

Honorable Ronald B. Leighton

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

**PATRICIA THOMAS, JENNIFER  
DOWLING, KELLEY DYE, JR., and ROBERT  
GIBSON, individually and on behalf of all other  
similarly situated persons,**

**Plaintiffs,**

**v.**

**KELLOGG COMPANY and KELLOGG  
SALES COMPANY,**

**Defendants.**

**Case No. 3:13-cv-05136**

**PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF PLAINTIFFS'  
MOTION TO CONDITIONALLY  
CERTIFY A FLSA  
COLLECTIVE ACTION AND  
TO ISSUE NOTICE**

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**TABLE OF AUTHORITIES**

**Cases**

1

2 *Barrentine v. v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).....20

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4 *Beall v. Tyler Technologies, Inc.*, 208 Civ. 422 TJW, 2009 WL 3064689 (E.D. Tex. Sept. 23, 2009).....22

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6 *Bollinger v. Residential Capital, LLC*, 761 F.Supp.2d 1114 (W.D. Wash. 2011) ..... 12, 14, 18

7 *Brabazon v. Auroro Health Care, Inc.*, 10 Civ. 714, 2011 WL 1131097 (E.D. Wisc. March 28, 2011).....12

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9 *Campanelli v. Hershey Co.*, 08 Civ. 1862 BZ, 2011 WL 3583597 (N.D. Cal. May 4, 2011)..... 16, 17

10 *Carter v. Anderson Merchandisers LP*, 2010 WL 1946784 (C.D. Cal. May 11, 2010)..... 15

11 *Cerutti v. Frito Lay, Inc.*, 2:09 Civ. 00022-JFC, Doc 41 (W.D. Pa. June 15, 2011).....16

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15 *Foster v. Kraft Foods Group, Inc.*, 2:09 Civ. 00453-CB, Doc. 93 (W.D. Pa. Sept. 28, 2012)..... 17, 21

16 *Godfrey v. Chelan County PUD*, 06 Civ. 00332-JLQ, 2007 WL 2327582 (E.D. Wash. Aug. 10, 2007).....14

17 *Goudie v. Cable Communications, Inc.*, 08 Civ. 507-AC, 2008 WL 4628394 (D. Or. Oct. 14, 2008) .....22

18 *Graham v. Overland Solutions, Inc.*, 10 Civ. 672 BEN (BLM), 2011 WL 1769737 (S.D. Cal. May 9, 2011) .....23

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Getman & Sweeney, PLLC  
9 Paradies Lane  
New Paltz, NY 12561  
(845) 541-8880

1 *Hipp v. Liberty National*, 252 F. 3d 1208 (11<sup>th</sup> Cir. 2001) *cert. denied* 534 U.S.  
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2 *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D.N.Y. 1997) ..... 15

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4 *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F.Supp. 2d 1053 (N.D.  
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6 *Jordan v. Swindall*, 105 F.R.D. 45 (D. Ala.1985) ..... 19

7 *Joseph v. GMC*, 109 F.R.D. 635 (D. Col.1986) ..... 19

8 *Khadera v. ABM Industries Inc.*, 701 F.Supp.2d 1190 (W.D. Wash. 2010) ..... passim

9 *Kornbau v. Frito Lay North America, Inc.*, 4:11 Civ. 02630, 2012 WL 3778977  
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10 *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623 (E.D. Cal. 2009) ..... 18, 19

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14 *Lewis v. Wells Fargo & Co.*, 669 F.Supp. 2d 1124 (N.D. Cal. 2009) ..... 23

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16 *McKinzie v. Westlake Hardware, Inc.*, 09 Civ. 0796-W-FJG, 2010 WL 2426310  
17 (W.D. Mo. June 11, 2010) ..... 22

18 *Mevorah v. Wells Fargo Home Mortg., Inc.*, C 05-1175 MHP, 2005 WL 4813532  
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21 *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) ..... 14

22 *Morden v. T-Mobile USA, Inc.*, C05-2112RSM, 2006 WL 2620320 (W.D. Wash.  
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23 *Morden v. T-Mobile USA, Inc.*, No. C05-2112RSM, 2006 WL 2620320 (W.D.  
24 Wash. Sept. 12, 2006) ..... 12, 14, 15

25 *N.J. Dept. of Labor v. Pepsi-Cola*, No. A-918-00T5, 2002 WL 187400  
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26 *Overnight Motor Co. v. Missel*, 316 U.S. 572 (1942) ..... 20

1 *Parks v. Dick’s Sporting Goods*, 05 Civ. 6590 CJS, 2007 WL 913927 (W.D.N.Y.  
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2 *Raniere v. Citigroup Inc.*, 11 Civ. 2448, 2011 WL 5881926 (S.D.N.Y. Nov. 22,  
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4 *Ribot v. Farmers Ins. Group*, 11 Civ. 02404 DDP (FMOx), 2013 WL 3778784  
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5 *Rindfleisch v. Gentiva Health Services, Inc.*, 1:10 Civ. 03288-SCJ, Doc. 167  
6 (N.D. Ga. April 13, 2011).....19

7 *Sliger v. Prospect Mortg., LLC*, Civ. S–11–465 LKK/EFB, 2011 WL 3747947  
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8 *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943) .....20

9 *Stiller v. Costco*, 09 Civ. 2473-H (BLM), 2010 WL 5597272 (S.D. Cal. Dec. 13,  
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11 *Struck v. PNC Bank N.A.*, 2:11 Civ. 00982, 2013 WL 571849 (S.D. Ohio Feb.  
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12 *Troy v. Kehe Food Distributors, Inc.* No. C09-0785 JLR, Doc. 144 (W.D. Wash.  
13 Nov. 3, 2011) .....23

14 *Troy v. Kehe Food Distributors, Inc.*, 276 F.R.D. 642 (W.D. Wash. 2011) ..... 12, 14, 15, 17

15 *West v. Lowes Home Centers, Inc.*, 6:09-1310, 2010 WL 5582941 (W.D. La. Dec.  
16 16, 2010).....19

17 *Wren v. Rgis Inventory Specialists*, C-06-05778 JCS (CONSOLIDATED), 2007  
18 WL 4532218 (N.D. Cal. Dec. 19, 2007) .....18

19 *Zulewski v. Hershey Co.*, 11 Civ. 05117–KAW, 2013 WL 1748054 (N.D. Cal.  
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21 **Statutes**

22 29 U.S.C. § 202.....21

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1 **I. INTRODUCTION**

2 Kellogg<sup>1</sup> pays its Morning Foods Division Retail Sales Representatives (RSRs) and  
3 Snacks Division Territory Managers (TMs) a salary, but denies them overtime premium pay for  
4 overtime hours. TMs and RSRs regularly work far in excess of 40 in a workweek. This Fair Labor  
5 Standards Act case challenges Kellogg’s treatment of Plaintiffs as FLSA exempt and the resulting  
6 refusal to pay overtime.

7 Because Kellogg treats all its Retail Sales Representatives (RSR) and Territory Managers  
8 (TM) as salaried exempt employees, RSRs and TMs are similarly situated and entitled to receive  
9 notice about this case. Notice will ensure that employees similarly situated to Plaintiffs know  
10 about and may participate in this case. Early notice in FLSA cases serves several important goals.  
11 A collective action ensures that similarly situated employees can cheaply and efficiently litigate  
12 their similar claims. Since the FLSA requires that employees “opt in” to a represented action, and  
13 the statute of limitations runs until an employee opts in, early notice avoids prejudice to class  
14 members and prevents an employer from obtaining the benefit of what may be an illegal policy at  
15 the expense of its workers and competitors. A collective action also effectively uses judicial  
16 resources by concentrating similar claims in a single case. *Hoffmann-La Roche Inc. v. Sperling*,  
17 493 U.S. 165, 170 (1989).

18 Plaintiffs respectfully request that the Court conditionally certify this case as a collective  
19 action on behalf of two groups of employees. The FLSA RSR Collective Action Class is defined  
20 as:  
21  
22

23 All persons who have worked for Kellogg as a Retail Sales Representative (or  
24 similarly titled employee who police retail stores’ compliance with Kellogg’s  
25 contract) in the Morning Foods division, between three years prior to the filing of  
26 this case and the date of final judgment in this matter and who were paid on a

27 <sup>1</sup> Kellogg collectively refers to Defendants.

1 salary basis without compensation at the rate of time and one-half for all hours  
2 worked over 40 in a workweek.

3 The FLSA TM Collective Action Class is defined as:

4 All persons who have worked for Kellogg between three years prior to the filing of  
5 this case and the date of final judgment in this matter in the Snacks division and  
6 were required to move snack products from the storeroom to the store shelf and  
7 who were paid on a salary basis without compensation at the rate of time and one-  
half for all hours worked over 40 in a workweek. Job positions within this class  
include Territory Managers, Sales Rep DSD (Direct Store Delivery) and RSR  
(Retail Sales Representatives).

8 Plaintiffs move for an Order authorizing notice to the classes and requiring Kellogg to provide  
9 Plaintiffs with the names, last known address, employer ID number, telephone numbers, email  
10 addresses, and as to any class members' whose notice is undeliverable, partial Social Security  
11 Numbers (for skip tracing).<sup>2</sup>

## 12 **II. FACTS**

13 Kellogg manufactures and markets ready-to-eat cereal and convenience foods. Kellogg  
14 employs RSRs and TMs<sup>3</sup> to provide services to Kellogg's business customers throughout the  
15 United States. Kellogg's RSRs and TMs regularly work more than 40 hours in a workweek.  
16 Because Kellogg classifies RSRs and TMs as exempt from the FLSA, they are not paid any  
17 overtime premium pay at the rate of time and one-half their regular rate for each hour worked  
18 more than 40 in a workweek.  
19

### 20 **A. Kellogg's business**

21 Kellogg, founded in 1906, is based in Battle Creek, Michigan. Kellogg manufactures its  
22 products in 17 countries and markets ready-to-eat cereal and convenience foods in 180 countries.  
23  
24

25 <sup>2</sup> Exhibit 1 to Plaintiffs' motion is the proposed notice to be mailed to similarly situated  
26 employees.

27 <sup>3</sup> Kellogg also employs other job titles who perform the same work using the same pay structure,  
and who thus meet the class definition and are covered by this motion.

1 Ex. 3, Kellogg's 2011 Annual Report, p. 23. Kellogg maintains offices and distribution centers  
2 throughout the United States. *Id.* Kellogg's products are distributed to grocery stores and  
3 supermarkets. *Id.* These stores include Target, Wal-Mart, Fred Meyer, Safeway, and Kroger,  
4 among others. Kivett Dec. ¶ 8; Moody Dec. ¶ 8; Sayed Dec. ¶ 8; Thomas Dec. ¶ 8; Vivano Dec. ¶  
5 8

6 Kellogg's "principal products are ready-to-eat cereals and convenience foods, such as  
7 cookies, crackers, toaster pastries, cereal bars, fruit-flavored snacks, frozen waffles and veggie  
8 foods." Ex. 2, Annual Report, p. 23. Kellogg distributes its products through two primary  
9 divisions: "Morning Foods" and "Snacks." Ater Dec. ¶ 3; Dowling Dec. ¶ 3; Dye Dec. ¶ 3;  
10 Gibson Dec. ¶ 3; Jimenez Dec. ¶ 3; Kivett Dec. ¶ 4; Maxwell Dec. ¶ 3; Moody Dec. ¶ 3; Sayed  
11 Dec. ¶ 3; Scafede Dec. ¶ 3; Thomas Dec. ¶ 4; Viviano Dec. ¶ 3. The Morning Foods division  
12 distributes cereal products, Health & Wellness Bars/Shakes and frozen foods. *Id.* Products  
13 include, Fiber Plus, Frosted Flakes, Special K, Shakes, and Eggos. *Id.* The "Snacks" division  
14 distributes products such as Cheez-Its, Chips Deluxe Cookies, Vanilla Wafers, and Town House  
15 Crackers. *Id.*

16  
17  
18 **B. Kellogg employs RSRs and TMs throughout the country**

19 Over the past three years Kellogg's has employed RSRs and TMs to serve Kellogg's  
20 business customers throughout the United States. Ater Dec. ¶ 5; Dowling Dec. ¶ 5; Dye Dec. ¶ 5;  
21 Gibson Dec. ¶ 5; Jimenez Dec. ¶ 5; Kivett Dec. ¶ 6; Maxwell Dec. ¶ 5; Moody Dec. ¶ 5; Sayed  
22 Dec. ¶ 5; Scafede Dec. ¶ 5; Thomas Dec. ¶ 6; Viviano Dec. ¶ 5. For organizational purposes  
23 Kellogg divides the country into zones. Each zone is divided into districts. Within the zones and  
24 districts, Kellogg employs RSRs and TMs. Plaintiffs worked out of offices in the following  
25 Zones: Columbus, Ohio; Kansas City; Pacific Northwest; Rocky Mountain; Syracuse, New York;  
26

1 Knoxville, Indianapolis; Minnesota; Phoenix; and Tampa.<sup>4</sup> Plaintiffs are also aware that other  
2 RSRs and TMs worked in their zone and others throughout the country. *See e.g.*, Dye Dec. ¶¶ 5,  
3 7; Gibson Dec. ¶¶ 5, 7; Kivett Dec. ¶¶ 6, 13; Thomas Dec. ¶¶ 6, 13; Ex. 1 to Thomas Dec.

4 **C. The Plaintiffs' Jobs**

5 Kellogg's RSRs are responsible for monitoring Kellogg's products in Kellogg's  
6 customer's stores and TMs are responsible for moving product from customers' storerooms to the  
7 shelves. Employees in both positions work more than 40 hours in a workweek. However, Kellogg  
8 classifies RSRs and TMs as exempt from the overtime pay provisions, under the outside sales  
9 exemption, and Kellogg refuses to pay these employees overtime wages. Answer ¶ 8<sup>5</sup>. Plaintiffs  
10 expect to show that neither job position has the primary job duty of making sales, and thus that  
11 neither position is exempt under the FLSA.  
12

13 **1. Retail Sales Representatives (RSRs)**

14 RSRs have worked for Kellogg over the past three years in Kellogg's Morning Foods  
15 division. Kivett Dec. ¶ 7; Thomas Dec. ¶ 7. For example, Thomas was employed as a RSR from  
16 January 2007 to April 2012. Thomas Dec. ¶ 7. And Opt-in Plaintiff Kivett worked as a RSR from  
17 May 2001 until April 2012. Kivett Dec. ¶ 7.  
18  
19  
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21 <sup>4</sup> The Kansas City zone includes Kansas City and Omaha; the Pacific Northwest zone contains  
22 three districts that include Oregon, Utah, and Washington; the Rocky Mountain Zone contains  
23 three districts within Colorado and parts of Utah; the Knoxville Zone contains four districts that  
24 include Tennessee, Kentucky and Alabama; the Minnesota Zone contains districts in Minnesota,  
25 Wisconsin, South Dakota, and Iowa; the Phoenix Zones includes districts in the states of Arizona  
26 and Nevada. Ater Dec. ¶ 4; Dowling Dec ¶ 4; Jimenez Dec. ¶ 4; Kivett Dec. ¶ 5; Moody Dec. ¶ 4;  
27 Sayed Dec. ¶ 4; Scafede Dec. ¶ 4; Thomas Dec. ¶ 5; Viviano Dec. ¶ 4.

28 <sup>5</sup> Kellogg's answer also alleges that the administrative or executive exemptions may be asserted  
as a defense to the claims. However, neither exempt should apply here as Plaintiffs' primary job  
duties are not "administrative" and "executive".

1 Kellogg assigned each RSR a large number of stores. For example, Thomas was assigned  
2 approximately 80 stores and Kivett was assigned approximately 90 stores. Thomas Dec. ¶ 8;  
3 Kivett Dec. ¶ 8. RSRs generally visit each store once or twice a month. Thomas Dec. ¶ 8; Kivett  
4 Dec. ¶ 8. Examples of the stores that RSRs handle include Wal-Mart, Safeway, and Fred Meyer.  
5 Kivett Dec. ¶ 8; Thomas Dec. ¶ 8.

6 Named Plaintiff Thomas and opt-in Kivett performed the same job duties as other RSRs  
7 who worked in Kellogg's Morning Foods division. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. RSRs job  
8 responsibilities included monitoring the stores to make sure Kellogg's products were displayed  
9 properly, ensuring that Kellogg has access to the correct square footage on Kellogg's customer's  
10 shelves, building and stocking displays, and monitoring freshness dates to be sure product on the  
11 shelves was not out of date. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. RSRs, including Thomas and  
12 Kivett, verify and ensure that Kellogg's products are given their contractually pre-arranged shelf  
13 space in the stores. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. RSRs ensured that other companies did not  
14 infringe on Kellogg's space. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. RSRs also counted the number of  
15 boxes of cereal that faced out from the shelf. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. If Kellogg  
16 contracted for three boxes facing across the front of the shelf, RSRs ensured that at least three  
17 boxes faced out from the shelf. Kivett Dec. ¶ 9; Thomas Dec. ¶ 9. RSRs also confirmed that the  
18 boxes were on the correct shelf as defined by the contractually pre-arranged store schematic.  
19 Kivett Dec. ¶9; Thomas Dec. ¶ 9. And RSRs at times increased Kellogg's share of the shelf by  
20 putting Kellogg product in spaces used by competing companies. Kivett Dec. ¶ 9; Thomas Dec. ¶  
21 9.  
22  
23  
24

25 Thomas, Kivett, and other RSRs' primary job was not to sell Kellogg's products. Kivett  
26 Dec. ¶ 10; Thomas Dec. ¶ 10. Kellogg employed other employees to make sales. Kivett Dec. ¶

1 10; Thomas Dec. ¶ 10. Other Kellogg employees negotiated contracts with companies such as  
2 Wal-Mart, Fred Meyer, and Safeway about the dollar volume of product to be sold, the products  
3 that were to be promoted, the product's price, how much shelf space Kellogg would receive, and  
4 the placement of the product on the shelves. Kivett Dec. ¶ 10; Thomas Dec. ¶ 10.

5 Making sales and taking orders was not RSRs' primary duty. The only sales activities that  
6 RSRs, including Thomas and Kivett, performed were to ask store managers for special  
7 promotions (such as to build and place a display or run a special product or a new item) on a  
8 periodic basis. Kivett Dec. ¶ 11; Thomas Dec. ¶ 11. On the occasions when managers were  
9 available to talk, these conversations amounted to only a few minutes duration. Kivett Dec. ¶ 11;  
10 Thomas Dec. ¶ 11.

## 12 2. Territory Managers (TMs)

13 Territory Managers worked in the Kellogg's Snacks division, which includes Keebler  
14 products. Ater Dec. ¶ 6; Dowling Dec. ¶ 6; Dye Dec. ¶ 6; Gibson Dec. ¶ 6; Jimenez Dec. ¶ 6;  
15 Kivett Dec. ¶ 12; Maxwell Dec. ¶ 6; Moody Dec. ¶ 6; Sayed Dec. ¶ 6; Scafede Dec. ¶ 6; Thomas  
16 Dec. ¶ 12; Viviano Dec. ¶ 6. For example, Named Plaintiff Dowling worked as a TM from May  
17 2009 to March 2013, Named Plaintiff Dye worked as a TM from approximately 2000 to October  
18 2012, Named Plaintiff Thomas worked as a TM from April 2012 to February 2013, Named  
19 Plaintiff Gibson worked as a TM from approximately November 2002 to February 2008 and  
20 again from November 2009 to April 2011. Dowling Dec. ¶ 6; Dye Dec. ¶ 6; Gibson Dec. ¶ 6;  
21 Thomas Dec. ¶ 12.<sup>6</sup> Because Kellogg restructured the Snack and Morning Foods divisions, there  
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24  
25 <sup>6</sup> Other opt-in plaintiffs also worked as TMs over the last three years. Opt-in Kivett worked as a  
26 TM from April 2012 to April 2013. Kivett Dec. ¶ 12. Opt-in Maxwell worked as a TM from June  
27 of 2006 to December 2011. Jimenez Dec. ¶ 6. Opt-in Moody worked as a TM from approximately

1 are different names for TMs, but they all have the same or substantially similar job duties. Ater  
2 Dec. ¶ 6; Dowling Dec. ¶ 6; Dye Dec. ¶ 6; Gibson Dec. ¶ 6; Jimenez Dec. ¶ 6; Kivett Dec. ¶ 12;  
3 Maxwell Dec. ¶ 6; Moody Dec. ¶ 6; Sayed Dec. ¶ 6; Scafede Dec. ¶ 6; Thomas Dec. ¶ 12;  
4 Viviano Dec. ¶ 6. These names included Sales Rep DSD (Direct Store Delivery) and RSR (Retail  
5 Sales Representatives). *Id.* Even though Kellogg used different job titles for a TM, they all  
6 performed the same primary job – moving Kellogg’s snack products from the customer’s  
7 storeroom to the shelf.

8  
9 TMs are assigned fewer stores than RSRs. TMs are assigned between 6 and 18 stores. Ater  
10 Dec. ¶ 8; Dowling Dec. ¶ 8; Dye Dec. ¶ 8; Gibson Dec. ¶ 8; Jimenez Dec. ¶ 8; Kivett Dec. ¶ 14;  
11 Maxwell Dec. ¶ 8; Moody Dec. ¶ 8; Sayed Dec. ¶ 8; Scafede Dec. ¶ 8; Thomas Dec. ¶ 14;  
12 Viviano Dec. ¶ 8. Some examples of the stores that TMs visit include Wal-Mart, Price Chopper,  
13 Hy-Vee, Safeway, Target, and Top Foods. *Id.* TMs visit each store approximately one to ten  
14 times a week. *Id.* Sometimes, TMs visit a store more frequently depending on the store’s needs.  
15 *Id.*

16  
17 The Named Plaintiffs and opt-ins performed the same job duties as Kellogg’s other TMs.  
18 Ater Dec. ¶ 9; Dowling Dec. ¶ 9; Dye Dec. ¶ 9; Gibson Dec. ¶ 9; Jimenez Dec. ¶ 9; Kivett Dec. ¶  
19 15; Maxwell Dec. ¶ 9; Moody Dec. ¶ 9; Sayed Dec. ¶ 9; Scafede Dec. ¶ 9; Thomas Dec. ¶ 15;  
20 Viviano Dec. ¶ 9. TMs take responsibility for pallets of snacks that are shipped to each store,  
21 moving the product from the stock room to the store shelf. To do this, TMs job responsibilities  
22 include breaking down pallets of product in the store room, moving the needed product to the  
23 floor of the store, stocking product on store shelves, policing and enforcing shelf space and  
24

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25 October 2011 through April 2012. Moody Dec. ¶ 6. Opt-in Sayed worked as a TM from  
26 approximately May 2010 to March 2012. Sayed Dec. ¶ 6. Opt-in Scafede worked as a TM from  
27 2006 to April 2013. Scafede Dec. ¶ 6. Opt- in Viviano worked as a TM from approximately 2007  
28 to April 2012. Viviano Dec. ¶ 6.

1 product placement, making sure that the product is rotated forward on the shelf so it would be  
2 sold before the product was out of date, monitoring how much product is in Kellogg's customer's  
3 storerooms, managing damaged products, and letting Kellogg know when and how much product  
4 to replenish for a particular store. *Id.*

5 Like RSRs, a TM's primary job was not to sell Kellogg's products. Kellogg employed  
6 other employees to make sales of its snack products. For example, Kellogg account  
7 representatives negotiated contracts with national and regional chain stores such as Wal-Mart,  
8 Kroger, and Safeway about the dollar volume of snack product, the products to promote, the  
9 product's price, how much shelf space Kellogg received, and the placement of the product on the  
10 shelves. Ater Dec. ¶ 10; Dowling Dec. ¶ 10; Dye Dec. ¶ 10; Gibson Dec. ¶ 10; Jimenez Dec. ¶  
11 10; Kivett Dec. ¶ 16; Maxwell Dec. ¶ 10; Moody Dec. ¶ 10; Sayed Dec. ¶ 10; Scafede Dec. ¶ 10;  
12 Thomas Dec. ¶ 16; Viviano Dec. ¶ 10.

14 While TMs had some responsibility to supervise merchandisers who also moved product  
15 from stockroom to store shelves, TMs did not supervise 80 or more hours of merchandiser time in  
16 every pay week.<sup>7</sup> Ater Dec. ¶ 12; Dowling Dec. ¶ 12; Dye Dec. ¶ 12; Gibson Dec. ¶ 12; Jimenez  
17 Dec. ¶ 12; Kivett Dec. ¶ 18; Maxwell Dec. ¶ 12; Moody Dec. ¶ 12; Sayed Dec. ¶ 12; Scafede Dec.  
18 ¶ 12; Thomas Dec. ¶ 18; Viviano Dec. ¶ 12.

20 TMs perform nominal sales work. The only sales activities that TMs performed were to  
21 ask store managers for special promotions such as to place a display or special product, if that  
22 even counts as sales.<sup>8</sup> TMs asked for special promotions when a manager was available or if the  
23 TM had time to speak with the manager. Ater Dec. ¶ 11; Dowling Dec. ¶ 11; Dye Dec. ¶ 11;

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25 <sup>7</sup> TMs are therefore not exempt under the managerial exemption. 29 C.F.R. §541.100 et seq.; 29  
26 U.S.C. §213(a)(1).

27 <sup>8</sup> To the extent that displays would be stocked with product already in the stockroom, obtaining  
28 permission to place an extra display would be promotional and not sales activity.

1 Gibson Dec. ¶ 11; Jimenez Dec. ¶ 11; Kivett Dec. ¶ 17; Maxwell Dec. ¶ 11; Moody Dec. ¶ 11;  
2 Sayed Dec. ¶ 11; Scafede Dec. ¶ 11; Thomas Dec. ¶ 17; Viviano Dec. ¶ 11. TMs generally spent  
3 no more than 45 minutes to 5 hours a week trying to upsell additional product with local store  
4 managers. These activities thus took a very small amount of time in comparison to the time spent  
5 performing all other job duties. Ater Dec. ¶ 16; Dowling Dec. ¶ 16; Dye Dec. ¶ 16; Gibson Dec. ¶  
6 16; Jimenez Dec. ¶ 16; Kivett Dec. ¶ 22; Maxwell Dec. ¶ 16; Moody Dec. ¶ 16; Sayed Dec. ¶ 16;  
7 Scafede Dec. ¶ 16; Thomas Dec. ¶ 22; Viviano Dec. ¶ 16. Sales was not TM's primary job duty.  
8

9 **D. RSRs and TMs worked more than 40 hours in a workweek**

10 RSRs and TMs regularly worked more than 40 hours in a week. Amended Compl. ¶¶ 26,  
11 32, 37, 42; Ater Dec. ¶ 18; Dowling Dec. ¶ 18; Dye Dec. ¶ 18; Gibson Dec. ¶ 18; Jimenez Dec. ¶  
12 18; Kivett Dec. ¶ 24; Maxwell Dec. ¶ 18; Moody Dec. ¶ 18; Sayed Dec. ¶ 18; Scafede Dec. ¶ 18;  
13 Thomas Dec. ¶ 24; Viviano Dec. ¶ 18. RSRs and TMs, including the Named Plaintiffs and opt-in  
14 Plaintiffs, had to work overtime hours to keep up with their work. Ater Dec. ¶ 18; Dowling Dec. ¶  
15 18; Dye Dec. ¶ 18; Gibson Dec. ¶ 18; Jimenez Dec. ¶ 18; Kivett Dec. ¶ 24; Maxwell Dec. ¶ 18;  
16 Moody Dec. ¶ 18; Sayed Dec. ¶ 18; Scafede Dec. ¶ 18; Thomas Dec. ¶ 24; Viviano Dec. ¶ 18. For  
17 example, TMs, including the Named Plaintiffs and opt-in Plaintiffs, worked 55 to 72 hours or  
18 more per week. Similarly, RSRs, including Thomas and Kivett, regularly worked more than 43  
19 hours a week. Kivett Dec. ¶ 25; Thomas Dec. ¶ 25.  
20

21 Overtime hours are common for RSRs and TMs and it is widely known to be  
22 impracticable to do the job in forty hours or less per week. Ater Dec. ¶ 21; Dowling Dec. ¶ 21;  
23 Dye Dec. ¶ 21; Gibson Dec. ¶ 21; Jimenez Dec. ¶ 21; Kivett Dec. ¶ 27; Maxwell Dec. ¶ 21;  
24 Moody Dec. ¶ 21; Sayed Dec. ¶ 21; Scafede Dec. ¶ 21; Thomas Dec. ¶ 27; Viviano Dec. ¶ 21.  
25 While RSRs and TMs worked more than 40 hours in a workweek, they were not given a time card  
26  
27

1 or time sheet to record their work hours. Ater Dec. ¶ 22; Dowling Dec. ¶ 22; Dye Dec. ¶ 22;  
2 Gibson Dec. ¶ 22; Jimenez Dec. ¶ 22; Kivett Dec. ¶ 28; Maxwell Dec. ¶ 22; Moody Dec. ¶ 22;  
3 Sayed Dec. ¶ 22; Scafede Dec. ¶ 22; Thomas Dec. ¶ 28; Viviano Dec. ¶ 22. In another lawsuit  
4 against Kellogg, RSRs and TMs alleged that they worked approximately 50 hours per week and  
5 the parties reached a settlement based on seven overtime hours per week. Ex. 3, *Engelsen v.*  
6 *Keebler Company*, No. 02 CC 00305, pp.4, 7 (Orange County Superior Court May 14, 2003).<sup>9</sup>  
7 The long hours of work that TMs and RSRs endure should come as no surprise. Because Kellogg  
8 pays TMs and RSRs a salary without overtime premium pay, each additional hour of work is  
9 effectively free labor to Kellogg.  
10

11 **E. RSRs and TMs are not paid overtime premium pay for their overtime hours**

12 Kellogg does not pay RSRs and TMs overtime wages at the rate of time and one-half the  
13 regular rate for working more than 40 hours in a workweek. Ater Dec. ¶ 23; Dowling Dec. ¶ 23;  
14 Dye Dec. ¶ 23; Gibson Dec. ¶ 23; Jimenez Dec. ¶ 23; Kivett Dec. ¶ 29; Maxwell Dec. ¶ 23;  
15 Moody Dec. ¶ 23; Sayed Dec. ¶ 23; Scafede Dec. ¶ 23; Thomas Dec. ¶ 29; Viviano Dec. ¶ 23.  
16 Instead Kellogg paid RSRs and TMs, including Thomas, Ater, Dowling, Dye, Gibson, Jimenez,  
17 Kivett, and Maxwell, Moody, Sayed, Scafede, and Viviano a salary and some bonuses. *Id.*  
18 Kellogg classified Plaintiffs as exempt from the overtime pay provisions of the FLSA. Even  
19 though Kellogg settled a class action for RSRs and TMs in *Engelsen v. Keebler, supra* on a class  
20 basis awarding them 7 hours of overtime hours per week, Kellogg has not changed its practices  
21 since that settlement. Ex. 5, Keebler Joint Application for Preliminary Approval of Class Action  
22 Settlement, p. 4.  
23  
24

25  
26 <sup>9</sup> At the time Kellogg Company owned Keebler Company. Ex. 8, Kellogg website A Historical  
27 Overview.

1 **III. ARGUMENT**

2 Courts in this District follow a two-stage procedure for determining whether a case should  
3 proceed as an FLSA collective action. *See Troy v. Kehe Food Distributors, Inc.*, 276 F.R.D. 642,  
4 649 (W.D. Wash. 2011). The first step is conducted early in the litigation when the court has  
5 limited evidence regarding the “similarly situated” issue. The court grants “conditional”  
6 certification at this stage only for the purpose of issuing notice, so that class members can  
7 preserve their federal overtime claims, and for thereafter conducting discovery. *Troy*, 276 F.R.D.  
8 at 649. Because at this stage the court has minimal evidence, the court applies a lenient standard  
9 which typically results in ‘conditional certification’ of a collective class. *Khadera v. ABM*  
10 *Industries Inc.*, 701 F.Supp.2d 1190 (W.D. Wash. 2010); *Morden v. T-Mobile USA, Inc.*, No.  
11 C05-2112RSM, 2006 WL 2620320, \*2 (W.D. Wash. Sept. 12, 2006). Courts rely on the  
12 complaint and supporting declarations to meet this lenient standard. *Bollinger v. Residential*  
13 *Capital, LLC*, 761 F.Supp.2d 1114, 1119 (W.D. Wash. 2011); *Morden*, 2006 WL 2620320, \*2  
14 (W.D.Wash. Sept. 12, 2006). At this stage, “the Court requires little more than substantial  
15 allegations, supported by declarations or discovery, that the putative class members were together  
16 the victims of a single decision, policy, or plan.” *Troy*, 276 F.R.D. at 649 (citations and internal  
17 quotations omitted). If the district court conditionally certifies the class, potential class members  
18 are given notice and the opportunity to opt-in. *Troy*, 276 F.R.D. at 658; *Bollinger*, 761 F.Supp.2d  
19 at 1119 (W.D. Wash. 2011).

20 The second stage review occurs after discovery is complete and is typically precipitated by  
21 a motion for decertification filed by the defendant. *Troy*, 276 F.R.D. at 649; *Bollinger*, 761  
22 F.Supp.2d at 1119. If the additional claimants are similarly situated, the district court allows the  
23 collective action to proceed. If the claimants are not similarly situated, the district court decertifies  
24  
25  
26  
27

1 the class and opt-in plaintiffs are dismissed without prejudice. *Khadera*, 701 F.Supp.2d at 1194  
2 (W.D. Wash. 2010); *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1218 (11th Cir.  
3 2001) *cert. denied* 534 U.S. 1127. This determination takes place on the fuller record developed  
4 after discovery is complete.

5 The reason for this two-step process with its relatively liberal first-stage standard for  
6 assessing the question of whether class members are “similarly situated” arises because, unlike a  
7 Rule 23 class action, the statute of limitations is not tolled for putative members of an FLSA class  
8 *until they affirmatively opt into the action*. 29 U.S.C. § 216(b). **Thus, it is critical that notice of**  
9 **the right to opt-in issue promptly after the filing of the case if there is a colorable basis for**  
10 **believing the class members may be similarly situated.** See *Thiessen v. GE Capital Corp.*, 267  
11 F.3d 1095, 1105 (10th Cir. 2001); *Hipp*, 252 F.3d at 1216-1217. Thus the two-stage procedure  
12 protects the interests of workers’ in ensuring they receive prompt and timely notice of their right  
13 to vindicate their FLSA rights while simultaneously ensuring that only claims on behalf of  
14 genuinely similarly situated workers will be handled in the action.  
15

16 Here, Plaintiffs meet the lenient first stage standard. Plaintiffs are “similarly situated” with  
17 respect to Kellogg’s common policies and practices. RSRs and TMs perform similar job duties,  
18 RSRs and TMs work more than 40 hours in a workweek, and Kellogg pays RSRs and TMs a  
19 salary without time and one half and treats them as exempt from the FLSA. Plaintiffs support  
20 their allegations with testimony and facts sufficient to meet the limited standard for conditional  
21 certification and notice.  
22

23 **A. Courts send FLSA notices early to avoid prejudicing Plaintiffs’ rights.**

24 Section 216(b) of the FLSA provides that a person may maintain an action on “behalf of  
25 himself or themselves and other employees similarly situated. No employee shall be a party  
26 plaintiff to any such action unless he gives his consent in writing to become such a party and such  
27

1 consent is filed in the court in which the action is brought.” 29 U.S.C. § 216(b). Thus, there are  
2 only two requirements to proceed as a collective action: (1) plaintiffs must be “similarly situated”;  
3 and (2) a current or former employee must consent in writing to join in the suit. This latter  
4 requirement means that a collective action follows an “opt-in” rather than an “opt-out” class  
5 procedure. *See Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995); *Morden*,  
6 2006 WL 2620320, \*2 (W.D. Wash. Sept. 12, 2006). “Certification” at this stage only means that  
7 notice will be issued to make putative class members.  
8

9 Courts facilitate notice to make similarly situated employees aware of the action and their  
10 right to participate, thereby allowing employees and the Courts to benefit from litigation of  
11 similar claims in a single case. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172  
12 (1989). Collective actions allow employees to pool expenses and efficiently litigate claims, and  
13 allow Courts to avoid a multiplicity of suits. *Id.* Collective actions also afford current employees  
14 and others who might be unwilling or unable to secure private counsel to sue wealthy companies  
15 on their own. To facilitate these purposes, Courts regularly certify collective actions and ordering  
16 notice to be sent to the class. *See, e.g., Troy*, 276 F.R.D. at 649; *Bollinger*, 761 F.Supp.2d 1114;  
17 *Khadera*, 701 F.Supp.2d 1190 (W.D. Wash. 2010); *Godfrey v. Chelan County PUD*, 06 Civ.  
18 00332-JLQ, 2007 WL 2327582 (E.D. Wash. Aug. 10, 2007); *Morden*, 2006 WL 2620320 (W.D.  
19 Wash. Sept. 12, 2006). A Court supervised notice also allows the Court to ensure that employees  
20 receive information that is “timely, accurate, and informative” as well as neutral. *Sperling*, 493  
21 U.S. at 172. At this point, the terms of such notices are standard.  
22

23 Although the FLSA does not define the term “similarly situated”, courts have generally  
24 agreed that Plaintiffs must allege that the putative class members were injured as a result of a  
25 policy or plan that violated the law. *See Troy*, 276 F.R.D. at 649. As then-District Court Judge  
26  
27

1 Sotomayor explained:

2 Neither the FLSA nor its implementing regulations define the term “similarly  
3 situated.” However, courts have held that plaintiffs can meet this burden by  
4 making a modest factual showing sufficient to demonstrate that they and potential  
5 plaintiffs together were victims of a common policy or plan that violated the law.

6 *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y. 1997).

7 Here, Plaintiffs are similarly situated insofar as each class member had similar job duties,  
8 worked more than 40 hours per week, was paid a salary and bonus without time and one-half  
9 premium pay, and was classified as “exempt” from the FLSA.

10 **B. Courts regularly conditionally certify FLSA misclassification cases.**

11 This District regularly conditionally certifies FLSA collective actions in misclassification  
12 cases. *Troy*, 276 F.R.D. at 649; *Bollinger*, 761 F.Supp.2d at 1119 (conditionally certifying class of  
13 underwriter employees misclassified as exempt); *Morden v. T-Mobile USA, Inc.*, No. C05-  
14 2112RSM, 2006 WL 2620320, \*3 (W.D. Wash. Sept. 12, 2006) (conditionally certified class of  
15 Account Representatives and Territory Representatives that were classified as exempt from the  
16 FLSA). Similarly, this District, Courts in this Circuit, and Courts throughout the country regularly  
17 award conditional certification in misclassification cases. *Morden v. T-Mobile USA, Inc.*, C05-  
18 2112RSM, 2006 WL 2620320 (W.D. Wash. Sept. 12, 2006)(granting conditional certification  
19 where “defendant wilfully classified these employees as exempt from the FLSA”); *Harris v.*  
20 *Vector Marketing Corp.*, 716 F.Supp.2d 835, 844 (N.D. Cal. 2010) (granting conditional  
21 certification for class of sales representatives that were classified as independent contractors);  
22 *Carter v. Anderson Merchandisers LP*, 2010 WL 1946784, \*5 (C.D. Cal. May 11, 2010) (granting  
23 final collective action certification where all sales representatives were classified as exempt);  
24 *Raniere v. Citigroup Inc.*, 11 Civ. 2448, 2011 WL 5881926, \*24 (S.D.N.Y. Nov. 22, 2011)  
25 (evidence of a misclassification supports that defendants treated class members with uniform pay  
26  
27

1 and employment-related policies). Indeed, the Courts have certified collective actions for  
2 analogous positions including other national food manufacturers. For example, in a case similar to  
3 this one, the Northern District of California conditionally certified a nationwide FLSA collective  
4 action against the Hershey Company on behalf of a group of RSRs that were classified as exempt  
5 from the FLSA. There, Hershey's RSRs stocked shelves, sorted product, built displays, and  
6 tagged Hershey products. *Campanelli v. Hershey Co.*, 08 Civ. 1862 BZ, 2010 WL 3219501, \*\*2-  
7 5 (N.D. Cal. Aug. 13, 2010); *see also, Campanelli v. Hershey Co.*, 08 Civ. 1862 BZ, 2011 WL  
8 3583597 (N.D. Cal. May 4, 2011)(confidential settlement on behalf 120 plaintiffs).  
9

10 Other food manufacturing companies that employ employees similar to Kellogg's RSRs  
11 and TMs have faced similar lawsuits alleging the employees were misclassified. For example,  
12 Pepsi was sued for its failure to pay overtime wages under both state and federal law. *Leigh v.*  
13 *Bottling Group, LLC*, 8:10 Civ. 00218-DKC, Doc. 47 (D. Md. Feb. 10, 2012) (\$625,066  
14 settlement on behalf of Pepsi sales representatives who would take orders, stock shelves, create  
15 displays, and stock shelves and not paid overtime wages); *see also N.J. Dept. of Labor v. Pepsi-*  
16 *Cola*, No. A-918-00T5, 2002 WL 187400 (N.J.Super.A.D. Jan. 31, 2002); Ex. 6, Sherri Day,  
17 *Pepsi Bottling Settles Case On Overtime*, N.Y. Times (March 14, 2003) (\$17.36 million  
18 settlement on behalf of 700 employees who "deliver and set out for retail display Pepsi products  
19 to convenience stores, gas stations, and other small markets" or "put Pepsi's products on display  
20 on the sites of large customers, primarily large chain supermarkets" and were not paid overtime  
21 wages under New Jersey law). Similarly, Frito Lay and Kraft settled overtime lawsuits for  
22 improper payment of overtime wages. *Cerutti v. Frito Lay, Inc.*, 2:09 Civ. 00022-JFC, Doc 41, ¶  
23 1.7 and 2 (W.D. Pa. June 15, 2011) (\$1,575,000 class settlement on behalf of RSRs who worked  
24 in Pennsylvania who were improperly paid overtime under the FLSA and Pennsylvania state  
25  
26  
27

1 law); *Foster v. Kraft Foods Group, Inc.*, 2:09 Civ. 00453-CB, Doc. 93, ¶¶ 1.7, 2 (W.D. Pa. Sept.  
2 28, 2012) (\$1,750,000.00 class settlement on behalf of 301 RSRs who worked in Pennsylvania  
3 and were improperly paid overtime under the FLSA and Pennsylvania state law); *see also*  
4 *Campanelli*, 2011 WL 3583597 (N.D. Cal. May 04, 2011). Even Kellogg resolved a  
5 misclassification case for RSRs and TMs on a class basis in California. *Engelsen v. Keebler*  
6 *Company*, No. 02 CC 00305 (Orange County Superior Court Oct. 17, 2002); Ex. 7, *Keebler*  
7 settlement (class consisting of Territory Managers and Retail Sales Representatives).  
8

9 **C. This case meets the lenient standard for conditional certification.**

10 Plaintiffs and the class they seek to represent are “similarly situated”. As explained in  
11 Plaintiffs’ declarations, Kellogg employed all of the putative class members as RSRs or TMs. All  
12 RSRs perform the same work, i.e., policing product display, ensuring the correct square footage  
13 on Kellogg’s customer’s shelves, building and stocking displays, and monitoring product  
14 freshness dates. All TMs also perform the same essential work, i.e., moving Kellogg’s products  
15 from the storeroom to the store shelf. *Pl. Decls.* All of the putative class members regularly  
16 worked more than 40 hours in a workweek. *Id.* All TMs and RSRs were paid a salary and bonus  
17 without time and one-half premium pay for overtime hours. *Id.* All were treated by Kellogg as  
18 FLSA exempt under the outside sales exemption and thus denied overtime premium pay at the  
19 rate of time and one-half the regular rate. *Id.* The failure to pay overtime premium pay to workers  
20 with similar job responsibilities makes workers “similarly situated” for FLSA purposes. *Troy*,  
21 276 F.R.D. at 649 (merchandisers and sales representatives are similarly situated because they  
22 have similar job duties, they are paid the same, and treated as exempt from the FLSA);  
23 *Campanelli*, 2010 WL 3219501 (N.D. Cal. Aug. 13, 2010) (RSRs had the same job title,  
24 description, the same general job duties, and a uniform compensation plan based on a salary and  
25  
26  
27

1 bonuses); *Bollinger*, 761 F.Supp.2d at 1121 (plaintiffs were similarly situated because they  
2 performed same job duties, employer had a policy of not paying overtime, and the employer  
3 treated the class as exempt from the FLSA).

4 All RSRs and TMs have similar job duties, worked more than 40 hours, were paid a salary  
5 and bonus without time and one-half premium pay, and were classified as “exempt” from the  
6 FLSA. Conditional certification is appropriate.

7  
8 **D. The decision to send notice focusses is on the Plaintiffs allegations, not  
Kellogg’s disputed facts.**

9 Conditional certification focusses on Plaintiffs’ allegations. The allegations may be  
10 supported by the Plaintiffs’ Complaint, Plaintiffs’ declarations, and any supporting documents.  
11 *Khadera*, 701 F.Supp.2d at 1195 (W.D. Wash. 2010); *Sliger v. Prospect Mortg., LLC*, Civ. S–11–  
12 465 LKK/EFB, 2011 WL 3747947, \*2 (E.D. Cal. Aug. 24, 2011) citing *Kress v.*  
13 *PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 628 (E.D. Cal. 2009); *see also, Stiller v. Costco,*  
14 *09 Civ. 2473-H (BLM)*, 2010 WL 5597272 (S.D. Cal. Dec. 13, 2010); *Misra v. Decision One*  
15 *Mortg. Co., LLC*, 673 F.Supp.2d 987, 993 (C.D. Cal. June 23, 2008); *Wren v. Rgis Inventory*  
16 *Specialists*, C-06-05778 JCS (CONSOLIDATED), 2007 WL 4532218, \*4 (N.D. Cal. Dec. 19,  
17 2007). Here, Plaintiffs’ evidence consists of the Complaint, Plaintiffs’ numerous declarations and  
18 several exhibits. That is more than sufficient to establish that the class is “similarly situated”.  
19

20  
21 Employers frequently oppose notice by introducing “happy camper” declarations or  
22 declarations by supervisors supporting their defenses to the action. Plaintiffs counsel are aware  
23 that Kellogg has been obtaining happy camper declarations for its response to this motion. Any  
24 attempts by Kellogg to argue the merits of Plaintiffs’ claims and offer their own version of the  
25 facts is simply irrelevant at this stage. It is an attempt to leap forward to the second stage inquiry  
26 and ignores this District’s first-stage analysis. The law throughout the country is that courts  
27

1 should not engage in factual disputes at the first-stage inquiry. *Khadera*, 701 F.Supp.2d at 1195  
2 (W.D.Wash. 2010); *Sliger*, 2011 WL 3747947, \*2 (E.D. Cal. Aug. 24, 2011) citing *Kress v.*  
3 *PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 628 (E.D. Cal. 2009); *see also, Struck v. PNC*  
4 *Bank N.A.*, 2:11 Civ. 00982, 2013 WL 571849, \*4 (S.D. Oh Feb. 13,2013); *Stiller*, 2010 WL  
5 5597272; *Misra*, 673 F.Supp.2d at 993; *Wren*, 2007 WL 4532218, \*4.

6 Courts around the country have consistently held that “happy camper” declarations are of  
7 no value in deciding whether a FLSA class should be certified. Such declarations go to the merits  
8 of the claims and like other factual disputes are appropriately considered after discovery.  
9 *Khadera*, 701 F.Supp.2d at 1195 (W.D.Wash. 2010) (declarations for current employees refuting  
10 plaintiffs’ allegation were not considered because it went to the merits of the claims, not the  
11 appropriateness of notice); *Struck*, 2013 WL 571849, \*4 (S.D. Ohio Feb. 13,2013); *Creely v. HCR*  
12 *ManorCare, Inc.*, 789 F.Supp. 2d 819, 840 (N.D. Ohio 2011); *West v. Lowes Home Centers, Inc.*,  
13 6:09-1310, 2010 WL 5582941, \*8 (W.D. La. Dec. 16, 2010); *see also Cohen v. Gerson Lehrman*  
14 *Group, Inc.*, 09 Civ. 4352 (PKC), 2010 WL 92484, \*11 (S.D.N.Y. Jan. 7, 2010); *Hipp v. Liberty*  
15 *Nat’l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Rindfleisch v. Gentiva Health Services,*  
16 *Inc.*, 1:10 Civ. 03288-SCJ, Doc. 167, pp. 7-8 (N.D. Ga. April 13, 2011) (Court refused to rely on  
17 employee declarations that alleged that they were properly compensated); *Parks v. Dick’s*  
18 *Sporting Goods*, 05 Civ. 6590 CJS, 2007 WL 913927, \*4 (W.D.N.Y. Mar. 23, 2007); *Joseph v.*  
19 *GMC*, 109 F.R.D. 635, 640 (D. Col.1986) (“The mere fact that some class members may not wish  
20 to become members of the class or pursue claims against GM does not indicate that their interests  
21 are antagonistic to those of the named plaintiffs or the remainder of the class, so that class action  
22 treatment would be inappropriate.”); *Jordan v. Swindall*, 105 F.R.D. 45, 48 (D.Ala.1985)  
23 (“Evidence that some female police officers do not believe they are victims of sex discrimination  
24  
25  
26  
27

1 is beside the point of class certification"). Many courts also disregard such declarations from  
2 current employees because of the likelihood that they were coerced. *In re Wells Fargo Home*  
3 *Mortg. Overtime Pay Litig.*, 527 F.Supp.2d 1053, 1060-61 (N.D. Cal. 2007); *Mevorah v. Wells*  
4 *Fargo Home Mortg., Inc.*, C 05-1175 MHP, 2005 WL 4813532, \*4 (N.D. Cal. Nov. 17, 2005) ("it  
5 is still reasonable to assume that an employee would feel a strong obligation to cooperate with his  
6 or her employer in defending against a lawsuit."); *Longcrier v. HL-A Co, Inc.*, 595 F. Supp. 2d  
7 1218 (S.D. Ala. Dec. 10, 2008); *Belt v. Emcare, Inc.*, 299 F.Supp. 2d 664, 668 (E.D. Tex. 2003)  
8 ("where the absent class member and the defendant are involved in an ongoing business  
9 relationship, such as employer-employee, any communications are more likely to be coercive.").  
10 Of course, another benefit to employers obtaining "happy camper" declarations is that the mere  
11 fact of giving a declaration chills participation *ab initio* by employees who feel they may not then  
12 join the case. Such chilling reduces the employer's exposure regardless of whether the Court  
13 ignores the declaration. Any declarations that Kellogg's submits from current and former  
14 employees should be utterly disregarded.  
15

16  
17 **E. Public policy supports conditional certification**

18 The FLSA was designed in order "to ensure that each employee covered by the Act would  
19 receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of  
20 'overwork' as well as 'underpay'". *Barrentine v. v. Arkansas-Best Freight System, Inc.*, 450 U.S.  
21 728, 739 (1981). The FLSA's overtime pay provisions are meant to reduce an employee's work  
22 hours in order to spread employment and maintain the employee's health. *Southland Gasoline Co.*  
23 *v. Bayley*, 319 U.S. 44, 48 (1943), *citing Overnight Motor Co. v. Missel*, 316 U.S. 572, 576-7  
24 (1942). Congress sought not only to ensure proper payment of overtime wages to employees but  
25 to eliminate "unfair method[s] of competition in commerce". 29 U.S.C. § 202(a)(3). Many of  
26  
27

1 Kellogg's competitors, like Frito-Lay, Hershey, Kraft, and Pepsi pay their RSRs and TMs  
 2 premium overtime wages. *See e.g., Kornbau v. Frito Lay North America, Inc.*, 4:11 Civ. 02630,  
 3 2012 WL 3778977 (N.D. Ohio Aug. 30, 2012) (Frito Lay pays RSRs overtime); *Zulewski v.*  
 4 *Hershey Co.*, 11 Civ. 05117-KAW, 2013 WL 1748054, \*1 (N.D. Cal. April 23, 2013)  
 5 (reclassified RSRs as nonexempt from the FLSA in January 2012); *Foster v. Kraft Foods Group,*  
 6 *Inc.*, 2:09 Civ. 00453-CB, Doc. 93, ¶ 1.7, ¶ 2 (W.D. Pa. Sept. 28, 2012) (pays sales  
 7 representatives overtime). Thus, RSRs and TMs should receive notice so they may preserve their  
 8 FLSA claims. Any delay in authorizing notice permits Kellogg to benefit from a business  
 9 advantage over competitors which conflicts with the FLSA. 29 C.F.R. 202(a)(3).

11 **F. Kellogg should provide class members' names, addresses, unique employer id,  
 12 telephone numbers, and e-mail addresses to assist with issuance of notice. And  
 13 where the initial notice is returned for an insufficient address, Defendants  
 14 should be required to provide partial social security numbers to located class  
 15 members.**

16 When conditionally certifying an FLSA action, Courts routinely direct the employer to  
 17 supply contact information necessary to issuing the best practicable notice. Kellogg should  
 18 initially provide Plaintiffs with all class members' names, addresses, telephone numbers, and e-  
 19 mail addresses to facilitate notice. Employer identification numbers are also essential in  
 20 maintaining accuracy of class member identity as litigation progresses.<sup>10</sup> Defendants should also  
 21 produce the last four digits of social security numbers of the class members whose notices are  
 22 returned without forwarding addresses. The skip tracing of individuals will assist with the  
 23 issuance of the notice whose notice is returned by the post office. *Lewis v. Nevada Property I,*

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24 <sup>10</sup> Unique identifiers are used to maintain database integrity in producing payroll. Providing the  
 25 company's unique identifiers will allow Plaintiffs to synch the resulting database of clients with  
 26 the Defendant's' databases for determining merits and damages issues. Without this ability to  
 27 synch, for example, it will be unknown whether the Robert Doe in a given record refers to Robert  
 28 Doe Jr, Robert Doe, Sr. Rob Doe, Rob Don, etc. Unique identifiers remove many of the database  
 management issues that make handling a case of this type far more complex and time consuming  
 than necessary.

1 *LLC*, 2:12 Civ. 01564–MMD–GWF, 2013 WL 237098, \*17 (D. Nev. Jan. 22, 2013) (ordering  
2 production of names, last known addresses and social security numbers); *Hill v. R+L Carriers,*  
3 *Inc.*, 690 F.Supp. 2d 1001, 1010 (N.D. Cal. 2010) (ordering production of names, addresses,  
4 alternate addresses, email addresses, social security numbers and telephone numbers); *Goudie v.*  
5 *Cable Communications, Inc.*, 08 Civ. 507-AC, 2008 WL 4628394, \*9 (D. Or. Oct. 14, 2008)  
6 (ordering production of names, addresses, phone numbers, and email addresses).

7  
8 **G. Plaintiffs should be permitted to mail, e-mail, send a follow up post card to class members.**

9 Mailing of notice is an important component to providing the best notice practicable, and  
10 that is the routine method for delivering notice. However, this means is not foolproof, particularly  
11 with a mobile class with a limitation period extending over three years.<sup>11</sup> While first class mail  
12 can be expected to arrive in most instances, it does not always do so. It may be mis-delivered, or  
13 taken from shared boxes and not delivered to the recipient. Children or family members might  
14 misplace the notice. More to the point, in the hectic lives of most working Americans, not all mail  
15 is opened. Mail from unrecognized sources, particularly business mail, is often discarded or left  
16 unopened. And mail can be misplaced before it is opened or afterward.

17  
18 Sending notice by e-mail is a common supplement in this electronic age. *See, e.g., Beall v.*  
19 *Tyler Technologies, Inc.*, 208 Civ. 422 TJW, 2009 WL 3064689, \*2 (E.D. Tex. Sept. 23, 2009);  
20 *McKinzie v. Westlake Hardware, Inc.*, 09 Civ. 0796-W-FJG, 2010 WL 2426310, \*5 (W.D. Mo.  
21 June 11, 2010) (ordering defendant to provide telephone numbers and e-mail addresses of class  
22 members); *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 631 (E.D. Cal. 2009); *Lewis*  
23

24  
25 <sup>11</sup> The FLSA limitation period is 3 years, or 2, if the violation is not willful. 29 U.S.C. § 255(a).  
26 Here, given the *Engleson* settlement, any violation would likely be found “willful.” In any event,  
27 Courts routinely grant notice to all class members working within the last 3 years since discovery  
on willfulness has not commenced. *See, e.g., Ribot v. Farmers Ins. Group*, 11 Civ. 02404 DDP  
(FMOx), 2013 WL 3778784, \*18 (C.D.Cal. July 17, 2013).

1 v. *Wells Fargo & Co.*, 669 F.Supp.2d 1124, 1128 (N.D. Cal. 2009). E-mail makes sense as a  
2 supplementary form of notice because it is an efficient and inexpensive way to give notice and  
3 may reach some class members who have changed their physical address.

4 **H. Plaintiffs' proposed Notice is neutral and should be approved.**

5 Exhibit 1 is the copy of the notice Plaintiffs propose to send to the class members. This  
6 notice is similar to the approved notice in *Troy v. Kehe Food Distributors, Inc.* No. C09-0785  
7 JLR, Doc. 144 (W.D. Wash. Nov. 3, 2011). This notice informs class members in neutral  
8 language of the nature of this action, of their right to participate in it by filing a Consent to Sue  
9 form with the Court and the consequences of their joining or not joining the action.

11 Plaintiffs further request that the Court allow their counsel to send a follow-up postcard to  
12 any class members who have not responded thirty days after the mailing of the initial notice. A  
13 copy of the postcard Plaintiffs propose to send to the class members is attached as Exhibit 2. Such  
14 follow up mailing contributes to dissemination among similarly situated employees and serves  
15 what the Supreme Court in *Hoffman-La Roche v. Sperling* recognized as section 216(b)'s  
16 "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite  
17 disposition of the action." 493 U.S. at 172. Courts have routinely approved the sending of a  
18 follow-up postcard to class members who have not responded after the mailing of the initial  
19 notice. *See, e.g., Helton v. Factor 5, Inc.*, C 10-04927 SBA, 2012 WL 2428219, \*7 (N.D. Cal.  
20 June 26, 2012); *Graham v. Overland Solutions, Inc.*, 10 Civ. 672 BEN (BLM), 2011 WL  
21 1769737, \*4 (S.D. Cal. May 9, 2011). Plaintiffs' counsel will bear the cost of mailing the notices  
22 and reminders.  
23  
24

25 **IV. CONCLUSION**

26 This Court should conditionally certify this action as a collective action on behalf of RSRs  
27

1 and TM employed by Kellogg three years before the mailing of notice, authorize Plaintiffs'  
2 counsel to issue the notice attached to Plaintiffs' motion by regular mail and email. The Court  
3 should also order Kellogg to provide Plaintiffs with name, the last known addresses, unique  
4 employee ID number, telephone numbers, email addresses, and (for returned notices only), partial  
5 social security numbers, so that Plaintiffs' counsel may issue the notice to potential class  
6 members.

7 Dated: August 9, 2013

Respectfully Submitted,

9 s/ Dan Getman

10 Dan Getman (Pro Hac Vice)

11 Matt Dunn (Pro Hac Vice)

**GETMAN & SWEENEY, PLLC**

12 9 Paradies Lane

New Paltz, NY 12561

13 phone: (845)255-9370 / fax: (845) 255-8649

14 email: dgetman@getmansweeney.com

email: mdunn@getmansweeney.com

15 Michael C. Subit (WSBA No. 29189)

**FRANK FREED SUBIT & THOMAS LLP**

16 Suite 1200

17 Hoge Building

705 Second Avenue

18 Seattle, Washington 98104-1729

19 **ATTORNEYS FOR PLAINTIFFS**

