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE. Magistrate Judge Vascura.

Opinion by: ALGENON L. MARBLEY

Opinion

OPINION AND ORDER

This matter is before the Court on Plaintiff DeAngela Smith's Motion for Conditional Certification and Notification of all Putative Class Members under *29 U.S.C. § 216(b)*. (Docs. 19, 20.) Also pending is Plaintiff's Motion to Expedite Consideration of her Motion for Conditional Class Certification (Doc. 30), which was filed on May 18, 2017, and Plaintiff's Motion for Extension of Time to Complete Discovery. (Doc. 32.) The Court held a hearing on Plaintiff's Motion for Conditional Certification on June 29, 2017. For the reasons set forth below, Plaintiff's Motion for Conditional Certification is **GRANTED**, and Plaintiff's Motion to Expedite and Motion for Extension of Time are now **MOOT**.

I. BACKGROUND

Plaintiff brings this action for wage and hour violations under the *Fair Labor Standards Act ("FLSA")* **[*2]** and related Ohio laws, on behalf of herself and individuals employed by Defendants Generations Healthcare Services, LLC and/or Generations Too, LLC ("Defendants") as registered nurses, licensed practical nurses, physical and occupational therapists, and home health aides since after January 1, 2015. (Second Am. Compl., Doc. 43; Mem. in Support of Mot. for Conditional Class Cert., Doc. 20, at 2.) Plaintiff has been employed by Defendants as an hourly home health aide ("HHA") since July 2014. (Doc. 20 at 2.) Her job duties include light housework and direct patient care. (*See id.*) According to Plaintiff, throughout her employment, she has regularly

worked over 40 hours per workweek, but has not been compensated at the overtime rate of one and one-half times her regular rate for her excess hours. (*See* Doc. 43 ¶¶ 26-28.) Additionally, Plaintiff alleges that hours over 40 per workweek were not even recorded on her paystubs. (*See id.* ¶ 32.)

Defendants are Ohio limited liability companies that offer in-home healthcare services in several Ohio counties. (Doc. 20 at 2.) Plaintiff alleges that Defendants violated the FLSA and Ohio wage and hour laws by failing to pay Plaintiff and **[*3]** similarly-situated employees overtime at a wage rate of one and one-half times her regular rate and by failing to maintain and preserve timesheet and payroll records. (*See* Doc. 43 ¶¶ 26-32.)

Plaintiff's Second Amended Complaint asserts causes of action under the FLSA (Count 1); and the *Ohio Wage Act (Ohio Rev. Code Chapter 4111*) and the *Ohio Prompt Pay Act (Ohio Rev. Code § 4113.15(A)*) (Count 2). (*See id.* ¶¶ 52-74.) Plaintiff asks the Court to certify conditionally this case as a collective action for unpaid overtime wages under the FLSA. Specifically, Plaintiff seeks to certify conditionally a class defined as:

> **All current and former Home Health Aides or other job titles performing similar job duties (collectively, "HHAs") employed by Generations Healthcare Services, LLC and/or Generations Too, LLC at any time after January 1, 2015, who worked over 40 hours per week, and were not paid overtime for hours worked over 40 in a workweek**.

(*Id.* ¶ 39.) Plaintiff also asks the Court to:

- Approve her proposed Court-authorized Notice and Consent to Sue form;
- Compel Defendants to produce the full names, all known addresses, e-mail addresses, and telephone numbers of potential class members within **14 days** of the Order granting this Motion;
- Permit **[*4]** Plaintiff's counsel to send, within **14 days** of receipt of the class list from Defendants, the Court-authorized Notice and Consent to Sue form via U.S. mail and e-mail to putative class members;
- Require Defendants to post a copy of the Court-authorized Notice in their facilities;
- Allow **90 days** for putative class members to return their Consent to Sue form to Plaintiff's counsel for filing with the Court; and
- Appoint Plaintiff's counsel as counsel for members of the putative class.

(*See* Doc. 20 at 1-2.) Plaintiff's Motion is ripe for adjudication.

II. STANDARD OF REVIEW

The FLSA allows employees to maintain an action on behalf of "themselves and other employees similarly situated." *29 U.S.C. § 216(b)*. *Section 216(b)* specifies that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." This means that putative plaintiffs in FLSA class actions, such as this one, must opt in to the litigation. *See Albright v. Gen. Die Casters, Inc., 5:10-CV-480, 2010 U.S. Dist. LEXIS 142329, 2010 WL 6121689, at *2 (N.D. Ohio July 14, 2010)* ("[U]nder the FLSA a putative plaintiff must affirmatively opt-in to the class"); *Jackson v. Papa John's USA, Inc., No. 1:08-CV-2791, 2008 U.S. Dist. LEXIS 107650, 2009 WL 385580, at *4 (N.D. Ohio Feb. 13, 2009)* (same). In short, the **[*5]** Act establishes two requirements for a representative FLSA action against an employer: "(1) the plaintiffs must actually be 'similarly situated,' and (2) all plaintiffs must signal in writing their affirmative consent to participate in the action." *Snelling v. ATC Healthcare Services, Inc., No. 2:11-CV-983, 2012 U.S. Dist. LEXIS 172052, 2012 WL 6042839, at *2 (S.D. Ohio Dec. 4, 2012)* (quoting *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*).

Notably, the commencement of an FLSA collective action does not toll the statute of limitations for putative class members. *Stout v. Remetronix, Inc., No. 3:13-cv-026, 2013 U.S. Dist. LEXIS 112563, 2013 WL 4048241, at *2 (S.D. Ohio Aug. 9, 2013)*; *29 U.S.C. § 256(b)*. An FLSA collective action "is considered to have commenced as to each individual opt-in plaintiff only when she files written consent to join the action." *Myers v. Marietta Mem'l Hosp., 201 F. Supp. 3d 884, 897 (S.D. Ohio 2016)* (citing *29 U.S.C. § 256*). The distinct "opt-in" structure of *§ 216(b)* heightens the need for employees to "receiv[e] accurate and timely notice concerning the pendency of the collective action." *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. The statute therefore vests district courts with "discretion . . . to implement *29 U.S.C. § 216(b)* . . . by facilitating notice to potential plaintiffs." *Id. at 169*. The decision to conditionally certify a class, and thereby facilitate notice, is thus "within the discretion of the trial court." *Snelling, 2012 U.S. Dist. LEXIS 172052, 2012 WL 6042839 at *2* (citing *Hoffmann-La Roche, 493 U.S. at 169*).

Accordingly, the Sixth Circuit has "implicitly upheld a two-step procedure for determining whether an FLSA case **[*6]** should proceed as a collective action." *Heibel v. U.S. Bank Nat'l Ass'n, No. 11-cv-593, 2012 U.S. Dist. LEXIS 139510, 2012 WL 4463771, at *2 (S.D. Ohio Sept. 27, 2012)* (citations omitted). First, at the "initial notice" stage, before discovery has occurred, the Court "determine[s] whether to conditionally certify the collective class and whether notice of the lawsuit should be given to putative class members." *Id.* (quotation omitted). The second stage of the FLSA collective action analysis occurs once discovery is complete, when "the defendant may file a motion to decertify the class if appropriate to do so based on the individualized nature of the plaintiff's claims." *Id.* (quotation omitted).

Whether Plaintiff's suit may proceed as a collective action pursuant to the FLSA at the initial notice stage, then, depends on a showing that potential class members are in fact "similarly situated." *Comer, 454 F.3d at 546*. At this stage, the Court "does not generally consider the merits of the claims, resolve factual disputes, or evaluate credibility." *Myers, 201 F. Supp. 3d at 890* (internal citations omitted). The FLSA does not explicitly define the term "similarly situated," and neither has the Sixth Circuit. *Wade v. Werner Trucking Co., No. 10-cv-280, 2012 U.S. Dist. LEXIS 156257, 2012 WL 5378311, at *3 (S.D. Ohio Oct. 31, 2012)* (citing *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009)*). Although the Sixth Circuit has declined to "create comprehensive criteria **[*7]** for informing the similarly situated analysis," it has held that FLSA plaintiffs may proceed collectively in cases where "their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien, 575 F.3d at 585*. At this first stage, then, "the plaintiff must show only that 'his position is similar, not identical, to the positions held by the putative class members.'" *Comer, 454 F.3d at 546-47* (quoting *Pritchard v. Dent Wizard Int'l, 210 F.R.D. 591, 595 (S.D. Ohio 2002)*). The Court considers that issue "using a fairly lenient standard, and typically [the determination] results in conditional certification of a representative class." *Id. at 547* (quotation omitted).

III. ANALYSIS

There are three issues before the Court in this first-stage analysis: (1) the appropriateness of conditional certification under the FLSA; (2) the propriety of Plaintiff's proposed notice; and (3) whether Plaintiff's counsel should be appointed class counsel in this action. The Court will address each issue in turn.

A. Conditional Certification

Plaintiff seeks FLSA conditional certification with respect to the following class:

> **All current and former Home Health Aides or other job titles performing similar job duties (collectively, "HHAs") employed [*8] by Generations Healthcare Services, LLC and/or Generations Too, LLC at any time after January 1, 2015, who worked over 40 hours per week, and were not paid overtime for hours worked over 40 in a workweek**.

(Doc. 43 ¶ 39.) Plaintiff argues that she has met the requirements for FLSA conditional certification by offering "substantial allegations that surpass the modest showing required at stage one." (Doc. 20 at 6.) Specifically, Plaintiff points to the allegations in her Second Amended Complaint and her declaration that Plaintiff and the putative class members had the same job duties, regardless of their formal job titles; and that Defendants treated all HHAs the same by subjecting them to the same company-wide policies of failing to report hours worked in excess of 40 per workweek on their HHA paystubs and failing to pay them overtime premiums in violation of the FLSA. (*See id.*)

Additionally, although Plaintiff did not submit this evidence with her class certification Motion, attached as an exhibit to her Motion to Expedite are excerpts from the deposition testimony of Defendants' corporate representative, Sabatha Umoette. (*See* 30(b)(6) Dep. of Sabatha Umoette, Doc. 30-1.) At her deposition, **[*9]** Ms. Umoette testified that: (1) she was unaware of the federal law requiring overtime pay; (2) Defendants do not pay the required overtime premium; (3) she was not aware of the change in the law effective January 1, 2015 that mandated overtime pay for home health workers; (4) Defendants have not done anything to change their pay practices since the change in the law because they "didn't think they were doing anything wrong"; and (5) all HHAs are "paid in the same manner, all subject to the same rules, the same time sheet, the same procedures, the same office manager." (*See id.* at 37:3-8, 37:21-38:6, 39:3-8, 41:13-19, 71:19-23.) Ms. Umoette also testified that Defendants never accepted employee time sheets with over 40 hours per workweek. (*See id.* at 66:15-20.)

Based on this evidence, Plaintiff argues that she has shown that she and putative class members "are similarly situated because they were hourly, non-exempt employees of Defendants who share similar duties and responsibilities and were victims of Defendants' same policy, decision, and practice to deny them premium overtime wages for hours worked in excess of 40 per workweek," and that is "all that is needed for conditional certification **[*10]** at this notice stage." (*Id.*)

Defendants counter that Plaintiff has not met her burden of showing that she and other potential class members are "similarly situated" because she has not: (1) identified potential plaintiffs or provided affidavits from potential plaintiffs; or (2) provided sufficient evidence of a common policy or plan that violated the FLSA. (*See* Mem. Opp'n to Pl.'s Mot. for Conditional Class Cert., Doc. 22, at 4-7.) Defendants correctly note that Plaintiff asks the Court to grant conditional certification based solely on her declaration and the allegations presented in her Second Amended Complaint—although, as discussed above, Plaintiff provided additional information with her Motion to Expedite. (*See id.* at 4.)

As this Court has explained, "[s]ome courts hold that a plaintiff can demonstrate that potential class members are 'similarly situated,' for purposes of receiving notice, based solely upon allegations in a complaint of class-wide illegal practices." *Pritchard, 210 F.R.D. at 595* (quoting *Belcher v. Shoney's, Inc., 927 F. Supp. 249, 251 (M.D. Tenn. 1996)*). "[O]ther courts hold that a plaintiff meets this burden by demonstrating some factual support for the allegations before issuance of notice." *Id. at 595-96* (quoting *Belcher, 927 F. Supp. at 251*). Such a showing, however, need only be "modest," sufficient to establish **[*11]** at least a colorable basis for a plaintiff's claim that a class of "similarly situated" plaintiffs exist. *Id.* (citing *Severtson v. Phillips Beverage Co., 137 F.R.D. 264, 266-67 (D. Minn. 1991)*). Courts requiring a factual showing

have considered factors such as "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; whether evidence of a widespread discriminatory plan was submitted; and whether as a matter of sound class management, a manageable class exists." *Lewis v. Huntington Nat'l Bank, 789 F. Supp. 2d 863, 868 (S.D. Ohio 2011)* (Marbley, J.) (quotation omitted).

Although the standard used to evaluate whether conditional certification under the FLSA is appropriate is a "fairly lenient" one, Plaintiff still barely meets this minimal standard. *See Comer, 454 F.3d at 547*. As Defendants point out, and Plaintiff acknowledges, Plaintiff's Motion for conditional certification is supported solely by the allegations in her Second Amended Complaint and in her declaration. (*See* Doc. 22 at 4; Pl.'s Reply in Support of Mot. for Conditional Class Cert., Doc. 27, at 3.) In her Second Amended Complaint, Plaintiff alleges that the class of employees on behalf of whom she brings this action are "similarly situated" because:

> (a) they have been or are employed in the same or similar positions; (b) they were or are subject **[*12]** to the same or similar unlawful practices, policy, or plan (namely, Defendants' policy of not paying their employees overtime at a rate of one-and-one-half times their regular rate); (c) their claims are based on the same factual and legal theories; and (d) the employment relationship between Defendants and every putative [c]lass member is exactly the same and differs only by name, location, and rate of pay.

(Doc. 43 ¶ 40.) But Plaintiff alleges only "[u]pon information and belief" that there are other HHAs who performed uncompensated overtime hours. (*Id.* ¶ 41.) And in her declaration, Plaintiff merely states that she is "aware" of other HHAs who performed the same or similar duties and were also subjected to Defendants' compensation policies which resulted in HHAs not being paid overtime. (*See* Doc. 20-1 ¶ 8.)

This Court has noted that a plaintiff "must demonstrate a factual nexus—that is, something more than 'bare allegations'—to warrant conditional certification." *O'Neal v. Emery Fed. Credit Union, No. 1:13CV22, 2014 U.S. Dist. LEXIS 167419, 2014 WL 6810689, at *5 (S.D. Ohio Dec. 3, 2014)* (quotation omitted). Indeed, in the majority of cases, this Court has required more than allegations in the complaint and a single plaintiff's affidavit to conditionally certify an FLSA **[*13]** class. *See, e.g., Lewis, 789 F. Supp. 2d at 868 (Marbley, J.)* (conditionally certifying FLSA class based on allegations in complaint, declarations of multiple named plaintiffs, and affidavit of defendant's general counsel); *Crescenzo v. O-Tex Pumping, LLC, No. 15-CV-2851, 2016 U.S. Dist. LEXIS 78012, 2016 WL 3277226, at *4 (S.D. Ohio June 15, 2016)* (Marbley, J.) (granting motion for conditional certification supported by declaration of named plaintiff and declarations of twenty-two additional employees subject to same compensation policies); *Jasper v. Home Health Connection, Inc., No. 2:16-cv-125, 2016 U.S. Dist. LEXIS 71616, 2016 WL 3102226, at *1 (S.D. Ohio June 1, 2016)* (granting motion for conditional certification supported by declarations of nine named plaintiffs); *Atkinson v. TeleTech Holdings, Inc., No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *3 (S.D. Ohio Feb. 26, 2015)* (conditionally certifying FLSA class based on declarations from twelve potential plaintiffs).

The Northern District of Ohio has, on the other hand, recognized that at the notice stage, the district court has "minimal" evidence and makes its conditional certification decision "usually based only on the pleadings and *any* affidavits which have been submitted." *Douglas v. GE Energy Reuter Stokes, No. 1:07CV077, 2007 U.S. Dist. LEXIS 32449, 2007 WL 1341779, at *4 (N.D. Ohio Apr. 30, 2007)* (emphasis added). Further, in at least one instance, this Court has found that a plaintiff met his burden of showing that he was "similarly situated" to the employees he sought to represent simply **[*14]** by alleging in his complaint that there were "numerous paintless dent removal technician's

[sic] employed by Defendant in Ohio, that all of these technicians were paid on a commission basis, and Defendant did not pay these technician's [sic] overtime."[1] *Pritchard, 210 F.R.D. at 596*.

Plaintiff has met the bare minimum standard applied by the *Pritchard* and *Douglas* courts. Construing Plaintiff's allegations generously, she has made a "modest" factual showing establishing "at least a colorable basis" for her claim that a class of similarly-situated plaintiffs exist through the allegations in her Second Amended Complaint and her sworn declaration. *See id.* (quotation omitted). As Plaintiff correctly points out, while her allegations are less than fulsome, to question *how* she became aware of other HHAs employed by Defendants who were not paid overtime is to inquire into Plaintiff's credibility—which the Court typically does not undertake at the conditional certification stage. *See Myers, 201 F. Supp. 3d at 890* (internal citations omitted); *see also Swigart v. Fifth Third Bank, 276 F.R.D. 210, 214 (S.D. Ohio 2011)*.

Moreover, although not presented with her class certification Motion, the deposition testimony of Ms. Umoette provides additional evidence to support the fact that a class of similarly-situated **[*15]** plaintiffs exist. Ms. Umoette conceded that Defendants' payment policy of paying *no* overtime premium applies uniformly to all of the companies' HHAs, and also that Defendants have a policy of not accepting any timesheets with more than 40 hours per workweek recorded. (*See* Doc. 30-1 at 71:19-23, 66:15-20.) Presumably, there is more than one HHA employed by Defendants. Therefore, with this extra evidence, Plaintiff has provided the factual nexus necessary to warrant conditional certification.

Plaintiff's Motion for conditional certification is **GRANTED**.[2]

[1] *Pritchard* involved a *Rule 12(b)(6)* motion to dismiss, not a motion for conditional certification.

[2] Whether Plaintiff's proposed class should be certified conditionally under the FLSA is a close question. As previously stated, the evidence provided by Plaintiff—particularly without the deposition testimony of Ms. Umoette—barely meets the lenient standard for conditional certification. However, after balancing the equities of the case, the Court determines that it would be easier for Defendants to attempt to decertify the class than for Plaintiff to engage in further discovery and re-file a Motion for Conditional Certification. While Plaintiff's counsel certainly did not put forth the most valiant effort to engage in discovery, the putative class members should not be punished for this laxity.

B. Class Notice

Having determined that conditional certification is warranted, the Court turns now to the form and manner of Plaintiff's proposed notice. Plaintiff requests that the Court: (1) approve her proposed Notice and Consent-to-Sue form; (2) order Defendants to produce a class list; (3) allow Plaintiff's counsel to disseminate the Notice and Consent-to-Sue form within 14 days of receipt of the class list from Defendants; (4) permit the dissemination of notice via e-mail; (5) order notice to be posted at Defendants' company facilities; and (6) approve a 90-day opt-in period. (*See* Doc. 20 at 7-12.) The Court will address these requests **[*16]** *seriatim*.

1. Contents of Notice and Consent-to-Sue Forms

As threshold matter, Defendants argue that Plaintiff's request to disseminate notice is "premature" given that she has not met her burden for conditional certification, but that if the Court *does* conditionally certify a class, "the limitations period should be two years because Plaintiff has failed to provide any basis for a willful violation." (Doc. 22 at 9-10.) The FLSA establishes a general two-year statute of limitations, but a cause of action arising out of a "willful" violation of the act increases the statute of limitations to three years. *29 U.S.C. § 255(a)*. A violation of the FLSA is "willful" when an employer either "kn[ows] or show[s] reckless disregard as to whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 130, 108 S. Ct.*

1677, 100 L. Ed. 2d 115 (1988). Whether Defendants' alleged FLSA violations are "willful" is a question better suited for a later stage of the litigation. *See, e.g.*, *Stanley v. Turner Oil & Gas Props., No. 2:16-cv-386, 2017 U.S. Dist. LEXIS 5434, 2017 WL 127481 at *9 (S.D. Ohio Jan. 13, 2017)* (using three-year limitations period for willful violations at notice stage); *Colley v. Scherzinger Corp., 176 F. Supp. 3d 730, 735 (S.D. Ohio 2016)* (finding the absence of willful conduct not established by the pleadings at the notice stage and using a three-year limitations period). Accordingly, the Court should use a three-year limitations period and reject any of Defendants' **[*17]** objections to the form of notice based on its reference to a three-year statute of limitations. (*See* Doc. 22 at 11-12.)

As for the remainder of Defendants' objections to Plaintiff's proposed notice, "[b]oth the parties and the court benefit from settling disputes about the content of the notice before it is distributed." *Hoffmann-LaRoche, 493 U.S. at 172*. Accordingly, the parties are **ORDERED** to meet and confer about the content of Plaintiff's proposed Notice and Consent-to-Sue forms and resolve all objections to the extent possible. Plaintiff must file an updated proposed notice, and Defendants must lodge any remaining objections to that proposed notice within **14 days** of the date of this Order.

2. Defendants' Production of Class List and E-mail Notice

Plaintiff asks the Court to order Defendants to produce a list of all putative class members to Plaintiff's counsel, which should include the following information about putative class members: (1) each employee's full name; (2) all known addresses; (3) e-mail addresses; and (4) telephone numbers. (Doc. 20 at 8.) Defendants object to disclosing telephone numbers and e-mail addresses of current and former employees, for privacy reasons. (Doc. 22 at 12-13.) Additionally, Plaintiff **[*18]** asks the Court to permit notice via e-mail to former employees in addition to ordinary mail. (Doc. 20 at 9.)

The Court finds that e-mail notice is warranted. It had been the common practice in this district to order notice to be sent by first-class mail to current employees and by first-class mail *and* electronic mail to former employees due to concerns that former employees may have moved after the conclusion of their employment. *See, e.g.*, *Lutz v. Huntington Bancshares, Inc., No. 2:12-cv-1091, 2013 U.S. Dist. LEXIS 56477, 2013 WL 1703361, at *7 (S.D. Ohio Apr. 19, 2013)*; *Wolfram v. PHH Corp., No. 1:12-cv-599, 2012 U.S. Dist. LEXIS 181073, 2012 WL 6676778, at *4 (S.D. Ohio Dec. 21, 2012)* (noting that e-mail notice to former employees "appropriately safeguards the privacy of individuals not currently a party to the case and helps ensure that all potential plaintiffs receive notice of their right to join this lawsuit"); *Swigart, 276 F.R.D. at 215*. In more recent cases, however, courts in this district have ordered e-mail notice to all putative class members. *See Atkinson, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *5*; *Petty v. Russell Cellular, Inc., No. 2:13-cv-1110, 2014 U.S. Dist. LEXIS 42185, 2014 WL 1308692, at *6 (S.D. Ohio Mar. 28, 2014)*. This Court agrees with the *Atkinson* court, which held that e-mail notice "appears to be in line with the current nationwide trend" and "advances the remedial purpose of the FLSA, because service of the notice by two separate methods increases the likelihood **[*19]** that all potential opt-in plaintiffs will receive notice of the lawsuit." *Atkinson, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at *5*. This is also consistent with the trend among courts nationwide. *See, e.g.*, *Kutzback v. LMS Intellibound, LLC, No. 2:13-cv-2767, 2015 U.S. Dist. LEXIS 37946, 2015 WL 1393414, at *6 (W.D. Tenn. Mar. 25, 2015)*; *Jones v. JGC Dallas LLC, No. 3:11-cv-2743-O, 2012 U.S. Dist. LEXIS 185042, 2012 WL 6928101, at *5 (N.D. Tex. Nov. 29, 2012)*, *adopted by* *2013 U.S. Dist. LEXIS 8865, 2013 WL 271665 (N.D. Tex. Jan. 23, 2013)*; *Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1128-29 (N.D. Cal. 2009)*.

Therefore, once the Court approves the parties' agreed-upon Notice and Consent-to-Sue form, Plaintiff is permitted to disseminate the notice via regular mail *and* e-mail to all putative class members. There appears to be no need for Plaintiff to have the telephone numbers of putative class members. Defendants must produce the names, all known addresses, and email addresses of putative class members within **14 days** of this Court's order approving Plaintiff's updated notice.

3. Posting of Notice at Defendants' Facilities

Plaintiff also requests that notice be posted at Defendants' company facilities. (Doc. 20 at 10.) Because this is a common practice, and Defendants do not object, the Court approves this form of notice. *See, e.g.*, *Denney v. Lester's, LLC, No. 4:12CV377, 2012 U.S. Dist. LEXIS 125560, 2012 WL 3854466, at *4 (E.D. Mo. Sept. 5, 2012)*.

4. 90-day Opt-in Period

Finally, Plaintiff asks the Court to approve a 90-day opt-in period, in light of the fact that "Plaintiff and the putative [c]lass are employees **[*20]** of an industry with a high turnover rate" and therefore Plaintiff's counsel "anticipates significant difficulties in locating all potential class members." (Doc. 20 at 11-12.) Defendants have no objection to a 90-day opt-in period, and because 90 days is a standard notice period and fair in this case, the Court approves a 90-day notice period. *See, e.g.*, *Wolfram, 2012 U.S. Dist. LEXIS 181073, 2012 WL 6676778, at *4* (granting 90-day notice period); *Musarra v. Digital Dish, Inc., No. C2-05-545, 2008 U.S. Dist. LEXIS 110003, 2008 WL 818692, at *7 (S.D. Ohio Mar. 24, 2008)* (same).

C. Class Counsel

Plaintiff asks the Court to appoint the law firms of Levin Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. ("Levin Papantonio") and Johnson Becker, PLLC ("Johnson Becker") as interim class counsel. (*See* Doc. 20 at 12.) The appointment of interim class counsel is governed by *Federal Rule of Civil Procedure 23(g)(3)*, and courts routinely evaluate the factors in *Rule 23(g)(1)* when appointing interim class counsel prior to class certification. *See Ross v. Jack Rabbit Servs., LLC, No. 3:14-CV-00044, 2014 U.S. Dist. LEXIS 72950, 2014 WL 2219236, at *5 (W.D. Ky. May 29, 2014)*. These factors include:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable **[*21]** law; and
> (iv) the resources that counsel will commit to representing the class;

Fed. R. Civ. P. 23(g)(1). In addition, a court may consider whether counsel can fairly and adequately represent the interests of the class. *Id.* *23(g)(4)*; *see also Ross, 2014 U.S. Dist. LEXIS 72950, 2014 WL 2219236, at *5*.

All of the *Rule 23(g)(1)* factors appear to be met here, and Defendants do not challenge Plaintiff's request to appoint her counsel as interim class counsel. Plaintiff attached the resumes of Levin Papantonio and Johnson Becker as exhibits to her Motion for conditional certification. (*See* Docs. 20-3, 20-4.) Both firms have significant experience, and would fairly and adequately represent the class. Thus, Plaintiff's counsel is hereby appointed as interim class counsel.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion (Docs. 19, 20) to certify conditionally this case as a collective action under the FLSA is **GRANTED**.

The Court **ORDERS** the parties to confer on the form of notice and submit agreed proposed Notice

and Consent-to-Sue forms within **14 days** of the date of this Order. Once notice is approved, Defendants must provide a class list to Plaintiff's counsel within **14 days**, and notice may then be distributed to putative class members by regular mail and e-mail. Notice may also **[*22]** be posted at Defendants' facilities if necessary. The opt-in period should last 90 days. Levin Papantonio and Johnson Becker are appointed as interim class counsel.

IT IS SO ORDERED.

/s/ Algenon L. Marbley

ALGENON L. MARBLEY

UNITED STATES DISTRICT JUDGE

Dated: July 11, 2017

End of Document

Exhibit 26

Anderson v. Minacs Grp. (USA) Inc.

United States District Court for the Eastern District of Michigan, Southern Division

May 9, 2017, Decided; May 9, 2017, Filed

Case No. 16-13942

Reporter
2017 U.S. Dist. LEXIS 70513 *

BRENDA ANDERSON, individually and on behalf of others similarly situated, Plaintiff, v. THE MINACS GROUP (USA) INC., Defendant.

Counsel: **[*1]** For Brenda Anderson, Plaintiff: Charles R. Ash, IV, Jesse L. Young, Sommers Schwartz, Southfield, MI; Jason T. Brown, Nicholas Conlon, JTB Law Group, LLC, Jersey City, NJ; Kevin J. Stoops, Sommers Schwartz, PC, Southfield, MI; .

For The Minacs Group (USA), Inc., Defendant: Jaclyn R. Giffen, Sarah L. Simmons, Littler Mendelson, P.C., Detroit, MI.

Judges: Honorable Nancy G. Edmunds, United States District Judge.

Opinion by: Nancy G. Edmunds

Opinion

OPINION AND ORDER GRANTING PLAINTIFF'S PRE-DISCOVERY MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION [11]

On November 7, 2016, Plaintiff Brenda Anderson commenced this action on behalf of herself and other similarly situated current and former employees of Defendant, The Minacs Group (USA) Inc., alleging that Defendant violated the federal *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.*, by failing to compensate Plaintiff and other call center representatives for all work activities they performed and failing to pay overtime for work in excess of 40 hours per week. Plaintiff further alleges that Defendant unlawfully retaliated against her by terminating her employment after she complained that she had not received overtime pay to which she was entitled under the FLSA.

Through **[*2]** the present motion filed on December 30, 2016, Plaintiff requests that the Court (i) conditionally certify a collective action under the FLSA, and (ii) approve a proposed notice to be issued to the members of this putative class, consisting of all current and former hourly customer service representatives who worked at Defendant's Farmington Hills, Michigan call center during the past three years. Plaintiff further asks that Defendant be compelled to identify all potential members of this putative class and provide their contact information, and that the putative class members be granted a period of sixty days to submit notices stating that they wish to join this class.

On April 26, 2017, the Court heard oral argument on Plaintiff's motion. For the reasons stated more fully below, the Court GRANTS this motion, except to the extent that Plaintiff seeks authorization to distribute notice to the putative class via text message.

I. FACTS

A. The Parties

The Defendant company, The Minacs Group (USA) Inc., is a business and technology support service provider for clients in a wide range of industries, including manufacturing, retail, banking, health care, and the public sector. Defendant's headquarters **[*3]** is located in Farmington Hills, Michigan.[1]

At all relevant times, Defendant's Farmington Hills office has been the site of a call center, in which hourly customer service representatives ("Representatives") handle telephone calls from customers of Defendant's clients. Representatives report to Team Leaders, each of whom manages multiple Representatives, and Team Leaders, in turn, report to the Team Manager. Each of Defendant's call centers has multiple "campaigns," or client-specific programs, and each of the company's Representatives works for a specific campaign and receives training that is tailored to a particular client's computer systems and customer needs.

The named Plaintiff, Brenda Anderson, was employed as a Representative in Defendant's Farmington Hills call center from approximately September 2011 to October 2015. According to Defendant, Plaintiff worked on the Consumers Energy campaign, one of multiple campaigns operating out of Defendant's Farmington Hills office. At the time of her discharge, Plaintiff's pay rate was $11.25 per hour. Since this suit was brought, three additional individuals who worked as Representatives in Defendant's Farmington Hills office — Alicia Currie, **[*4]** Terra Page, and Marcus Van — have given their written consent to join this suit as plaintiffs.[2]

B. Plaintiff's Supporting Declarations

In support of the present motion, Plaintiff has submitted declarations from herself and another former Representative, Alicia Currie. Plaintiff states in her declaration that as a Representative employed at Defendant's Farmington Hills call center, her "primary duty was answering telephone calls regarding billing and other account activity from customers of [Defendant's] clients." (Plaintiff's Motion, Ex. 3, Anderson Decl. at ¶ 5.) In handling these calls, Plaintiff "performed work on a computer supplied by [Defendant], including reviewing customer accounts, preparing forms for customers, transcribing notes from calls for other representatives, and reading and sending work emails." (*Id.*)

At the beginning of each shift, Plaintiff had to perform a number of tasks before she could begin to accept incoming customer calls. First, she had to "enter[] a security code to enter [her] assigned office concourse" and "walk[] to [her] cubicle[]." (*Id.* at ¶ 10.) Plaintiff then "logg[ed] into [her] work computer[] and Windows operating system[]," and began "loading applications **[*5]** (including one called 'Citrix') which enabled [her] to review customer accounts, prepare forms for customers, and transcribe notes form calls for other representatives." (*Id.*) Once these applications "were fully open and loaded, [Plaintiff] accessed [Defendant's] telephone system 'IEX,' which enabled [her] to start receiving inbound calls." (*Id.*)

Plaintiff estimates that "due to delays in [Defendant's] computer systems, it took anywhere from 3-10 minutes on most days for the required computer applications to open and load." (*Id.*) To ensure that this process was completed prior to the beginning of her scheduled shift, Plaintiff was instructed by the individual who trained her, Ken Ford, and her manager, Margarita Vasquez, that she should arrive fifteen minutes before her scheduled shift. (*Id.* at ¶¶ 11-12.) In light of these directives, Plaintiff "frequently arrived at the office concourse

[1] The Minacs Group evidently was acquired by SYNNEX Corporation in August of 2016, and has been integrated into SYNNEX's Concentrix business segment. Nonetheless, the parties continue to refer to The Minacs Group as the defendant in this case, and the Court will do likewise in this opinion.

[2] In its response to Plaintiff's motion, Defendant asserts (without citation to the record) that Mr. Van worked at a different call center and was assigned to a different campaign than Ms. Anderson, Ms. Currie, and Ms. Page.

and began logging into [her] computer[] and opening applications approximately fifteen (15) minutes before the start of [her] scheduled shift[]," and she observed other Representatives doing likewise. (*Id.* at ¶ 14.) If she was able to complete this process before the start of her scheduled shift, Plaintiff **[*6]** would "spend the remaining time reviewing work e-mails that contained information necessary for [her] to perform [her] duties" as a Representative. (*Id.*)

Plaintiff states that she and her fellow Representatives were not paid for the time spent on these preparatory tasks. (*Id.* at ¶ 15.) Although Defendant "maintained a formal policy — applicable to all representatives — of allowing representatives to submit requests to be paid for time spent waiting for computer applications to load," Plaintiff states that the actual company practice was "not [to] pay for pre-shift time, even if a representative requested to be paid for it." (*Id.*) Plaintiff further asserts that "[o]n many occasions [she] followed [Defendant's] protocol for requesting to be paid for pre-shift time," but that each such request was "ignored." (*Id.*)

Plaintiff next states that Defendant "frequently denied [her] . . . hourly compensation for time during [her] shift[] in which [she] was not engaged in telephone calls with customers," but instead was performing such tasks as "reviewing customer accounts, preparing forms for customers, transcribing notes from calls for other representatives, reading and sending work emails, [and] **[*7]** troubleshooting connectivity issues with [Defendant's] computer and telephone systems." (*Id.* at ¶ 17.) Plaintiff also asserts that Defendant's timekeeping system experienced "persistent irregularities" that would result in employees "randomly" being designated as "no call" or "no show" and being denied pay for their work. (*Id.*)

Plaintiff states that she "frequently worked over forty (40) hours per week," including Monday through Friday and "additional shifts on Saturdays." (*Id.* at ¶ 4.) Nonetheless, on one occasion in September of 2015, Plaintiff received a paycheck that reflected "significantly fewer overtime hours than [she] had worked." (*Id.* at ¶ 18.) When Plaintiff looked into this issue, she was advised by her Team Leader, Tiara Milton, that her clocked hours had been "reduced . . . to reflect only the time [she] spent engaged in telephone calls with customers." (*Id.*) Milton further advised Plaintiff that "she was required to alter [Plaintiff's] time in this manner due to [Defendant's] corporate policy," which entailed Team Leaders "manually reduc[ing] representatives' clocked hours to reflect only the time they spent on the telephone with customers." (*Id.* at ¶¶ 18-19.) Defendant's Team **[*8]** Leaders purportedly "determined which time to remove from representatives' clocked hours based on measurements of their call times performed by IEX, the telephone application used by all representatives at [Defendant's] Farmington Hills, Michigan call center." (*Id.* at ¶ 19.)

Following this incident in September of 2015, Plaintiff and other Representatives submitted a grievance challenging Defendant's policy of reducing clocked hours to reflect only the time spent on phone calls with customers. (*Id.* at ¶ 20.) In response, Defendant's human resources office advised Plaintiff and her fellow Representatives that the company "would not pay us any additional compensation on account of the hours we claimed were improperly reduced from our clocked hours." (*Id.*) Plaintiff believes that her "participation in this grievance led to [her] termination . . . several weeks later." (*Id.* at ¶ 21.)

Plaintiff states that "[a]t all relevant times, there were approximately 300-400 other hourly-paid representatives employed by [Defendant] at its Farmington Hills, Michigan call center," and that she "worked in the same office concourse" as approximately 50 to 150 of these Representatives. (*Id.* at ¶ 6.) All of the **[*9]** Representatives who worked at the Farmington Hills call center "had the primary duty of answering telephone calls regarding billing and other account activity from customers of [Defendant's] clients," and Plaintiff

believes, based on her discussions with and observations of her fellow Representatives as they performed their jobs, that she and these co-workers were subject to common policies and procedures regarding (i) compensation only for time spent on phone calls with customers, and (ii) refusal to pay for pre-shift duties such as logging into computer systems and waiting for applications to load. (*Id.* at ¶¶ 7, 9, 13-16, 19.)

As noted, Plaintiff's motion also is supported by the declaration of a second individual, Alicia Currie, who "was employed by [Defendant] as a call center representative from approximately June 2012 to November 2015." (Plaintiff's Motion, Ex. 4, Currie Decl. at ¶ 2.) Ms. Currie states that she, like Plaintiff, worked at Defendant's Farmington Hills facility, and that she was paid $10.50 per hour at the time she left Defendant's employ. (*Id.* at ¶¶ 2-3.)

The statements in Ms. Currie's declaration largely reiterate the facts attested to by Plaintiff. Ms. Currie's **[*10]** primary duty was answering telephone calls, and she states that she was subject to Defendant's "common policy of only paying its representatives for the time they spent engaging in telephone calls" with customers of Defendant's clients. (*Id.* at ¶¶ 7-9.) As a result, Ms. Currie asserts that she was not compensated for the time spent (i) at the beginning of her shift logging into Defendant's computer systems and waiting for the required computer applications to open and load, and (ii) on such tasks as "reviewing customer accounts, preparing forms for customers, transcribing notes from calls for other representatives, reading and sending work emails, [and] troubleshooting connectivity issues with [Defendant's] computer and telephone systems." (*Id.* at ¶¶ 10-11, 15, 17.) Ms. Currie, like Plaintiff, states that "on many occasions, [she] followed [Defendant's] protocol for requesting to be paid for pre-shift time, but [her] requests were ignored." (*Id.* at ¶ 15.)

Ms. Currie also challenged Defendant's policy of only paying its Representatives for time spent engaged in telephone calls with customers, as well as the practice of Team Leaders "to manually reduce representatives' clocked hours to **[*11]** reflect only" this time spent on the phone with customers. (*Id.* at ¶¶ 19-21.) In response, Ms. Currie was advised by one of Defendant's Team Managers, Stanetta Jones, "that in order to control the labor budget and motivate representatives to complete more calls, [Defendant] maintained a policy of only paying representatives for time spent engaged in telephone calls with customers." (*Id.* at ¶ 21.) Ms. Currie joined Plaintiff and other Representatives in filing a grievance against this policy, but Defendant's human resources office advised Ms. Currie and the other grievants that no additional compensation would be paid to them "on account of the hours [they] claimed were improperly reduced from [their] clocked hours." (*Id.* at ¶ 22.)

C. Defendant's Declaration in Opposition to Plaintiff's Motion

Defendant's response in opposition to Plaintiff's motion is accompanied by the declaration of Stanetta Jones, who currently works as an Operations Manager with supervisory responsibility over multiple campaigns conducted out of Defendant's Farmington Hills office. (Defendant's Response, Ex. 1, Jones Decl. at ¶ 1.) Ms. Jones was hired as a Team Leader in 2014, was then promoted in July of 2015 to **[*12]** Team Manager for the Consumers Energy campaign, and more recently was promoted to her current position of Operations Manager in July of 2016. (*Id.*) During the time Ms. Jones served as a Team Manager, Plaintiff and Ms. Currie — as well as another individual, Terra Page, who has given her written consent to join this suit as a plaintiff — were employed as call center representatives for the Consumers Energy campaign.

According to Ms. Jones, while "[t]he primary duty of a Representative is to answer customer telephone

calls," these employees carry out other, related tasks such as "entering account notes and filling out necessary forms," and the time spent on all such work tasks and work related activities "is tracked and compensated." (*Id.* at ¶ 7.) In particular, Ms. Jones states that once a Representative is logged into the Web Powered Access ("WPA") application at the beginning of her shift, this employee is "on the clock" and will be paid for her time on the job until she logs out of the WPA system for a break or lunch period or at the end of her shift. (*Id.* at ¶¶ 9-11.) For Representatives who work on the Consumers Energy campaign, Team Leaders are responsible for manually entering the **[*13]** WPA timestamp information into the IEX timekeeping system at the end of each shift, but Representatives "receive an electronic alert if the IEX data entered by the Team Leader differs from the WPA timestamp data," and this allows Representatives the opportunity to "challenge any data entry issues" concerning the time for which they will be compensated. (*Id.* at ¶¶ 12-13.)[3] In addition, Team Leaders have the ability to enter "various pay codes" into the IEX system so that Representatives may be "compensated for time they are not logged into WPA," including such circumstances as "coaching sessions" and "troubleshoot[ing] system downtime." (*Id.* at ¶ 14.)

Ms. Jones asserts that the total amount of time it takes to "get[] from the production floor door" to a workstation and then to log into the WPA system is "from 1 minute 15 seconds to 1 minute 50 seconds." (*Id.* at ¶ 9.) She further states that "[i]f the process takes longer due to computer or systems problems[,] the Representatives are trained to inform their Team Leader, who adjusts their time and therefore their pay to reflect the additional time spent logging in." (*Id.*)

II. ANALYSIS

[3] Ms. Jones states that this manual data entry process is "specific to" the Consumers Energy campaign and "is not necessarily the process" used with other campaigns. (*Id.* at ¶ 12.)

A. The Law Governing Plaintiff's Motion

Through the present motion, Plaintiff **[*14]** requests that the Court conditionally certify this suit as a collective action under the FLSA. The pertinent FLSA provision states as follows:

> An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). As the Sixth Circuit has observed, the type of suit authorized under this provision is termed a "collective action," and an individual must "opt into" the suit in order to be joined as a party plaintiff. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*. The opt-in nature of an FLSA collective action is thus "distinguished from the opt-out approach utilized in class actions under *Fed. R. Civ. P. 23*." *Comer, 454 F.3d at 546*.

This Court has previously elucidated the standards that govern the decision whether to conditionally certify a suit as an FLSA collective action:

> *Section 216(b)* establishes two requirements for a representative action brought by employees in their own behalf and for similarly situated persons. First, the plaintiffs **[*15]** must actually be similarly situated, and second, all plaintiffs must signal in writing their affirmative consent to participate in the action. Accordingly, the district court's task is to first consider whether plaintiffs have shown that the employees to be notified of the collective action are, in fact, similarly situated. If the plaintiffs meet this burden, then the district court may use its discretion to authorize notification of similarly situated employees to

allow them to opt into the lawsuit.

Although the phrase "similarly situated" is undefined, the Sixth Circuit has recognized that district courts typically follow a two-stage certification process to determine whether the opt-in plaintiffs and lead plaintiffs are similarly situated. The first stage of *§ 216(b)* certification, also known as the "notice stage," takes place early in the litigation; i.e., at the beginning of discovery. It is here where the court determines whether the suit should be conditionally certified as a collective action so that potential opt-in plaintiffs can be notified of the suit's existence and of their right to participate. The second stage occurs much later; after all of the opt-in forms have been received **[*16]** and discovery has been concluded.

Fisher v. Michigan Bell Telephone Co., 665 F. Supp.2d 819, 824-25 (E.D. Mich. 2009) (internal quotation marks, citations, and alterations omitted).

The present motion has been brought in the "notice" stage of this litigation, before the parties have commenced any discovery efforts, and it seeks only conditional certification of this suit as a collective action. In this stage, Plaintiff "bear[s] the burden of showing that the opt-in plaintiffs are similarly situated to the lead plaintiff[]." *Fisher, 665 F. Supp.2d at 825* (internal quotation marks and citation omitted). This standard is "less stringent" than the showing demanded of a plaintiff who seeks class certification under *Fed. R. Civ. P. 23*, and Plaintiff may meet this burden by establishing that her claim and the claims of the opt-in plaintiffs are "unified by common theories of [Defendant's] statutory violations, even if the proofs of those theories are inevitably individualized and distinct." *665 F. Supp.2d at 825* (internal quotation marks and citations omitted).

Moreover, Plaintiff "must show only that h[er] position is similar, not identical, to the positions held by the putative class members." *665 F. Supp.2d at 825* (internal quotation marks, alteration, and citation omitted). This is a "fairly lenient" standard, entailing a "modest factual showing" that Plaintiff and the **[*17]** potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." *665 F. Supp.2d at 825* (internal quotation marks and citations omitted). In analyzing the evidence put forward by the parties, the Court "does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations." *665 F. Supp.2d at 825* (internal quotation marks and citation omitted).

B. Plaintiff Has Satisfied the Lenient Standard Governing Her Request for Conditional Certification.

Against this legal backdrop, the Court turns to Plaintiff's motion, which seeks conditional certification of a class of "[a]ll current and former hourly customer service representatives who worked for Defendant in its Farmington Hills, Michigan call center at any time during the last three years." (Plaintiff's Motion, Br. in Support at 1.) In support of this request, Plaintiff argues that the record at this preliminary stage of this litigation sufficiently demonstrates that Plaintiff and her fellow Representatives at the Farmington Hills call center were subjected to similar policies and procedures regarding their compensation that (i) improperly disregarded some of their work-related activities in tallying **[*18]** the number of hours they worked, and (ii) thereby resulted in denial of overtime pay to which these employees were entitled under the FLSA. As discussed below, the Court agrees.

First, the declarations of Plaintiff and another former Representative at Defendant's Farmington Hills facility, Alicia Currie, support the conclusion that Defendant operated under policies and practices that failed to count the time spent on certain work-related activities toward a Representative's total hours worked. According to

Plaintiff and Ms. Currie, Representatives were compensated only for time spent on the telephone with customers of Defendant's clients. This policy, in Plaintiff's view, unduly discounted two types of work activities that should be included in a Representative's compensated hours spent at work. First, Plaintiff states that once she arrived at her workstation at the beginning of her shift, "it took anywhere from 3-10 minutes on most days" to open and load the computer applications needed for her to receive phone calls from customers. (Anderson Decl. at ¶ 10.) Although Defendant ostensibly "maintained a formal policy . . . of allowing representatives to submit requests to be paid for **[*19]** time spent waiting for computer applications to load," Plaintiff asserts that Defendant did not abide by this policy, and that her requests "to be paid for pre-shift time[] . . . were ignored." (*Id.* at ¶ 15.)[4]

Next, Plaintiff and Ms. Currie have identified a number of seemingly necessary work activities for which they were not compensated, due to Defendant's purported practice of paying its Representatives only for time spent on the phone with customers. Specifically, Plaintiff cites the time she spent "reviewing customer accounts, preparing forms for customers, transcribing notes from calls for other representatives, reading and sending work emails, [and] troubleshooting connectivity issues with [Defendant's] computer and telephone systems" as excluded from Defendant's calculation of her pay. (Anderson Decl. at ¶ 17.) When Plaintiff inquired about this, her Team Leader, Tiara Milton, told her that "she had reduced [Plaintiff's] clocked hours to reflect only the time [she] spent engaged in telephone calls with customers," and Milton further explained that "she was required to alter [Plaintiff's] time in this manner due to [Defendant's] corporate policy." (*Id.* at ¶ 18.)[5]

This record **[*20]** suffices to make the requisite "modest factual showing" that Plaintiff and other potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." *Fisher, 665 F. Supp.2d at 825* (internal quotation marks and citations omitted). As this Court observed in *Fisher* — a suit which, like this one, was brought by call center employees — a number of district courts have "granted conditional certification to call center employees alleging similar 'off-the-clock' FLSA violations." *665 F. Supp.2d at 826* (citing cases). Likewise, Plaintiff has identified still more cases "around the nation" in which district courts have conditionally certified collective actions brought by call center employees. (Plaintiff's Motion, Br. in Support at 18 (collecting cases).) And in *Fisher* itself, of course, this Court found that conditional certification was warranted based on evidence that the defendant did not compensate the plaintiff call center employees for (i) pre-shift time spent logging into their computers and loading software applications, (ii) work-related tasks other than taking calls from customers that were dictated by the defendant's expectations and quotas for employee performance, and (iii) time spent on calls **[*21]** that were still ongoing at the end of an employee's shift. *See Fisher, 665 F. Supp.2d at 823, 826*. Plaintiff here has produced two of these three categories of evidence, and the Court finds that this evidence is sufficient to satisfy the fairly lenient standard that governs pre-discovery conditional certification of a collective action.

Defendant suggests three grounds for avoiding this result, but none is persuasive. First, Defendant contends that the allegations and evidence produced by Plaintiff are insufficient to satisfy even

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[4] Ms. Currie's declaration includes essentially the same assertions regarding Defendant's failure to compensate her for the time spent waiting for computer applications to load and its failure to act upon her requests that she be paid for this pre-shift time. (*See* Currie Decl. at ¶¶ 10, 15.)

[5] Again, Ms. Currie also states that she was not paid for time spent on various work tasks other than speaking on the phone with customers, and that she was told by her supervisors that this practice was attributable to Defendant's corporate policy. (*See* Currie Decl. at ¶¶ 17, 19-21.)

Plaintiff's modest burden to show that she and the proposed class of Representatives employed at Defendant's Farmington Hills call center are similarly situated. Rather, Defendant asserts that the Representatives in this putative class differ from one another in two respects: (i) they are trained to use different computer operating systems and applications that are specific to the campaigns to which they are assigned, and thus "cannot simply be transferred from campaign to campaign without extensive training," and (ii) they are paid in accordance with systems and processes that "vary by campaign." (Defendant's Response Br. at 8-9.)

This challenge to Plaintiff's showing of similarly situated **[*22]** call center employees suffers from two deficiencies. First, even accepting that the Representatives at Defendant's Farmington Hills call center undergo training specific to their campaigns and cannot readily be reassigned from one campaign to another, any such differences among Representatives with respect to their training, knowledge, or skills have no bearing on the pertinent question here — namely, whether these employees were subject to common policies or practices concerning their compensation, such that they all were victims of the same alleged FLSA violations arising from these common policies or practices. As for Defendant's claim of compensation processes or practices that differ from one campaign to another, the record fails to disclose any meaningful differences that would undercut Plaintiff's evidence of a more uniform compensation scheme. Instead, Defendant has produced only the statement of an Operations Manager, Stanetta Jones, that the process used to pay Representatives who work in the Consumers Energy campaign is "specific to this campaign and is ***not necessarily*** the process for other campaigns." (Jones Decl. at ¶ 12 (emphasis added).) Ms. Jones does not elaborate **[*23]** on this assertion,[6] and nothing in her declaration, or elsewhere in the record, identifies particular features of the compensation schemes used in different campaigns that would undercut Plaintiff's evidence of common policies and practices that affect the pay of all Representatives employed at Defendant's Farmington Hills call center.

Defendant next insists, however, that the evidence produced by Plaintiff fails to establish that any alleged shortfalls in the compensation paid to Plaintiff and other Representatives at the Farmington Hills facility are attributable to Defendant's common policies and payroll processes, as opposed to the practices of individual supervisors and employees. Defendant claims, for example, that it has "standard FLSA compliant policies" in place for its Consumers Energy campaign that required Plaintiff "to report uncompensated time to [her] Team Leader" in order to trigger payment for this time, but it states that there is "no evidence" that Plaintiff availed herself of this process. (Defendant's Response Br. at 9.) Defendant further notes that Plaintiff and the other individuals who have given their written consent to join this suit "reported to . . . different **[*24]** Team Leaders," which suggests the possibility that one or more of these Team Leaders might have deviated from Defendant's written policy in reducing the work hours of the Representatives they supervised. (*Id.* at 10.) These individualized inquiries, in Defendant's view, defeat Plaintiff's showing that she and the other Representatives at Defendant's Farmington Hills call center are similarly situated.

These challenges once again run afoul of the limited record presently before the Court. Contrary to Defendant's contention, both Plaintiff and Ms. Currie expressly state in their declarations that they complained to their Team Leaders about work activities for which they were not being paid, but that their Team Leaders responded that these activities had to be deducted from their hours worked as a matter of "[Defendant's] corporate

[6] Thus, while Defendant contends in its response brief that Team Leaders in the Consumers Energy campaign "manually enter WPA data into IEX" but the systems used in other campaigns "automatically upload time stamp data into IEX," (Defendant's Response Br. at 9), Defendant does not cite anything in the present record that would support this assertion.

policy." (Anderson Decl. at ¶ 18; *see also* Currie Decl. at ¶¶ 19-21.)[7] Similarly, as to Defendant's suggestion that each of the individual Team Leaders who supervised Plaintiff and the other potential class members might have deviated from Defendant's written policies in different ways, Plaintiff has produced evidence that she and Ms. Currie both were told by their Team **[*25]** Leaders that the complained-of reductions in their hours worked were a product of a corporate policy, and not the individual decisions of these supervisors. (*See* Anderson Decl. at ¶ 18; Currie Decl. at ¶¶ 19-21.) To the extent that the record on this point is contested and remains open to exploration upon the commencement of discovery, the Court already has explained that it "does not resolve factual disputes" in analyzing a pre-discovery request for conditional certification of an FLSA collective action. *Fisher, 665 F. Supp.2d at 825* (internal quotation marks and citation omitted); *see also Wlotkowski v. Michigan Bell Telephone Co., 267 F.R.D. 213, 219 (E.D. Mich. 2010)* (explaining that a defendant's evidence refuting a plaintiff's showing of similarly situated employees is more properly "addressed at the second stage" of the *§ 216(b)* certification process).

Finally, Defendant argues that the modest record submitted by Plaintiff in support of her motion is inadequate to establish that Plaintiff and the other Representatives employed at Defendant's Farmington Hills call center were subject to a "common policy or plan that violated the law," *Fisher, 665 F. Supp.2d at 825* (internal quotation marks and citations omitted), particularly where it is questionable whether Plaintiff and her fellow declarant, Ms. Currie, have personal **[*26]** knowledge about Defendant's corporate policies and practices governing employee compensation. The Court rejected this same challenge in *Fisher*, however, explaining that the declarants in that case had sufficiently "aver[red] that their supervisors were aware of Defendant's alleged illegal practices." *665 F. Supp.2d at 826*. Likewise, Plaintiff and Ms. Currie expressly state in their declarations that they learned of Defendant's allegedly unlawful corporate policies as a direct result of discussions with their supervisors, in which they were told that their work hours were reduced pursuant to Defendant's policy that Representatives should be paid only for time spent in telephone calls with customers. (*See* Anderson Decl. at ¶ 18; Currie Decl. at ¶¶ 19-21.)

Plaintiff and Ms. Currie further state that in their discussions with and observations of other Representatives at the Farmington Hills facility, they learned that some of these fellow employees (i) also had been instructed to arrive at work 15 minutes before the start of their scheduled shifts so that they could log into their computers and load the necessary computer applications before their shifts began, (ii) also had asked to be paid for these pre-shift activities **[*27]** but had received no response to these requests, and (iii) also had been advised of Defendant's corporate policy that Representatives were paid only for the time they spent on the telephone with customers. (*See* Anderson Decl. at ¶¶ 13, 16, 19; Currie Decl. at ¶¶ 13, 16.) To the extent that Defendant contends that these statements should be discounted as containing hearsay or as lacking a sufficient basis in the personal knowledge of the two declarants, this Court recognized in *Fisher* that a plaintiff's evidence in support of a pre-discovery motion for conditional certification need not "meet the same evidentiary standards applicable to motions for summary judgment[,] because to require more at this stage of the litigation would defeat the purpose of the two-stage analysis under *Section 216(b)*." *665 F. Supp.2d at 826* (internal quotation marks and citation omitted).

To be sure, the lead plaintiffs in *Fisher* submitted the "declarations of 67 opt-ins," and also "provided the deposition testimony of eight opt-ins supporting their claim that they are all victims of a common

[7] Indeed, Ms. Currie states that she raised this issue not only with her Team Leader but also with Ms. Jones, who told her that Defendant "maintained a policy of only paying representatives for time spent engaged in telephone calls with customers." (Currie Decl. at ¶ 21.)

policy or plan . . . that violates the FLSA. *665 F. Supp.2d at 826*. Here, in contrast, Plaintiff offers only her own declaration and that of one other opt-in plaintiff, Ms. Currie, **[*28]** and she has identified only two other individuals who have given their written consent to be joined as plaintiffs. Nonetheless, as explained by another court in this District, "the Sixth Circuit has never required evidence that others will opt in before the [conditional] certification decision can be made," and there is no threshold number of co-worker declarations that a plaintiff must provide in order to make the requisite modest factual showing of similarly situated employees who are subject to a common policy or plan. *Shipes v. Amurcon Corp., No. 10-14943, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995362, at *8-*9 (E.D. Mich. March 23, 2012)*; *see also Myers v. Marietta Memorial Hospital, 201 F. Supp.3d 884, 892 (S.D. Ohio 2016)*. While the record here is not overwhelming, the Court finds it sufficient to meet the fairly lenient standard for demonstrating, in the pre-discovery phase of this case, that Plaintiff and other similarly-situated Representatives employed at Defendant's Farmington Hills call center were deprived of compensation mandated under the FLSA as a result of common corporate policies and procedures adopted by Defendant.

C. The Notice Proposed by Plaintiff Is Appropriate, But This Notice Should Be Sent Only by Ordinary and Electronic Mail and Not by Text Message.

Plaintiff's motion is accompanied by a proposed notice that she wishes to send to each member of the proposed **[*29]** plaintiff class, and she requests authorization to distribute this notice by ordinary mail, electronic mail, and text message. In response, Defendant contends that the proposed notice should be sent only by ordinary mail, and it also argues (i) that it should be ordered to provide a more limited set of information in response to Plaintiff's request that it identify the members of the proposed class, (ii) that Plaintiff's notice should more specifically identify the start and end dates of the period during which prospective class members must have worked at Defendant's Farmington Hills call center, and (iii) that conditional certification should be limited to only those Representatives who worked on the Consumers Energy campaign. The Court already has addressed (and rejected) the last of these contentions in its discussion of Plaintiff's showing of similarly situated employees. As to Defendant's remaining arguments, the Court agrees that notice via text message is not appropriate and that the class period should be more specifically delineated, but otherwise approves the notice proposed by Plaintiff.

As Defendant correctly observes, it must supply the telephone numbers of its current **[*30]** and former employees in order to enable Plaintiff to serve her notice by text message, and this is an unnecessary intrusion upon the privacy of these individuals. In addition, the Court finds that the transmission of notice by text message could well be viewed by the recipients as harassing in nature, and that a significant number of recipients are likely to disregard this notice as "spam." Accordingly, the Court concludes that notice by text message is not appropriate. The Court does not agree, however, with Defendant's further contention that notice by electronic mail is unwarranted. As Plaintiff points out, such notice comports with a trend toward greater use of e-mail (and corresponding less use of ordinary mail) for most types of communications. It follows that Defendant should provide e-mail addresses for the potential members of the plaintiff class, but that it need not provide telephone numbers.

As for Defendant's contention that it should not have to provide dates of employment or job titles for potential class members because this information is already "encompassed in Plaintiff's class description," (Defendant's Response Br. at 14), the Court does not agree that this information **[*31]** is unnecessarily duplicative. Rather, the information requested by Plaintiff provides greater detail about the employment

histories of the potential class members, and this is likely to prove useful in subsequent stages of this litigation.

Finally, Defendant argues that the notice issued by Plaintiff should specifically identify the start and end dates of the time period in which class members must have been employed as Representatives at Defendant's Farmington Hills facility. As Plaintiff recognizes, the appropriate period encompassed by her proposed collective action is "three (3) years prior to the filing of the complaint." (Plaintiff's Reply Br. at 6.) The Court agrees with Defendant that the proposed notice provided by Plaintiff is not sufficiently specific in identifying this three-year period. In particular, where this notice refers to individuals employed at Defendant's Farmington Hills call center "at any time during the last three years," it should be amended to instead refer to individuals employed at this location "at any time during the three-year period beginning on November 7, 2013 and ending on November 7, 2016."

III. CONCLUSION

For these reasons,

The Court hereby GRANTS **[*32]** Plaintiff's December 30, 2016 motion for conditional certification and court-ordered notice (Dkt. 11), except to the limited extent that the Court has instructed Plaintiff to amend her proposed notice and to issue this notice by ordinary and electronic mail only.

SO ORDERED.

/s/ Nancy G. Edmunds

Nancy G. Edmunds

United States District Judge

Dated: May 9, 2017

Exhibit 27

Kim v. Detroit Med. Informatics, LLC

United States District Court for the Eastern District of Michigan, Southern Division

November 25, 2019, Decided; November 25, 2019, Filed

Civil Case No. 19-11185

Reporter
2019 U.S. Dist. LEXIS 204014 *; 2019 WL 6307196

ANDREW KIM and JONATHAN ROLLINS, Individually and on behalf of all others similarly situated, Plaintiffs, v. DETROIT MEDICAL INFORMATICS, LLC, d/b/a DMI, Defendant.

Subsequent History: Motion denied by *Kim v. Detroit Med. Informatics, LLC, 2019 U.S. Dist. LEXIS 204015 (E.D. Mich., Nov. 25, 2019)*

Counsel: **[*1]** For Andrew KIm, Jonathan Rollins, Plaintiffs: Alexandra K. Piazza, Sarah Schalman-Bergen, Berger Montague PC, Philadelphia, PA; Frances J. Hollander, David M. Blanchard, Blanchard & Walker, PLLC, Ann Arbor, MI; Harold Lichten, Lichten & Liss-Riordan PC, Boston, MA; Olena Savytska, Lichten & Liss-Riordan, P.C., Boston, MA.

For Detroit Medical Informatics, LLC d/b/a DMI, Defendant: Bernard Mazaheri, Mazaheri & Mazaheri, Frankfort, KY.

Judges: Honorable LINDA V. PARKER, UNITED STATES DISTRICT JUDGE.

Opinion by: LINDA V. PARKER

Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION (ECF NO. 23) AND DENYING WITHOUT PREJUDICE PLAINTIFFS' MOTION FOR EQUITABLE TOLLING (ECF NO. 30)

Plaintiffs bring this lawsuit under the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq.*, and similar statutes in Illinois, Missouri, and Massachusetts. They allege that Defendant misclassified them and similarly situated workers as independent contractors to circumvent the protections of federal and state wage laws. Presently before the Court are Plaintiffs' motion for conditional certification, filed July 2, 2019 (ECF No. 23), and Plaintiffs' motion for equitable tolling, filed October 18, 2019. (ECF **[*2]** No. 30.) Finding the legal arguments sufficiently presented in the parties' briefs, the Court is dispensing with oral argument with respect to both motions pursuant to Eastern District of Michigan *Local Rule 7.1(f)(2)*. For the reasons that follow, the Court is granting in part and denying in part Plaintiffs' motion for conditional certification, but is denying without prejudice their motion for equitable tolling.

I. Factual and Procedural Background

Defendant provides information technology education services for the healthcare industry across the United States. (Compl. ¶ 12, ECF No. 1 at Pg ID 3.) Between September 2016 and February 2018, Plaintiffs worked for Defendant as consultants, offering support and training to Defendant's clients in using new recordkeeping systems in Arizona, Massachusetts, Missouri, and Illinois. (*Id.* ¶ 7, Pg ID 3.) Plaintiffs specifically provided educational and support services to healthcare staff at hospitals in those states. (*Id.* ¶¶

24, 25, Pg ID 6.)

Plaintiffs allege that Defendant classified them as independent contractors and paid them a set hourly rate for all hours worked. (*Id.* ¶ 26, Pg ID 26.) Plaintiffs further allege that they routinely worked more than forty hours **[*3]** a workweek without receiving overtime for hours worked in excess of forty hours. (*Id.*) Plaintiffs assert that they were in fact employees of Defendant and not exempt from the overtime-pay requirements of the FLSA and similar state laws. (*Id.* ¶¶ 27-45, Pg ID 6-10.) According to Plaintiffs, Defendant's violations of federal and state law were willful. (*Id.* ¶¶ 50-51, Pg ID 12-13.)

Plaintiffs initiated this action on April 24, 2019. On July 2, 2019, they filed their motion for conditional certification. (ECF No. 23.) In the motion, Plaintiffs seek to represent the following class of workers in this action:

> All individuals who worked for Detroit Medical Informatics, LLC d/b/a DMI providing training and support to Detroit Medical Informatics, LLC d/b/a DMI's clients in connection with the implementation of electronic recordkeeping systems in the United States and who did not receive overtime compensation for hours worked in excess of forty (40) per week from three years prior to the filing of this lawsuit to the present.

(Pls.' Mot. at 1, ECF No. 23 at Pg ID 123.) Plaintiffs also seek the Court's approval to (i) notify potential collective members of the lawsuit by regular United States mail **[*4]** and electronic mail, (ii) send reminder e-mails forty-five days after the original notice, (iii) allow potential collective members to electronically sign and return the court-approved notice to opt-in, and (iv) provide collective members ninety days to return the Opt-In form. Plaintiffs submit their declarations to explain why e-mail is the most practical method to inform collective members of this lawsuit. (*Id.* Exs. 1 & 2, ECF Nos. 23-2 & 23-3.)

In response, Defendant does not challenge Plaintiffs' request for conditional certification and "has agreed to conditional certification of a class of individuals alleged by Plaintiff[s] to be similarly-situated in this action ...." (Def.'s Resp. Br. at 6, ECF No. 28, at Pg ID 293, emphasis removed.) However, as Defendant's proposed notice to the class reflects (*see id.* Ex. E, ECF No. 28-5), Defendant wants to limit the action to individuals who worked for Defendant two years prior to the order granting certification and authorizing notice. Defendant also contends that Plaintiffs' proposed notice is akin to direct advertising by their counsel in violation of the model rules and Michigan's rules of professional conduct. (Def.'s Resp. Br. at **[*5]** 5-8, ECF No. 28 at Pg ID 292-96.)

Defendant further maintains that e-mail is an inappropriate method for communicating with potential collective members. Defendant asks the Court to strike the declarations provided by Drs. Kim and Rollins, arguing that their representations therein that regular mail is an inefficient and impossible method to communicate with them is inconsistent with legal obligations to which they have bound themselves under Georgia and South Carolina law.[1] Defendant also asks the Court to (i) limit the opt-in period to thirty days from the date of mailing, (ii) preclude Plaintiffs from sending a reminder and collective members from opting-in by electronically signing and submitting the opt-in form, and (iii) prohibit either party's counsel from communicating with putative class members about the case until after the expiration of the court-approved notice period. Defendant's proposed notice also warns potential collective members that

[1] Specifically, Defendant points out that Plaintiffs both interacted with Defendant through their corporate identities, which they registered under Georgia or South Carolina law; and, that Plaintiffs consented, under the laws of those states, to accept service via regular mail. (Def.'s Resp. Br. at 10-11, ECF No. 28 at Pg ID 297-98.) Defendant further points out that as medical doctors, Drs. Kim and Rollins are required to register their physical addresses with their state's medical licensing board. (*Id.* at 12, Pg ID 299.) Although the Court is unclear how this impacts the issues before it, Defendant asserts that "[s]ociety benefits when we know where to find [professional workers like them which are held to a higher standard of conduct]." (*Id.*)

by opting-in, they "consent to bear [their] pro-rata share of any litigation costs assessed against [them] if [their] claim is unsuccessful." (Def.'s Resp. Ex. E at 1, ECF No. 28-5 at Pg ID 312.)

On October 18, 2019, Plaintiffs filed **[*6]** their motion for equitable tolling, asking the Court to toll the statute of limitations in this case from the date they filed their motion for conditional certification until the date the Court rules on the motion. (ECF No. 30.) Defendant argues in response that Plaintiffs' request is premature. (ECF No. 31.)

II. Conditional Certification & Notice

The FLSA requires all qualifying employers to pay employees no less than the minimum wage and to compensate employees for hours worked in excess of forty per workweek at a rate not less than one-and-a-half times the regular rate of pay. *29 U.S.C. §§ 206(a)(1), 207(a)(1)*. The statute authorizes collective actions to recover damages for unpaid wages provided two conditions are satisfied: (1) the employees are "similarly situated" and (2) all plaintiffs provide written consent to becoming a party and such consent is filed with the court. *29 U.S.C. § 216(b)*. "This section provides a mechanism that is 'something akin to a class action.'" *Torres v. Gristede's Operating Corp., No. 04-cv-3316, 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730, at *7 (S.D.N.Y. Sept. 29, 2006)* (citing *Scholtisek v. Eldre Corp., 229 F.R.D. 381, 386 (W.D.N.Y. 2005))*.

Nevertheless, there are differences between FLSA collective actions and class actions certified under *Federal Rule of Civil Procedure 23*. For one, "the collective action binds only potential plaintiffs who 'opt-in,' whereas *Rule 23* requires **[*7]** class members to opt-out, if they wish not to be included." *Torres, 2006 U.S. Dist. LEXIS 74039, 2006 WL 2819730, at *7* (citing *Sipas v. Sammy's Fishbox, Inc., No. 05-cv-10319, 2006 U.S. Dist. LEXIS 24318, 2006 WL 1084556, at *2 (S.D.N.Y. Apr. 24, 2006)*). Second, the FLSA requires that employees be only "similarly situated," whereas *Rule 23*'s requirements for class certification are more detailed and stringent. *Id.*

Courts within the Sixth Circuit and in other Circuits generally apply a two-step procedure for determining whether a FLSA case should proceed as a collective action. *See, e.g.*, *Waggoner v. U.S. Bancorp, 110 F. Supp. 3d 759, 764 (N.D. Ohio 2015)*; *Watson v. Advanced Distrib. Servs., LLC, 298 F.R.D. 558, 561 (M.D. Tenn. 2014)*; *see also Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546-47 (6th Cir. 2006)* (describing the two-step process). At the initial stage, the court applies a fairly lenient standard because it has minimal evidence. *Olivo v. GMAC Mortgage Co., 374 F. Supp. 2d 545, 548 (E.D. Mich. 2004)*.

At the first stage, commonly referred to as the notice stage or conditional certification, "the plaintiff must only 'make a modest factual showing' that [the plaintiff] is similarly situated to the other employees he [or she] is seeking to notify." *Waggoner, 110 F. Supp. 3d at 764* (brackets added) (quoting *Comer, 454 F.3d at 546-47*.) The plaintiff is required to show only that his or her position is similar, not identical, to the other employees. *See Heibel v. U.S. Bank, N.A., No. 2:11-cv-00593, 2012 U.S. Dist. LEXIS 139510, 2012 WL 4463771, at *3 (S.D. Ohio Sept. 27, 2012)* (citations omitted). Although neither the FLSA nor the Sixth Circuit has defined "similarly situated," courts generally find plaintiffs similarly situated **[*8]** where "their claims [are] unified by common theories of [the employer's] statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 585 (6th Cir. 2009)*; *see also Olivo, 374 F. Supp. 2d at 548* (Plaintiffs must show "they and potential plaintiffs together were victims of a common policy or plan that violated the law."). However, "[s]howing a 'unified policy' of violations is not required." *O'Brien, 575 F.3d at 584*.

This "'certification is conditional and by no means final.'" *Comer, 454 F.3d at 546* (quoting *Pritchard v. Dent Wizard Int'l, 210 F.R.D. 591, 595 (S.D.*

Ohio 2002)). Finally, at this stage of the litigation, the court does not consider the merits, evaluate credibility, or resolve factual disputes. *See* *Heibel, 2012 U.S. Dist. LEXIS 139510, 2012 WL 4463771, at *3*.

At the second stage, the court "examine[s] more closely the question of whether particular members of the class are, in fact, similarly situated." *Comer, 454 F.3d at 547*. The court's focus is on whether the individuals who have opted into the litigation are similarly situated. *See* *Ruiz v. Citibank, N.A., 93 F. Supp. 3d 279, 297, (S.D.N.Y. 2015)*. The court may decertify the class if it determines at the second step that the plaintiffs are not similarly situated.

Plaintiffs have met the "modest factual showing" that they are similarly situated to other individuals who were classified as "exempt employees," worked more than forty hours a workweek, and were not paid overtime premiums **[*9]** under the FLSA. Defendant does not challenge Plaintiffs' ability to make this showing. In fact, in its Answer, Defendant indicates that it "seeks entry of an Order *Conditionally* Certifying a Collective Action pursuant to *29 U.S.C. § 216(b)* ...." (Answer ¶ 114(a), ECF No. 12 at Pg ID 67, emphasis in original.)

As indicated above, however, Defendant does challenge the use of e-mail to notify potential collective members of this action, a follow-up reminder notice, the amount of time allowed to opt-in, the method for individuals to opt-in, and Plaintiffs' purported request for "direct, continuous, and unsupervised contact with putative class members[.]" (Def.'s Resp. Br. at 6-7, ECF No. 28 at Pg ID 293-94, emphasis removed.) Defendant also wants to limit the applicable statute of limitations to two, rather than three, years. Lastly, Defendant wants to warn potential class members in the Notice that, if they opt-in and their claims are unsuccessful, they "consent to bear [their] pro-rata share of any litigation costs assessed against [them] ..." (*Id.*, Ex. E, ECF No. 28-5.) "'The district court has discretion regarding the form and content of the notice'" provided to potential opt-in FLSA plaintiffs. *Valerio v. RNC Indus., LLC, 314 F.R.D. 61, 76 (E.D.N.Y. 2016)* (quoting **[*10]** *In re Penthouse Exec. Club Comp. Litig., No. 10 Civ. 1145, 2010 U.S. Dist. LEXIS 114743, 2010 WL 4340255, at *5 (S.D.N.Y. Oct. 27, 2010)*; *see also* *Lee v. ABC Carpet & Home, 236 F.R.D. 193, 202 (S.D.N.Y. 2006)* (citing *Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989))* ("The Supreme Court has noted that the 'details' of notice should be left to the broad discretion of the trial court.").

To begin, the Court finds nothing to suggest that Plaintiffs' counsel intends to engage in unprofessional or unethical communications with potential collective members. Absent evidence of inappropriate communications, the Court finds unwarranted Defendant's request for a blanket order "prohibiting either party's counsel from communicating with putative class members about the case until after the expiration of the court-approved notice period" (*see* Def.'s Resp. Br. at 16, ECF No. 28 at Pg ID 303). *Gulf Oil Co. v. Bernard, 452 U.S. 89, 101, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* (holding that "an 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."). The Court also does not find the asserted inconsistency between Drs. Kim's or Rollins' declarations and their agreement to accept service via regular mail in connection with their businesses or medical board certifications. Thus, the Court rejects Defendant's request to strike their declarations. **[*11]** But their declarations are not even necessary for the Court to conclude that e-mail is an appropriate method of service.

"Accurate and timely notice concerning the pendency of a collective action promotes judicial economy because it discourages class members from filing numerous identical suits and allows them to pursue their claims in one case where the

same issues of law and fact are already being addressed." *Petty v. Russell Cellular, Inc., No. 2:13-cv-1110, 2014 U.S. Dist. LEXIS 42185, 2014 WL 1308692, at *5 (S.D. Ohio Mar. 28, 2014)* (citing *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*). Courts nationwide now recognize that e-mail notice increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit and "advances the remedial purpose of the FLSA." *Atkinson v. TeleTech Holdings, Inc. No. 3:14-cv-253, 2015 U.S. Dist. LEXIS 23630, 2015 WL 853234, at * 5 (S.D. Ohio Feb. 26, 2015)* (citation omitted) (noting that sending notice via regular U.S. mail *and* e-mail to *all* potential opt-in plaintiffs "appears to be in line with the current nationwide trend"). Defendant—which is in the business of electronic recordkeeping systems—cannot possibly dispute that electronic methods of communicating and sending and receiving information dominate today's society.

The use of electronic signatures to opt-in also is consistent with our electronic age. The federal **[*12]** courts have required attorneys to sign all filings electronically since the implementation of the Case Management/Electronic Case Filing system in 2003. The Federal Rules of Civil Procedure allow the submission of electronic signatures. *Fed. R. Civ. P. 5(d)(3)(C)*. The Uniform Electronics Transactions Act (UETA) and the *Electronic Signatures in Global and National Commerce (E—SIGN) Act* have legitimized the use of e-mail as a binding method of conducting business, and the Federal Rules of Evidence recognize a print-out of an email to be an original document. *See Fed. R. Evid. 1001(3)*. Requiring individuals to print and sign their Consent to Join forms and then submit the forms via regular U.S. mail would only serve to discourage potential collective members from joining the litigation and thus would not advance the purposes of the FLSA. Defendant's concern that the communication to potential collective members will include "a hyperlink in the body titled 'Click Here to Claim Cash'" (Def.'s Resp. Br. at 13, ECF No. 28 at Pg ID 300) is unwarranted and out of touch with the manner in which many contracts and documents are executed today.

Because notice will be sent via two methods—regular United States mail and e-mail—the Court finds **[*13]** a reminder notice unnecessary and redundant. *See Wlotkowski v. Mich. Bell Tel. Co., 267 F.R.D. 213, 220 (E.D. Mich. 2010)* (agreeing with *Witteman v. Wis. Bell, Inc., No. 09-cv-440, 2010 U.S. Dist. LEXIS 8845, 2010 WL 446033, at *3 (W.D. Wis. Feb. 2, 2010)*, that a reminder is "'unnecessary and potentially could be interpreted as encouragement by the court to join the lawsuit.'"); *see also Ganci v. MBF Inspection Servs., Inc., No. 2:15-cv-2959, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *2 (S.D. Ohio Sept. 20, 2016)* (citing cases in which courts rejected reminder notices).

The Court also finds Defendant's proposed warning in the notice concerning potential fees and costs unnecessary and, in fact, improper. Courts in this District and elsewhere routinely refuse to include such references, finding that it "may deter an employee from participating, and that adverse effect is disproportionate to the burden they may face by joining the action." *McKinstry v. Developmental Essential Servs., Inc., No. 2:16-cv-12565, 2017 U.S. Dist. LEXIS 29229, 2017 WL 815666, at *3 (E.D. Mich. Mar. 2, 2017)* (citing *Bath v. Red Vision Sys., Inc., 2:13-02366, 2014 U.S. Dist. LEXIS 73563, 2014 WL 2436100, at *7 (D.N.J. May 29, 2014)* and *Guzman v. VLM, Inc., No. 07-cv-1126, 2007 U.S. Dist. LEXIS 75817, 2007 WL 2994278, at *8 (E.D.N.Y. Oct. 11, 2007)*); *see also Hall v. U.S. Cargo & Courier Serv., LLC, 299 F. Supp. 3d 888, 898 (S.D. Ohio 2018)* (including cost information is inappropriate and could unfairly dissuade potential class members from participating in the action).

Plaintiffs propose an opt-in period of ninety days. Defendant seeks to limit the period to thirty days. The efficiency of using e-mail to notify potential collective **[*14]** members of their right to opt-in to

this lawsuit and to allow them to opt-in suggests that Plaintiffs' proposed period is unnecessarily long. On the other hand, limiting the opt-in period to thirty days seems unnecessarily short and insufficient to enable individuals interested in opting in to do so. Sixty days should be sufficient, while also moving the case along expeditiously.

Finally, the parties disagree as to whether the class definition should reflect a two- or three-year limitations period. The FLSA establishes a general two-year statute of limitations, but the limitations period is extended to three years for "willful" violations. *29 U.S.C. § 255(a)*. A violation is "willful" when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute[.]" *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988)*.

Where the plaintiff alleges that the employer's violations were willful, but willfulness is disputed, as is the case here, courts in this district and elsewhere generally find that a three-year limitations period is appropriate to use in the notice to potential class members. *See, e.g.*, *Benion v. Lecom, Inc., No. 15-cv-14367, 2016 U.S. Dist. LEXIS 63210, 2016 WL 2801562, at *11 (E.D. Mich. May 13, 2016)* (citing *Colley v. Scherzinger Corp., 176 F. Supp. 3d 730, 2016 WL 1388853, at *4 (S.D. Ohio 2016)*; *Matthews v. ALC Partner, Inc., No. 08-cv-10636, 2009 U.S. Dist. LEXIS 141292, 2009 WL 10680524, at *3 (E.D. Mich. Oct. 27, 2009)* (citing **[*15]** cases from other districts concluding that three-year limitations period should be used for notice purposes). As Judge Murphy reasoned in *Matthews*:

> Given the fact that opt-in notice at this early stage of the litigation is to be construed broadly in furtherance of the remedial purposes of the FLSA ... and the fact that it would be prudent to cast a wider net with respect to potential plaintiffs at the early stage, and then limit the class—if appropriate—in the second phase of the collective action process, the Court will apply a three-year statute of limitations period for potential members of the exempt classes.

*Matthews, 2009 U.S. Dist. LEXIS 141292, 2009 WL 10680524, at *3* (internal citation omitted). The Court finds this reasoning sound and will likewise apply a three-year limitations period when defining the conditional class.

III. Equitable Tolling

Plaintiffs ask the Court to enter an order tolling the statute of limitations from the date their motion for conditional certification was fully briefed until the date the motion is decided. Plaintiffs make this request because the FLSA's statute of limitations continues to run until an individual consents to opt-in to a filed lawsuit. *See* *29 U.S.C. § 256*. Tolling preserves the extinction on statute of limitations **[*16]** grounds of potentially meritorious claims by potential plaintiffs who are not yet aware of the action.

The doctrine of equitable tolling "permits courts to extend the statute of limitations on a case-by-case basis to prevent inequity." *Baden-Winterwood v. Life Time Fitness, 484 F. Supp. 2d 822, 826 (S.D. Ohio 2007)* (citing *Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998)*). Whether to invoke equitable tolling in a particular case lies within the court's discretion; however, the Sixth Circuit has warned that the doctrine should be used "sparingly." *Robertson v. Simpson, 624 F.3d 781, 784 (2010)* (citing *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 560-61 (6th Cir. 2000)*. Typically, "equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Graham-Humphreys, 209 F.3d at 561-62* (citing *Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)*).

The Sixth Circuit has identified five factors for courts to consider in deciding whether equitable tolling is appropriate:

> (1) the plaintiff's lack of notice of the filing

> requirement;
> (2) the plaintiff's lack of constructive knowledge of the filing requirement; (3) the plaintiff's diligence in pursuing [his or] her rights; (4) an absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement.

Jackson v. United States, 751 F.3d 712, 719 (6th Cir. 2014) (citing *Truitt, 148 F.3d at 648*). This list "is not necessarily comprehensive, and not all factors are relevant in all cases." *Allen v. Yukins, 366 F.3d 396, 401 (6th Cir. 2004)*. The plaintiff **[*17]** bears the burden of showing that equitable tolling should be invoked. *Id. at 718-19* (citations omitted).

Plaintiffs do not address any of the relevant factors in their motion requesting equitable tolling. In fact, until potential class members are identified, it is impossible to know whether any of the factors support the use of the doctrine here. For that reason, "[m]ost District Judges in [the Sixth Circuit] have concluded that it is improper to equitably toll the claims of potential opt-in plaintiffs who are not yet before the court." *Brittmon v. Upreach, LLC, 285 F. Supp. 3d 1033, 1046 (S.D. Ohio 2018)* (collecting cases); *see also Matthews, 2009 U.S. Dist. LEXIS 75097, 2009 WL 2591497, at *8* (concluding that the five factor analysis is not "suitable for preemptive, one-size-fits-all application to a group of as-yet-unidentified potential plaintiffs"). Once individuals opt-in, the Court can apply the relevant factors to determine whether equitable tolling is appropriate with respect to their claims.

IV. Conclusion

For the reasons stated, the Court is conditionally certifying the following FLSA collective class:

> All individuals who worked for Detroit Medical Informatics, LLC d/b/a DMI providing training and support to Detroit Medical Informatics, LLC d/b/a DMI's clients in connection with the implementation of electronic recordkeeping **[*18]** systems in the United States and who did not receive overtime compensation for hours worked in excess of forty (40) per week from three years prior to the filing of this lawsuit to the present (the "FLSA Collective" or "Collective").

Notice to the Collective shall be consistent with this Opinion and the Orders set forth below.

The Court finds Plaintiffs' motion for equitable tolling to be premature. Requests for equitable tolling may be renewed, if necessary, at a later time.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Equitable Tolling (ECF No. 30) is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Conditional Certification and Court-Authorized Notice (ECF No. 23) is **GRANTED IN PART AND DENIED IN PART** in that

(a) Within ten (10) days from the date of this Opinion and Order, Defendant shall produce to Plaintiffs' counsel a list of names, mailing addresses, and email addresses for the putative class members as defined above.

(b) The Notice and Opt-In Consent Form submitted by Plaintiffs are approved, except they shall be modified to reflect that any member of the Collective shall have sixty (60) days from the initial date of mailing of the Notice and **[*19]** Opt-In Consent Form to return a copy of the Opt-In Consent Form to Plaintiffs' counsel for filing.

(c) Within five days of receiving the Collective list from Defendant, Plaintiffs' counsel shall cause the Notice and Opt-In Consent Forms to be mailed and e-mailed, at their expense, to the Collective. Plaintiffs' counsel shall provide notice to Defendant when the Notice and Opt-In Consent Forms have been mailed and e-mailed.

(d) Opt-In Consents will be deemed to be filed on the day they are stamped as received by Plaintiffs' counsel, unless they are received by regular mail, in which case they must be postmarked within sixty (60) days from the initial date of mailing.

(e) The Notice and Opt-In Consent Form will be the only means by which the Parties and their counsel will communicate with putative class members regarding opting in to this lawsuit, except that this order shall in no way limit Plaintiffs' counsel from communicating with its existing clients or individuals who contact them for advice or representation.

IT IS SO ORDERED.

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: November 25, 2019

End of Document

Exhibit 28

Westley v. CCK Pizza Co., LLC

United States District Court for the Eastern District of Michigan, Northern Division

June 4, 2019, Decided; June 4, 2019, Filed

Case No. 18-13627

Reporter
2019 U.S. Dist. LEXIS 93015 *; 2019 WL 2355597

PAUL WESTLEY, individually and on behalf of similarly situated persons, Plaintiffs, v CCK PIZZA COMPANY, LLC and CHRIS SCHLOEMANN, Defendants.

Subsequent History: Motion granted by, Request denied by *Westley v. CCK Pizza Co., LLC, 2019 U.S. Dist. LEXIS 136177 (E.D. Mich., Aug. 13, 2019)*

Motion granted by, Settled by, Costs and fees proceeding at *Westley v. CCK Pizza Co., LLC, 2019 U.S. Dist. LEXIS 188889 (E.D. Mich., Oct. 31, 2019)*

Counsel: **[*1]** For Paul Westley, Plaintiff: Frances J. Hollander, David M. Blanchard, Blanchard & Walker, PLLC, Ann Arbor, MI; Jesse Hamilton Forester, Forester Haynie PLLC, Dallas, TX.

For CCK Pizza Company, LLC, Chris Schloemann, Defendants: James M. Reid, IV, Maddin, Hauser, Southfield, MI; R.J. Cronkhite, Maddin, Hauser, Roth & Heller, P.C., Southfield, MI.

Judges: Honorable THOMAS L. LUDINGTON, United States District Judge.

Opinion by: THOMAS L. LUDINGTON

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR FLSA CONDITIONAL CERTIFICATION AND NOTICE AND GRANTING DEFENDANTS' MOTION TO FILE SUR-REPLY AND DIRECTING ITS FILING

On November 20, 2018, Plaintiff Paul Westley filed a complaint against Defendants CCK Pizza Company, LLC and Chris Schloemann. ECF No. 1. Plaintiff alleges that Defendants have failed to adequately reimburse Defendants' employees for their labor in violation of the *Fair Labor Standards Act ("FLSA")* and the *Michigan Wage Law*. *Id.*

On January 31, 2019, Plaintiff filed a motion for Conditional Certification and Notice pursuant to the FLSA. ECF No. 13. On May 24, 2019, Defendants filed a motion to file sur-reply relating to Plaintiff's motion for FLSA certification and notice. ECF No. 30. For the following reasons, the **[*2]** motions will be granted.

I.

A.

According to Plaintiff's Amended Complaint,[1] Defendants CCK Pizza Company ("CCK") and Chris Schloemann own and operate numerous Domino's pizza franchise stores.[2] PageID.351. Schloemann is an owner, officer and director of CCK. *Id.* While in this capacity, Schloemann

[1] Plaintiff's Amended Complaint was filed on May 9, 2019. ECF No. 19.

[2] Defendants state in their answer that CCK owns four Domino's franchise stores. PageID.39.

implemented the pay rate at issue and has overseen and enforced CCK's pay practices. *Id.*

Defendants' Domino's stores employ delivery drivers primarily to deliver food items to customers. PageID.352. Defendants require their drivers to maintain and pay for safe, legally-operable, and insured automobiles when delivering the food items. *Id.* The drivers incur costs for gasoline, vehicle parts and fluids, repair and maintenance services, insurance, depreciation, and other expenses while delivering the food items. *Id.*

All of Defendants' delivery drivers were subject to reimbursement for these costs. PageID.355. Since November 20, 2015,[3] Defendants have utilized various methods of reimbursement to account for these expenses. PageID.352. Plaintiffs allege that none of Defendants' methods have adequately reimbursed the actual vehicle expenses incurred by the delivery drivers. *Id.* Plaintiffs therefore allege **[*3]** that Defendants have a flawed reimbursement policy that has resulted in the under reimbursement of all of Defendants' delivery drivers' actual automobile expenses. *Id.* As a result of the flawed reimbursement policy, the drivers' net wages were allegedly diminished beneath the federal minimum wage requirements as required in the FLSA. PageID.354.

While employed as a delivery driver with Defendants, Plaintiff was paid a cash wage of $5.75 per hour, plus a tip credit.[4] *Id.* The federal minimum wage throughout the duration of Plaintiff's employment by Defendants was $7.25 per hour. *29 U.S.C. § 206(a)(1)(C)*. During Plaintiff's employment period, he was reimbursed at various rates, with a minimum reimbursement of $.29 per mile. PageID.355. Also during Plaintiff's employment period, the IRS business mileage rate ranged between $.535 and $.56 per mile. *Id.* The IRS mileage rate provides optional "standard mileage rates for taxpayers to use in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes." PageID.537. Using the IRS data as a reasonable approximation of Plaintiff's automobile expenses, every mile driven by Plaintiff allegedly decreased his net wages **[*4]** by at least $.245 per mile, or by $.735 per hour. PageID.355. Plaintiff contends that this decrease in net wages diminished his wages beneath the federal minimum wage. PageID.354.

All of Defendants' delivery drivers allegedly shared similar experiences to those of the Plaintiff: drivers were "subject to the same reimbursement policy; received similar reimbursements; incurred similar automobile expenses; completed deliveries of similar distances and at similar frequencies; and were paid at or near the federal minimum wage before deducting unreimbursed business expenses." PageID.355. During the entire FLSA statutory period, the IRS business mileage reimbursement rate ranged between $.535 and $.575 per mile. PageID.352. Similarly, companies, like AAA, tasked with studying the cost of owning and operating a vehicle have determined that the average cost doing so ranged between $.571 and $.608 during the statutory period. PageID.352-53. Both figures represent a reasonable approximation of the average cost of owning and operating a vehicle to use for delivering food items. PageID.353. Therefore, the Defendants allegedly failed to reimburse their delivery drivers at a reasonable approximation **[*5]** of the cost of owning and operating a vehicle for the purpose of delivering food items. *Id.*

Defendants' low reimbursement rates allegedly were a frequent complaint of delivery drivers, some of whom discussed their concerns with management. PageID.356. However, Defendants continued to reimburse their delivery drivers at a

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[3] Plaintiff alleges a "willful" violation of the FLSA. PageID.356. The statute of limitations period is three years prior to the date of the complaint's filing for a plaintiff alleging a willful violation of the FLSA. *29 U.S.C. § 255(a)*.

[4] Plaintiff states in his reply brief that it is "undisputed that Defendants never claimed a tip credit greater than the difference between the drivers' cash wage and the applicable minimum wage." PageID.568-69.

rate lower than the reasonable approximation of automobile expenses, as determined by the data above. *Id.*

B.

Plaintiff's amended complaint presents two counts. Count I alleges that Defendants violated the federal minimum wage as mandated by the Fair Labor Standards Act. PageID.362-65. Count II states that Defendants violated Michigan's minimum wage as mandated by the *Michigan Minimum Wage Law*. PageID.365-66.

II.

Plaintiff seeks conditional class certification and judicial notice of a collective action pursuant to the Fair Labor Standards Act, *29 U.S.C. § 216(b)*. *§ 216(b)* provides that "an employer who violates the provisions of *section 206* or *section 207* of this title shall be liable to the employee or employees affected in the amount of their unpaid wages . . . ."[5] *Id.*

Section 216 further provides that an employee may maintain an action against his employer on behalf of himself and other employees who 1) are "similarly situated", **[*6]** and 2) "consent in writing" to be a part of the collective action. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)* (quoting *29 U.S.C. § 216(b)*). If the plaintiff shows that he is similarly situated to the other potential plaintiffs, a court may conditionally certify the collective action by authorizing notice of the action to the potential plaintiffs that seeks their requisite consent to opt into the action. *Fisher v. Mich. Bell Telephone Co., 665 F. Supp. 2d 819, 824-25* (citing *Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165, 167-68, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*).

[5] *29 U.S.C. § 206(a)(1)(C)* provides that employees have been entitled to compensation at a rate of at least $7.25 per hour since July 24, 2009.

Whether the proposed class members are similarly situated is analyzed in two stages. The first stage, also called the "notice stage," takes place "at the beginning of discovery." *Comer, 454 F.3d at 546*. At this stage, the plaintiff "must show only that his position is similar, not identical" to the positions of the other potential plaintiffs to the action. *Id.* The plaintiff need only make a "modest factual showing" or make "substantial allegations" that he and the other potential plaintiffs were "victims of a common policy or plan that violated the law." *White v. MPW Industrial Services, Inc., 236 F.R.D. 363, 372 (E.D. Tenn. 2006)*. The courts employ a "fairly lenient standard" when deciding whether plaintiffs are similarly situated. *Comer, 454 F.3d at 547*. Plaintiff is seeking conditional certification at this first stage.

The second stage of certification occurs post-discovery. *Id.* At this stage, the courts employ a "stricter standard" to reexamine whether **[*7]** plaintiffs to the action are similarly situated by evaluating the plaintiffs' factual differences. *Id.* Using this evidence, the courts will decide whether to finalize the conditional certification obtained in the first stage or, alternatively, decertify the class. *See Id. at 546*.

III.

Plaintiff seeks conditional certification of "[a]ll delivery drivers employed by Defendants at any time since November 20, 2015" for his claim that Defendants' reimbursement policy diminishes their delivery drivers' wages beneath the federal minimum wage as mandated in the FLSA. PageID.83.

A.

A preliminary issue is whether the delivery drivers for whom Plaintiff seeks conditional certification are classified as independent contractors or employees of the Defendants. "Independent contractors do not enjoy FLSA protections." *Keller*

v. Miri Microsystems LLC, 781 F.3d 799, 806 (6th Cir. 2015).

Defendants admit in their answer to Plaintiff's complaint that CCK "employs delivery drivers who use their own automobiles to deliver pizza and other food items to the customers of Defendant CCK Pizza Company, LLC." PageID.35. Further, neither party alleges that Defendants' delivery drivers ever worked under an independent contractor agreement and Defendants do not contest the provisions of the declarations **[*8]** of Plaintiff, Ema Westley, and Jeffrey Bourcier that state they "worked for the Defendants" and were "employed as a delivery driver." *See* PageID.249; PageID.724; PageID.727.

Accordingly, the delivery drivers are assumed employees of Defendants and enjoy FLSA protections.

B.

Plaintiff first contends that he was paid a subminimum wage because Defendants' reimbursement rates for delivery drivers did not cover all of Plaintiff's incurred vehicle expenses. PageID.95. Plaintiff cites the difference between the IRS business mileage reimbursement rate and his actual reimbursement rate, as well as his allegation that he was paid at or near the minimum wage, as evidence that Defendants diminished his wages beneath the federal minimum wage. PageID.94-95.

Defendants contend that the IRS rate is insufficient to show that their reimbursement policy violates the FLSA and therefore that "Plaintiff has failed to allege even a facially valid FLSA violation, let alone a modest factual showing of an FLSA violation." PageID.451. However, this district has recognized that the court does not "decide substantive issues on the merits" until the second stage of certification. *Fisher, 665 F. Supp 2d at 825* (citing *Brasfield v. Source Broadband Servs., LLC, 257 F.R.D. 641, 642 (W.D. Tenn. 2009)*.

Therefore, whether the IRS's **[*9]** reimbursement rate adequately reflects the Plaintiff's actual cost for operating and maintaining a vehicle is not considered at this stage of certification.

The current issue is solely whether Plaintiff is in a similarly situated position as the potential plaintiffs with respect to the Defendants' allegedly flawed and undercompensating reimbursement policy.

C.

Plaintiff argues that he fulfills the lenient standard for establishing that all delivery drivers employed by Defendants are similarly situated for purposes of *§ 216(b)* conditional certification and notification. PageID.98-101.

1.

Plaintiff contends that he is similarly situated to all other delivery drivers employed by Defendants during the statutory period because they "held the same job, shared the same primary job duty of delivering food using their personal vehicles, were required to incur automobile costs in delivering food to Defendants' customers, and were reimbursed according to Defendants' uniform policy." PageID.98.

Defendants acknowledge that all delivery drivers were subject to reimbursement. PageID.47. However, Defendants maintain that potential plaintiffs are not united by a common decision, policy or plan, and thus are not **[*10]** similarly situated to the plaintiff, because "different CCK drivers were subject to up to three different policies at different times and at different stores." PageID.453.

Plaintiff argues that the reimbursement methods employed by Defendant are only secondary to a uniformly "flawed" reimbursement system, regardless of methodology. PageID.565. To support his allegation that all delivery drivers, regardless of

method, were subject to a flawed reimbursement policy that diminished their wages below the federal minimum wage, Plaintiff has provided his declaration as well as declarations of three former delivery drivers employed by Defendants. The declarations state that the reimbursements received were inadequate to reimburse them for the automobile expenses incurred while delivering food for Defendants, as determined by the IRS's reasonable approximation of automobile expenses.

The question before the Court is whether Plaintiff has submitted enough evidence to make a modest factual showing or substantial allegation that he and the potential plaintiffs are similarly situated by unity of a common plan in violation of the FLSA. Plaintiff has met this burden, despite differences in the methods **[*11]** of reimbursement dependent on each driver's date of employment and store.

Plaintiff states in his declaration that Domino's per mile reimbursement rate was less than the IRS reimbursement rate. PageID.250. Furthermore, Plaintiff also states that Domino's mileage reimbursement rate based on six percent of gross sales for deliveries was less than the IRS reimbursement rate when accounting for miles driven. *Id.* Plaintiff concludes that Domino's reimbursement rates did not cover all expenses incurred while delivering food items for the Defendants' Bay City, Michigan location. *Id.* Plaintiff further concludes that "based on conversations with other drivers with whom [he] worked while employed by Defendants," these workers "were subjected to the same inadequate reimbursement policy." *Id.*

Ema Westley, Plaintiff's wife and a current delivery driver for Domino's at the Defendants' Bay City location, states the same allegations and conclusions as Plaintiff regarding reimbursement in accordance with Defendants' per mile method. PageID.728. E. Westley does not make any allegations with respect to the Defendants' percentage of gross sales reimbursement method.

Jeffrey Bourcier, a former delivery driver **[*12]** for Domino's at the Defendants' Midland, Michigan location, states in his declaration that Domino's flat rate reimbursement of at least $.75 per delivery was less than the IRS reimbursement rate when accounting for miles driven. PageID.725. Bourcier concludes that Domino's reimbursement rates did not cover all expenses incurred while delivering food items for the Defendants' Midland location. *Id.* Bourcier further concludes that "based on conversations with other drivers with whom [he] worked while employed by Defendants," these workers "were subjected to the same inadequate reimbursement policy." *Id.*

Defendants attached an affidavit to their sur-reply contesting Bourcier's declaration that he was employed by the Defendants within the statutory period. PageID.756-63. However, at this conditional first stage of certification, "the Court does not resolve factual disputes, decide substantive issues on the merits, or make credibility determinations." *Fisher, 665 F. Supp. 2d at 826*. Therefore, Defendants' evidence challenging the validity of Bourcier's declaration will be addressed during the second stage of certification.

The declarations collectively provide substantial allegations that all three methodologies used by **[*13]** Defendants to reimburse delivery drivers undercompensated actual automobile expenses incurred. Moreover, Defendants acknowledge that all delivery drivers were subject to one of the three reimbursement methods and the declarations allege that other Domino's employees worked under the same subminimum wage, plus tip credit, policy. Therefore, Plaintiff has carried his burden of showing a similarly situated class at this lenient first stage of certification.

2.

Defendants further argue that Plaintiff has not made a modest factual showing that his vehicle expenses are similar to the proposed collective. PageID.458-59. Defendants state that Plaintiff has not provided any facts that his "vehicle expenses relating to gas

use, vehicle depreciation, insurance rates, and other vehicle expenses are similar to the proposed collective." PageID.459. However, "disparate factual and employment settings of the individual plaintiffs should be considered at the second stage of analysis." *Fisher, 665 F. Supp. 2d at 827*. Plaintiff has established that the collective class is sufficiently similarly situated to proceed to discovery because the drivers are all subject to an allegedly inadequate reimbursement rate regardless of method used **[*14]** (see III.C.1). At this first lenient stage, conditionally certifying the class would not impose a burdensome factual inquiry on the Court because all delivery drivers were subject to reimbursement and no exceptions to the policy are alleged.

IV.

If the plaintiff shows that other potential plaintiffs are similarly situated, a court may conditionally certify the collective action by authorizing notice of the action to the potential plaintiffs that seeks their requisite consent to opt into the action. *Fisher, 665 F. Supp. 2d at 824-25* (citing *Hoffmann, 493 U.S. at 167-68*).

Defendants do not contest Plaintiff's requests to 1) order Defendants to identify all delivery drivers they have employed at any time since November 20, 2015; 2) order Defendants to provide to Plaintiff's attorneys the names, last known mailing and e-mail addresses, and telephone numbers for all collective members, within ten business days of the date of an Order granting this motion; and 3) direct the issuance of Plaintiff's proposed notice and consent form to all such persons. PageID.105.

Plaintiff's proposed Notice is approved in the form provided by Plaintiff. PageID.259-63. Further, notification of all delivery drivers employed by Defendants at any time since November 20, 2015 **[*15]** is authorized in accordance with granting Plaintiff's motion for conditional certification. Defendants are therefore required to provide to Plaintiff's attorneys the contact information of each delivery driver employed by Defendants since November 20, 2015 within ten business days of the date of this Order. Plaintiff may send by First Class Mail, email, or both the Notice to all potential plaintiffs of the conditionally certified class.

After Defendants have produced collective members' names and contact information, and Plaintiff has issued the Notice, collective members are given a 90-day period to return a signed consent form. The proposed 90-day notice and opt-in provision is consistent with this district's timeframe for authorizing contact of potential plaintiffs by postal mail, email, or both. *Benion v. LeCom, Inc., 2016 U.S. Dist. LEXIS 63210, at *35 (E.D. Mich. May 13, 2016)*.

Lastly, Plaintiff proposes that a "reminder" notice be sent 45 days prior to the close of the 90-day opt-in period. Plaintiff may send a reminder notice through the same means it served the Notice to all potential plaintiffs of the conditionally certified class that have not opted in to the litigation at the time the reminder notice is sent. *See Hamm v. S. Ohio Med. Ctr., 275 F. Supp. 3d 863, 879 (S.D. Ohio 2017)*.

V.

Accordingly, it is **ORDERED** that Plaintiff's **[*16]** motion for FLSA conditional certification, ECF No. 13, as a collective is **GRANTED**.

It is further **ORDERED** that Defendants must provide to Plaintiff's attorneys the names, last known mailing and email addresses, and telephone numbers of the potential plaintiffs of the conditionally certified class **on or before June 27, 2019**.

It is further **ORDERED** that Plaintiff shall deliver notice by First Class Mail, email, or both to conditionally certified class members. The Notice shall state that interested class members may opt in to this litigation **on or before September 25, 2019**.

It is further **ORDERED** that Defendants' motion to file sur-reply, ECF No. 30, is **GRANTED**. Defendants are **DIRECTED** to file the sur-reply, ECF No. 30-2, upon receipt of this Order.

Dated: June 4, 2019

/s/ Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

End of Document

Exhibit 29

Cobus v. DuHadway, Kendall & Assocs.

United States District Court for the Eastern District of Michigan, Southern Division

August 21, 2014, Decided; August 21, 2014, Filed

Case No. 13-cv-14940

Reporter
2014 U.S. Dist. LEXIS 116403 *; 2014 WL 4181991

Bret Cobus, et al., Plaintiffs, v. DuHadway, Kendall & Assocs., Inc., Defendant.

Subsequent History: Costs and fees proceeding at *Cobus v. Duhadway, Kendall & Assocs., 2015 U.S. Dist. LEXIS 130676 (E.D. Mich., Sept. 29, 2015)*

Counsel: **[*1]** For Bret Cobus, James Krupa, Tony Logan, John Voydanoff, Lynn Williams, Plaintiffs: Maia E. Johnson, Gold Star Law, Troy, MI.

For DuHadway, Kendall & Associates Inc, Doing business as DK Security, Defendant: Allan S. Rubin, Christina A. Daskas, Jackson Lewis P.C., Southfield, MI; Timothy J. Ryan, Jackson Lewis P.C., Grand Rapids, MI.

Judges: Hon. Judith E. Levy, United States District Judge. Mag. Judge David R. Grand.

Opinion by: Judith E. Levy

Opinion

OPINION AND ORDER PARTIALLY GRANTING PLAINTIFFS' [11] MOTION FOR CONDITIONAL CERTIFICATION OF FLSA COLLECTIVE ACTION AND AUTHORIZING NOTICE

This action is brought by five named plaintiffs, Bret Cobus, James Krupa, Tony Logan, John Voydanoff, and Lynn Williams, on behalf of themselves and other similarly situated employees, against their employer, defendant DuHadway, Kendall & Associates, d/b/a DK Security. The named plaintiffs, joined by 21 current and former employees of defendant who have opted into this action (collectively "plaintiffs"), allege defendant violated the Fair Labor Standards Act of 1938, *29 U.S.C. § 201 et seq.*, by failing to pay overtime wages to them and to other similarly situated employees at defendant's Michigan locations.

This matter is before the Court on plaintiffs' **[*2]** Motion for Conditional Certification of an FLSA Collective Action and for an Order for Notice to the Class (Dkt. 11). For the reasons stated below, the Court grants the motion with respect to one location: the Selfridge Air National Guard facility ("Selfridge") in Harrison, Michigan. Two of the opt-in plaintiffs did not work at Selfridge, but at a Federal Emergency Management Agency site in western Michigan (the "FEMA site"). As discussed further below, the Court also allows plaintiffs to conduct limited discovery to determine whether other potential plaintiffs exist at the FEMA site.

I. Background facts

Plaintiffs are security officers ("SOs") employed by defendant DuHadway, Kendall & Assocs., Inc., d/b/a DK Security. Defendant is a corporation located in Kentwood, Michigan that employs approximately 922 SOs at 149 sites throughout Michigan. 130 of the SOs, including the plaintiffs, are armed SOs.

Defendant contracted to provide security at Selfridge beginning December 3, 2011. Defendant

hired 19 employees from the former security contractor for Selfridge. Defendant typically assigns 25-33 SOs to Selfridge. The SOs report to a site supervisor. Since taking over security at Selfridge, defendants have **[*3]** assigned two different supervisors to that site. Both were former employees of the previous security contractor for Selfridge.

All but two of the plaintiffs work at Selfridge. The Selfridge SOs are paid on an hourly basis and are scheduled to work 8 hours per shift, 5 days per week, for a total of 40 scheduled hours per week. Plaintiffs allege that, until December 2013, they actually worked 8.5 hours per day, 42.5 hours per week, but were not compensated for the 2.5 hours per week of overtime. Plaintiffs claim the 2.5-hour discrepancy between weekly hours scheduled and weekly hours worked resulted from defendant requiring plaintiffs to work through their 1/2-hour unpaid lunch break each day. In some instances, plaintiffs allege they were required to report early to prepare for the shift or to wait beyond the end of the shift for relief to arrive. Plaintiffs allege they were not paid overtime for that pre- and post-shift time.

Plaintiffs recorded their time on shift logs and, until December 2013, submitted them to their supervisor at the end of each shift. The logs indicate that plaintiffs worked the entire 8.5-hour shift without a break. (*See* Dkt. 11, Ex. 1 to Plaintiffs' Brief in Support **[*4]** of Motion for Conditional Certification). The shift logs were signed by the SO and, in some instances, by the supervisor as well. (*See id.*). The supervisor then prepared time sheets for all Selfridge SOs based on the shift logs. (*See* Dkt. 11, Ex. 2 to Plaintiffs' Brief). The time sheets indicate that each SO was credited with 8 hours of work per shift. (*See* Dkt. 11, Ex. 2 to Plaintiffs' Brief).

Plaintiffs filed their complaint in this action on December 3, 2013, alleging defendant violated *section 207* of the Fair Labor Standards Act ("FLSA") by failing to pay plaintiffs overtime compensation. On March 12, 2014, plaintiffs moved for conditional certification of this action as a collective action pursuant to *section 216(b) of the FLSA*. Plaintiffs propose the following class:

> All current and former persons employed as security officers and compensated on an hourly, non-salary basis by Defendant throughout Michigan who worked for at least one week in excess of forty hours but were paid only for forty hours, during the period from three years prior to the filing of this complaint to the present. (Compl. ¶ 39).

II. Analysis

A. Principles governing collective certification

Section 207 of the FLSA requires employers to pay employees at least 1 1/2 times their regular **[*5]** rate of pay for any time worked in excess of 40 hours per week. *29 U.S.C. § 207(a)*. *Section 216* provides that an employer who violates *section 207* "shall be liable to the employee or employees affected" for unpaid overtime compensation and an additional equal amount as liquidated damages. *Id. § 216(b)*. *Section 216* also permits employees to bring a collective action on behalf of themselves and other employees "similarly situated." *Id.* Putative class members must opt into the class by written consent and become party plaintiffs. *Id.; O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 583 (6th Cir. 2009)*.

Plaintiffs must meet two requirements to certify a collective action. First, the named plaintiffs must be "similarly situated" to each other and to putative plaintiffs. *Comer v. Wal-Mart Stores, 454 F.3d 544, 546 (6th Cir. 2006)*. Second, all plaintiffs must submit written consent to participate in the collective action. *Id.* Accordingly, the court first must determine "whether plaintiffs have shown that the employees to be notified of the collective action are, in fact, similarly situated." *Fisher v. Michigan Bell Tel. Co., 665 F. Supp. 2d 819, 824 (E.D. Mich.*

2009). If the plaintiffs make this showing, the court may then "authorize notification of similarly situated employees to allow them to opt into the suit." Id. at 825. The court may also order the defendant to provide plaintiffs with the contact information of potential opt-in plaintiffs.

Courts in **[*6]** the Sixth Circuit generally "follow[ ] a two-stage certification process . . . to determine whether the opt-in and lead plaintiffs [are] similarly situated." O'Brien, 575 F.3d at 583. The first, or "notice," stage, takes place at the beginning of discovery. Comer, 454 F.3d at 546. The court "determines whether the suit can be conditionally certified as a collective action so that potential opt-in plaintiffs can be notified of the suit's existence and of their right to participate." Fisher, 665 F. Supp. 2d at 825 (citation and internal quotation marks omitted). The second stage follows receipt of opt-in forms and the conclusion of discovery. *Id*. At that point, "trial courts examine more closely the question of whether particular members of the class are, in fact, similarly situated" and "employ[ ] a stricter standard" for final certification. Comer, 454 F.3d at 547 (citation and internal quotation marks omitted).

Plaintiffs' motion here involves the first stage and seeks only conditional certification. Plaintiffs thus have the burden of showing that "the opt-in plaintiffs are similarly situated to the lead plaintiffs." O'Brien, 575 F.3d at 584. The FLSA does not define "similarly situated." But plaintiffs must show "only that [their] position is similar, not identical, to the positions held by the putative **[*7]** class members." Comer, 454 F.3d at 546-47. Plaintiffs can meet this burden by showing that "they and potential plaintiffs together were victims of a common policy or plan that violated the law." Id. at 547. "Showing a unified policy of violations is not required, though." Id. at 584. Alternatively, plaintiffs can show their claims are "unified by common theories of defendant's statutory violations, even if the proofs of those theories are inevitably individualized and distinct." Id. at 585.

Plaintiffs' burden at the first stage is less stringent than the burden for class certification under Rule 23. O'Brien, 575 F.3d at 584. The standard of proof is "fairly lenient," requiring only that plaintiffs "submit evidence establishing at least a colorable basis for their claim that a class of similarly situated plaintiffs exists." Fisher, 665 F. Supp. 2d at 825. Courts also routinely describe plaintiffs' burden as a "modest factual showing." *E.g.*, Comer, 454 F.3d at 547. This showing may be based solely on the pleadings and affidavits. Lee v. Gab Telecom, Inc., No. 12-14104, 2013 U.S. Dist. LEXIS 54494, 2013 WL 1632552, at *4 (E.D. Mich. Apr. 16, 2013). The court does not "resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations" at this stage. Fisher, 665 F. Supp. 2d at 825.

The notice stage "typically results in conditional certification of a representative class." Wheeler v. City of Detroit, No. 11-11455, 2012 U.S. Dist. LEXIS 47202, 2012 WL 1119300, at *3 (E.D. Mich. Apr. 3, 2012). If, however, a court denies conditional certification, **[*8]** it may still allow discovery to give plaintiffs a second chance to obtain sufficient evidence to warrant conditional certification. Arrington v. Mich. Bell Tel. Co., No. 10-10975, 2011 U.S. Dist. LEXIS 84234, 2011 WL 3319691, at *6 (E.D. Mich. Aug. 1, 2011). Moreover, the court may grant a motion for conditional certification, but limit the scope of the conditional class based on the plaintiff's factual showing. *See* Swinney v. Amcomm Telecomm., Inc., No. 12-12925, 2013 U.S. Dist. LEXIS 119749, 2013 WL 4507919, at *10 (E.D. Mich. Aug. 23, 2013) (conditionally certifying collective action, but limiting to one of defendant employer's locations); Shipes v. Amurcon Corp., No. 10-14943, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995632, at *6 (E.D. Mich. Mar. 23, 2012)(stating that "this Court has the discretion to re-shape the class in an appropriate manner" and citing cases).

B. Plaintiffs have met the burden for conditional certification with respect to Selfridge

Plaintiffs have made the requisite "modest factual showing" that similarly situated SOs exist at Selfridge.

As discussed above, plaintiffs have alleged in their Complaint that there are similarly situated employees of defendant at Selfridge who 1) work as SOs; 2) work full-time, 3) are required to work 8.5-hour shifts; 4) are permitted or required to work through their 1/2-hour unpaid breaks; 5) are only paid for 8 hours per shift, and thus are not paid for 2.5 hours of overtime per week. Named plaintiffs have submitted affidavits supporting these allegations. Plaintiffs have thus shown that they **[*9]** have the same job duties and the same hours, work at the same location, and are subject to the same time reporting procedures.

Plaintiffs have also submitted shift logs from one named plaintiff, as well as time sheets for a number of SOs at Selfridge, showing 8.5 hours of work (shift log), but only 8 hours of time recorded for payment (time sheets). (Dkt. 11, Ex. 1, 2 to Plaintiffs' Brief). The shift logs are signed by the SOs, and sometimes by the supervisor. Defendants do not dispute that, until Dec. 2013, SOs at Selfridge submitted shift logs to a supervisor, who then filled out the time sheets. These time sheets are evidence that defendant regularly failed to credit the Selfridge SOs with one half-hour of work time per shift. Plaintiffs have thus made an adequate factual showing that they were subject to a common policy or plan.

Defendants maintain that plaintiffs have not shown the existence of a common policy violating the FLSA. Rather, any violations are attributable to the actions of "rogue managers." (Dkt. 12, Defendant's Response to Plaintiffs' Motion for Conditional Certification 12-14). Defendants cite a number of district court cases, all from outside the Sixth Circuit, **[*10]** in support of this argument. But the Sixth Circuit has expressly recognized that "showing a unified common policy that violates the FLSA is not required." *Shipes, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995632, at *5* (citing *O'Brien, 575 F.3d at 584*). Rather, it is enough if "plaintiffs' claims are unified by common theories of defendants' statutory violations." *Id*. As indicated above, plaintiffs have made an adequate showing that they were subject to a common policy that violated the FLSA. Alternatively, plaintiffs have shown their claims are unified by a common theory of defendant's violations; namely, that defendant routinely permitted or required plaintiffs to work through their unpaid lunch break, yet did not count the lunch break in plaintiffs' time sheets.

C. Plaintiffs have not met the burden for conditional certification with respect to defendant's other locations

Each of the five named plaintiffs makes the same two statements in his or her affidavit: "Every other SO with whom I have spoken has told me that he or she was compensated on the same basis as I was," and "Based on information and belief, all SOs working for Defendant are and were compensated similarly to myself." (*E.g.*, Dkt. 11, Ex. 3 to Plaintiffs' Brief, Cobus Affidavit ¶¶ 8-9). This is the only **[*11]** evidence plaintiffs offer to show that similarly-situated employees exist outside Selfridge and the FEMA site.

Defendants challenge the statements as 1) hearsay, and 2) lacking sufficient information (e.g., names and work locations) to warrant notice to defendant's other locations.

Defendant's hearsay challenge is unavailing. Courts in this Circuit have "repeatedly rejected" the contention that plaintiffs' evidence at the conditional certification stage must be admissible under the Federal Rules of Evidence. *Fisher, 665 F. Supp. 2d at 826* (citing cases).

The sufficiency challenge is another matter. To certify a class covering all of defendant's locations, plaintiffs do not need to allege facts or present other evidence for each of those locations. Nonetheless, plaintiffs must "provide sufficient evidence of a company-wide practice through

declarations of present and former employees at other locations" to justify "sending notice to similarly situated employees at all locations at issue in the litigation." *Fisher, 665 F. Supp. 2d at 828*.

Plaintiffs' counsel indicated at oral argument on this motion that the named plaintiffs have spoken only with other SOs who work at Selfridge. The named plaintiffs' affidavits contain no facts supporting their "information **[*12]** and belief" that SOs at all other locations are similarly situated to plaintiffs. These affidavit statements cannot qualify "sufficient evidence of a company-wide practice." *Compare Gab Telecom, 2013 U.S. Dist. LEXIS 54494, 2013 WL 1632552, at *3* (finding plaintiffs' statements sufficient where plaintiff alleged personal knowledge that other workers were similarly situated, and "provided a plausible account" of how they acquired that knowledge) *with Shipes, 2012 U.S. Dist. LEXIS 39794, 2012 WL 995362, at *11* (finding plaintiff's affidavit "bare-bones" and statement that "I know of other individuals who regularly worked overtime hours for Amurcon" insufficient to support conditional certification).

Moreover, plaintiffs' evidence addresses only 2 of the 149 sites covered by the proposed class definition. Again, this is not "sufficient evidence of a company-wide practice" that supports authorizing notice to all 149 sites. *Compare Swinney, 2013 U.S. Dist. LEXIS 119749, 2013 WL 4507919, at *10* (court limited conditional certification to 1 of defendant's 4 locations, since plaintiff had not "provided an affidavit or any evidence showing that there were similarly situated independent contractors in Defendant's other locations"), *with Russell v. Ill. Bell Tel. Co., 575 F. Supp. 2d 930, 937 (N.D. Ill. 2008)* (finding affidavits from employees at three of four defendant locations justified sending notice of collective action to all four locations). **[*13]**

D. Plaintiffs' proposed notice

District courts may authorize notice of a collective action to employees whom plaintiffs have shown are similarly situated. *Comer, 454 F.3d at 546*. Counsel for both parties approved the revised proposed notice plaintiffs submitted on June 18, 2014. That notice is addressed to the following proposed class:

> All current and former Security Officers employed by DK Security, Inc. at the Selfridge Air National Guard Base after December 3, 2011, who worked hours for which they were not paid and overtime hours for which they were not paid overtime wages during all or part of their employment.

The Court will approve the notice as to form and authorize notification of all SOs employed by defendant at Selfridge between December 3, 2011 and December 3, 2013. The Court will also require defendant to provide the names and contact information of all such SOs.

E. The FEMA site

In their reply brief, plaintiffs indicate for the first time that two opt-in employees worked at a FEMA site in west Michigan and "were not paid for all hours worked before and after their scheduled shifts." (Dkt. 14, Plaintiffs' Reply Brief 3). Plaintiffs have not alleged further facts nor provided additional evidence about **[*14]** these two employees. For example, plaintiffs have not indicated 1) whether the two employees are security guards, 2) whether they work full-time, or 3) whether the two employees' pre- and post-shift hours were overtime or "straight time."

Without more information, it is not possible to determine whether these two employees, as well as others at the FEMA site, are similarly situated to the named plaintiffs. At the conclusion of the hearing on this motion, the Court therefore authorized plaintiffs to conduct limited discovery, in the form of written interrogatories to defendant, to determine whether similarly situated employees exist at the FEMA site. The Court also set a

deadline of August 14, 2014 for plaintiffs to move for extension of the conditional certification to the FEMA site. On August 13, 2014, plaintiffs' counsel informed the Court that plaintiffs will not seek extension of the conditional certification to the FEMA site.

III. Conclusion

Accordingly, plaintiffs' motion is GRANTED with respect to the Selfridge facility ONLY;

Plaintiff's motion is DENIED without prejudice with respect to defendant's other locations;

Plaintiff's proposed notice, submitted on June 18, 2014, is APPROVED **[*15]** as to form; and

Plaintiffs may give notice of this collective action to all SOs employed by defendant at Selfridge between December 3, 2011 and December 3, 2013.

IT IS SO ORDERED.

Dated: August 21, 2014

/s/ Judith E. Levy

Judith E. Levy

United States District Judge

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Exhibit 30

Henry v. Dish Network, L.L.C.

United States District Court for the Western District of Tennessee, Eastern Division

June 29, 2012, Decided; June 29, 2012, Filed

No.: 1:11-cv-1376

Reporter
2012 U.S. Dist. LEXIS 192484 *

JASON HENRY and others similarly situated, Plaintiffs, v. DISH NETWORK, L.L.C., Defendant.

Subsequent History: Magistrate's recommendation at *Henry v. Dish Network, L.L.C., 2012 U.S. Dist. LEXIS 141738 (W.D. Tenn., July 26, 2012)*

Counsel: **[*1]** For Jason Henry, and others similarly situated, Plaintiff: Clinton H. Scott, GILBERT RUSSELL McWHERTER PLC, Jackson, TN; Michael L. Russell, GILBERT RUSSELL McWHERTER SCOTGT BOBBITT PLC, Franklin, TN.

For Dish Network L.L.C., Defendant: Christian Charles Antkowiak, George Basara, LEAD ATTORNEYS, Lisa M. Passarello, BUCHANAN INGERSOLL & ROONEY PC, Pittsburgh, PA.

Judges: EDWARD G. BRYANT, UNITED STATES MAGISTRATE JUDGE.

Opinion by: EDWARD G. BRYANT

Opinion

JURY DEMANDED

FLSA COLLECTIVE ACTION

REPORT AND RECOMMENDATION

Before the Court is Plaintiffs' Expedited Motion [D.E. 31] for Approval of *29 U.S.C. § 216(b)* Notice and Consent Forms and to Order Disclosure of Current and Former Employees. Defendant has failed to respond.[1] This matter has been referred to the Magistrate Judge for the purpose of determination and/or Report and Recommendation [D.E. 32]. The Magistrate Judge respectfully submits the following report and recommendation.

Plaintiff requests that the Court authorize this case to proceed as a collective action for overtime violations under the *Fair Labor Standards Act (FLSA)*, *29 U.S.C. § 216(b)*[2] and Tennessee law, on behalf of all non-exempt employees of Defendant

---

[1] As this Order was being entered, Defendants filed an untimely response, a month after Plaintiff's Expedited Motion was filed, with no acknowledgement or excuse for their failure to timely file their response. There is no request for extension of time in the record, timely or otherwise. The Magistrate Judge recommends **[*2]** that Defendant's Response not be considered in light of these circumstances. However, should the District Court in its discretion consider Defendant's Response, the Magistrate Judge believes that, nevertheless, Plaintiff has met his burden and conditional certification is appropriate in this case. The Magistrate Judge further notes that Plaintiff has failed to file a Certificate of Consultation with his Motion, however, given the nature of Defendant's untimely response, it appears that consultation would not have resolved this matter and therefore the Magistrate Judge does not find good grounds for denying the Motion pursuant to ***Local Rule 7.2(a)(1)(B)***.

[2] *Section 216(b)* of the statute provides in pertinent part: An action to recover the liability prescribed in [the FLSA's overtime provision] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

at its Jackson, Tennessee location(s) within the past six years who have been worked "off the clock" without proper compensation by Defendant; (2) issue an Order directing Defendant to immediately provide a list of names, last known addresses, and last known telephone numbers for all putative class members within the last six years; (3) **[*3]** issue an Order that notice be prominently posted at Defendant's Jackson, Tennessee location(s) where putative class members work, attached to current employees' next scheduled pay check, and mailed to the employees so that they can assert their claims on a timely basis as part of this litigation; (4) issue an Order tolling the statute of limitations for the putative class as of the date this action was filed; and (5) Order that the opt in plaintiffs Consent Forms be deemed "filed" on the date they are postmarked.

As Plaintiff notes, the standard that plaintiffs must meet to obtain court certification of a FLSA collective action is lower than **[*4]** that for *Fed. R. Civ. P. 23* class actions. *O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d at 584*. Lead plaintiffs in a FLSA collective action need only show that they are "similarly situated" to employees in the class they seek to certify. *Id.*; *§ 216(b)*. Courts typically engage a two-phase inquiry to determine whether the lead plaintiffs have satisfied that showing, with the first taking place at the beginning of discovery. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*. Plaintiff's burden is "fairly lenient" in this first phase, the conditional certification, and the lead plaintiff must make only a "modest factual showing" that he is similarly situated to members of the prospective class he seeks to certify and send court-supervised notice. *Id. at 546-47*. Because of this lenient standard, conditional certification of collective actions is typically granted. *Id.* Likewise, companion state law claims are permitted. *See O'Brien v. Ed Donnelly Enterprises, Inc. 575 F.3d 567, 580 (6th Cir. 2009)* ("an opt-in employee with FLSA and supplemental claims can have both of those claims certified as part of a collective action where a lead plaintiff has FLSA and supplemental claims").

As an initial matter, pursuant to *Local Rule 7.2(a)(2)*, "[f]ailure to respond timely to any motion, other than one requesting dismissal of a claim or action, may be deemed good grounds for granting the motion." Because Defendant has failed to timely respond, **[*5]** the Magistrate Judge recommends granting Plaintiff's Motion on this basis alone.

As alternate grounds, the Magistrate Judge believes that there is a reasonable basis for Plaintiff's claims and that Plaintiff has submitted detailed allegations that he is similarly situated to members of the prospective class, in both the Complaint and his Affidavit, sufficient to satisfy the modest factual showing that is required. Defendant cable satellite television provider employs Plaintiff and others to install and repair its products. Plaintiff describes that he and his co-workers are regularly worked over 40 hours per week, "off the clock" and without proper compensation. There are three forms of this uncompensated work, which include pre-shift and post-shift work mainly having to do with employees loading, inspecting, and unloading their vans in seven minutes, which Plaintiff states was an impossibility, necessitating that employees work "off the clock" to comply with company policy. The third form of uncompensated work is missed/interrupted meal breaks where Defendant automatically deducts a meal period. The Magistrate Judge recommends that the Court find these allegations, together with Plaintiff's **[*6]** Affidavit, sufficient for conditional certification.

Plaintiff requests, and the Magistrate Judge respectfully recommends (after slight modification), an order be entered as follows:

1. That Plaintiff's Motion for Conditional Certification of Collective Action and for Court Approved Notice to Members of Collective Class be granted.

2. The Notice of Right to Opt-In to Lawsuit ("Notice") and Consent to Become Party Plaintiff ("Consent") that were attached as exhibits to Plaintiff's Motion for Approval of *29 U.S.C.*

§216(b) Notice and Consent Forms and to Order Disclosures of Current and Former Employees be approved.

3. On or before thirty days from the date of the District Court's Order, that Defendant shall provide Plaintiff with the names, dates of employment, last-known addresses, and last known telephone numbers, on a computer disk or other mutually agreeable form, of all current and former employees who, during the **three** years[3] preceding the filing of this lawsuit, were non-exempt employees at Defendant's Jackson, Tennessee location(s).

4. On or before thirty days from the date of this Order, Defendant shall post the Notice and Consent Forms referenced above at or near the time clock at Defendant's Jackson, **[*7]** Tennessee location(s) and enclose a copy of the Notice and Consent Forms with each non-exempt employee's next scheduled check so that they can assert their claims on a timely basis as part of this litigation.

5. On or before sixty days from the date of this Order, Plaintiff shall mail via regular U.S. Mail copies of the annexed Notice and Consent forms to all current and former employees who, during the **three** years preceding the filing of this lawsuit, worked for Defendant at its Jackson, Tennessee location(s). The date on the Notice shall be the date that Plaintiffs mail the Notice. the Complaint was filed in this matter.

6. The statute of limitations in this matter for the putative class shall be tolled as of the date

7. As indicated in the annexed Notice, a potential opt-in plaintiff who wishes to join this lawsuit shall complete, sign, and mail the Consent form so that it is received by Plaintiff's counsel no later than ninety days after the consent forms are mailed.

8. Upon receipt of a Consent form from an opt-in plaintiff, Plaintiff's counsel shall stamp the Consent form with the date of the receipt of the Consent form. The Consent form shall be deemed filed as of the postmark date, **[*8]** which shall also be notated on the Consent form by Plaintiffs' counsel. With regard to these duties, Plaintiff's counsel shall be acting as an Officer of the Court.

9. At the conclusion of the opt-in period, Plaintiff's counsel shall file all of the Consent forms as a single filing with the Clerk of Court.

Respectfully Submitted,

/s/ **Edward G. Bryant**

EDWARD G. BRYANT

UNITED STATES MAGISTRATE JUDGE

Date: **June 29, 2012**

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[3] Plaintiff proposed six years, which the Magistrate Judge recommends modifying to three years in light of the District Court's findings in *Carter v. Jackson Hospital District*, No. 1:10-cv-01155, Docket No. 101, where the Court found under similar circumstances that the unjust enrichment claims asserted were subject to a three year statute of limitations period. However, conceivably a six year notice period could be allowed, as there is no argument from Defendant. *See* *Miller v. Jackson, Tenn. Hosp. Co, No. 3:10-1078, 2011 U.S. Dist. LEXIS 60594, 2011 WL 2197694, at *1 (M.D. Tenn. June 6, 2011)* (where the Defendant did not contest the statute of limitations for the supplemental unjust enrichment claim the court allowed a six year notice period).

Exhibit 31

Brandenburg v. Cousin Vinny's Pizza, LLC

United States District Court for the Southern District of Ohio, Western Division

August 14, 2017, Decided; August 15, 2017, Filed

Case No. 3:16-cv-516

Reporter
2017 U.S. Dist. LEXIS 129955 *; 2017 WL 3500411

THOMAS BRANDENBURG, et al., On behalf of themselves and those similarly situated, Plaintiffs, v. COUSIN VINNY'S PIZZA, LLC, et al., Defendants.

Subsequent History: Magistrate's recommendation at *Brandenburg v. Cousin Vinny's Pizza, 2017 U.S. Dist. LEXIS 176529 (S.D. Ohio, Oct. 24, 2017)*

Class certification granted by, Motion denied by *Brandenburg v. Cousin Vinny's Pizza, LLC, 2018 U.S. Dist. LEXIS 189878 (S.D. Ohio, Nov. 5, 2018)*

Settled by, Request granted, Costs and fees proceeding at *Brandenburg v. Pizza, 2019 U.S. Dist. LEXIS 204371 (S.D. Ohio, Nov. 25, 2019)*

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For Cousin Vinny's Pizza, LLC, CVP17, LLC, Cousin Vinny's Pizzeria, LLC, Cousin Vinny's #9 LLC, Third Day Pizzeria, LLC, R & M Pizzeria, LLC, CVP014 LLC, CVP 16 LLC, CVP18 LLC, CVP19 LLC, CVP DNC LLC, CVP Royality LLC, Dough Boy Fresh LLC, CVP Dough LLC, CVP Dough 2, LLC, Mo Rashad, MGL Pizza LLC, CVP 10, Inc., Defendants: Samir Dahman, LEAD ATTORNEY, Kohrman Jackson Krantz, LLP, Columbus, OH; Alexis V. Preskar, Kohrman, Jackson & Krantz, LLP, Columbus, OH.

For Doe Corporations 1-10, Defendant: Samir Dahman, LEAD ATTORNEY, Kohrman Jackson Krantz, LLP, Columbus, OH.

Judges: WALTER H. RICE, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE MICHAEL J. NEWMAN. **[*2]**

Opinion by: WALTER H. RICE

Opinion

ENTRY SUSTAINING MOTION TO CONDITIONALLY CERTIFY AN FLSA COLLECTIVE ACTION AND TO AUTHORIZE NOTICE OF PLAINTIFFS THOMAS BRANDENBURG, MICHAEL DOOLIN, KURTIS MEDLEY AND BENSON RUSSELL, ON BEHALF OF THEMSELVES AND THOSE SIMILARLY SITUATED (DOC. #5); PARTIES SHALL COMPLY WITH THE FORM AND PROCEDURES FOR NOTICE TO POTENTIAL OPT-IN COLLECTIVE MEMBERS SET FORTH HEREIN

Plaintiffs Thomas Brandenburg ("Brandenburg"), Michael Doolin ("Doolin"), Kurt's Medley ("Medley") and Benson Russell ("Russell"), on behalf of themselves and others similarly situated (collectively "Plaintiffs"), have filed suit against Cousin Vinny's Pizza, LLC, Mo Rashad ("Rashad"), and numerous limited liability corporations[1] which are owned and operated by Rashad as a single integrated enterprise (collectively "Defendants" or "Cousin Vinny's"). In the lawsuit, Plaintiffs allege that Defendants have failed to pay them, as current or former delivery drivers for Cousin Vinny's, the minimum and overtime wages to which they are entitled, in violation of: the *Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.*; the *Ohio Minimum Fair Wage Standards Act ("OMFWSA"), Ohio Rev. Code § 4111.01 et seq.*; *Article II, Section 34a of the Ohio Constitution*; and the *Prompt Pay Act, Ohio Rev. Code § 4113.15*. Doc. #28. Plaintiffs have filed a Motion **[*3]** to Conditionally Certify an FLSA Collective Action and to Authorize Notice ("Motion"). Doc. #5. For the reasons set forth below, and subject to the form and procedures set forth below, their Motion is SUSTAINED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Cousin Vinny's is a chain of pizzerias located mainly in the Greater Dayton, Ohio, area. Plaintiffs are, or were, employed by Cousin Vinny's as delivery drivers. Doc. #28, ¶¶ 3-4, PAGEID #412. During their employment, Plaintiffs were non-exempt employees subject to the minimum and overtime wage requirements of the above federal and state laws. Plaintiffs allege that, despite "spend[ing] approximately half of their time at work completing non-tipped duties inside the restaurant," *id.*, ¶ 7, PAGEID #413, they "were nonetheless compensated at minimum wage minus a 'tip credit'[,]" for all hours spent working. *Id.* Specifically, Brandenburg avers that he was hired as a delivery driver for Cousin Vinny's in February 2014 at a rate of $5.00 per hour. That rate is less than the federal and Ohio minimum wages for untipped employees, *i.e.*, the "basic minimum wage," of $7.25 and $8.15 per hour, respectively, but is greater than the Ohio minimum wage for **[*4]** tipped employees of $4.08 per hour. Doc. #5-1, ¶¶ 3, 9, PAGEID #82, 83; *Ohio Const. art. II, § 34a*; *29 U.S.C. §§ 203(m, t), 206(a)*. While Brandenburg periodically received raises until he resigned his position at Cousin Vinny's on November 30, 2016, he was always paid less than the basic minimum wage. *Id.*, ¶¶ 10-11, PAGEID #83; *Ohio Const. art. II, § 34a*.

Also, Plaintiffs were required "to incur and/or pay job-related expenses, including but not limited to automobile costs and depreciation, . . . cellular telephone charges, . . . and other equipment necessary for delivery drivers to complete their job duties[,]" Doc. #28, ¶ 207, PAGEID #437, yet "were reimbursed a flat per delivery amount, no matter how many miles the delivery driver travelled to complete the delivery." *Id.*, ¶ 209. The flat reimbursement rate is inadequate to cover the costs incurred by the drivers. *Id.*, ¶¶ 210, 216-18, PAGEID #437, 438. Plaintiffs claim that Defendants' failure to fully reimburse delivery drivers for expenses incurred was also a violation of federal and state minimum and overtime wage laws. *Id.*, ¶ 221, PAGEID #439.

Brandenburg filed an initial Class and Collective Action Complaint ("Complaint") on December 23, 2016. Doc. #1. In the Complaint, Brandenburg raised claims **[*5]** that he intended to form the basis for a collective action arising out of Defendants' alleged FLSA violations. *Id.*, ¶¶ 230-40, PAGEID #30-31. Further, Brandenburg raised potential class action claims against Defendants arising out of their alleged violations of the OMFWSA, the Prompt Pay Act and the Ohio

[1] Cousin Vinny's Pizzeria, LLC; Cousin Vinny's Pizza #9, LLC; CVP 10, Inc.; CVP014, LLC; CVP 16 LLC; CVP17 LLC; CVP18 LLC; CVP19 LLC; CVP DNC LLC; CVP Dough, LLC; CVP Dough 2, LLC; CVP Royality, LLC; MGL Pizza LLC; R&M Pizzeria, LLC; Third Day Pizzeria, LLC;

Constitution. *Id.*, ¶¶ 241-57, PAGEID #31-34. On February 10, 2017, Brandenburg filed the instant Motion, seeking to conditionally certify a collective of all of Defendants' current and former delivery drivers who were employed in such a capacity at some point during or after February 2014. Doc. #5; *29 U.S.C. § 255(a)*.

In a March 28, 2017, conference call with the Court, the parties indicated that they would need to conduct limited discovery prior to filing a motion for conditional class certification. On April 20, 2017, Doolin and Russell filed their respective notices of consent to join the captioned cause as named plaintiffs, and Medley filed an identical notice on June 8, 2017. Doc. #19-20, 29. On May 22, 2017, Plaintiffs filed a motion for leave to file an amended complaint. Doc. #25. On June 2, 2017, the Court sustained that motion and, noting that the proposed amended complaint contained new class **[*6]** allegations, ordered Plaintiffs to file an amended motion for conditional collective and class certification within fourteen days of filing an amended complaint. Doc. #27 (citing Doc. #25-1). Plaintiffs filed their Amended Complaint on June 2, 2017, Doc. #28, and on June 14, 2017, Plaintiffs and Defendants filed a stipulation stating that additional discovery was still necessary prior to Plaintiffs filing a motion for conditional class certification, but that no further briefing was required for the Court to rule on the instant Motion. Doc. #30.

II. LEGAL STANDARD

The FLSA requires covered employers to pay non-exempt employees not less than the applicable minimum wage for each hour worked, and one and one-half times the employee's regular rate of pay for each hour worked in excess of forty hours per week. *29 U.S.C. §§ 206-207*. Employers who violate these provisions are liable for the unpaid wages, plus an additional amount as liquidated damages, reasonable attorneys' fees and costs. *29 U.S.C. § 216(b)*.

Under the FLSA, a collective action may be filed by one or more employees on behalf of themselves and other "similarly situated" employees. *Id.* However, unlike a typical class action lawsuit, Inlo employee shall be a party **[*7]** plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

The certification process in an FLSA collective action typically proceeds in two phases. Because the statute of limitations on an FLSA claim continues to run until written consent is filed with the court, it is important that notice of the collective action be given to all potential opt-in plaintiffs as soon as practicable so they can decide whether to participate in the lawsuit. *Lewis v. Huntington Nat'l Bank, 789 F. Supp. 2d 863, 867 (S.D. Ohio 2011)* (Marbley, J.).

Before authorizing the plaintiffs to send the notice, however, the Court must first determine whether they have shown "that the employees to be notified are, in fact 'similarly situated." *Corner v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006)*. Because this determination is generally made before discovery is conducted, plaintiffs need make only a "modest showing" at this initial stage of the litigation. *Lewis, 789 F. Supp. 2d at 867*. While "similarly situated" is not defined in the FLSA, employees are generally considered to be similarly situated if their "causes of action accrued in approximately the same manner as those of the named plaintiffs." *Id. at 868*. "Plaintiffs can show they are similarly situated by showing that **[*8]** 'their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Swigart v. Fifth Third Bank, 276 F.R.D. 210, 213* (quoting *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584-85 (6th Cir. 2009)*, *abrogated on other grounds by Campbell-Ewald Co. v. Gomez, U.S. , 136 S.Ct. 663, 193 L.Ed.2d 571 (2016))*. The "'similarly situated' requirement is less stringent than that for joinder under *Rule 20(a)* or for separate trials under *Rule*

42(b)[,] . . . [and] is considerably less stringent than the requirement of Rule 23(b)(3) that common questions 'predominate[.]'" Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996). Application of this "fairly lenient standard . . . typically results in conditional certification." Corner, 454 F.3d at 547. At no point in resolving the conditional certification issue does the Court opine on, or even consider, the merits of plaintiffs' claims. Lacy v. Reddy Elec. Co., No. 3:11-cv-52, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842, at *7 (S.D. Ohio Dec. 9, 2011) (Rice, J) (citing Creely v. HCR Manorcare, Inc., 789 F.Supp.2d 819 (N.D. Ohio 2011)). Factors to be considered include: "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; whether evidence of a widespread discriminatory plan was submitted, and whether as a matter of sound class management, a manageable class exists." Lewis, 789 F. Supp. 2d at 868 (quotations and citations omitted).

III. PLAINTIFFS HAVE MET BURDEN FOR CONDITIONAL CERTIFICATION

Plaintiffs request that the Court conditionally certify the following collective: **[*9]** 141 non-owner, non-employer delivery drivers who worked for Defendants at any Cousin Vinny's Pizza location from February 10, 2014 to present, and who, in one or more workweeks, were paid less than the full nontipped minimum wage that was applicable at the time of their employment." Doc. #5, PAGED #61 (citing 29 U.S.C. § 216(b)). Plaintiffs claim that "[t]hrough the Complaint's allegations, Plaintiff's declaration, Plaintiff's employment documents, and Defendants' representations to the public, Plaintiff meets his modest burden to show that the proposed Collective members are similarly-situated to Plaintiff[,]" *id.*, PAGEID #63, and thus, conditional certification is warranted.

Defendants, in their memorandum *contra*, argue that, for several reasons Brandenburg's declaration is legally and factually insufficient, and thus, Plaintiffs have failed to meet the threshold for conditional certification. Doc. #13, PAGEID #266 (citing Lacy, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842, at *2). First, they claim that all portions of Brandenburg's declaration in which he writes "it was my understanding" must be stricken for lack of personal knowledge. *Id.*, PAGEID #268-69 (citing Fed. R. Evid. 602; Doc. #5-1, ¶¶ 5, 13, 16, 27-28, PAGEID #82, 83, 84, 85). Further, Defendants argue that other paragraphs **[*10]** in Brandenburg's declaration speak to the actions and states of mind of individuals besides Brandenburg, and thus must also be struck. *Id.* (citing Fed. R. Evid. 602; Doc. #5-1, ¶¶ 17, 35, 40, 42, PAGEID # 84, 86-87, 88).

Defendants' argument is not persuasive. If Brandenburg had stated "it was my understanding," with no further context, then the Court would strike those portions of his affidavit as lacking personal knowledge. Yet, Brandenburg, in his declaration, went well beyond that simple phrase and provided reasons as to why his understanding was both well-informed and reasonable. For instance, Brandenburg avers that it was my understanding that all delivery drivers who worked for Cousin Vinny's Pizza were paid minimum wage minus a tip credit." Doc. #5-1, ¶ 13, PAGEID #83. In the next paragraph, he states that he "was told by three managers . . . that delivery drivers are hired on at $5.00 per hour. The managers told me this information because they wanted me to talk to other people who might be interested in working as delivery drivers, so that I could explain to those people the terms of employment." *Id.*, ¶ 14. From the additional details provided, the Court may reasonably infer that the statements **[*11]** in his declaration were sufficiently based on personal knowledge to satisfy Federal Rule of Evidence 602, and they will not be stricken.

Second, Defendants claim that lalt a minimum, certification typically requires more than two declarations and possibly a deposition transcript." Doc. #13, PAGEID #266 (citing Lacy, 2011 U.S.

*Dist. LEXIS 142050, 2011 WL 6149842, at *2)*. Defendants argue that, because Plaintiffs failed to offer a declaration from any other Cousin Vinny's employee besides Brandenburg, they have failed to show that the other delivery drivers are similarly situated. *Id.*, PAGEID #266-67. This Court did not intend for its statement that "collective actions have been certified based on no more than a couple of declarations and a deposition transcript[,]" *Lacy, 2011 U.S. Dist. LEXIS 142050, 2011 WL 6149842, at *2*, to stand for the proposition that two declarations and deposition testimony was the minimum evidence necessary to sustain a motion for conditional certification. Rather, the Court was merely underscoring the modest burden that Plaintiffs face at the conditional stage—demonstrating a "factual nexus" that allows the Court to infer that Brandenburg "has actual knowledge about other employees job duties, pay structures, hours worked, and whether they were paid for overtime hours." *O'Neal v. Emery Fed. Credit Union, No. 1:13-cv-22, 2013 U.S. Dist. LEXIS 110383, 2013 WL 4013167 (S.D. Ohio Aug. 6, 2013)* **[*12]** (Dlott, J.) (emphasis in original).

Brandenburg has demonstrated such a factual nexus. For example, he was told by his supervisors that compensating delivery drivers the tipped minimum wage of $5.00 per hour was a uniform practice. Doc. #5-1, ¶¶ 13-14, PAGEID #83, He identifies at least four other delivery drivers "who were required to work inside the store without receiving tips for large periods of time, often roughly half of their time at work. I know this because I saw them complete this work and worked alongside them." *Id.*, 31, PAGEID #86.[2] Moreover, Plaintiff set forth specific facts regarding manager training, delivery drivers working at multiple Cousin Vinny's locations, and uniform promotional, management, employment and payroll practices across all Cousin Vinny's locations. *Id.*, ¶¶ 1132-41, PAGEID #86-87. From those facts, the Court may reasonably infer that the job duties and wage and hour practices for delivery drivers were set by Rashad and uniform across all Cousin Vinny's locations.

In sum, Plaintiffs have demonstrated that all other delivery drivers were similarly situated, and the proposed collective may be conditionally certified.

IV. NOTICE AUTHORIZED UNDER [*13] THE FOLLOWING PARAMTERS

A. Notice Applies to All Defendants

In their memorandum *contra*, Defendants state that "CVP DNC LLC, CVP Royality LLC, CVP Dough LLC, and CVP Dough 2, LLC do not employ any delivery drivers as they do not operate as Cousin Vinny's restaurants." Doc. #13, PAGEID #270 (citing Doc. #13-2, ¶¶ 3-8, PAGEID #286-87). "Therefore, . . . in keeping with Plaintiff's proposed class, Defendants respectfully request the Court deny the Motion with respect to CVP DNC LLC, CVP Royality LLC, CVP Dough LLC, and CVP Dough 2, LLC." *Id.* Defendants' argument is not persuasive, for two reasons. First, notice of the lawsuit will not be sent to individual companies, but to individual workers. Thus, if one of the above-discussed defendants "did not employ workers covered by the [collective] definition, then no worker from that entity will receive notice." Doc. #15, PAGEID #302-03. Second, as Plaintiffs correctly note, one or more of the above entities may be employing individuals who previously worked as delivery drivers at a Cousin Vinny's restaurant, and failing to include those entities "may result in someone not receiving a notice when [he or she] should." Doc. #15, PAGEID #303. Accordingly, **[*14]** all named Defendants shall be subject to the Court-authorized notice.

B. Notice may be Given to Potential Collective Members via Text Message, Electronic Mail and

[2] Contrary to Defendants' argument, Doc. #13, PAGEID #266, Brandenburg not knowing the first and last names of his former co-workers does not demonstrate a lack of personal knowledge. Nor does it undermine the substance and veracity of Brandenburg's statement.

Regular Mail

Plaintiffs seek to transmit notice to all individuals who worked as Cousin Vinny's delivery drivers at any time on or after February 10, 2014, via regular mail (including, but not limited to, United States Postal Service, United Parcel Service or FedEx), email and mobile phone text message. Further, they seek authorization to post the notice at all Cousin Vinny's restaurants. Doc. #5, PAGED #73-74. In support, Plaintiffs argue that neither the FLSA nor the Supreme Court mandates that notice be transmitted to potential collective members in any particular format. Rather, the notice need only be "timely, accurate, and informative." *Id.*, PAGED #74 (quoting *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 172, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989))*. To that end, Plaintiffs note that numerous courts have allowed notice to be transmitted via email and text message. *Id.*, PAGEID #75-76.

Defendants do not object to notifying current employees via postal mail and former employees via electronic mail. Doc. #13, PAGEID #271. However, they argue that informing potential collective members via postal mail, regular mail, **[*15]** text message and posting at restaurants is "unnecessary, duplicative and outweighed by the privacy interests of [Brandenburg's] former co-workers." *Id.* They note that Districts Courts within the Southern District of Ohio have typically allowed only one method of notice "unless there is a reason to believe that method is ineffective[,]" *id.* (quoting *Wolfram v. PHH Corp., No. 1:12-cv-599, 2012 U.S. Dist. LEXIS 181073, 2012 WL 6676778, at *4 (S.D. Ohio Dec. 21, 2012)* (Black, J.)), and have "disallowed duplicative notices as to current employees in the forms of posting, email, and direct mail." *Id.*, PAGEID #271-72 (citing *Fenley v. Wood Grp. Mustang, Inc., 170 F. Supp. 3d 1063, 1074-75 (S.D. Ohio 2016)*; *Lewis v. Huntington Nat'l Bank, No. C2:11-cv-58, 2011 U.S. Dist. LEXIS 65068, 2011 WL 8960489 (S.D. Ohio Jun. 20, 2011)* (Marbley, J.)). Thus, they argue that Plaintiffs should not be allowed to post the notice at Cousin Vinny's locations; nor should they be permitted to send notice via electronic mail to current employees. *Id.*, PAGEID #271.

Further, Defendants object to notifying potential collective members via text message. They argue that invading the privacy interests of these individuals, who are not currently parties, by divulging their telephone numbers, outweighs any convenience or minimal increase in effectiveness of notice that might occur as a result of notification in that manner. Doc. #13, PAGEID #272. **[*16]** In support, they note that Courts have typically only allowed notification via text message when a plaintiff has made a showing of special need. *Id.* (citing *Swigart, 276 F.3d at 215*; *Hardesty v. Kroger Co., No. 1:16-cv-298, 2016 U.S. Dist. LEXIS 93866, 2016 WL 3906236 (S.D. Ohio Jul. 19, 2016)* (Black, J.); *Lemmon v. Harry & David Opers., Inc., No. 2:15-cv-779, 2016 U.S. Dist. LEXIS 11810, 2016 WL 234854 (S.D. Ohio Jan. 20, 2016)* (Smith, J.); *Wolfram v. PHH Corp., No. 1:12-cv-599, 2014 U.S. Dist. LEXIS 82378, 2014 WL 2737990 (S.D. Ohio Jun. 17, 2014)* (Black, J.); *Lutz v. Huntington Bancshares, No. 2:12-cv-1091, 2013 U.S. Dist. LEXIS 56477,. , 2013 WL 1703361 (S.D. Ohio Apr. 19, 2013)* (Frost, J.)). As Plaintiffs have not shown that notice via postal or electronic mail is unlikely to be effective in reaching potential opt-in plaintiffs, Defendants argue that they should not be allowed to send notice via text message. *Id.*

In their reply memorandum, Plaintiffs argue that Defendants are trying to "tamp down" participation in the lawsuit, which is contrary to the Supreme Court's mandate that "timely, accurate, and informative" notice be conveyed to all putative collective members. Doc. #15, PAGEID #304 (citing *Hoffman-La Roche, 493 U.S. at 172*). To that end, Plaintiffs claim, all forms of notice should be permitted. Plaintiffs argue that posting the notice at all Cousin Vinny's locations is economical, and will ensure that notice reaches current Cousin Vinny's employees for whom Defendants do not have current, accurate postal **[*17]** mail addresses. Doc. #15, PAGEID #304-05 (citing *Redmond v.*

*NPC Int'l., Inc., No. 13-cv-1037, 2016 U.S. Dist. LEXIS 172057, 2016 WL 7223468, at *9 (W.D. Tenn. Dec. 13, 2016)*; *Potts v. Nashville Limo & Transp., LLC, No. 3:14-cv-1412, 2015 U.S. Dist. LEXIS 89825, 2015 WL 4198793, at * 8 (M.D. Tenn. Jul. 10, 2015))*. Further, Plaintiffs claim that potential opt-in plaintiffs, as Cousin Vinny's drivers, are both potential witnesses at trial and potential clients if Plaintiffs' class action is certified. Thus, Defendants would be required to disclose their drivers' phone numbers at some point, and Plaintiffs are willing to enter into a confidentiality agreement or stipulated protective order to ensure that the telephone numbers of the potential opt-in plaintiffs are not disclosed. *Id.*, PAGEID #305.

As both Plaintiffs and Defendants agree, the *Hoffman-La Roche* mandate of "timely, accurate, and informative" notice gives this Court wide latitude in determining he method or methods of notice that will reach the potential opt-in plaintiffs while maintaining the privacy of the not-as-yet parties to the case and ensuring that the notice does not create an undue burden on Defendants. To that end, the Court concludes that notice may be sent by Plaintiffs' counsel via electronic mail and postal mail to all current and former Cousin Vinny's delivery drivers, **[*18]** to the extent that Defendants have such information for putative collective members. Electronic mail is an inexpensive, non-invasive, effective way to ensure that notice is received in a timely manner. Further, given the three-year lookback period for Plaintiffs' FLSA claims, it is likely that at least some of the electronic and postal mail addresses that Defendants possess for their current and former delivery drivers are outdated. Thus, notification by both electronic mail and postal mail will adequately account for any shortcomings in the information possessed by Defendants, and Plaintiffs may send notice using both methods.

However, the Court agrees with Defendants that notice via text message is premature. Plaintiffs' proposed format for the text message—a message with a link to a URL containing the actual notice and Consent to Join form—is so cumbersome as to be invasive. Moreover, even if the delivery drivers would be members of any opt-out class, disclosure of their mobile telephone numbers would be premature, as Plaintiffs have not filed a motion for conditional certification of a *Rule 23* class. Thus, Plaintiffs may not notify potential opt-in collective members of the lawsuit via **[*19]** text message, unless they can show that notice via postal and electronic mail is insufficient as to a given potential member.

Finally, the question of whether notice should be posted at Cousin Vinny's locations is, as discussed above, within this Court's broad discretion, and District Courts within the Sixth Circuit have split on whether to allow postings of the notice at places of work in the context of a FLSA collective action. *See Fenley v..l/.n Wood Grp. Mustang, Inc., 170 F. Supp. 3d 1063, 1074-75 (S.D. Ohio 2016)* (Smith, J.); *Lindberg v. UHS of Lakeside, LLC, 761 F. Supp. 2d 752, 765 (W.D. Tenn. 2011)*; *Lewis v. Huntington Nat'l Bank, No. C2-11-cv-58, 2011 U.S. Dist. LEXIS 65068, 2011 WL 8960489, at *2-3 (S.D. Ohio Jun. 20, 2011)* (Marbley, J.) (refusing to authorize notice to be posted at places of work because there was no reason for the Court to conclude that sending notice via postal and electronic mail would be inadequate); *but see Redmond v. NPC Int'l, Inc., No. 13-cv-1037, 2016 U.S. Dist. LEXIS 172057, 2016 WL 7223468, at *9 (W.D. Tenn. Dec. 13, 2016)*; *Potts v. Nashville Limo & Transp., LLC, No. 3:14-cv-1412, 2015 U.S. Dist. LEXIS 89825, 2015 WL 4198793, at * 8 (M.D. Tenn. Jul. 10, 2015)* (authorizing notice to be posted conspicuously at the places of work despite potential opt-in plaintiffs also receiving notice via postal or electronic mail).

The *Redmond* Court, in authorizing notice to be posted at the Pizza Hut locations at issue, noted that "Courts routinely approve requests to post notice on employee bulletin boards and in other common areas, even where potential **[*20]** members will also be notified by mail." *2016 U.S. Dist. LEXIS*

*172057, 2016 WL 7223468, at *8* (internal quotation marks omitted)(quoting *D'Antuono v. C&G of Groton, Inc., No. 3:11cv33 (MRK), 2011 U.S. Dist. LEXIS 135402, 2011 WL 5878045, at *6 (D. Conn. Nov. 23, 2011)*; citing *Rosario v. Valentine Ave. Disc. Store, Co., Inc., 828 F. Supp. 2d 508, 521 (E.D.N.Y. 2011))*. The Court is persuaded that posting the notice at Cousin Vinny's locations is a low-cost, non-invasive way to ensure that timely and accurate notice of the lawsuit is conveyed to putative collective members. This Court is mindful of its obligation to avoid the appearance of "stirring up" litigation or opining on the merits of Plaintiffs' claims. *Fenley, 170 F. Supp. 3d at 1074-75* (citations omitted). Yet, the format and content of the notice are sufficient to avoid any appearance of bias on the part of the Court. While some courts have held that "only a single method for notification" is appropriate "unless there is a reason to believe that method will be inadequate[,]" *Lewis, 2011 U.S. Dist. LEXIS 65068, 2011 WL 8960489, at * 3* (citations omitted); *accord Fenley, 170 F. Supp. 3d at 1075*, as discussed above, the Court is concerned that Defendants may not have current electronic or postal mail addresses for all potential opt-in plaintiffs. This concern is sufficient to require posting.

In sum, Plaintiffs may transmit notice to potential opt-in plaintiffs via electronic and postal mail, at Plaintiffs' expense. A copy of the notice will also be posted in a conspicuous **[*21]** location at all of Defendants' places of business. However, notice via text message will not be permitted unless Plaintiffs can show that notice through the other three methods was ineffective.

C. Disclosure of Names and Contact Information

In their Motion, Plaintiffs ask "that the Court direct Defendants to produce a computer-readable list of the names, last known addresses, telephone numbers, email addresses, dates of employment, and job titles for all persons employed at Cousin Vinny's Pizza as delivery drivers between February 10, 2014[,] and the present" Doc. #5, PAGEID #78-79. In a telephonic status conference on or about March 28, 2017, Defendants agreed to provide Plaintiffs' counsel with the requested information within fifteen days of the Motion being sustained. Defendants are hereby ordered to disclose such information to Plaintiffs' counsel within the time promised.

D. Form and Content of the Notice

Plaintiffs submitted a proposed notice as an exhibit to their Motion. Doc. #5-7, PAGEID #169-73. Further, Plaintiffs request that this Court authorize a "reminder" postcard to be sent to potential collective members who do not indicate their consent or refusal to join within a certain **[*22]** amount of time. Doc. #5-8, PAGEID #175-76. Finally, Plaintiffs have submitted a proposed electronic mail cover message to be sent along with the copy of the notice. Doc. #5-9, PAGEID #178. Defendants submitted their own proposed notice, Doc. #13-1, and raised several objections to Plaintiffs' notice. Doc. #13. The Court considers Defendants' objections in turn.

1. Plaintiffs' Electronic Cover Message is Permissible

Defendants propose that Plaintiffs attach the notice, in portable document format ("PDF"), to an electronic mail message. Doc. #13, PAGEID #273 ("[t]his safeguard is proposed only to retain the accuracy of the message and should not negatively affect the reception of the notice."). However, they object to the cover message proposed by Plaintiffs, in which their counsel explains: the purpose of the lawsuit; why the potential opt-in plaintiff is being contacted; the process by which the recipient can opt in; and contact information for Plaintiffs' counsel. Doc. #5-9, PAGEID #178. They argue that such a message contravenes Plaintiffs' obligation to ensure that the notice is "accurate, [does] not cause

confusion, and [is] crafted so as to avoid any misunderstanding as to the status **[*23]** of the lawsuit." Doc. #13, PAGEID #273 (internal quotation marks omitted) (quoting *Swigart, 276 F.R.D. at 214*; *Hardesty, 2016 U.S. Dist. LEXIS 93866, 2016 WL 3906236, at *1)*. Defendants argue that the cover electronic mail message should have no text in the body of the email aside from the following: "FLSA Notice — Please see the attached." *Id.*

Plaintiffs argue that, because Defendants' barebones message provides no information about the lawsuit, many potential opt-in plaintiffs will delete the electronic mail message without reading the notice. Doc. #15, PAGEID 306. The Court agrees. The proliferation of computer viruses, malware and ransomware transported through electronic mail messages has caused people to be wary of opening any message or attachment from an unknown sender. It is very likely that a putative collective member would be skeptical of the vague text, and would delete the message without reading. Moreover, Plaintiffs' proposed cover message does not go into the merits of their claims or in any way suggest bias on the part of the Court. Indeed, the cover message contains no information that the potential opt-in plaintiffs could not obtain through the Public Access to Court Electronic Records website for this Court. Thus, Plaintiffs' proposed cover electronic message **[*24]** is permissible.

2. Reminder Postcard is Premature

Plaintiffs move that this Court authorize their counsel to send a follow-up postcard to any putative collective members who had not evinced their consent or refusal to join within forty-five days of the notice being sent via postal and electronic mail. Doc. #5, PAGEID #73-74. The reminder postcard would inform the potential opt-in plaintiff of the date by which she must return her consent to join form, the relief sought in the lawsuit (recovery of unpaid wages) and the contact information for Plaintiffs' counsel. Doc. #5-8, PAGEID #175. Defendants argue that a reminder postcard would unnecessarily stir up litigation. Doc. #13, PAGEID #273-74. The Court concludes that any resolution on this issue would be premature. In light of the Court authorizing notice via postal mail, electronic mail and posting at all of Defendants' places of business, a reminder postcard is unnecessarily duplicative and invasive at this juncture. However, if on motion, Plaintiffs can show good cause that a reminder postcard is necessary in light of low response rates to the initial sending of the notice, then the Court may authorize the sending of such a reminder **[*25]** at Plaintiffs' expense.

3. Consent to Join Form may be Signed Electronically

Plaintiffs ask that the Court authorize potential collective members to opt in by using an electronic signature on the DocuSign website, arguing that "[p]ermitting electronic signature achieves the remedial purposes of the FLSA," Doc. #5, PAGEID #78. Defendants argue that there is no caselaw in which a District Court from the Sixth Circuit has allowed plaintiffs to opt in via electronic signature. Doc. #13, PAGEID #274. Moreover, they claim, allowing such a practice would be redundant, as potential collective members "need only take a picture [of the signed consent form] with their phone and attach that picture to the email" that they would send to Plaintiffs' counsel indicating their consent to join. *Id.*

Defendants' argument is not persuasive. Even assuming that putative collective members can send a picture of the signed Consent to Join form to their chosen counsel via electronic mail, they would still be required to print out the form to sign it. Doc. #15, PAGEID #307. Further, despite the lack of caselaw regarding electronic signatures in the FLSA context, federal courts have required attorneys to sign all filings electronically **[*26]** since the implementation of the Case Management/Electronic Case Filing ("CM/ECF")

system in 2003. Defendants do not argue that the DocuSign website is a less secure or reliable means of electronic signature than is CM/ECF. Moreover, the Consent to Join form will be sent via postal mail as attachment to the notice. Thus, if putative collective members would rather sign the paper copy, take a picture of it and electronically mail it to Plaintiffs' counsel, they are free to do so. However, to force potential opt-in plaintiffs to expend additional time and resources to join the instant lawsuit would serve no purpose other than to discourage potential collective members from joining the litigation. Thus, the Court will permit potential opt-in plaintiffs to sign their Consent to Join forms electronically via the DocuSign website if they so choose.

4. Defendants' Objections to the Language in Plaintiffs' Proposed Notice

"Defendants seek to include language relating to judicial neutrality, putative plaintiffs' right to their own counsel, putative plaintiffs' responsibilities with respect to discovery, and Defendants' good faith compliance with the FLSA." Doc. #13, PAGEID #275. The Court addresses **[*27]** these proposed inclusions in turn.

a. Judicial Neutrality

Defendants seek to include two provisions that underscore: (a) the fact that the Court did nothing more than authorize the Notice to be sent; and (b) the Court's commitment to neutrality throughout the proceedings. First, Defendants ask the Court to include the below language, in bold type and all capital letters, at the top of the first page of the notice:

> **ALTHOUGH THIS NOTICE AND ITS CONTENTS HAVE BEEN AUTHORIZED BY THE HONORABLE WALTER H. RICE, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO, THE COURT TAKES NO POSITION REGARDING THE MERITS OF PLAINTIFF'S CLAIMS OR DEFENDANTS' DEFENSES**.

Doc. #13, PAGEID #275 (citing *Ganci v. MBF Inspections Servs., Inc., No. 2:15-cv-2959, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *4 (S.D. Ohio Sept. 20, 2016)* (Smith, J.)) (authorizing identical language with the same bold type and capitalization). Second, they seek to include the following language: "Please do not contact the Clerk of Court or offices of the Judge or Magistrate Judge. They are not in a position to answer questions about the case." *Id.*, PAGEID #275-76 (quoting *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *4)*.

Plaintiffs do not object to the first statement of neutrality being included, but seek to include it in regular type and capitalization **[*28]** at the bottom of the first page of the Notice. Doc. #15, PAGEID #307-08. The last paragraph on the first page of Plaintiffs' proposed notice states that "[t]he purpose of this Notice is to inform you about the Lawsuit, your rights, and provide you with an opportunity to join the Lawsuit for the claims outlined above." *Id.* The Court concludes that Defendants' proposed language fits naturally after the immediately preceding sentence or as a new paragraph at the bottom of the first page. Defendants' language shall be included as follows:

> **Although this notice and its contents have been authorized by the Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, the Court takes no position regarding the merits of Plaintiffs' claims or Defendants' defenses**.

Plaintiffs, in their reply memorandum, argue that the inclusion of the instruction to potential opt-in collective members not to contact the Court is unnecessary, "as putative opt-in plaintiffs have already been instructed to direct any questions to Plaintiff's [*sic*] counsel." Doc. #15, PAGEID #308. The Court agrees, and also concludes that the above statement of judicial neutrality sufficiently

discourages potential **[*29]** opt-in plaintiffs from contacting the Court. Thus, Defendants' proposed instruction shall not be included.

b. Right to Counsel of their Choice

In furtherance of the right of FLSA collective members to retain their own counsel, Defendants seek to include the following language: "If you decide to join this lawsuit and be represented by a lawyer of your choice, that lawyer will have to notify the Court of your intention to join the case no later than 90 days from the date Notice is sent." Doc. #13, PAGEID #276 (quoting *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *4)*. As Plaintiffs do not object to the inclusion of that sentence, it shall be included at the top of page four of the Notice. Plaintiffs do, however, object to Defendants' request that, throughout the notice, references to "Plaintiffs' Counsel" be changed to "the attorney you hire" or "Your Attorney." Doc. #15, PAGEID #308 (citing Doc. #13, PAGEID #276). Plaintiffs argue that changing the language will cause confusion, and note that Defendants did not include such language in their proposed notice. *Id.* The Court agrees, and concludes the inclusion of Defendants' proposed sentence above adequately informs putative collective members of their right to retain counsel of their **[*30]** choice. Thus, all references to "Plaintiffs' Counsel" shall remain unchanged.

c. Participation in Discovery and Payment of Costs

Defendants seek to amend Plaintiffs' proposed Notice to include a "statement that opt-in plaintiffs may be required to participate in written discovery and that they may be required to appear for deposition and/or trial." Doc. #13, PAGEID #276 (quoting *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *7)*. Plaintiffs object to the inclusion of such language "because it may deter an employee from participating, and that adverse effect is disproportionate to the burden they may face by joining the action." Doc. #15, PAGEID #309 (quoting *McKinstry v. Developmental Essential Services, Inc., No. 2:16-cv-12565, 2017 U.S. Dist. LEXIS 29229, 2017 WL 815666, *3 (ED. Mich. Mar. 2, 2017))*. Plaintiff cites several cases that accord with *McKinstry's* logic. *Id.* (citations omitted). However, those cases are all from outside of the Southern District of Ohio, and Courts within the Southern District have "stated on several occasions that such information should be disseminated in FLSA notices." *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *7* (citing *Heaps v. Safelite Sols., LLC, No. 2:10-CV-729, 2011 U.S. Dist. LEXIS 40089, 2011 WL 1325207, at *8 (S.D. Ohio Apr. 5, 2011)* (Frost, J.); *Baden-Winterwood v. Life Time Fitness, No. 2:06-cv-99, 2006 U.S. Dist. LEXIS 53556, 2006 WL 2225825, at *2 (S.D. Ohio Aug. 2, 2006)* (Frost, J.)). Moreover, the proposed sentence does nothing more than underscore the **[*31]** obligations that putative collective members would have if they opt in as plaintiffs. Thus, the statement will be included.

However, Defendants' final proposed inclusion, a paragraph stating that potential opt-in plaintiffs could be responsible for paying a portion of Defendants' court costs if Defendants are prevailing parties, Doc. #13, PAGEID #277 (quoting Doc. #13-1, PAGEID #283), would improperly dissuade putative collective members from opting into the lawsuit. While a prevailing party's court costs are generally taxed against the other party, *Fed. R. Civ. P. 54(d)(1)*, Plaintiffs' minimum wage claims arise under both federal and Ohio law. Doc. #15, PAGEID #309. In a civil suit claiming that an employer has failed to pay the minimum wages mandated by the Ohio Constitution, a court may not impose "costs or attorney's fees on an employee except upon a finding that such action was frivolous in accordance with the same standards that apply generally in civil suits." *Ohio Const., art. II, § 34a*. Including Defendants' proposed paragraph creates an acute risk that putative collective members will decide not to opt in, fearing that they may incur monetary liability in the

future—a liability that this Court may not even be allowed to impose. **[*32]** [3] Thus, any statement about opt-in plaintiffs potentially being liable for Defendants' costs, in the event that the Defendants are prevailing parties, shall not be included.

d. Statement of Good Faith

Defendants note that "this Court has previously held that "the notice must include language stating Defendant's denial of the allegations and its belief that it complied with the FLSA in good faith[,]" and asks that the Court include such a statement in the Notice. Doc. #13, PAGEID #277 (emphasis in original) (internal quotation marks omitted) (quoting *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at * 5*; citing *Heaps, 2011 U.S. Dist. LEXIS 40089, 2011 WL 1325207, at *9)*. In their reply memorandum, Plaintiffs do not object to the inclusion of such language. Thus, the Court will include the phrase "in good faith" in the following sentence on the first page: "The Defendants deny the allegations and claim that they did not violate any wage and hour law, and complied with the Fair Labor Standards Act in good faith." Doc. #13-1, PAGEID #281.

V. CONCLUSION

For the foregoing reasons, the Court SUSTAINS Plaintiffs' Motion. Doc. #5. The Court orders the following:

1. The following collective is conditionally certified: all of Defendants' current and former delivery drivers who were **[*33]** employed in such a capacity at some point during or after February 23, 2014;

2. Defendants shall provide to Plaintiffs' counsel a computer-readable list of the names and contact information of all putative collective members within fifteen days of this Entry;

3. Plaintiffs' counsel may transmit, at Plaintiffs' cost, notice of the lawsuit to putative collective members via electronic mail and first-class U.S. mail or equivalent means;

4. Defendants shall post copies of the notice at all of its places of business, in locations where employees would reasonably be expected to see the Notice;

5. Plaintiffs' Proposed Notice, Doc. #5-7, shall serve as the notice to be sent to potential opt-in plaintiffs, subject to the following conditions:

a. Putative collective members may sign the Consent to Join form electronically via the DocuSign website;

b. The following statement shall be included at the bottom of page one of the Notice, in bold typeface: "**Although this notice and its contents have been authorized by the Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, the Court takes no position regarding the merits of Plaintiffs' claims or Defendants' defenses." [*34]** ;

c. The following statement shall be included at the top of page four of the notice: "If you decide to join this lawsuit and be represented by a lawyer of your choice, that lawyer will have to notify the Court of your intention to join the case no later than ninety days from the date Notice is sent.";

d. The far-right hand column in the second row of the table on page two of the notice shall include the following statement: "If you choose to join the lawsuit, you may be required to participate in written discovery and/or attend a deposition. You may also be required to attend a trial."; and

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[3] Defendants cited two cases in language regarding potential liability for attorney fees was included in a notice. Doc. #13, PAGEID #277 (citing *Lackie v. U.S. Well Servs., LLC, No. 2:15-cv-3078, 2017 U.S. Dist. LEXIS 12373, 2015 WL 395735, at *4 (S.D. Ohio Jan. 30, 2017)* (Smith, J.); *Ganci, 2016 U.S. Dist. LEXIS 128190, 2016 WL 5104891, at *6)*. However, in neither case did plaintiffs bring claims under the minimum wage section of the Ohio Constitution.

e. The statement immediately following the two bullet points on the page one of the notice read: The Defendants deny the allegations and claim that they did not violate any wage and hour law, and complied with the Fair Labor Standards Act in good faith."; and

6. If putative collective members wish to participate in the instant lawsuit, they shall have ninety days from the date that the notice is sent to sign the Consent to Join form, return the form to Plaintiffs' counsel or counsel of their choosing. Counsel for any opt-in member must also file the signed Consent to Join form for each opt-in plaintiff **[*35]** within ninety days of the notice being sent.

Date: August 14, 2017

/s/ Walter H. Rice

WALTER H. RICE

UNITED STATES DISTRICT JUDGE

Positive
As of: July 26, 2021 6:44 PM Z

Exhibit 32

Ross v. Jack Rabbit Servs., LLC

United States District Court for the Western District of Kentucky, Louisville Division

March 13, 2014, Decided; March 14, 2014, Filed

CIVIL ACTION NO. 3:14-CV-00044-TBR

Reporter
2014 U.S. Dist. LEXIS 33142 *

RICHARD ROSS, individually and on behalf of all other similarly situated, Plaintiff, v. JACK RABBIT SERVICES, LLC, and JACK RABBIT USA, LLC, Defendants

Subsequent History: Motion granted by *Ross v. Jack Rabbit Servs., LLC, 2014 U.S. Dist. LEXIS 72950 (W.D. Ky., May 29, 2014)*

Motion granted by, in part *Ross v. Jack Rabbit Servs., LLC, 2015 U.S. Dist. LEXIS 45603 (W.D. Ky., Apr. 7, 2015)*

Motion granted by, Objection overruled by *Ross v. Jack Rabbit Servs., LLC, 2015 U.S. Dist. LEXIS 193465 (W.D. Ky., Oct. 21, 2015)*

Motion granted by, Settled by, Costs and fees proceeding at *Ross v. Jack Rabbit Servs., LLC, 2016 U.S. Dist. LEXIS 173292 (W.D. Ky., Dec. 15, 2016)*

LexisNexis® Headnotes

Civil Procedure > ... > Notice of Class Action > Content of Notice > Opt Out Provisions

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN1[] **Content of Notice, Opt Out Provisions**

The Fair Labor Standards Act (FLSA) provides that an employee may bring a claim for and in behalf of himself and other employees similarly situated. *29 U.S.C.S. § 216(b)*. A collective action under the FLSA permits similarly situated employees to opt in to the action, unlike the opt-out approach typically utilized under *Fed. R. Civ. P. 23*. An opt-in action under *§ 216(b)* prohibits any person from becoming a party plaintiff in the collective action unless he or she files a written consent with the court; therefore, these similarly situated employees must be notified of the lawsuit.

Evidence > Burdens of Proof > Allocation

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN2[] **Burdens of Proof, Allocation**

The United States Court of Appeals for the Sixth Circuit utilizes a two-step approach for the certification of collective actions under the Fair Labor Standards Act. The first stage, conditional certification, occurs at the beginning of discovery. At this stage, the court must determine whether notice of the pending action and the opportunity to opt in should be given to potential class members. A plaintiff seeking to certify a collective action bears the burden of establishing that he and the proposed class he seeks to represent are similarly situated. However, because conditional certification decisions generally are made prior to discovery, a plaintiff's evidentiary burden is not a heavy one.

Generally speaking, at the first stage of conditional certification, courts require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan. Thus, the named plaintiff need merely provide a modest factual showing to demonstrate that he is similarly situated to the putative class members. The second stage occurs later in the litigation after all opt-in forms have been received and discovery has concluded.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Governments > Legislation > Statute of Limitations > Tolling

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN3 **Judges, Discretionary Powers**

The United States Supreme Court has acknowledged that judicial notice to a putative class in Fair Labor Standards Act collective actions is proper in appropriate cases. If it determines that a plaintiff has shown that the current and former employees to be notified are similarly situated with him, the court has discretion to authorize notification of those individuals to allow them to opt in to the lawsuit. The conditional certification of a collective action under *29 U.S.C.S. § 216(b)*, unlike class actions under *Fed. R. Civ. P. 23*, does not toll the statute of limitations of potential plaintiffs. Thus, judicial notice protects claims by informing similarly situated employees of the facts needed to make an informed decision whether to opt in to the collective action. Judicial notice promotes judicial economy by helping to avoid duplicative litigation.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN4 **Discovery & Disclosure, Disclosure**

The United States Supreme Court has approved the discovery of potential class members' names and addresses in order to facilitate effective notice. Other district courts, both within and without the Sixth Circuit, additionally have approved the discovery of potential class members' telephone numbers, dates of employment, locations of employment, and dates of birth. While at least one court has approved the discovery of partial Social Security numbers, others, including at least one court in the Sixth Circuit, have not. The United States District Court for the Western District of Kentucky, Louisville Division, is not persuaded that the discovery of partial Social Security numbers is necessary.

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

HN5 **Class Attorneys, Appointments**

The appointment of interim class counsel is governed by *Fed. R. Civ. P. 23(g)(3)*. Courts routinely use the factors in *Rule 23(g)(1)* when appointing interim class counsel prior to class certification. When one applicant seeks appointment as class counsel, the court may appoint the applicant only if the applicant is adequate under *Rule 23(g)(1)* and *(4)*. *Rule 23(g)(2)*. *Rule 23(g)(4)* simply requires that class counsel fairly adequate and adequately represent the interests of the class.

Counsel: **[*1]** For Richard Ross, Individually and on behalf of all others similarly situated, Plaintiff: Alex C. Davis, Lawrence L. Jones, II, LEAD ATTORNEYS, Jones Ward PLC, Louisville, KY; Jason J. Thompson, Jesse L. Young, Kevin J. Stoops, LEAD ATTORNEYS, Sommers Schwartz,

P.C., Southfield, MI; Timothy J. Becker, LEAD ATTORNEY, Johnson Becker, PLLC, Minneapolis, MN.

For Jack Rabbit Services, LLC, a Kentucky limited liability compan, Defendant: Amanda M. Smith, Kenneth S. Handmaker, LEAD ATTORNEYS, Loren T. Prizant, Middleton Reutlinger, Louisville, KY; Tiffany A. Sullivan, LEAD ATTORNEY, Moore Hill & Westmoreland, PA, Pensacola, FL.

For Jack Rabbit USA, LLC, a Florida limited liability company; jointly and severally, Defendant: Tiffany A. Sullivan, LEAD ATTORNEY, Moore Hill & Westmoreland, PA, Pensacola, FL; Loren T. Prizant, Middleton Reutlinger, Louisville, KY.

Judges: Thomas B. Russell, Senior United States District Judge.

Opinion by: Thomas B. Russell

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Plaintiff Richard Ross's Motion for Conditional Class Certification. (Docket No. 7.) Neither Defendant Jack Rabbit Services, LLC, nor Defendant Jack Rabbit USA, LLC, has responded in opposition, and the **[*2]** time to do so now has passed. Accordingly, this matter is ripe for adjudication.

BACKGROUND

Plaintiff brings this action for unpaid wages pursuant to the Fair Labor Standards Act (FLSA), challenging the Defendants' policy and practice of classifying workers as independent contractors. Defendants are in the business of providing roadside assistance services, such as changing tires, providing jump starts, and delivering fuel. Defendants appear to serve some 50 locations across more than a dozen states. According to Plaintiff, Defendants employ or have employed over 1,000 roadside assistance technicians during the past three years. Plaintiff was employed as such a technician.

Plaintiff alleges that he and the putative class members were employees-in-fact but were intentionally misclassified by Defendants as independent contractors in an effort to circumvent the minimum-wage and overtime provisions of the FLSA. Plaintiff asserts that he and the putative class members are similarly situated in terms of job duties and classification status, as well as because they all are (or were) subject to the same or similar pay structure and because they all worked similar hours. Plaintiff presently seeks **[*3]** conditional certification of this action as an FLSA collective action with the proposed FLSA class to be defined as:

> *All roadside assistance technicians who worked for Defendants and were misclassified by Defendants as independent contractors at any time in the past three years.*

Plaintiff further requests that the Court approve a court-supervised notice to the putative class members, that the Court require Defendants to identify potential opt-in plaintiffs by promptly providing an updated computer-readable data file containing contact information for those individuals, and that the Court appoint Sommers Schwartz, P.C., and Johnson Becker, PLLC, as interim class counsel.

DISCUSSION

HN1[↑] The FLSA provides that an employee may bring a claim "for and in behalf of himself . . . and other employees similarly situated." *29 U.S.C. § 216(b)*. A collective action under the FLSA permits similarly situated employees to opt in to the action, unlike the opt-out approach typically utilized under *Federal Rule of Civil Procedure 23*. An opt-in action under *§ 216(b)* prohibits any person from becoming a party plaintiff in the collective action unless he or she files a written consent with the Court; therefore, **[*4]** these similarly situated employees must be notified of the lawsuit. *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th*

Cir. 2006).

HN2[⬆] The Sixth Circuit utilizes a two-step approach for the certification of collective actions under the FLSA. *Id.* The first stage,[1] "conditional certification," occurs at the beginning of discovery. At this stage, the Court must determine whether notice of the pending action and the opportunity to opt in should be given to potential class members. *See* *Jones-Turner v. Yellow Enter. Sys., LLC, 2007 U.S. Dist. LEXIS 79414, 2007 WL 3145980, at *1 (W.D. Ky. Oct. 25, 2007)*; *Crawford v. Lexington-Fayette Urban Cnty. Gov't, 2007 U.S. Dist. LEXIS 6711, 2007 WL 293865, at *5 (E.D. Ky. Jan. 26, 2007)*. A plaintiff seeking to certify a collective action bears the burden of establishing that he and the proposed class he seeks to represent are similarly situated. *See* *Jones-Turner, 2007 U.S. Dist. LEXIS 79414, 2007 WL 3145980, at *1*. However, because conditional certification decisions generally are made prior to discovery, a plaintiff's evidentiary burden is not a heavy one. "Generally speaking, at the first stage of conditional certification, courts require nothing more than substantial allegations that the putative class members were together the victims **[*5]** of a single decision, policy, or plan." *2007 U.S. Dist. LEXIS 79414, [WL] at *2* (citation omitted). Thus, the named plaintiff need merely provide a modest factual showing to demonstrate that he is similarly situated to the putative class members. *Id.* (citing *Comer, 454 F.3d at 547*).

Upon reviewing Plaintiff's Motion and attached Declaration and exhibits, (*see* Docket Nos. 7; 7-2; 7-3; 7-4), and considering the absence of any response in opposition by either Defendant, the Court is satisfied that Plaintiff has met his burden and made the requisite factual showing for conditional certification of a collective action. The Court is further satisfied that the definition of Plaintiff's proposed collective action group is proper. As such, the Court will GRANT Plaintiff's request for conditional certification.

As for the issuance of notice, the FLSA is notably silent on how notification should be given to other similarly situated persons in *§ 216(b)* collective actions. ***HN3***[⬆] The Supreme Court has acknowledged that judicial notice to a putative class in FLSA collective actions is proper **[*6]** in appropriate cases. *See* *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*. Having determined that Plaintiff has shown that the current and former employees to be notified are similarly situated with him, the Court has discretion to authorize notification of those individuals to allow them to opt in to the lawsuit. *Comer, 454 F.3d at 546*. The Court is satisfied that judicial notice is appropriate here for several reasons. For one, the conditional certification of a collective action under *§ 216(b)*, unlike class actions under *Rule 23*, does not toll the statute of limitations of potential plaintiffs. *Id.* Thus, judicial notice protects these claims by informing similarly situated employees of the facts needed to make an informed decision whether to opt in to the collective action. *See* *Hoffmann-La Roche, 493 U.S. at 170*. For another, judicial notice promotes judicial economy by helping to avoid duplicative litigation. *See* *id. at 172*. Furthermore, Plaintiff's proposed notice is substantially similar to FLSA collective claim notices approved by other courts, including other district courts in this circuit, in FLSA collective actions. *See, e.g., Shipes v. Amurcon Corp.*, No. 2:10-CV-14943 (E.D. Mich. May 17, 2012), **[*7]** Docket No. 91-2; *Aguilera v. Mich. Turkey Producers Coop., No. 1:09-CV-00420, 2010 U.S. Dist. LEXIS 144549 (W.D. Mich. February 10, 2010)*, Docket No. 49-2. Therefore, the Court will GRANT Plaintiff's request for approval of the proposed class notice.

Next, Plaintiff seeks an order directing Defendants to identify all potential opt-in plaintiffs. Specifically, Plaintiff requests that the following information be produced:

A list in electronic format and importable

[1] The second stage occurs later in the litigation after all opt-in forms have been received and discovery has concluded. *See* *Comer, 454 F.3d at 547*.

> format, of all individuals who worked for Defendants as [a] roadside assistance technician during the past three years, including each roadside assistance technician's name, job title, address, telephone number, email address, dates of employment, location of employment, date of birth, and last four digits of his Social Security number.

(Docket No. 7, at 25.) ***HN4***[⬆] The Supreme Court has approved the discovery of potential class members' names and addresses in order to facilitate effective notice. *Hoffmann-La Roche, 493 U.S. at 170*. More recently, other district courts, both within and without this circuit, additionally have approved the discovery of potential class members' telephone numbers, dates of employment, locations of employment, **[*8]** and dates of birth. *See, e.g.*, *Fisher v. Mich. Bell Tele. Co., 665 F. Supp. 2d 819, 830 (E.D. Mich. 2009)*; *Russell v. Ill. Bell Tele. Co., 575 F. Supp. 2d 930, 939-40 (N.D. Ill. 2008)*; *Lynch v. United Servs. Auto. Ass'n, 491 F. Supp. 2d 357, 371-72 (S.D.N.Y. 2007)*. While at least one court has approved the discovery of partial Social Security numbers, *see Lynch, 491 F. Supp. 2d at 371-72*, others, including at least one court in this circuit, have not, *see Fisher, 665 F. Supp. 2d at 830*; *Russell, 575 F. Supp. 2d at 939-40*. Like the courts in *Fisher* and *Russell*, this Court is not persuaded that the discovery of partial Social Security numbers is necessary. As the Court has approved the sending of notice to the putative class members, and given that Defendants have not responded in opposition to this request, the Court will GRANT Plaintiff's request and order Defendants to produce the requested information, with the exception of the putative plaintiffs' Social Security numbers. The information to be provided under this Order may only be used for the purpose of notifying potential plaintiffs in this action and may only be disseminated among Plaintiffs' counsel.

Finally, Plaintiff requests **[*9]** that the Court appoint the law firms of Sommers Schwartz, P.C., and Johnson Becker, PLLC, as interim class counsel. ***HN5***[⬆] The appointment of interim class counsel is governed by *Federal Rule of Civil Procedure 23(g)(3)*. Courts routinely use the factors in *Rule 23(g)(1)* when appointing interim class counsel prior to class certification. "When one applicant seeks appointment as class counsel," as is the case here, "the court may appoint the applicant only if the applicant is adequate under *Rule 23(g)(1)* and *(4)*." *Fed. R. Civ. P. 23(g)(2)*. *Rule 23(g)(4)* simply requires that class counsel fairly adequate and adequately represent the interests of the class. Upon reviewing Plaintiff's Motion and the pertinent exhibits thereto, the Court is satisfied that these firms satisfy the requirements of *Rule 23(g)* and, so, will GRANT Plaintiff's request and appoint Jason J. Thompson of Sommers Schwartz, P.C., and Timothy J. Becker of Johnson Becker, PLLC, as interim class counsel.

CONCLUSION

Having considered Plaintiff's Motion for Conditional Class Certification, (Docket No. 7), and being otherwise sufficiently advised;

IT IS HEREBY ORDERED as follows:

(1) Plaintiff's Motion, (Docket No. 7), is GRANTED consistent **[*10]** with the foregoing discussion;

(2) The proposed collective FSLA class is hereby conditionally certified and defined as:

> *All roadside assistance technicians who worked for Defendants and were misclassified by Defendants as independent contractors at any time in the past three years.*

(3) Defendants shall produce to Plaintiff's counsel, within 10 days of entry of this Order, a list in electronic format and importable format, of all individuals who worked for Defendants as roadside assistance technicians during the past three years, including each roadside assistance technician's (1) name; (2) job title; (3) last known address; (4) telephone number; (5) email address, if available; (6) dates of employment; (7) location of

employment; and (8) date of birth;

(4) The Court-approved "Notice of Collective Action," attached below, shall be sent via first class U.S. mail and, where possible, via email, to all roadside assistance technicians who worked for Defendants and were classified by Defendants as independent contractors at any time in the past three years; and

(5) Jason J. Thompson of Sommers Schwartz, P.C., and Timothy J. Becker of Johnson Becker, PLLC, are hereby appointed as interim class **[*11]** counsel.

IT IS SO ORDERED.

Date: March 13, 2014

/s/ Thomas B. Russell

Thomas B. Russell, Senior Judge

United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

RICHARD ROSS, individually and on

behalf of all others similarly situated,

Plaintiff,

v.

JACK RABBIT SERVICES, LLC,

a Kentucky limited liability company;

JACK RABBIT USA, LLC, a Florida

limited liability company; jointly and severally,

Defendants.

Civil Action No. 3:14-CV-00044-TBR

NOTICE OF RIGHT TO OPT IN TO LAWSUIT

TO: ALL ROADSIDE ASSISTANCE TECHNICIANS WHO WORKED FOR DEFENDANTS AS INDEPENDENT CONTRACTORS AT ANY TIME IN THE PAST THREE YEARS

RE: FAIR LABOR STANDARDS LAWSUIT FILED AGAINST JACK RABBIT SERVICES, LLC, AND JACK RABBIT USA, LLC

The purpose of this Notice is to inform you of a collective action lawsuit filed in which you are potentially "similarly situated" to the named Plaintiff, Richard Ross, to advise you of how your rights may be affected by this action, and to inform you of the procedure to make a claim if you chose to do so.

1. INTRODUCTION

On January 20, 2014, an action was filed against Jack Rabbit Services, LLC, and Jack Rabbit USA, LLC, (hereinafter "Defendants"), in the United States District Court **[*12]** for the Western District of Kentucky. *Section 216(b)* of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 216(b)*, permits employees to band together to collectively enforce their federal minimum wage and overtime rights and the Court has authorized us to send you this Notice.

As an individual who worked for Defendants as an "independent contractor", you have the right to join this lawsuit if you wish. **The law prohibits any Defendant from retaliating against you for exercising your rights under the FLSA, including signing this Notice and joining this lawsuit. It is illegal for Defendants to fire you or retaliate against you in any manner because you choose to participate in this lawsuit. Your right to participate in this lawsuit by signing this Notice has not been lost or released even if you have signed any document indicating that you did not intend to join the lawsuit or that you act as an "independent contractor" in connection with your service for**

Defendants.

If the case is successful, the FLSA authorizes the Court to award you back pay or damages, plus an equal amount as liquidated damages (double damages), plus costs and attorneys' fees.

2. DESCRIPTION OF THE LAWSUIT

The lawsuit **[*13]** alleges that Defendants violated the FLSA by misclassifying its employees as independent contractors, by failing to pay its workers a minimum wage for all time worked, and overtime wages when applicable, and by making improper and unlawful deductions from employee pay to account for: 1) alleged damage to customer vehicles; 2) alleged mileage miscalculations; and 3) alleged insurer refusal to pay mileage invoices exceeding certain distances. Plaintiff alleges that he and the Class members are entitled to recover for all hours of time that Defendants failed to properly compensate them for. Plaintiffs also seek an additional equal amount as liquidated damages, as well as attorneys' fees and costs. This litigation is currently in the early pretrial stage.

Defendants deny Plaintiff's allegations that they has violated the FLSA or failed to properly pay their workers, and have further denied Plaintiff's allegations that they are liable to Plaintiff and Class members under any circumstances.

3. PERSONS ELIGIBLE TO RECEIVE THIS NOTICE

The United States District Court for the Western District of Kentucky has approved this Notice to be distributed to:

All roadside assistance technicians who worked [*14] for Defendants and were misclassified by Defendants as independent contractors at any time in the past three years.

4. YOUR RIGHT TO PARTICIPATE IN THIS LAWSUIT

If you meet the description in preceding Paragraph and believe that Defendants failed to pay you minimum wages or other compensation for the time you spent working for them, you may join and participate in this lawsuit if you wish. It is entirely your own decision whether to join this lawsuit.

5. EFFECT OF JOINING THIS LAWSUIT

If you choose to join this lawsuit, you will be bound by any judgment entered by the Court, whether favorable or unfavorable. That means that, if Plaintiff wins, you likely will be eligible to share in the monetary award approved by the Court; likewise, if Plaintiff loses, no money will be awarded to you, but you also will not be able to file or join any other lawsuit related to the matters that were decided in this case.

By joining this lawsuit you agree to stay in contact with class counsel throughout the pendency of the lawsuit and to provide timely assistance to the attorneys and their staff, including preserving and providing documents and discovery responses, returning phone calls and emails, and testifying **[*15]** at depositions and trial.

6. NO LEGAL EFFECT IN NOT JOINING THIS LAWSUIT

If you choose not to join this lawsuit, you will not be affected or bound by any judgment entered in this case, you will not receive any back pay or liquidated damages as part of this case, and you will retain any legal rights you may have to file a lawsuit or complaint of your own against Defendants.

7. REPRESENTATION BY CLASS COUNSEL

Unless you retain other legal counsel, at your own expense, you will be represented in this lawsuit by the Sommers Schwartz, P.C., and Johnson Becker, PLLC, firms ("class counsel").

No prepayment of legal fees or costs is required. If the case is successful, class counsel will seek to recover their costs and attorneys' fees either from Defendants or from any settlement or recovery approved by the Court.

If this collective action is later decertified, class counsel will inform you of your options; and class counsel may ask you to enter into a separate written retainer agreement at that time.

8. HOW TO JOIN THIS LAWSUIT

If you wish to join this lawsuit, please complete and return the enclosed Consent to Join form **no later than June 10, 2014**, to:

Veronica Stewart

Sommers Scwhartz, P.C.

One Towne **[*16]** Square, Suite 1700

Southfield, Michigan 48076

Phone: (248) 746-4056

Fax: (248) 936-2147

vstewart@sommerspc.com

WE MUST RECEIVE YOUR SIGNED CONSENT TO JOIN FORM BY JUNE 10, 2014 FOR YOU TO BE ELIGIBLE TO PARTICIPATE IN THIS LAWSUIT.

9. DEADLINE

Your completed Consent to Join form must be filed with the Court by **June 10, 2014**, in order to be eligible to participate in this lawsuit. You should ensure that it is received by Ms. Stewart at the address indicated in paragraph 8 above before that date.

10. NO OPINION EXPRESSED AS TO MERITS OF THIS LAWSUIT

Although this Notice and its contents have been authorized by the Court, the Court takes no position regarding the merits of Plaintiff's claims or Defendants' defenses, and there is no assurance that the Court will grant any relief to you or the Plaintiffs in this case.

11. FURTHER INFORMATION

For further information about this lawsuit, you may contact Plaintiffs' counsel at the addresses, telephone number, or email addresses below:

Jason J. Thompson

Sommers Schwartz, P.C.

2000 Town Center, Suite 900

Southfield, MI 48075-1100

(248) 355-0300

jthompson@sommerspc.com

Timothy J. Becker

Johnson Becker PLLC

33 South 6th Street, Suite 4530

Minneapolis, MN 55402

(612) **[*17]** 436-1804

tbecker@johnsonbecker.com

PLEASE DO NOT ATTEMPT TO CONTACT THE COURT REGARDING THIS LAWSUIT

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

RICHARD ROSS, individually and on

behalf of all others similarly situated,

Plaintiff,

v.

JACK RABBIT SERVICES, LLC,

a Kentucky limited liability company;

JACK RABBIT USA, LLC, a Florida

limited liability company; jointly and severally,

Defendants.

Civil Action No. 3:14-CV-00044-TBR

CONSENT TO JOIN

1. Pursuant to the Fair Labor Standards Act, *29 U.S.C. §216(b)*, I hereby consent to join and act as a plaintiff in the above-captioned lawsuit.

2. I agree to be bound by any adjudication or court rulings in the lawsuit, whether favorable or unfavorable.

3. I hereby designate the law firms of Sommers Schwartz, P.C. and Johnson Becker, PLLC, to represent me in the lawsuit under the terms and conditions set forth on the following page.

Signature: _

Print Name: _

Street Address: _

City, St, Zip: _

Telephone: _

Date Signed: _

End of Document

Exhibit 33

Kidd v. Mathis Tire & Auto Serv.

United States District Court for the Western District of Tennessee, Western Division

September 18, 2014, Decided; September 18, 2014, Filed

No. 2:14-cv-02298-JPM-dkv

Reporter
2014 U.S. Dist. LEXIS 142164 *; 2014 WL 4923004

Billy J. Kidd, on behalf of himself and all others similarly situated, Plaintiff, v. MATHIS TIRE AND AUTO SERVICE, INC., a Tennessee corporation, and DIRECT TIRE DISTRIBUTORS, INC., a Tennessee Corporation, Defendants.

Counsel: **[*1]** For Billy J. Kidd, Plaintiff: Laura Ann Elizabeth Bailey, Alan G. Crone, CRONE & MCEVOY, PLC, Memphis, TN; Michael N. Hanna, MORGAN & MORGAN, PA - Plantation, Plantation, FL.

For Mathis Tire and Auto Service, Inc., Defendant: Courtney Leyes Tomlinson, FISHER & PHILLIPS, LLP - Memphis, Memphis, TN; Jeff Weintraub, Fisher and Phillips, LLP, Memphis, TN.

For Direct Tire Distributors, Inc., Defendant: Courtney Leyes Tomlinson, FISHER & PHILLIPS, LLP - Memphis, Memphis, TN.

Judges: JON P. McCALLA, UNITED STATES DISTRICT JUDGE.

Opinion by: JON P. McCALLA

Opinion

ORDER GRANTING PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION AND FACILITATE NOTICE TO POTENTIAL CLASS MEMBERS

Before the Court is Plaintiff's Motion to Conditionally Certify Collective Action and Facilitate Notice to Potential Class Members, filed September 10, 2014. (ECF No. 30.) The motion is generally unopposed. Defendants object only to Plaintiff's request to send a single reminder notice, identical to the actual notice, twenty (20) days into the notice period. A telephonic hearing was held on the instant motion on September 17, 2014. (ECF No. 32.)

Plaintiff seeks to certify a class as follows: "All 'Technicians' and 'Mechanics' employed by Defendants, **[*2]** Mathis Tire and Direct Tire, within the last three (3) years [prior to September 10, 2014]." (ECF No. 30 at 1, 2.) For the reasons set forth below, Plaintiff's motion is GRANTED.

I. BACKGROUND

On April 28, 2014, Bill J. Kidd ("Plaintiff") filed a complaint on behalf of himself and those similarly situated against Defendants Mathis Tire and Auto Service, Inc. and Direct Tire Distributors, Inc. (collectively "Defendants"). (ECF No. 1.) In his Complaint, Plaintiff alleges that Defendants violated the Fair Labor Standards Act ("FLSA") by not compensating Plaintiff and other members of the purported class for overtime as required by the FLSA. (Id. ¶¶ 59-61.)

Defendants' business consists of servicing automobiles and selling automotive products in Mississippi and Tennessee. (Id. ¶ 39; Answer ¶ 39, ECF No. 14.) Plaintiff alleges that he was employed by Defendants from approximately March 1, 2013 to October 31, 2013. (Compl. ¶ 9,

ECF No. 1.) According to Plaintiff, he worked at least 58 hours per week -- and sometimes as much as 70 hours a week -- and was paid approximately between $420 per week and $611.00 per week. Plaintiff alleges Defendants employed others with substantially similar job **[*3]** requirements and pay provisions who were similarly subject to insufficient pay under the FLSA. (Id. ¶ 19.) Defendant does not deny that Plaintiff describes an extant group of similarly situated people, but does deny that any of them were employed in a manner violating the FLSA. (Answer ¶¶ 18-19 (internally described as referencing what should be Paragraphs 20 to 22), ECF No. 14.)

II. STANDARD FOR CONDITIONAL CLASS CERTIFICATION AND COURT-FACILITATED NOTICE

Section 216(b) of the FLSA provides that employees may recover unpaid overtime compensation by collectively suing an employer under certain circumstances. *29 U.S.C. § 216(b)*. Specifically, *§ 216(b)* states:

> Any employer who violates [the maximum hours provisions] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be.... An action to recover [for such liability] may be maintained ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

Id. "To proceed collectively, named plaintiffs must therefore demonstrate that they are 'similarly situated' to the opt-in plaintiffs—the employees they seek to notify and represent." **[*4]** *Lindberg v. UHS of Lakeside, LLC, 761 F. Supp. 2d 752, 757 (W.D. Tenn. 2011)*.

Courts generally employ a two-phase inquiry to determine whether plaintiffs are similarly situated. *O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 583 (6th Cir. 2009)*. "The first stage occurs early in the discovery process, when the Court determines whether to 'conditionally' certify the proposed class. *Lindberg, 761 F. Supp. 2d at 757* (citing *Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546-47 (6th Cir. 2006))*. The purpose of conditional certification is providing notice to potential plaintiffs and presenting them with an opportunity to opt in. *Id. at 758*. The second stage only occurs after "all of the opt-in forms have been received and discovery has concluded." *Comer, 454 F.3d at 546*. At that point, a second determination, using a more rigorous standard, is made as to whether the named plaintiffs and opt-in plaintiffs are similarly situated. *Id. at 547*.

This case is at the first stage. "Because the determination at this stage is made using a fairly lenient standard, the Sixth Circuit has recognized that it 'typically results in conditional certification of a representative class.'" *Lindberg, 761 F. Supp. 2d at 758* (quoting *Comer, 454 F.3d at 547* (citations omitted)). "If the court determines that conditional certification is appropriate, putative class members are given notice and the opportunity to opt-in." Id. (internal quotation marks omitted).

III. ANALYSIS

A. Similarly Situated Analysis

As the standard the Court must use at this **[*5]** stage is "fairly lenient," id., and "typically results in conditional certification," *Comer, 454 F.3d at 547*, and Defendants have conceded that such a class of similarly situated employees exists, Plaintiff has met his burden for conditional certification. Accordingly, conditional certification is hereby GRANTED.

B. Notice Analysis

"Pursuant to *Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480*

(1989), the Court exercises its discretion to approve that potential members of the above-described class be notified and given an opportunity to opt-in to the action." *Lindberg, 761 F. Supp. 2d at 765*. Plaintiff has requested they be permitted to distribute a jointly prepared Class Notice (Ex. 1, ECF No. 33-1) via first-class mail. (ECF No. 30 at 5.) Plaintiff further requests permission to transmit a Reminder Notice (Ex. 2, ECF No. 33-2) that is largely identical to the Class Notice on the twentieth day of the notice period. (ECF No. 30 at 2) The Class Notice is unopposed, whereas the Reminder Notice is opposed. (Id.)

Defendants advance two arguments against permitting the distribution of the Reminder Notice. First, Defendants argue that the Reminder Notice is not necessary to inform the putative class members of their rights. (Id. at 9.) Second, Defendants assert that the Reminder **[*6]** Notice borders on encouragement contrary to the purpose of the liberal granting of conditional certification in the FLSA. (Id.) Defendants cite *Wlotkowski v. Michigan Bell Telephone Co., 267 F.R.D. 213, 220 (E.D. Mich. 2010)* and *Lutz v. Huntington Bancshares Inc., 2:12-CV-01091, 2013 U.S. Dist. LEXIS 56477, 2013 WL 1703361, at *7-*8 (S.D. Ohio Apr. 19, 2013)* to support their contentions. (ECF No. 30 at 9-10.)

Plaintiff argues that the Reminder Notice serves the remedial purposes of the FLSA, and that it is appropriate to help ensure that the putative class members are actually aware of their rights. In support of his arguments, Plaintiff cites to dozens of cases in which reminder notices were allowed.

The Court agrees with Plaintiff. The FLSA serves remedial purposes. See *Ellington v. City of East Cleveland, 689 F.3d 549, 554-55 (6th Cir. 2012)*. In order for the FLSA to serve its remedial function, putative class members must actually become aware of their right to opt in. Although it may be inappropriate for the Court to sanction notice that actually functions to encourage recipients to join a law suit, that is not the apparent function of the Reminder Notice. As such, the Court finds that the Reminder Notice functions primarily to inform putative class members of their rights. Accordingly, the Plaintiff's requests to send its Class Notice (Ex. 1, ECF No. 33-1) and Reminder Notice (Ex. 2, ECF No. 33-2) twenty days **[*7]** into the notice period are GRANTED.

In light of the foregoing, and on the agreement of the parties, it is hereby ORDERED:

1. This case may proceed as a collective action under the Fair Labor Standards Act, *29 U.S.C. § 201, et seq.*;
2. Defendants shall produce to Plaintiff's counsel within seven (7) days a list containing the names, the last known addresses and phone numbers of putative class members who worked for Defendants from September 10, 2011 to present;[1]
3. The initial Class Notice (Ex. 1, ECF No. 33-1) and Consent Form (Ex. 3, ECF No. 33-3) shall be sent by first-class mail to all potential plaintiffs at any time, but no later than sixty (60) days after Plaintiff's receipt of the list and contact information of putative class members;
4. The Reminder Notice (Ex. 2, ECF No. 33-2) and Consent Form (Ex. 3, ECF No. 33-3) may be sent by first-class mail to potential plaintiffs twenty (20) days after the initial Class Notice (Ex. 1, ECF No. 33-1) is mailed; and
5. Class members shall be limited to those who communicate a Consent form (Ex. 3, ECF No. 33-3) within 45 days from the mailing of the initial Class Notice.[2]

IT IS SO ORDERED, this 18th day of September, 2014.

/s/ Jon P. McCalla

JON P. McCALLA

---

[1] This was agreed to by the parties during the September 17, 2014 telephonic status conference. **[*8]** (ECF No. 32.)

[2] Same.

UNITED STATES DISTRICT JUDGE

End of Document

Exhibit 34

Craft v. Ray's, LLC

United States District Court for the Southern District of Indiana, Indianapolis Division

December 31, 2008, Decided; December 31, 2008, Filed

1:08:cv-00627-RLY-JMS

Reporter
2008 U.S. Dist. LEXIS 105807 *; 2008 WL 5458947

JOSEPH L. CRAFT, DANIEL J. SMITH, RANDY L. HOWARD, KEVIN J. HOWARD, and JEREMY L. CHAMBERS, on behalf of themselves and on behalf of all other employees similarly situated, Plaintiffs, vs. RAY'S, LLC and DONALD MATTHEWS, Defendant.

Subsequent History: Summary judgment granted by *Craft v. Ray's, LLC, 2009 U.S. Dist. LEXIS 90862 (S.D. Ind., Sept. 29, 2009)*

Prior History: *Craft v. Ray's, LLC, 2008 U.S. Dist. LEXIS 87887 (S.D. Ind., Oct. 29, 2008)*

Counsel: **[*1]** For CHRIS MCGUIRE, TIMOTHY MORTON, JOSEPH L. CRAFT, DANIEL J. SMITH, RANDY L. HOWARD, KEVIN J. HOWARD, JEREMY CHAMBERS, Plaintiffs: Andrew G. Jones, Philip J. Gibbons, Jr., GIBBONS JONES P.C., Indianapolis, IN.

For RAY'S LLC, DONALD MATTHEWS, Defendants: Kim F. Ebert, Steven F. Pockrass, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Indianapolis, IN.

Judges: RICHARD L. YOUNG, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD L. YOUNG

Opinion

ENTRY ON DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED NOTICE AND DEFENDANTS' REQUEST THAT IDENTIFYING INFORMATION BE PROVIDED TO A NEUTRAL THIRD-PARTY

Plaintiffs, Joseph L. Craft, Daniel J. Smith, Randy L. Howard, Kevin J. Howard, and Jeremy L. Chambers (collectively, "Plaintiffs"), filed the instant lawsuit against Ray's, LLC ("Ray's") and Donald Matthews ("Matthews") (collectively, "Defendants") for alleged overtime violations of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201 et seq.* and Indiana law. In its entry dated October 29, 2008, the court granted Plaintiffs' motion for conditional certification under the FLSA and ordered Defendants to disclose the contact information of the prospective members. At that time, the court also took Plaintiffs' motion for approval of **[*2]** their proposed notice and consent form under advisement, allowing Defendants additional time to file any objections.

The court, having read and reviewed the parties' submissions and the applicable law, now **GRANTS IN PART** Plaintiffs' Motion for Notice to Potential Plaintiffs and **SUSTAINS IN PART** Defendants' Objections to Plaintiffs' Proposed Notice. Defendants' request that identifying information be provided to a neutral third-party is **DENIED**.

I. Notice to Potential Plaintiffs

Plaintiffs have filed a Notice to Potential Plaintiffs ("Notice") (Docket # 30-8) which contains 8 headings. Defendants lodge a number of objections under these various headings, many of which

Plaintiffs' do not oppose. The court has read and reviewed the Notice and the objections made by Defendants and now rules as follows:

(1) With respect to the case caption, Jeremy L. Chambers shall be listed as a Plaintiff and the terms "Amended Complaint Class Action" and "Collective Action" shall be deleted.

(2) With respect to the heading, the notice shall be entitled "Notice to Potential Party Plaintiffs," the date October 29, 2005 shall replace the blank space in the "TO" line, and the word "Allegedly" shall be inserted **[*3]** prior to "Unpaid" in the "RE" line.

(3) With respect to Section 2, entitled "Description of the Lawsuit," that section shall read:

> A lawsuit has been brought by Joseph L. Craft, Daniel J. Smith, Randy L. Howard, Kevin J. Howard, and Jeremy L. Chambers ("Plaintiffs") against Ray's seeking to recover alleged unpaid overtime wages. The lawsuit contends that Ray's maintained a practice and policy of unlawfully deducting a twenty (20) minute lunch break from the time of Drivers and Slingers for every shift worked. The lawsuit asserts that this practice and policy violates the federal Fair Labor Standards Act and unlawfully denies Drivers and Slingers payment of all overtime earned with respect to weeks in which they worked more than forty (40) hours. The lawsuit seeks to recover unpaid overtime compensation (liquidated damages), plus payment of reasonable attorney fees and costs.
>
> The Defendants deny Plaintiffs' allegations and deny any wrongdoing.
>
> The lawsuit is pending in the United States District Court for the Southern District of Indiana before Judge Richard L. Young in a case styled: *Joseph L. Craft, Daniel J. Smith, Randy L. Howard, Kevin J. Howard, and Jeremy L. Chambers v. Ray's LLC,* ***[*4]*** *et al., Cause No. 1:08-cv-0627-RLY-JMS.*

(4) Section 3, entitled "Composition of the Class," is redundant and therefore stricken.

(5) With respect to Section 4, entitled "How to Participate in this Suit," that section shall read:

> Enclosed you will find a form entitled "Consent to Become a Party Plaintiff" ("Consent Form"). If you were employed by Ray's, LLC as a Driver or Slinger on or after October 29, 2005, and you desire to join this lawsuit, **it is extremely important that you read, sign, and return the Consent Form**. An addressed and postage paid envelope is enclosed for your convenience. Should the enclosed envelope be lost or misplaced, the Consent Form should be sent to:
>
> Gibbons Jones, P.C.
> 10401 N. Meridian St., Suite 300
> Indianapolis, Indiana 46290
> Facsimile: 317-616-3336
>
> The signed Consent Form must be postmarked by [TO BE INSERTED-60 DAYS AFTER THE DATE OF THIS LETTER].
>
> **If your signed Consent Form is not postmarked by [TO BE INSERTED--SAME DATE AS ABOVE], you will not participate in any recovery against Ray's in this lawsuit**. If you have any questions about filling out or sending in the Consent Form, please contact Plaintiffs' counsel listed above.

(6) With respect to Section 5, entitled **[*5]** "Effect of Joining this Suit," the phrase "will share in" found in the first paragraph shall be revised to state "may share in." The following sentence shall be added to the third paragraph as the second sentence: "This does not, however, preclude the recovery of costs from you by Defendants."

(7) With respect to Section 6, entitled "No Retaliation Permitted," that section shall read:

> It is a violation of federal law for Ray's to discharge you in retaliation for your participating in this lawsuit or take any other

adverse employment action against you because you have exercised your legal right to join this lawsuit.

(8) With respect to Section 7, entitled "No Legal Effect in Not Joining this Suit," the section shall be renamed "Legal Effect of Not Joining this Lawsuit" and the first sentence shall be revised to read as follows: "If you choose not to join this lawsuit, you will not be affected by any judgment or settlement rendered in this case with respect to the FLSA claims, whether favorable or unfavorable to the class."

(9) With respect to Section 8, entitled "No Opinion Expressed as to the Merits of the Lawsuit," that section shall read:

This notice is being provided for the sole purpose **[*6]** of determining the identity of persons who may be entitled to and wish to participate in this lawsuit. Although the court has authorized Plaintiffs' counsel to send this notice, the court expresses no opinion regarding the merits of Plaintiffs' claims. The claims of any person who joins this lawsuit may be subject to dismissal if the court finds the claims lack merit or that this lawsuit cannot be litigated on a class-wide basis.

(10) With respect to Section 8 [sic], entitled "Further Information," the following sentence shall be added: "Other than to review the filings that have been made in this case, please do not contact the court or the clerk of the court directly."

(11) A section entitled "Your Legal Representation if You Join" and a section entitled "Defendants' Legal Representation" shall be inserted and should list contact information for both parties' counsel.

(12) With respect to the signature line at the conclusion of the notice, the reference to defense counsel shall be deleted.

II. Consent Form

Plaintiffs have filed a proposed Consent to Become a Party Plaintiff ("Consent Form") (Docket # 30-9). Defendants lodge a number of objections to the various paragraphs, many of which **[*7]** Plaintiffs' do not oppose. The court has read and reviewed the Consent Form and the objections made by Defendants and now rules as follows:

(1) With respect to the case caption, Jeremy L. Chambers shall be listed as a Plaintiff and the terms "Amended Complaint Class Action" and "Collective Action" shall be deleted.

(2) With respect to paragraph one, references to Donald Matthews shall be deleted.

(3) With respect to paragraph two, Jeremy L. Chambers shall be added as a "Named Plaintiff." No other changes shall be made.

(4) With respect to paragraph three, the phrase "the law firm's" shall be replaced with the phrase "my law firm's." The following shall be added to the next to last sentence: "but this does not preclude a recovery of costs by Defendants."

(5) With respect to paragraph four, the phrase "may in the future appoint" shall be replaced with the phrase "may in the future attempt to seek leave of the court to add."

(6) With respect to paragraph five, the phrase "will share in" shall be replaced with the phrase "may share in." No other changes shall be made.

(7) Paragraph six is unnecessary and therefore stricken.

III. Request to Disclose to a Neutral Third-Party

In its entry dated October **[*8]** 29, 2008, the court ordered Defendants to disclose the names, home addresses, and home phone numbers of all potential party plaintiffs within thirty days. Defendants now request that they be permitted to provide that information to Rust Consulting, a third-party consultant, who would then send out the Notice and Consent Form and report back to the court. Defendants argue that making use of a neutral third-party would allow prospective party plaintiffs

to make an independent and objective decision, free from pressure, harassment, and repeated solicitations by Plaintiffs' counsel.

Defendants offer no evidence to suggest that Plaintiffs' counsel will pressure, harass, or repeatedly solicit the potential party plaintiffs. Plaintiffs have requested permission to send out the court approved Notice and Consent Form, as well as permission to send a second copy to all individuals who have not responded within thirty days of the first mailing or who may have not received the first mailing due to a change in address. The court finds Plaintiffs' requests to be reasonable and, therefore, sees no reason to involve a third party. Defendants shall disclose the contact information for the potential **[*9]** party plaintiffs as ordered in the court's prior entry.

IV. Conclusion

Plaintiffs' Motion for Notice to Potential Plaintiffs (Docket # 29) is **GRANTED IN PART** and Defendants' Objections to Plaintiffs' Proposed Notice (Docket # 50) are **SUSTAINED IN PART**. The Notice and Consent Form sent to potential party plaintiffs shall conform with the requirements set forth in this entry. Defendants' Request that Identifying Information Be Provided to a Neutral Third Party (Docket # 50) is **DENIED**.

SO ORDERED this 31st day of December 2008.

/s/ Richard L. Young

RICHARD L. YOUNG, JUDGE

United States District Court

Southern District of Indiana

End of Document

Exhibit 35

Sanchez v. Sephora USA, Inc.

United States District Court for the Northern District of California, Oakland Division

July 17, 2012, Decided; July 18, 2012, Filed

Case No: 11-03396 SBA

Reporter
2012 U.S. Dist. LEXIS 99924 *; 19 Wage & Hour Cas. 2d (BNA) 720; 2012 WL 2945753

REBECCA SANCHEZ, individually and on behalf of all others similarly situated, Plaintiff, vs. SEPHORA USA, INC., Defendant.

Counsel: **[*1]** For Rebecca Sanchez, individually and on behalf of all others similarly situated, Plaintiff: Andrew Dunlap, LEAD ATTORNEY, Fibich Hampton Leebron Briggs & Josephson, L.L.P., Houston, TX; Bryan Jeffrey Schwartz, Hillary Jo Benham-Baker, Bryan Schwartz Law, Oakland, CA; Michael Andrew Josephson, PRO HAC VICE, Fibich Hampton and Leebron, LLP, Houston, TX.

For Sephora USA, Inc., Defendant: Andrew Ralston Livingston, LEAD ATTORNEY, Aubry Rebecca Holland, Brooke Desiree Arena, Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

Judges: SAUNDRA BROWN ARMSTRONG, United States District Judge.

Opinion by: SAUNDRA BROWN ARMSTRONG

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

Docket 27

Plaintiff Rebecca Sanchez ("Plaintiff"), individually and on behalf of all others similarly situated, brings the instant action against her former employer, Sephora USA, Inc. ("Sephora") under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 216(b)*, to recover unpaid overtime wages. See First Am. Compl. ("FAC"), Dkt. 9. The parties are presently before the Court on Plaintiff's Motion for Conditional Certification. Dkt. 27. Having read and considered the papers filed in connection with this matter, and being fully informed, **[*2]** the Court hereby GRANTS Plaintiff's motion for the reasons stated below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See *Fed.R.Civ.P. 78(b)*; *N.D. Cal. Civ. L.R. 7-1(b)*.

I. BACKGROUND

Sephora is a beauty supply retailer which owns and operates over 280 retail stores across the United States. From August 2004 to November 2009, Plaintiff worked as a Specialist for Sephora in stores located in Florida and Texas. As a Specialist, Plaintiff's job duties included: (a) sales; (b) merchandising; (c) customer service; (d) inventory; and (e) operating the cash register. Plaintiff was compensated on a salary basis, and typically worked fifty hours per week without any overtime compensation. She allegedly performed these functions in accordance with Sephora's corporate policies, practices, checklists, standards of conduct and guidelines which were disseminated and/or readily available to "cast members" (i.e., employees).

On July 11, 2011, Plaintiff filed the instant action in this Court against Sephora. Dkt. 1. On August 3, 2011, Plaintiff filed a First Amended Complaint

("FAC"), which alleges a single claim under the FLSA. Dkt. 8. Plaintiff alleges **[*3]** that Sephora misclassified her and other Specialists as "exempt" and, as a result, failed to pay her and putative class members overtime wages in violation of the FLSA. Plaintiff along with Marilyn Creek, Cherie Tahtinen and Merrie G. Pickering-Gray, who also were employed as Sephora Specialists on a salary basis, have filed consents to join the action. [1]

On December 29, 2011, Plaintiff filed the present motion for conditional certification. Dkt. 27. She seeks conditional certification of a Class defined as follows: "All individuals who were (a) employed by Sephora as a Specialist within the past three years prior to this action's filing date and through the final disposition of this lawsuit; and (b) paid a 'salary' with no overtime compensation." Mot. at 1 (footnote omitted). In response, Sephora has filed an opposition to the motion, as well as a separate brief styled as "Objections to Evidence Submitted by Plaintiff in Support of Motion for Class Certification." Dkt. 34, 46. Plaintiff timely filed a reply and a response to Sephora's evidentiary objections. **[*4]** Dkt. 48, 49. At the direction of the Court, Sephora submitted a surreply addressing certain aspects of Plaintiff's proposed class notice on June 8, 2012. The matter has been fully briefed and is ripe for adjudication.

II. DISCUSSION

A. SEPHORA'S OBJECTIONS TO PLAINTIFF'S DECLARATIONS

Sephora seeks to strike the declarations submitted by Plaintiff and four putative class members on the grounds that they are "cookie cutter" declarations. Dkt. 46. However, the mere fact that the declarations submitted by Plaintiff are virtually identical does not ipso facto render them incompetent, particularly at this stage of the proceeding where the Court is applying a lenient standard of review. See *Keilholtz v. Lennox Hearth Prods., Inc., 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010)* ("On a motion for class certification, the Court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims" and therefore "the Court may consider evidence that may not be admissible at trial."); *Bollinger v. Residential Capital, LLC, 761 F. Supp. 2d 1114, 1120 (W.D. Wash. 2011)* ("But at this stage, under a lenient standard, the use of similarly worded or even 'cookie cutter' declarations is not fatal **[*5]** to a motion to certify an FLSA collective action."). The Court also is unpersuaded by Sephora's ancillary contentions that the declarants' statements regarding their job duties lack foundation. It is axiomatic that the declarants are competent to articulate what their particular job duties were. Though the declarants may not have provided specific details regarding each and every aspect of their position as a Specialist, the lack of such information does not render their statements "vague and ambiguous" as Sephora asserts. For these reasons, the Court overrules Sephora's objections to the declarations submitted by Plaintiff.

B. CONDITIONAL CERTIFICATION

Under the FLSA, employers must pay their employees a minimum wage and overtime wages for hours worked in excess of forty per week. See *29 U.S.C. §§ 206*, *207*. If an employer fails to do so, an aggrieved employee may bring a collective action on behalf of "similarly situated" employees based on their employer's alleged violations of the FLSA. *Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000)*. The decision as to whether to certify a collective action is within the discretion of the district court. *Adams v. Inter-Con Sec. Sys., 242 F.R.D. 530, 535 (N.D. Cal. 2007)* **[*6]** (citing *Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 466 (N.D. Cal. 2004)*). The plaintiff bears the burden of showing that the putative collective action members are "similarly situated." *Adams, 242 F.R.D. at 535-536*; *Leuthold,*

[1] Sephora disputes that Ms. Creek was employed during the class period. However, that dispute is not germane to the instant motion.

224 F.R.D. at 466.

Although the FLSA does not define "similarly situated," federal courts have generally adopted a two-step approach to determine whether to permit a collective action. *Hill v. R+L Carriers, Inc., 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010)*. The first step is the "notice stage," at which time the district court assesses whether potential class members should be notified of the opportunity to opt-in to the action. *Buenaventura v. Champion Drywall, Inc. of Nev., No. 2:10-cv-00377-LDG (RJJ), 2012 U.S. Dist. LEXIS 41390, 2012 WL 1032428, at *8 (D. Nev., Mar. 27, 2012)*. "To grant conditional certification at this stage, the court requires little more than substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan." *Stanfield v. First NLC Fin. Servs., LLC, No. C 06-3892 SBA, 2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527, at *2 (N.D. Cal., Nov. 1, 2006)* (internal quotations and citations omitted) (Armstrong, **[*7]** J.). "Plaintiff need not show that his position is or was identical to the putative class members' positions; a class may be certified under the FLSA if the named plaintiff can show that his position was or is similar to those of the absent class members." *Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 990 (C.D. Cal. 2006)*. "Since this first determination is generally made before the close of discovery and based on a limited amount of evidence, the court applies a fairly lenient standard and typically grants conditional class certification." *Misra v. Decision One Mortg. Co., LLC, 673 F. Supp. 2d 987, 993 (C.D. Cal. 2008)* (emphasis added). [2] At the second step—typically initiated by a motion to decertify after discovery is complete—the court engages in a more searching inquiry. *Leuthold, 224 F.R.D. at 466*. "Should the court determine on the basis of the complete factual record that the plaintiffs are not similarly situated, then the court may decertify the class and dismiss the opt-in plaintiffs without prejudice." *Id. at 467*.

In the instant case, the Court finds that Plaintiff has satisfied the lenient **[*9]** standard for conditional certification. Four individuals representing different Sephora retail establishments, regions, and districts have filed consents to join this action. See Dkt. 1, 13, 14 and 15. The job descriptions, documents, admissions and declarations proffered by Plaintiff demonstrate that Sephora's policy of allegedly improperly classifying its Specialists as exempt from the FLSA is widespread and ongoing. This evidence shows Sephora's Specialists were employed with a common job description, performed similar job duties, under identical pay provisions, and is sufficient for conditional certification at this stage of the proceedings. See *Hill, 690 F. Supp. 2d at 1009* ("For conditional certification at this notice stage, the court requires little more than substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan.") (internal quotations and citations omitted).

Sephora offers several arguments in opposition to Plaintiff's motion for conditional certification, none of which the Court finds compelling. First, Sephora

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[2] The undersigned and other judges in this District uniformly apply the two-stage approach and a lenient standard to determine whether plaintiffs are "similarly **[*8]** situated." See *Guifu Li v. A Perfect Franchise, Inc., No. C 10-1189 LHK, 2011 U.S. Dist. LEXIS 114821, 2011 WL 4635198, at *6 (N.D. Cal., Oct. 5, 2011)* (Koh, J.); *Santiago v. Amdocs, Inc., No. C 10-4317 SI, 2011 U.S. Dist. LEXIS 146126, 2011 WL 6372348, at *7 (N.D. Cal., Dec. 19, 2011)* (Illston, J.); *Beauperthuy v. 24 Hour Fitness USA, Inc., 772 F. Supp. 2d 1111, 1117 (N.D. Cal. 2011)* (Conti, J.); *Gee v. Suntrust Mortg., Inc., No. C 10-1509 RS, 2011 U.S. Dist. LEXIS 21101, 2011 WL 722111, at *2 (N.D. Cal., Feb. 18, 2011)* (Seeborg, J.); *Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1003 (N.D. Cal. 2010)* (Chen, J.); *Wong v. HSBC Mortg. Corp., 749 F. Supp. 2d 1009, 2010 WL 3833952, at *1 (N.D. Cal., 2010* (Chesney, J.); *Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009)* (Wilken, J.); *Labrie v. UPS Supply Chain Solutions, Inc., No. C 08-3182 PJH, 2009 U.S. Dist. LEXIS 25210, 2009 WL 723599, at *4 (N.D. Cal., Mar. 18, 2009)* (Hamilton, J.); *Baas v. Dollar Tree Stores, Inc., C 07-3108 JSW, 2009 U.S. Dist. LEXIS 57531, 2009 WL 1765759, at *5 (N.D. Cal., June 18, 2009)* (White, J.); *In re Wells Fargo Home Mortg. Overtime Pay Litig., 527 F. Supp. 2d 1053, 1071 (N.D. Cal. 2007)* (Patel, J.); *Leuthold, 224 F.R.D. at 467 (Walker, J.)*.

argues that Plaintiff's evidentiary showing is too weak to **[*10]** justify conditional certification under the standard for class certification under *Rule 23* set forth in *Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 180 L. Ed. 2d 374 (2011)*. Dukes clarified that to show commonality under *Rule 23(a)(2)*, a plaintiff must demonstrate that class members "have suffered the same injury" and that their claims "depend upon a common contention ... of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 131 S.Ct. at 2551* (internal citation omitted). However, Sephora has not cited nor has the Court found any authority extending Dukes to a FLSA action, particularly at the first stage of the certification process. Indeed, application of *Dukes* to the conditional certification analysis would be contrary to the weight of authority holding that the FLSA's "similarly situated" requirement is less stringent than Rule 23's standard for class certification. See *O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009)* (holding that district court erred in applying Rule 23 standard to determine whether opt-in plaintiffs **[*11]** were similarly situated under the FLSA); see also *Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996)*.

Nor is the Court persuaded that, notwithstanding Dukes, Plaintiff has failed to make a sufficient showing to justify conditional certification at this juncture. Sephora complains that the declarations from Plaintiff and three opt-in claimants fail to show that Specialists in other stores around the country were subject to a common policy. Sephora's arguments, however, are better suited for resolution at the second stage of the certification process where a more rigorous analysis will be undertaken to determine whether Plaintiff's claims are similarly situated to potential class members. *Leuthold, 224 F.R.D. at 467-68*. At the first stage, where little, if any, discovery has yet been undertaken, only "some evidence" is necessary to show that the plaintiff and potential claimants are similarly situated with respect to their job duties and circumstances. *Kress v. PricewaterhouseCoopers, LLP, 263 F.R.D. 623, 630 (E.D. Cal. 2009)*. Plaintiff's evidentiary showing, while not substantial or detailed, is nonetheless more than sufficient at this stage of the proceedings. Id.

Sephora next **[*12]** contends that conditional certification is inappropriate on the grounds that determining whether Plaintiff and putative class members are similarly situated will entail individualized inquiries, ostensibly because Specialists' duties vary from store to store. This Court has rejected similar arguments during the first stage of the FLSA conditional certification process, finding that these arguments go to the merits and are better addressed at the second stage, after discovery has closed. See *Stanfield, 2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527 at *3*; accord *Harris v. Vector Marktg. Corp., 716 F. Supp. 2d 835, 841 (N.D. Cal. 2010)* (Chen, J.); *Labrie v. UPS Supply Chain Solutions, Inc., No. C 08-3182 PJH, 2009 U.S. Dist. LEXIS 25210, 2009 WL 723599, at *5-7 (N.D. Cal., May 18, 2010)* (Hamilton, J.); *Gilbert v. Citigroup, Inc., No. C 08-0385 SC, 2009 U.S. Dist. LEXIS 18981, 2009 WL 424320, at *4 (N.D. Cal., Feb.18, 2009)* (Conti, J.); *Escobar v. Whiteside Constr. Corp., No. C 08-01120 WHA, 2008 U.S. Dist. LEXIS 68439, 2008 WL 3915715, at *5 (N.D. Cal., Aug. 21, 2008)* (Alsup, J.).

The Court also notes that Sephora's argument inappropriately depends heavily on declarations from a number of its employees for the proposition that individualized inquiries are necessary to determine class members' job duties. **[*13]** E.g., Delaney Decl. ¶¶ 4-6; Johnson Decl. ¶ 9-14; Pacheco Decl. ¶ 10-11. Again, federal courts are in agreement that evidence from the employer is not germane at the first stage of the certification process, which is focused simply on whether notice should be disseminated to potential claimants. See *Grayson, 79 F.3d at 1099 n.17* (affirming district court's grant of conditional certification based on

plaintiff's substantial allegations, notwithstanding defendant's submission of affidavits contradicting plaintiff's allegations); *Luque v. AT & T Corp., No. C 09-5885 CRB, 2010 U.S. Dist. LEXIS 126545, 2010 WL 4807088, at *5 (N.D. Cal., Nov. 19, 2010)* (disregarding thirty declarations from other field managers submitted by defendants in opposition to motion for conditional certification) (Breyer, J.); *Kress, 263 F.R.D. at 628* ("In determining whether plaintiffs have met this standard, courts need not consider evidence provided by defendants.").

Finally, Sephora argues that Plaintiff has not shown that a sufficient number of other Specialists desire to opt-in to this lawsuit. There is no controlling authority holding that a FLSA plaintiff must make such a showing as a prerequisite to obtaining conditional certification. **[*14]** *Delgado v. Ortho-McNeil, Inc., No. SACV07-263CJCMLGX, 2007 U.S. Dist. LEXIS 74731, 2007 WL 2847238, at *2 (C.D. Cal., Aug. 6, 2007)*. Indeed, such a restriction is counter to the lenient standard applicable to motions for conditional certification. Moreover, it is inconsistent with the directive of the Supreme Court and the Ninth Circuit that the FLSA should be "liberally construed to apply to the furthest reaches consistent with Congressional direction." *Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007, 1010 (9th Cir. 2011)* (internal quotations and citations omitted); *Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 296, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985)*.

In sum, the Court thus concludes that Plaintiff has made a sufficient showing for conditional certification and dissemination of notice to the Class.

C. Modifications to the Class Notice

In addition to determining whether conditional certification is warranted, Plaintiff requests that the Court facilitate notice of the pending action to potential claimants so that they will have an opportunity to opt-in to this case. To this end, Plaintiff requests that the Court direct Sephora to disclose the names and contact information of the potential class members. **[*15]** Plaintiff also requests that the Court approve her proposed form of notice and proposed consent to join form, and then allow her counsel to send out these Court-approved forms to potential Class members. Sephora objects to certain provisions of Plaintiff's proposed class notice which are discussed below.

1. Time to Compile Class List

Plaintiff proposes that the Court require Sephora to compile a list of potential class members within ten days of the date of the Court's approval of the class notice. Sephora summarily states that it needs more than ten days, and proposes a thirty-day time period to prepare the class list. In her reply, Plaintiff proposes a compromise of twenty days. Neither party provides any particular reasons or evidentiary support for the proposed timeframes.

In this Court's experience, the amount of time allotted to a defendant to produce a list of proposed class members typically is resolved by mutual agreement among the parties. Indeed, the parties should be aware that they are required to meet and confer in advance of presenting any motion to the Court. See Standing Orders ¶ 5, 31. In the instant case, however, there is no indication that the parties have complied **[*16]** with this requirement. Therefore, the parties are directed to meet and confer regarding a mutually acceptable amount of time for Sephora to provide a list of potential class members to Plaintiff.

2. Dissemination of Class List

Sephora contends that either it or a neutral third party should disseminate the class notice in order to protect the privacy interests of putative class members. However, this Court previously rejected an identical argument made in an FLSA action. See *Stanfield, 2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527 at *5*; accord *Khalilpour v. CELLCO P'ship, C 09-02712 CW, 2010 U.S. Dist. LEXIS*

*43885, 2010 WL 1267749, at *3 (N.D. Cal., Apr. 1, 2010)* ("the disclosure of names, addresses, and telephone numbers is common practice in the class action context because it does not involve revelation of personal secrets, intimate activities, or similar private information, which have been found to be serious invasions of privacy"); see also *Algee v. Nordstrom, Inc., C 11-301 CW, 2012 U.S. Dist. LEXIS 73399, 2012 WL 1919134, at *1 (N.D. Cal., May 25, 2012)* (finding that privacy concerns did not preclude disclosure of class members' contact information to plaintiff) (Wilken, J.). Therefore, the Court finds that Plaintiff's counsel may disseminate notice to the class.

3. [*17] Amount of Time to Opt-In

Plaintiff requests that the Court set a ninety day notice period during which potential class members may opt-in, while Sephora proposes a forty-five day opt-in period. Though opt-in periods vary, timeframes of sixty to ninety days appear to have become the presumptive standard in this District. *Gee v. Suntrust Mortg., Inc., No. C-10-1509 RS, 2011 U.S. Dist. LEXIS 21101, 2011 WL 722111, at *4 (N.D. Cal., Feb. 18, 2011)* (ninety day opt-in period for mortgage underwriters) (Seeborg, J.); *Luque, 2010 U.S. Dist. LEXIS 126545, 2010 WL 4807088, at *7* (sixty day opt-in period telephone company field managers) (Breyer, J.); *Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1126 (N.D. Cal. 2009)* (seventy-five day opt-in period for bank's information technology employees) (Wilken, J.); *Stanfield, 2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527, at *6* (sixty day opt-in period for loan officers) (Armstrong, J.). However, a longer period may be appropriate in cases where the prospective class may be difficult to locate. E.g., *Carrillo v. Schneider Logistics, Inc., No. CV 11-8557 CAS (DTBx), 2012 U.S. Dist. LEXIS 26927, 2012 WL 556309, at *15 (C.D. Cal., Jan. 31, 2012)* (180-day opt-in period appropriate for class of low-income migrant workers).

Sephora contends that a forty-five -day opt-in **[*18]** period will expedite the action. In contrast, Plaintiff contends that a longer notice period is warranted, allegedly because putative class members "work long stretches from home and additional time is needed to ensure that they receive adequate notice of their right to participate in this case." Reply at 10. However, Plaintiff provides no evidentiary support for her assertion. In any event, the Court finds that a notice period of sixty days sufficiently balances both parties' concerns and is reasonable under the circumstances presented. See *Stanfield, 2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527, at *6*.

4. Subsequent Notices

Plaintiff proposes sending out a second notice prior to the expiration of the opt-in period to remind potential class members that their deadline to opt-in is coming due. Sephora contends that a second notice could be interpreted as encouragement by the Court to join the lawsuit. However, such concerns are uncompelling, given that the second notice will be disseminated by Plaintiff's counsel, not the Court. That aside, courts have recognized that a second notice or reminder is appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in. See *Harris, 716 F. Supp. 2d at 847* **[*19]** (approving post-card reminder); see also *Gee, 2011 U.S. Dist. LEXIS 21101, 2011 WL 722111, at *4* (approving reminder notice to be sent forty-five days after initial notice sent). The Court therefore authorizes Plaintiff to send a second notice, identical to the first, thirty days after the issuance of the first notice.

5. Content of Notice

The FLSA requires courts to provide potential plaintiffs "accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche, 493 U.S. at 170*.

Additionally, "[i]n exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action." *Id. at 174*.

Plaintiff has provided a copy of her proposed notice along with the instant motion. Pl.'s Ex. 18. In response, Sephora has provided a "redlined" version of the proposed notice which sets forth its proposed revisions. Plaintiff responds that "[m]any of **[*20]** the changes proposed by Defendant are reasonable and have been incorporated in the revised proposed notice...." Reply at 12. Nonetheless, two areas remain in dispute.

a) "Costs Associated with Suit"

Sephora proposes adding a section to the notice entitled "Costs Associated With This Suit." Opp'n Ex. A. In essence, this section states that if Plaintiff does not prevail, class members may be subject to a proportional share of costs, as well as sanctions under *Rule 11 of the Federal Rules of Civil Procedure* in the event the Court finds that Plaintiff has violated that rule. Citing out-of-district authority, Plaintiff expresses concern that the proposed language will dissuade potential class members from opting in. In Stanfield, however, this Court recognized that "potential Plaintiffs should be made aware of any fees or costs for which they may be liable before opting in to the lawsuit." *2006 U.S. Dist. LEXIS 98267, 2006 WL 3190527 at *5*. As in *Stanfield*, "[t]he parties are ordered to meet and confer to draft a mutually acceptable provision explaining potential costs that Plaintiffs may incur." Id.

b) "Effect of Joining Suit"

Sephora also has proposed a section titled "Effect of Joining Lawsuit." Among other things, **[*21]** this section informs putative class members that if they opt-in, they, inter alia: will be bound by the judgment "whether it is favorable or unfavorable"; "may be required to provide information, sit for depositions and testify in court"; and will be represented by Plaintiff's counsel, who will be paid on a contingency fee basis, and will be bound by decisions made by them. Def. Mot., Ex. A.

Plaintiff again relies on out-of-district authority for the proposition that it is unnecessary to include information regarding putative class members' potential litigation obligations. There is authority from this District, however, recognizing the propriety of including such information to adequately advise the potential class regarding the litigation. E.g., *Luque, 2010 U.S. Dist. LEXIS 126545, 2010 WL 4807088, at *7* ("it is appropriate to include a statement that class members might 'be required to provide information,' and so the Court adds such a statement to the Notice.").

The Supreme Court has specified that court-approved notice in a FLSA action must be "timely, accurate, and informative" to enable potential class members to make "informed decision[s]" as to whether to join the lawsuit. *Hoffmann-La Roche, 493 U.S. at 172*. **[*22]** In light of that directive, the Court is persuaded that it is appropriate to include some information in the Notice informing class members of possible obligations in the event they elect to opt-in. Nonetheless, the language set forth in Sephora's proposed modification is somewhat verbose and duplicative of the "Costs Associated with This Suit" section. Therefore, the parties are directed to meet and confer to draft mutually agreeable language for inclusion in the "Effect of Joining Lawsuit" section.

III. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Conditional Certification is GRANTED.

2. Within five (5) days of the date this Order is filed, the parties shall meet and confer regarding: (a) the timeframe for Sephora to provide Plaintiff's counsel a list of potential class members; and (b) mutually acceptable language for inclusion in the "Costs Associated With This Suit" and "Effect of Joining Lawsuit" sections of the Notice. Within fourteen (14) days of the date this Order is filed, the parties shall submit their proposed deadline for Sephora for provide a list of potential class members to Plaintiffs and their revised, proposed Class Notice, **[*23]** along with a proposed order approving the same. If the parties are unable to reach an agreement, each shall individually submit its proposed deadline and notice for the Court's consideration.

2. Within twenty (20) days of the date the Court approves the amended Class Notice, Notice shall be disseminated by Plaintiffs counsel or their agent. The opt-in period shall be limited to sixty (60) days from the date Notice is disseminated to the Class. Plaintiff is authorized to send a second Notice, identical to the first, no later than thirty (30) days after the issuance of the first Notice.

3. This Order terminates Docket 27.

IT IS SO ORDERED.

Dated: July 17, 2012

/s/ Saundra Brown Armstrong

SAUNDRA BROWN ARMSTRONG

United States District Judge

End of Document

Motions

2:20-cv-12994-LVP-DRG Ross v. Subcontracting Concepts, LLC et al

U.S. District Court

Eastern District of Michigan

Notice of Electronic Filing

The following transaction was entered by Blanchard, David on 7/26/2021 at 5:29 PM EDT and filed on 7/26/2021

Case Name: Ross v. Subcontracting Concepts, LLC et al
Case Number: 2:20-cv-12994-LVP-DRG
Filer: Mark Ross
Document Number: 22

Docket Text:
MOTION For Conditional Certification and Notice Pursuant to 29 USC 216(b) by Mark Ross. (Attachments: # (1) Index of Exhibits, # (2) Exhibit 1 - Ross Declaration, # (3) Exhibit 2 - Hurst Declaration, # (4) Exhibit 3 - O&O Agreement, # (5) Exhibit 4 - Bender Complaint, # (6) Exhibit 5 - Espinosa Complaint, # (7) Exhibit 6 - Kennedy Complaint, # (8) Exhibit 7 - Brown, # (9) Exhibit 8 - Williams, # (10) Exhibit 9 - Carter, # (11) Exhibit 10 - Neff I, # (12) Exhibit 11 - Neff II, # (13) Exhibit 12 - Rehberg, # (14) Exhibit 13 - Delgado, # (15) Exhibit 14 - Opt-Out Letter, # (16) Exhibit 15 - Anderson v PF Chang's, # (17) Exhibit 16 - Neville, # (18) Exhibit 17 - Bradford, # (19) Exhibit 18 - Cuevas, # (20) Exhibit 19 - Mode, # (21) Exhibit 20 - Friscia, # (22) Exhibit 21 - Ansoralli, # (23) Exhibit 22 - Sylvester, # (24) Exhibit 23 - Proposed Notice and Consent Form, # (25) Exhibit 24 - Benion, # (26) Exhibit 25 - Smith, # (27) Exhibit 26 - Anderson v Minacs, # (28) Exhibit 27 - Kim, # (29) Exhibit 28 - Westley, # (30) Exhibit 29 - Cobus, # (31) Exhibit 30 - Henry, # (32) Exhibit 31 - Bradenburg, # (33) Exhibit 32 - Ross, # (34) Exhibit 33 - Kidd, # (35) Exhibit 34 - Craft, # (36) Exhibit 35 - Sanchez) (Blanchard, David)

2:20-cv-12994-LVP-DRG Notice has been electronically mailed to:

David M. Blanchard blanchard@bwlawonline.com, ecf@bwlawonline.com, natalie@bwlawonline.com

Frances J. Hollander hollander@bwlawonline.com, ecf@bwlawonline.com, natalie@bwlawonline.com

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2:20-cv-12994-LVP-DRG Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a

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Document description: Exhibit 3 - O&O Agreement
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Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-5] [16ff7d24a1259b1fc4f4ae272ea3f97840214c12868ad4ec6cc4effd5f79616b804dd8067bd1f874363907bb8a3659e896148687029aa89a4d8c093c8fad6ca3]]
Document description: Exhibit 5 - Espinosa Complaint
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-6] [6fd70291f4df9cd5583a27f22ce8563d8f36537b46f1c827473b9950d35edb9a22f81e5386d2dd95af4b1d4bbae5eb77dcd96e78d08c86af14596f38960c6735]]
Document description: Exhibit 6 - Kennedy Complaint
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-7] [4ff0a27bd426415617abf25a9f4cabfd5e2eaffab3cc9e960070d631762d1a1dcd66dd420dd071b2e87d293be9209bd48cfef5f936796b4e5dcb3e06b38f76f7]]
Document description: Exhibit 7 - Brown
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-8] [691ce3c5791de770248bee7e9da871ec407a769f5eac638e8fefd85778fe50d0a9ddacb01429cf134f2bab44869b0b25f7b893f44117c30b03ce699e2330abfe]]
Document description: Exhibit 8 - Williams
Original filename:n/a

Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-9] [4d035e579fe077278f3410275c2f63478802da58e6f9b02288260a948e970ee193046d7be88e04826df7508e9351065bc6d2d13d517a753bb029352cc3f1bff3]]
Document description: Exhibit 9 - Carter
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-10] [6fb3c6199081fddd418bcc8da17459711ce4c7cc7c5c14717f0d07a8a83ac287a30e9c52b87f8bb083fb385dd79f7cbd9f6a9223cce812d65424902448b33ba5]]
Document description: Exhibit 10 - Neff I
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-11] [2537389e6f71757309bc837fd66dc696da6324a8ff6b6f140f462a96e6e43c667e57f1fd0e8373af55707c3712091409e98615dd45cb65e5391ee5766d129b28]]
Document description: Exhibit 11 - Neff II
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-12] [39088ef0743710ec094e0fff10875f42913888040be77baf9b3da5f26c1d20e40f8528c5f1367972f9704fa91d8ea6fb326a1c41ac59e183e2f7afc3c6193d9c]]
Document description: Exhibit 12 - Rehberg
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-13] [2a0a1076981fc3afebf2ddaafd5183beb1077e191463003062e8079f9e4e20a90d2c91019d10f9accf33f6b5734a08eb08a86bdeafc31c3034efd29ec551f613]]
Document description: Exhibit 13 - Delgado
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-14] [a23b9fe7b6ae69c0ede640f29bebe4325b518c0c7e1b0cc5ba6667c11e1d3de72959a8cbe30bc49e746fedf8a9e421cbee0aceecc2ccf236afe8687afbf44582]]
Document description: Exhibit 14 - Opt-Out Letter
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-15] [253981754d54ab039d297918520cbd0465c46685ee4f3de75c0b84f2973bf382b93279f8e194315a76cde26757d1cbfccf6de396ea53877674e53a26f0435687]]
Document description: Exhibit 15 - Anderson v PF Chang's
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-16] [2ed039ce84e0424fe8880a86755356965a579350c73ad957f26ef6d310b1347f201ffe5117522167ec4551b91a3c1c426c55e932afc6f4b24842e6603140e9de]]
Document description: Exhibit 16 - Neville
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-17] [b732bd1c00ddae02c1c9e00cc05aa959e1f469f557a1f6537ac78f81ffcb14fae4f6d28f1afba11b54643b61c04f9a908bf1cac11797f49d5d1ec86f6981d78f]]
Document description: Exhibit 17 - Bradford
Original filename:n/a

Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-18] [3680bd18718da033a423d46a6db13892628232e53a6e3dec5ed61bbd69ccd6ae24271f848a23335b43b0821def9b3b249e930fe9a39d63f30d2d4c89dafe1d19]]
Document description: Exhibit 18 - Cuevas
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-19] [544e0728669bfca30e46074f3c453c9cff57310b0f8364363b5cd47de176ec1cf9498922c7e62c017ebe295c374e0625361041028dc42e26cc3f5d1c80f5d252]]
Document description: Exhibit 19 - Mode
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-20] [2e80f75b1b48f41439e6ff3977a41eaa19f4788295a10dafa9d5ac0e7c150aadb8b23efe47a2499ca18f9bf8b7a746f7e4e2d02f7349cb9c247e45655fd3fea3]]
Document description: Exhibit 20 - Friscia
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-21] [26c6147db5c67649159cc37db2c3a58d6120728e2e29b075e1571f2f0b6ab6a401aed410fd2950cd079250da703296e3492fef7d2b0880dd32d9b2f4d74d4bd8]]
Document description: Exhibit 21 - Ansoralli
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-22] [338d7667b57236949e351974455bed7f21ed7e78ae120581cc41ec123fc973553dfec479d9315ce34636d68f2773117946132b12488b59b2a46d23886ab1b9d0]]
Document description: Exhibit 22 - Sylvester
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-23] [8cecb5f8b38f20317d0b33d5698aadb15a0c2d9c4ef429ede1222ec329434a8208c4752a5577638ac2afd354629ca8335f2414d984aaa681c498681103c310bc]]
Document description: Exhibit 23 - Proposed Notice and Consent Form
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-24] [3edbf30b110e4ba10a34c16693c93c4eb9f3f9f1d2190fd8232b7e32f7223876422967440396c64ef46c261d07624e9881ca94d5bda04b264a8b8ad62275e070]]
Document description: Exhibit 24 - Benion
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-25] [2c39ffc7a8e023c36f6121ee2c9a85defd91e86255256d9cfe750435a81dc22c7d0ef5e263b2652f630624b28574f2237d5e126a34cfc8eee1a968ce689c6ef2]]
Document description: Exhibit 25 - Smith
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-26] [60fb97f02dfc77b406fa57213dc60758262a5e03452d65b199c8fb6bd7cd7b790bab37c92839b0450546b862f6b501374d385d6ee4a7314c1c3fdf619e2fa487]]
Document description: Exhibit 26 - Anderson v Minacs
Original filename:n/a

Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-27] [bb7140fb358fd5a3c9889116121def64d3368ea6d37fe6f8e0f386f007e0ac01afbe219087f183d996586f1ba85bb26f19b4d5f5ae542e62614e2ae1c73093e5]]
Document description: Exhibit 27 - Kim
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-28] [7de16d0949dc2f34efc6e9bf1e2f210a216847116969b0172c3a4f8effbc2ffccb7a4351f19b34316234d03313cbd95f403dd56c7db82077ec6bb8358f289452]]
Document description: Exhibit 28 - Westley
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-29] [2fe801c7cc5471a85e44b1d286a45cf5f96a07a37f554f4f3c53688736253efb36ae1b2d364d224e70ee369fe663275618bdf741e647f07c0fa59f7d65fdefda]]
Document description: Exhibit 29 - Cobus
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-30] [48a469207df1564dbe866ffa6950ad78f9cf4585cd3b4a81e4272598992a69a9f61772eb55d384bd30528c49fccb3c8467253f4fc85d425221aea43785f0adc0]]
Document description: Exhibit 30 - Henry
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-31] [557335d6cc17caba23a94ffbaaf797fdb5896b839d969616c29eaf9a1d4325648bdcaa5f4d5c7db643a8c390134fc daaa7d0f30cf770e2c8bb14b8fefcbd5e45]]
Document description: Exhibit 31 - Bradenburg
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-32] [23da87c7c2ca6e19e0f4fd8f73b51a309b60c34d5edb86a2b459b03f99b98c98becaaa1aa77c401b4e55bbcfb01cf7b6a359aa9051898f64a2e4ca8428ff5add]]
Document description: Exhibit 32 - Ross
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-33] [2625103dfb599ea7ca08a70b356550dac0756f78229334d52d523daa3ac61c21a4ac3783d1375eb845bf8b3ee76ce6ebb91039c1c257618371d1281b514cc462]]
Document description: Exhibit 33 - Kidd
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-34] [127ffe6c2b6ad236ef0e5c17a9c1fb9e8c6ab88db41d0750342b51ce1bef8261e0e3d97b5f4c038298b4d0c1151add8f97f268321dc5952979f63afe986d073c]]
Document description: Exhibit 34 - Craft
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-35] [0ff4100cec342e4b32a5a226fbc6ed96e10f0e659326bf598359ebcc3d72523998a65e1213a6acb96222794999ec4e275da5500f4b029b723f6af31be18936d2]]
Document description: Exhibit 35 - Sanchez
Original filename:n/a

Electronic document Stamp:
[STAMP dcecfStamp_ID=1047317467 [Date=7/26/2021] [FileNumber=10449964-36] [9377cbc9f36d91202a500f728f21d69f0b7941f61af1ff4f05dcc10e4a976d9586587d1fc221ab15481ce85b1c5aebdfde1481e9cb8d112bc9848d225265f1c3]]