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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

THOMAS BELTON, MAURICE GREEN, MONYAL McLARTY, individually and on behalf all others similarly situated, **Plaintiffs,** **v.** **ALAMO CLAIM SERVICE, PETER PERRINE, THORLIN LEE, DAVID SERFASS, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,** **Defendants.**	**1:12-cv-01306-JES-BGC**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION AND SEND NOTICE TO THE CLASS

Respectfully Submitted,

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Plaintiffs Thomas Belton, Monyal McLarty, and Maurice Green, through their Second Amended Complaint (Doc. 49) filed this action on behalf of themselves and other similarly situated current and former employees pursuant to 29 U.S.C. § 216(b). Belton, McLarty, and Green allege that Defendant Alamo Claim Service ("ACS" or "Alamo Defendants") and Defendant State Farm Mutual Automobile Insurance Company ("State Farm") (collectively "Defendants") misclassified them and a class of similarly situated employees as independent contractors and failed to pay them and the class overtime wages.

Plaintiffs now move the Court to conditionally certify a Fair Labor Standards Act ("FLSA") collective action and order notice sent to all persons who were hired by Alamo Claim Service to work in State Farm offices in Illinois as claim representatives, were classified as independent contractors and paid a day rate for their work during a period of three years prior to the filing of this complaint and the date of final judgment in this matter (the "Class Members").

I. STATEMENT OF THE CASE

In 2011, ACS[1] and State Farm[2] entered into an agreement whereby ACS would provide State Farm with claim representatives in State Farm's Bloomington, Illinois office. Doc. 35-1, Thorlin Lee Declaration, ¶ 3, Exhibit B; Doc. 28-1, Declaration of Daniel Gerharz ¶ 5, Ex. A. ACS claim representatives were placed in several State Farm insurance units and were labeled independent contractors. Doc. 35-1, Thorlin Lee Declaration, ¶ 3; Doc. 28-1, Declaration of Daniel Gerharz ¶ 5. ACS hired Plaintiffs and Class Members to work as claim representatives in State Farm offices located throughout Illinois. *See* Declaration of Thomas Belton ("*Belton Decl.*") at ¶ 2-3 (Bloomington office); Declaration of Monyal McLarty ("*McLarty Decl.*") ¶ 2

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[1] ACS is a privately held company that provides customer service in claim handling and claim management for the insurance industry. See Exhibit A to Declaration of Michael Sweeney.

[2] State Farm is a family of insurance and financial services companies that together serve tens of millions of customers in the United States and Canada. *See* Exhibit B to *Sweeney Decl.*

(Collinsville office); Declaration of Maurice Green ("*Green Decl.*") ¶ 2 (Arlington Heights and Elmhurst offices).

Belton, McLarty and Green worked with ACS-hired claim representatives who were classified as independent contractors, paid a day rate, and not paid overtime. *Belton Decl.* ¶¶ 3, 8, 15, 16, *McLarty Decl.* ¶ 3, *Green Decl.* ¶ 3. Belton worked in State Farm's Bloomington, Illinois office as a claim representative from approximately November 7, 2011 to June 27, 2012. *See Belton Decl.* at ¶ 2. During his employment, approximately 60 Class Members worked with Belton as claim representatives at State Farm's Bloomington, IL office processing auto insurance claims. See *Belton Decl.* at ¶ 3. McLarty worked in State Farm's Collinsville, Illinois office as a claim representative in State Farm's Auto Claims Central unit ("ACC unit") from approximately October 18, 2011 to June 15, 2012. *McLarty Decl.* ¶ 2. During his employment, approximately 45 Class Members worked with McLarty as claim representatives processing auto insurance claims. *McLarty Decl.* ¶ 4. Green worked in State Farm's Arlington Heights and Elmhurst, IL offices as a claim representative in State Farm's Medical Payment Claims unit ("MPC" unit) from approximately September 2011 to October 2012. *Green Decl.* ¶ 2. During his employment, approximately four Class Members worked with Green as claim representatives processing medical auto insurance claims. *Green Decl.* ¶ 4.

Plaintiffs and Class Members were paid the same way and subject to the same ACS and State Farm policies. *McLarty Decl.* ¶ 6; *Green Decl.* ¶ 5. ACS used the same form employment contract in hiring Plaintiffs and Class Members, a contract which labeled them independent contractors. *See Belton Decl.* at ¶ 7; Ex. A to Belton *Decl.*; *McLarty Decl.* ¶¶ 7-8; Ex. A to *McLarty Decl.*; *Green Decl.* ¶¶ 6, 8; Ex. A to *Green Decl.* Class Members were scheduled to work 60 hours a week, ten hours a day Monday through Saturday. *Belton Decl.* at ¶ 14*; Hakimi*

Decl. ¶ 12; *McLarty Decl.* ¶ 16; *Green Decl.* ¶ 17. Defendants did not pay Plaintiffs or Class Members overtime wages. *Belton Decl.* at ¶ 15, 18*; Hakimi Decl.* ¶ 13; *McLarty Decl.* ¶ 17; *Green Decl.* ¶ 18. ACS and State Farm compensated the Plaintiffs and other Class Members in the same way —they were all paid a fixed daily rate that was prorated if they did not work their entire ten-hour shift. See Doc. 24, ACS Answer and Affirmative Defenses, ¶¶ 47-49; Doc. 54, ACS Answer to Second Amended Complaint, ¶¶58-59; *Belton Decl.* at ¶ 16, Ex. A to *Belton Decl.*, ¶ B.1; *McLarty Decl.* ¶¶ 18-19, Ex. A to *McLarty Decl.* ¶ B.1; *Green Decl.* ¶ 19-20, Ex. A to *Green Decl.* ¶B.1; *Hakimi Decl.* ¶ 14, 15. Class Members were required to complete calls with clients even if they had to work beyond their scheduled hours. *Belton Decl.* at ¶ 14; *McLarty Decl.* ¶ 16; *Green Decl.* ¶ 17. Belton and other Class Members were told to fill out their timesheets with their scheduled hours only, even if they worked more than their scheduled hours. See *Belton Decl.* at ¶ 17; *Hakimi Decl.* ¶ 15; *McLarty Decl.* ¶ 20; *Green Decl.* ¶ 21. Belton and Class Members regularly worked more than 40 hours a week, but were not paid an overtime premium for the hours they worked over 40 in a week. See *Belton Decl.* at ¶ 18; *Hakimi Decl.* ¶ 17; *McLarty Decl.* ¶ 17; *Green Decl.* ¶ 18.

Plaintiffs and the Class Members all performed the same essential job duties. Belton, McLarty, and Green were required to obtain facts from the insured, and input those facts into State Farm computers. *See Belton Decl.* at ¶ 4, 10; *Hakimi Decl.* ¶ 5, 9; *McLarty Decl.* ¶ 11; *Green Decl.* ¶ 11. Plaintiffs and the Class Members worked in the same State Farm offices as other claim representatives who performed the same work as them but were classified as State Farm employees. See *Belton Decl.* at ¶ 11; *Hakimi Decl.* ¶ 9; *McLarty Decl.* ¶ 12; *Green Decl.* ¶ 12.

Defendants ACS and State Farm supervised and controlled Plaintiffs and the Class

Members. When Plaintiffs and Class Members first arrived at the State Farm call center they were trained by State Farm employees to use State Farm equipment and State Farm's software (Enterprise Claim System or "ECS"). *See Belton Decl.* at ¶ 9; *Hakimi Decl.* ¶ 8; *McLarty Decl.* ¶ 10; *Green Decl.* ¶ 10. Plaintiffs and other Class Members were immediately supervised by a State Farm employee who would review the claims Plaintiffs and other Class Members handled and supervise their work performance. *Belton Decl.* at ¶ 13; *Hakimi Decl.* ¶ 11; *McLarty Decl.* ¶ 14; *Green Decl.* ¶ 14. Plaintiffs and Class Members were required to complete their work for State Farm at State Farm's facilities during the hours designated by ACS and State Farm. *See Belton Decl.* at ¶¶ 11, 13, 17; *Hakimi Decl.* ¶ 9, 11, 12; *McLarty Decl.* ¶¶ 12, 16; *Green Decl.* ¶¶ 12, 17. Prior to June of 2012, Plaintiffs and Class Members filled out timesheets each week, which were signed by their State Farm supervisor and submitted to ACS. See *Belton Decl.* at ¶ 17; *Hakimi Decl.* ¶ 16. After June of 2012, Class Members submitted timesheets to an ACS employee, which were reviewed by State Farm for final approval. *Hakimi Decl.* ¶ 16; *McLarty Decl.* ¶ 20; *Green Decl.* ¶ 21. State Farm supervisors also authorized Plaintiffs and Class Members vacation and time off requests until June 2012, when an ACS employee began handling vacation requests. *Belton Decl.* ¶ 13; *Hakimi Decl.* ¶ 16; *McLarty Decl.* ¶ 14; *Green Decl.* ¶ 16.

Plaintiffs' and Class Members' work was integral to Defendants' businesses. Both ACS and State Farm are in the business of processing insurance claims, ACS as a provider of claims processors and State Farm as an insurance provider. Under the supervision of State Farm and ACS, Plaintiffs and Class Members processed insurance claims. *Belton Decl.* at ¶¶ 10, 13; *McLarty Decl.* ¶¶ 5, 11; *Green Decl.* ¶¶ 4, 11. Defendants provided Plaintiffs and Class Members with all the equipment and materials needed to complete their work. Plaintiffs and Class

Members used State Farm equipment, including desks, phones, computers, email accounts, letterhead, and State Farm software to process insurance claims. *See Belton Decl.* at ¶ 11-12; *Hakimi Decl.* ¶ 9-10; *see also* Ex. B to Belton Decl. ("State Farm Confidentiality Agreement"); *McLarty Decl.* ¶ 12; *Green Decl.* ¶ 12. State Farm supervisors instructed Plaintiffs and Class Members to represent themselves as State Farm Claim Representatives in all phone calls and correspondence Class Members handled. *Belton Decl.* at ¶ 12; *McLarty Decl.* ¶ 13; *Green Decl.* ¶ 13; *Hakimi Decl*. ¶ 10. They also closely monitored and managed Plaintiffs' and Class Members' daily workload and work performance. *Belton Decl.* at ¶ 13; *McLarty Decl.* ¶ 15; *Green Decl.* ¶ 15; *Hakimi Decl*. ¶ 11.

While working at State Farm, Plaintiffs and Class Members were effectively not allowed to work anywhere else. Plaintiffs and Class Members were scheduled to work ten hours a day, Monday through Saturday, which left no time for other employment. See *Belton Decl.* at ¶ 14; *Hakimi Decl.* ¶ 6, 12; *McLarty Decl.* ¶ 16; *Green Decl.* ¶ 17.

II. A FLSA COLLECTIVE ACTION SHOULD BE CONDITIONALLY CERTIFIED AND NOTICE SENT TO THE CLASS

A. Legal Standards Governing FLSA Representative Actions

The purpose of the FLSA is to provide "specific minimum protections to *individual* workers and to ensure that each employee covered by the Act ... receive[s] '[a] fair day's pay for a fair day's work' and [is] protected from 'the evil of "overwork" as well as "underpay."'" *Barrentine v. Arkansas-Best Freight Sys. Inc.,* 450 U.S. 728, 739 (1981), citing *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942). The FLSA was designed to prevent long workweeks and to spread employment. "'[O]ne of the fundamental purposes of the Act was to induce worksharing and relieve unemployment by reducing hours of work.'" *Overnight Motor*, 316 U.S. 577. In passing the FLSA, Congress intended to address long working hours

that "are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine,* 450 U.S. at 739.

Congress recognized that allowing individual employees subject to the same illegal practices to bring claims collectively is both fair and efficient. *Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 170 (1989). And so, the FLSA provides for one or more employees to pursue an action in a representative capacity for "other employees similarly situated." *Id*., 29 U.S.C. § 216(b). "A collective action allows FLSA plaintiffs 'the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity.'" *Curless v. Great American Real Food Fast, Inc.*, 280 F.R.D. 429, 432-33 (S.D. Ill. 2012), *citing Hoffmann–La Roche*, 493 U.S. at 170.

Unlike Rule 23 class actions, plaintiffs to a FLSA collective action must "opt-in" to be parties to the suit, and they are not bound by the court's determination if they do not opt-in. *North v. Board of Trustees of IL State University*, 676 F. Supp. 2d 690, 694 (C.D. Ill. 2009). The majority of courts, including the district courts of this Circuit, have adopted a two-step approach to collective actions under the FLSA. *Lane v. Atlas Roofing Corp.*, 11 Civ. 04066, 2012 WL 2862462, *2 (C.D. Ill. July 11, 2012); *citing North*, 676 F. Supp. 2d at 694 (collecting cases). Moreover, the Seventh Circuit has recognized that district courts employ the two-step process. *See, e.g., Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 974 (7th Cir. 2011) (explaining that "[t]he conditional approval process is a mechanism used by district courts to establish whether potential plaintiffs in the FLSA collective action should be sent a notice of their eligibility to participate and given the opportunity to opt in to the collective action").

In the first step, the court determines whether the plaintiffs have made a "modest factual

showing that the members of the proposed collective action are 'similarly situated.'" *Lane*, 2012 WL 2862462 at *2. While the Seventh Circuit has yet to define precisely the contours of the "similarly situated" standard, most courts employ a lenient interpretation. *Betancourt v. Maxim Healthcare Services, Inc.*, 10 Civ. 4763, 2011 WL 1548964, *4 (N.D. Ill. Apr. 21, 2011). This means that the plaintiff must put on some evidence that he and the members of the collective action were "victims of a common policy or plan that violated the law." *North*, 676 F. Supp. 2d at 694 (citations omitted). There is no requirement that the job duties be identical in order to meet the similarly situated standard under 20 U.S.C. 216(b). *Brand v. Comcast Corp.*, No. 12 CV 1122, 2012 WL 4482124, *6 (N.D. Ill. Sept. 26, 2012) ("employees need not be in the 'same identical job or situation' for conditional certification to proceed so long as they were victims of a common policy or plan that violated the law.") (citing cases); *Alexander v. Caraustar Industries, Inc.*, No. 11 C 1007, 2011 WL 2550830, *2 (N.D. Ill. June 27, 2011) (At the initial conditional certification stage, "plaintiffs are not required 'to show that the potential class members have identical positions for conditional certification to be granted; plaintiffs can be similarly situated for purposes of the FLSA even though there are distinctions in their job titles, functions, or pay.'") (citing to *Jirak*, 566 F.Supp.2d at 848–49); *Rottman v. Old Second Bancorp, Inc.*, 735 F.Supp.2d 988, 990, 992 (N.D.Ill. 2010) (same).

In cases where varying job duties and locations exist, the plaintiff may meet the similarly situated requirement by establishing that employees were treated in a uniform manner. *See Russell v. Illinois Bell Telephone Co., Inc.*, 721 F. Supp. 2d 804, 937 (N.D. Ill. 2010) (finding that plaintiff provided sufficient evidence of a company-wide practice, through affidavits from current and former employees of the other three locations, to justify sending notice to similarly situated employees at all four locations); *Heckler v. DK Funding, LLC*, 575 F.Supp.2d 930, 781

(N.D. Ill. 2008) (holding that evidence suggesting company-wide practice of editing time sheets and not paying employees for all hours worked was sufficient to conditionally certify collective action on behalf of all of employer's hourly workers, not just mortgage closers such as plaintiff.); *Garza v. CTA*, No. 00-438, 2001 WL 503036, *3 (N.D. Ill. May 8, 2001) ("That the plaintiffs and other potential plaintiffs may have different jobs ... [and] earn different amounts of money ... does not mean that they are not operating under the same policies that allegedly entitle them to overtime pay."). An "affidavit, declaration, or other support beyond allegations" is typically sufficient to overcome the modest burden of showing that other similarly situated employees exist. *Lane*, 2012 WL 2862462 at *2. If this factual burden is met, the Court may conditionally certify the collective action. *Id*.

The reason for the relatively liberal first-stage standard for assessing the question of whether class members are "similarly situated" arises because, unlike a Rule 23 class action, the statute of limitations is not tolled for putative members of an FLSA class until they affirmatively opt into the action. See 29 U.S.C. § 255; *Alvarez v. City of Chicago*, 605 F.3d 445, 448 (7th Cir. 2010); *Perez v. Comcast*, 10 Civ. 1127, 2011 WL 5979769, at *2 (N.D. Ill. Nov. 29, 2011); *North v. Board of Trustees of IL State University*, 676 F.Supp.2d 690, 694 (C.D.Ill., 2009). "Because the FLSA statute of limitations is not tolled unless a potential plaintiff opts in, making time of the essence, the general thinking is that an earlier and less rigorous review for conditional certification would permit potential plaintiffs ample time to weigh the benefits of joining a lawsuit that alleges a FLSA violation." *Ruggles v. WellPoint, Inc.*, 591 F.Supp.2d 150, 162, fn 12 (N.D.N.Y., 2008). Thus, it is critical that notice of the right to opt-in issue promptly after the filing of the case if there is a colorable basis for believing the class members may be similarly situated. See *Lane*, 2012 WL 2862462, at *3; *Larsen v. Clearchoice Mobility, Inc.*, 11 Civ.

1701, 2011 WL 3047484, at *2 (N.D.Ill. July 25, 2011) (declining to delay the notification procedure).

Furthermore, "the burden in this preliminary certification is light because the risk of error is insignificant: should further discovery reveal that the named positions, or corresponding claims, are not substantially similar the defendants will challenge the certification." *Betancourt* 2011 WL 1548964 at *4. "On the other hand, denying conditional certification may prevent some plaintiffs from being able to pursue their claims due to the expense of litigation." *Id.* at *5; *Russell v. Illinois Bell Telephone Co., Inc.*, 721 F. Supp. 2d 804, 823 (N.D. Ill. 2010) ("Because of the modest amounts likely involved, many of the plaintiffs would be unable to afford the costs of pursuing their claims individually."). Since the standard is lenient, "it typically results in conditional certification of a representative class." *Betancourt*, 2011 WL 1548964 at *5.

When employees are shown to be similarly situated, the district court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient way and has the discretion to facilitate notice to potential plaintiffs of their right to opt-into the action. *See Hoffmann-La Roche,* 493 U.S. at 166, 170, 172; *see also Nehmelman v. Penn Nat. Gaming, Inc.*, 822 F. Supp. 2d 745, 750 (N.D. Ill. 2011) ("District courts have broad discretion in managing collective actions, and may facilitate notice to potential plaintiffs in order to implement the opt-in procedure"), *citing Hoffmann–La Roche*, 493 U.S. at 169. District courts in this district have regularly exercised discretionary authority over the notice process. *Lane*, 2012 WL 2862462; *Curless*, 280 F.R.D. at 435, citing *Anyere v. Wells Fargo, Co., Inc.*, 09 C 2769, 2010 WL 1542180, *1 (N.D. Ill. April 12, 2010); *North*, 676 F.Supp.2d at 698-99. Moreover, the Seventh Circuit has determined that a district court may not prohibit a plaintiff from sending notice altogether. *Anyere*, 2010 WL 1542180 at *1, (citing *Woods v. New York Life*

Ins. Co., 686 F.2d 578, 580 (7th Cir. 1982)). Such notice should be "timely, accurate, and informative." *See Hoffmann-La-Roche,* 493 U.S. at 172. Notice should issue early in the litigation to give class members the opportunity to join the action. *See, e.g.*, *Nehmelman*, 822 F. Supp. 2d at 763; *Howard v. Securitas Sec. Services, USA Inc.*, 630 F. Supp. 2d 905, 907 (N.D. Ill. 2009).

In step two, which typically occurs after discovery, the defendant may move to decertify the collective action. *Smith v. Safety-Kleen Systems, Inc.*, No. 10 Civ. 6574, 2011 WL 1429203, *2 (N.D. Ill. Apr. 14, 2011). In most cases, "'rigorous [ ] review [of] whether the representative plaintiff and the putative claimants are in fact similarly situated so that the lawsuit may proceed as a collective action' does not take place 'until potential plaintiffs have been given a chance to 'opt in' to the collective action and discovery is complete.'" *DeMarco v. Northwestern Memorial Healthcare*, 10 Civ. 397, 2011 WL 3510905, *2 (N.D. Ill. Aug. 10, 2011), *citing Persin v. Careerbuilder, LLC*, 2005 WL 3159684, *1 (N.D. Ill. Nov.23, 2005). To proceed as a collective action, plaintiffs must demonstrate that sufficient similarity exists between the named and opt-in plaintiffs. *Safety-Kleen Systems*, 2011 WL 1429203 at *2. If a collective action is decertified, it reverts to one or more individual actions on behalf of the named plaintiffs. *Alvarez*, 605 F.3d at 450. Opt-in plaintiffs' claims are dismissed without prejudice. *Curless*, 280 F.R.D. at 433. On the other hand, if the plaintiff has demonstrated that the class members all are similarly situated, the case proceeds to trial as a collective action. *Marshall v. Amsted Industries, Inc.*, 10 Civ. 0011, 2010 WL 2404340, at *5 (S.D. Ill. June 16, 2010).

B. This Case Meets the Standard for Conditional Certification

Belton, Green, and McLarty have met their first-stage burden to show that Class Members employed by Defendants are similarly situated. The burden at this stage is lenient and

the evidence that Plaintiffs offer is sufficient to meet it. They allege and have supplied documentary evidence that Defendants misclassified all Class Members as independent contractors, paid them a day rate but prorated their pay if they did not work an entire shift, and did not pay Class Members overtime wages for hours worked over 40 in a week in violation of the FLSA, 29 U.S.C. §207. Moreover, Defendants required Class Members to work beyond their shift hours and did not compensate them for the additional work time. These allegations and evidence are sufficient to show that all Class Members were subject to a common illegal pay policy. Accordingly, the putative class is similarly situated and should be conditionally certified for purposes of notifying putative Class Members of the opportunity to join the action. *See Lane,* 2012 WL 2862462 at *2; *Larsen*, 2011 WL 3047484 at *2; *Nicholson v. UTi Worldwide, Inc.*, 09 Civ. 722, 2011 WL 250563, at *5 (S.D. Ill. Jan. 26, 2011).

Defendants' own testimony supports conditional certification, at this initial stage, for all independent claim representatives hired by the Alamo Defendants to work in State Farm's Illinois offices. Defendants admit that Class Members were hired pursuant to their "Independent Adjuster Services Agreement" to work for State Farm to process insurance claims and that all the Class Members were paid in the same way. *See*, Doc. 24, ACS' Answer ¶ 47-48; Doc. 35-1, Declaration of Thorlin Lee, ¶ 3-5; Doc. 28-1, Declaration of Daniel Gerharz, ¶ 6-7. Moreover, State Farm's own testimony demonstrates that all Claim Representatives performed common duties: "all independent adjusters were expected to be proficient in claim adjusting techniques, practices, and standards, which are generally uniform throughout the insurance industry." *Gerharz Decl.*, ¶ 8, fn. 1.

Plaintiffs have established that they meet the similarly situated standard as they were all treated as independent contractors, paid a day rate, and not paid overtime for hours worked over

forty in a week. Moreover, Class Members all performed the same job—processing insurance claims for State Farm. Any variances that may exist among Class Members is not dispositive on the "similarly situated" analysis this Court is to employ because all Class Members were subject to the same illegal pay policy. [3]

C. Defendants Should Provide Information Necessary to Effectuate Notice

Court authorization of notice to the class in a FLSA collective action "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche*, 493 U.S. at 172.[4] In *Hoffmann-La Roche*, the Supreme Court recognized that courts have the authority to require employers to provide the names and addresses of putative class members. *Id.* at 170. Courts regularly require such production to facilitate notice. *See, e.g., Lane.*, 2012 WL 2862462, at *4 ; *Hundt v. DirectSat USA, LLC*, 08 Civ. 7238, 2010 WL 2079585, *5 (N.D. Ill. May 24, 2010); *Howard v. Securitas Security Services, USA Inc.*, 08 Civ. 2746, 2009 WL 140126, *10 (N.D. Ill. Jan. 20, 2009); *Acevedo v. Ace Coffee Bar, Inc.*, 248 F.R.D. 550, 556 (N.D. Ill. 2008).

Plaintiffs ask the Court to order Defendants to provide their counsel with the last known mailing and email addresses of the Class Members in order to assist with the issuance of the notice and to provide his counsel with the dates of birth and partial social security numbers for

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[3] No Class Members are exempt from the FLSA's overtime protections because Defendants did not pay any of them on a salary or fee basis as required by the professional, administrative, and executive exemptions that the Defendants have raised. 29 C.F.R. §§541.100 (executive), 541.200 (administrative), and 541.300 (professional).

[4] *Hoffmann-La Roche* involved a collective action brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, which incorporates the FLSA's collective action provision in 29 U.S.C. § 626(b). Courts have looked to *Hoffmann-La Roche* for guidance on interpretation of the FLSA, particularly since the Court's opinion contains an extended discussion of the FLSA collective action provision.

any class members whose mailed notice is returned by the post office. The dates of birth and partial social security numbers can assist with locating the correct address for those workers so that they receive notice. Courts in this Circuit have ordered the provision of this information. *See, e.g.*, *Swarthout v. Ryla Teleservices, Inc.*, 11Civ. 21, 2011 WL 6152347, at *5 (N.D. Ind. Dec. 12, 2011); *Kelly v. Bank of America*, N.A., 10 Civ. 5332, 2011 WL 7718421 (N.D. Ill. Sept. 23, 2011); *Thompson v. K.R. Denth Trucking, Inc.*, 10 Civ. 0135, 2011 WL 4760393 (S.D. Ind. June 15, 2011); *Anyere v. Wells Fargo, Co., Inc.*, 09 Civ. 2769, 2010 WL 1542180 (N.D. Ill. Apr. 12, 2010).

Plaintiffs ask the Court to authorize Plaintiffs to distribute the notice by first-class mail and by email and that Class Members have sixty days from the date that notice is issued to opt-into the Collective Action. Email distribution is an increasingly common form of distributing notice given the degree to which people depend upon and use email as their primary means of communication rather than mail. *See Pippins v. KPMG LLP,* 11 Civ. 0377, 2012 WL 19379, at *14 (S.D.N.Y. January 3, 2012) ("[G]iven the reality of communications today ... the provision of email addresses and email notice in addition to notice by first class mail is entirely appropriate"); *Denney v. Lester's, LLC*, 12 Civ. 377, 2012 WL 3854466, at *4 (E.D.Mo. Sept. 5, 2012) (finding that "fair and proper notice to current and former servers will be accomplished by regular mail, electronic mail"); *Kelly v. Bank of America*, N.A., 2011 WL 7718421 at *2 (ordering dissemination of Notice to potential FLSA class members at their last known email address); *Anyere v. Wells Fargo, Co., Inc.*, 2010 WL 1542180 at *5 (ordering production of email addresses); *Prescott v. Prudential Ins. Co.*, 729 F. Supp.2d 357, 371 (D.Me. 2010) (ordering production of email addresses); *Bass v. PJ Comn Acquisition Corp.*, 2010 WL 3720217, at *5 (D. Colo. 2010) (same). Distribution by email also increases the chances that

former employees will receive notice as email addresses tend to remain the same even when a person's physical address changes. A 60-day notice period is the typical amount of time granted for FLSA collective actions. See *Nehmelman v. Penn Nat. Gaming, Inc.*, 822 F.Supp.2d 745, 764 -765 (N.D. Ill. 2011) (approving 60 day opt-in period and noting that longer periods of time have been approved in the Seventh Circuit).

Plaintiffs further request that the Court allow their counsel to send a follow-up postcard to any class members who have not responded thirty days after the mailing of the initial notice. Such follow up mailing contributes to dissemination among similarly situated employees and serves what the Supreme Court in *Hoffman-La Roche v. Sperling* recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." 493 U.S. at 172. Accordingly, courts have approved the sending of a follow-up postcard to class members who have not responded after the mailing of the initial notice. *See, e.g., Guzelgurgenli v. Prime Time Specials Inc.*, --- F.Supp.2d ----, 11 Civ. 4549 , 2012 WL 3264314 (E.D.N.Y. Aug. 8, 2012) (listing cases); *Helton v. Factor 5, Inc.*, 10 Civ. 04927, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012); *Graham v. Overland Solutions, Inc.*, 10Civ.–672 , 2011 WL 1769737, *4 (S.D. Cal. May 9, 2011); *In re Janney Montgomery Scott LLC Financial Consultant Litigation*, 06 civ. 3202, 2009 WL 2137224 (E.D. Pa. July 16, 2009).

Plaintiffs also request that the Court order Defendants to post the notice at all of Defendants' worksites in the same areas in which it is required to post FLSA notices. *See* 29 C.F.R. 516.4 (requiring posting of FLSA requirements "in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy"). Posting of notice also contributes to dissemination among similarly situated employees and serves what the Supreme Court in *Hoffman-La Roche v. Sperling* recognizes as section

216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." 493 U.S. at 172.

District Courts around the country have recognized posting as an efficient, non-burdensome method of notice that courts regularly employ. *See Curless v. Great American Real Food Fast, Inc.*, 280 F.R.D. 429, 432, 437 (S.D. Ill. 2012) (granting plaintiff's motion to authorize notice, including inclusion of notice in employee pay envelopes and a posting of notice at each of defendant's restaurants); *Blakes v. Illinois Bell Telephone Co.*, 11 Civ. 336, 2011 WL 2446598, *10 (N.D. Ill. June 15, 2011) (granting plaintiff's request to post notice in defendant's garages "wherever other employment-related postings are placed"); *Nunes v. Chicago Import, Inc.*, 09 Civ. 7168, 2010 WL 1197532, *3 (N.D. Ill. Mar. 22, 2010) (ordering defendants to issue notice via employee pay envelope for two consecutive pay periods and to post the notice in a conspicuous location at its warehouse); s*ee also*, *Guzelgurgenli v. Prime Time Specials Inc.*, --- F.Supp.2d ----, 11 Civ.–4549 , 2012 WL 3264314, *16 (E.D.N.Y. Aug. 8, 2012) (ordering notice posted in defendant's restaurant franchise locations); *Barajas v. Acosta*, H–11–3862, 2012 WL 1952261, *3-*4 (S.D. Tex. May 30, 2012) (ordering notice posted in defendant's restaurant locations); *Garner v. Butterball, LLC*, 10 Civ. 01025, 2012 WL 570000, *8-*9 (E.D. Ark. Feb. 22, 2012) (ordering defendant to post notice on processing plant bulletin boards); *Sanchez v. Creekstone Farms Premium Beef, LLC*, 11 Civ. 4037, 2012 WL 380279, *3 (D. Kan. Feb. 6, 2012) (ordering notice posted in "conspicuous locations" in defendant's processing plant); *Carrillo v. Schneider Logistics, Inc.*, 11 Civ. 8557 , 2012 WL 556309, *12-*13 (C.D. Cal. Jan. 31, 2012) (listing cases and ordering notice posted at "the entry and in the lunchroom of each warehouse, that are accessible to the workers and including where other notices of workplace rights are posted"); *Williams v. ezStorage Corp.*, 10 Civ. 3335, 2011 WL 1539941, *5 (D. Md.

Apr. 21, 2011) (ordering defendant to post notices at its work facilities); *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, *12 (D.D.C. 2010) (defendants ordered to post notice at all of their workplaces and job sites); *Burkhart-Deal v. Citifinancial, Inc.*, 07 Civ. 1747, 2010 WL 457127 (W.D. Pa. Feb. 4, 2010) (allowing plaintiff to post notice at various branches).

D. Plaintiffs' Proposed Notice Should Be Approved

Courts in this district consistently recognize that Plaintiffs in a certified FLSA collective action are appropriately responsible for the content of the class notice. *Kelly v. Bank of America, N.A.*, 10 Civ. 5332, 2011 WL 7718421, *1 (N.D. Ill. Sept. 23, 2011). "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." *King v. ITT Continental Baking Co.*, 84 Civ. 3410, 1986 WL 2628, at *3 (N.D. Ill. Feb.18, 1986); *see also Heitmann v. City of Chicago*, 04 Civ. 3304, 2004 WL 1718420, *3 (N.D. Ill. July 30, 2004) ("'The Court has both the power and duty to ensure fair and accurate notice, [but] that power should not be used to alter plaintiffs' proposed notice unless such alternation is necessary.'"). A copy of the notice Plaintiffs propose to post and send to Class Members is attached as Exhibit 1. This notice accurately informs Class Members in neutral language of the nature of the action, of their right to participate in it by filing a Consent to Sue form with the Court, and the consequences of their joining or not joining the action. It is consistent with forms of notice that have been approved in this District. *See, e.g.*, *Sweeney Decl.* at ¶¶ 6 & 7; Ex. D & E to *Sweeney Decl.* Thus, the Court should order that Plaintiffs' proposed notice be sent to the Class.

CONCLUSION

For all of the foregoing reasons, this Court should (1) conditionally certify this action as a FLSA collective action on behalf of a class of all persons who were hired by Alamo Claim

Service to work in State Farm offices in Illinois as claim representatives, were classified as independent contractors and paid a day rate for their work during a period of three years prior to the filing of this complaint and the date of final judgment in this matter, (2) authorize Plaintiffs' counsel to issue the notice that is attached to this motion and to send a follow-up postcard to any Class Members who have not responded thirty days after the mailing of the initial notice, (3) order Defendants to provide Plaintiffs' counsel with the last known mail and email addresses of all Class Members, and the telephone number, date of birth, and last four digits of the social security number of any Class Member whose notice is returned by the post office, within 7 days of the Court's order conditionally certifying this FLSA collective action; (4) require Defendants to post the attached notice of this lawsuit and consents to sue in a conspicuous location in the workplace; and (5) giving Class Members sixty days, from the date that notice is issued, to opt-into the Collective Action.

Dated: February 4, 2013

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)(4)

I, Michael J.D. Sweeney, certify that the foregoing Memorandum in Support of Plaintiffs' Motion to Conditionally Certify a FLSA Collective Action and Send Notice to the Class contains 5,650 words or less, 34,550 characters or less, and 405 lines or less, and therefore complies with Local Rule 7.1(B)(4).

By: *_/s/ Michael J.D. Sweeney_*