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

ALANDO SMITH, and MAURICE HARRIS-BALL, individually and on behalf all others similarly situated, **Plaintiffs,** **v.** **ALAMO CLAIM SERVICE, PETER PERRINE, THORLIN LEE,DAVID SERFASS, CIS ALAMO, LLC, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,** **Defendants.**	**Case No.:** **13 Civ. 01481-JES-JAG**

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

Respectfully Submitted,

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Plaintiffs Smith and Harris-Ball, through their Complaint (Doc. 1) and Amended Complaint (Doc. 57) filed this action on behalf of themselves and other similarly situated current and former employees pursuant to 29 U.S.C. § 216(b). Smith and Harris-Ball allege that Defendants Alamo Claim Service, CIS Alamo, LLC ("CIS Alamo"), Peter Perrine, Thorlin Lee, David Serfass, and State Farm Mutual Automobile Insurance Company ("State Farm") 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 have worked for Alamo Claim Service or CIS Alamo (collectively "Alamo")[1] in State Farm offices outside of Illinois[2] as claims adjusters who were classified as independent contractors, were paid a day rate, worked more than 40 hours in a week, and were not paid overtime premium pay for working more than 40 hours in a workweek during any period during the three years prior to the filing of this complaint and the date of final judgment in this matter ("Class Members").

[1] Alamo Claim Service and CIS Alamo are privately held companies that provide customer service in claim handling and claim management for the insurance industry. *See*, Ex. 3 to Declaration of Matt Dunn ("Dunn Dec.") (all numbered exhibits are attached the Dunn Dec.); Amended Compl. ¶¶ 29 and 39. CIS Alamo, LLC purchased Alamo Claim Service in 2012. *See*, Ex. 4, Declaration of William Martin Newby ¶ 23; *see also* Ex. 5, CIS Alamo Press release announcing the purchase of Alamo Claim Service. That purchase included the contract to provide State Farm with claims adjusters classified as independent contractors. CIS Alamo continued to provide State Farm with claims adjusters classified as independent contractors after it purchased Alamo Claim Service. Amended Compl. ¶ 78.

[2] The time that adjusters worked for Alamo in State Farm Illinois offices are excluded from this action pursuant to the Settlement Agreement reached in *Belton et al. v. Alamo Claim Service et al.*, 1:12 Civ. 01306-JES-BGC, Doc. 108 (C.D. Ill.). However, if the adjuster worked in a non-Illinois location within the statute of limitations, then the adjuster is included in this action.

I. STATEMENT OF THE CASE

The Plaintiffs and Class Members were all hired by Alamo to work for State Farm[3] in State Farm offices as claims adjusters. Alamo and State Farm entered into an agreement whereby Alamo would provide State Farm with claims adjusters in various State Farm offices.[4] These claims adjusters were placed in State Farm insurance units and treated as independent contractors, even though they worked alongside State Farm employees performing the same claim-handling tasks.[5] Alamo hired Plaintiffs and Class Members to work as claims adjusters in State Farm offices located around the country, including in Florida, Michigan, Oklahoma, and Texas, and in State Farm's various divisions, including the Auto Claims Central Unit, Complex Claims Unit, Property Unit, Complex Property Damage Unit, and Central Total Loss Unit.[6]

Plaintiffs and the Class Members all performed the same essential job duties. They all processed insurance claims, which involved obtaining facts from the insured and inputting those

[3] 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* Ex. 6; State Farm Answer, ¶ 20, Doc. 31.

[4] Amended Compl. ¶¶ 74-75; State Farm Answer, ¶ 23; *see also*, Ex. 7, Master Contract.

[5] Amended Compl. ¶ 60; Declaration of Ellery Maurice Harris ("Harris-Ball Dec.") ¶¶ 2, 4, 18; Declaration of Ernest Alando Smith ("Smith Dec.") ¶¶ 2-3, 15, 22, 27; Declaration of Linda Francis ("Francis Dec.") ¶¶ 2, 4, 24; Declaration of Carol Gilkey ("Gilkey Dec.") ¶¶ 2-3, 15; Declaration of Jack Hick ("Hicks Dec.") ¶¶ 2-3, 14; Declaration of Terrence Smith ("T. Smith Dec.") ¶¶ 2, 4, 16, 23; Declaration of Wayne Torra ("Torra Dec.") ¶¶ 2-3, 15; Ex. 9, Declaration of Thorlin Lee ("Lee Dec.") ¶¶ 3, 5.

[6] Amended Compl. ¶ 66; State Farm Answer ¶ 29; Harris-Ball Dec. ¶ 2, 10, 17, 23; Smith Dec. ¶¶ 2-3, 10; Francis Dec. ¶ 2, 4; Gilkey Dec. ¶ 2, 8; Hicks Dec. ¶ 2, 9; T. Smith Dec. ¶ 2, 4; Torra Dec. ¶ 2, 8, 17; Ex. 9, Lee Dec. ¶ 9.

facts into State Farm computers.[7] They worked in State Farm offices, with State Farm equipment, on the State Farm database, and alongside State Farm employees who performed the same work.[8]

State Farm required Plaintiffs and Class Members to work more than 40 hours a week. Although the exact number of scheduled hours varied slightly from location to location, State Farm scheduled all Class Members to work more than 40 hours a week. Schedules typically required 11 hours of work per day and often required work on the weekend.[9]

Despite the scheduled overtime work, Alamo and State Farm did not pay Plaintiffs and Class Members overtime wages. They were all paid a fixed daily rate that was prorated if they did not work their entire shift.[10] For example, if a Class Member missed one hour in an eleven-hour day, he or she was docked 1/11 of her fixed daily rate.[11]

[7] Amended Compl. ¶ 1; State Farm Answer ¶ 49; Harris-Ball Dec. ¶¶ 5, 17; Smith Dec. ¶¶ 9, 17, 23; Francis Dec. ¶¶ 5, 15; Gilkey Dec. ¶¶ 4, 14; Hicks Dec. ¶¶ 4, 13; T. Smith Dec. ¶ 5; Torra Dec. ¶¶ 4, 14, 21.

[8] Amended Compl. ¶ 60; Harris-Ball Dec. ¶ 18; Smith Dec. ¶¶ 15, 27; Francis Dec. ¶¶ 16, 23; Gilkey Dec. ¶ 15; Hicks Dec. ¶ 14; T. Smith Dec. ¶¶ 16, 23; Torra Dec. ¶¶ 15, 22.

[9] Amended Compl. ¶ 83; Harris-Ball Dec. ¶ 12; Smith Dec. ¶¶ 10, 18, 24; Francis Dec. ¶¶ 11, 19; Gilkey Dec. ¶ 10; Hicks Dec. ¶ 10; T. Smith Dec. ¶¶ 11, 19; Torra Dec. ¶¶ 10, 18.

[10] Amended Compl. ¶¶ 6, 8; Harris-Ball Dec. ¶ 6; Smith Dec. ¶ 5; Francis Dec. ¶ 6; Gilkey Dec. ¶ 5; Hicks Dec. ¶¶ 5; T. Smith Dec. ¶ 6; Torra Dec. ¶¶ 5-7.

[11] Harris-Ball Dec. ¶ 12; Smith Dec. ¶ 18; Gilkey Dec. ¶ 20; Hicks Dec. ¶ 19; T. Smith Dec. ¶ 27.

Alamo and State Farm classified Plaintiffs and Class Members as independent contractors and did not pay them overtime wages.[12] Alamo used the same form employment contract in hiring Plaintiffs and Class Members around the country.[13] Pursuant to that contract, they were all treated as independent contractors.[14] Alamo and State Farm used the independent contractor classification as the reason for not paying overtime wages.[15]

Alamo and State Farm supervised and controlled Plaintiffs' and the Class Members' work. 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.[16] 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.[17] Plaintiffs and Class Members were required to complete their work for State

[12] Amended Compl. ¶ 56; Harris-Ball Dec. ¶ 21; Smith Dec. ¶ 31; Francis Dec. ¶ 25; Gilkey Dec. ¶ 18; Hicks Dec. ¶ 17; T. Smith Dec. ¶ 25; Torra Dec. ¶ 3.

[13] Harris-Ball Dec. ¶¶ 7-8; Smith Dec. ¶ 7; Francis Dec. ¶ 8; Gilkey Dec. ¶ 7; Hicks Dec. ¶ 7; T. Smith Dec. ¶ 8; Torra Dec. ¶ 7.

[14] Harris-Ball Dec. ¶¶ 7-9; Smith Dec. ¶¶ 6-7; Francis Dec. ¶¶ 7-8; Gilkey Dec. ¶¶ 6-7; Hicks Dec. ¶¶ 3, 6-7; S. Smith Dec. ¶¶ 7-8; Torra Dec. ¶¶ 3, 6-7; Ex. 9, Lee Dec. ¶ 7.

[15] Harris-Ball Dec. ¶ 20; Smith Dec. ¶ 30; Francis Dec. ¶ 24; Gilkey Dec. ¶ 17; Hicks Dec. ¶ 17; T. Smith Dec. ¶ 24.

[16] Amended Compl. ¶ 67; Harris-Ball Dec. ¶ 13; Smith Dec. ¶¶ 11, 19, 25, 27; Francis Dec. ¶ 12; Gilkey Dec. ¶ 11; T. Smith Dec. ¶ 12; Torra Dec. ¶¶ 11, 19.

[17] Amended Compl. ¶ 62; Harris-Ball Dec. ¶ 14; Smith Dec. ¶¶ 12, 20, 26; Francis Dec. ¶¶ 12-15, 20-22; Gilkey Dec. ¶¶ 11-12; Hicks Dec. ¶¶ 11, 13; T. Smith Dec. ¶¶ 12-15, 20-22; Torra Dec. ¶¶ 12, 14, 20, 21.

Farm at State Farm's facilities during the hours designated by Alamo and State Farm.[18] Plaintiffs and Class Members filled out timesheets that were signed by their State Farm supervisor and submitted to Alamo.[19] State Farm and Alamo supervisors also authorized Plaintiffs' and Class Members' vacation and time off requests.[20]

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.

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[18] Harris-Ball Dec. ¶¶ 2, 5, 12; Smith Dec. ¶¶ 8-10, 17-18, 23-24; Francis Dec. ¶¶ 2, 5, 9-11, 19; Gilkey Dec. ¶¶ 8-10; Hicks Dec. ¶¶ 8-10; T. Smith Dec. ¶¶ 2, 5, 9-11, 19; Torra Dec. ¶¶ 4, 8, 10, 17-18.

[19] Harris-Ball Dec. ¶ 16; Smith Dec. ¶ 34; Francis Dec. ¶ 28; Gilkey Dec. ¶ 21; Hicks Dec. ¶ 20; T. Smith Dec. ¶ 28.

[20] Harris-Ball Dec. ¶ 15; Smith Dec. ¶ 29; Francis Dec. ¶¶ 14, 21; Gilkey Dec. ¶ 13; Hicks Dec. ¶ 12; T. Smith ¶¶ 14, 21; Torra Dec. ¶ 13.

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 in 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 District and 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 plaintiffs must put on some evidence that they 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). 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 FLSA does not require job duties to be identical in order to meet the similarly situated standard under 29 U.S.C. § 216(b). *Brand v. Comcast Corp.*, 12 Civ. 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 Indus., Inc.*, 11 Civ. 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 v. Abbott Laboratories, Inc.*, 566 F.Supp.2d 845, 848-49 (N.D. Ill. 2008); *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, plaintiffs may meet the similarly situated requirement by establishing that employees were treated in a uniform manner. *See Russell v. Ill. Bell Tel. 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 the 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 those in the same position as the 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.").

The reason for the relatively liberal first-stage standard for assessing the question of whether class members are "similarly situated" is that, 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, *2 (N.D. Ill. Nov. 29, 2011); *North*, 676 F.Supp.2d at 694. Because the FLSA statute of limitations is not tolled until a potential plaintiff opts in, early notice is important to ensure that claims are not lost to the statute of limitations during discovery. *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 is sent 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, *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. 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 it has the discretion to facilitate notice to potential plaintiffs of their right to opt into the action. *See 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 regularly exercise 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.*, 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*, No. 05 C 2347, 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 Indus., Inc.*, 10 Civ. 0011, 2010 WL 2404340, *5 (S.D. Ill. June 16, 2010).

B. This Case Meets the Standard for Conditional Certification

Plaintiffs have met their first-stage burden to show that Class Members employed by Alamo and State Farm 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 testimony and documentary evidence that Alamo and State Farm 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. 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, *5 (S.D. Ill. Jan. 26, 2011).

Conditional certification of a nationwide class is appropriate because Plaintiffs have presented evidence that the alleged illegal pay policy was nationwide. Class Members who worked in Florida, Michigan, Oklahoma, and Texas have all testified to the common practice. The practice was also common to Illinois, where Alamo Claim Service recently settled a case raising these exact same allegations. *Belton v. Alamo Claim Service et al.*, 1:12-cv-01306-JES-BGC, Doc. 122 (C.D. Ill filed Dec. 18, 2013) (final approval order). Alamo and State Farm admit that Class Members were hired as independent contractors to work for State Farm to process insurance claims and that all the Class Members were paid in the same way. *See*, Ex. 9, Lee Dec. ¶ 7; State Farm Answer ¶ 49; Ex. 7, Master Contract; Ex. 8, Independent Contractor Agreement. State Farm also admits that "pursuant to its agreement with Alamo, independent claim adjusters provided by Alamo were required to be proficient in claim adjusting techniques, practices, and standards prior their assignment to State Farm." State Farm Answer ¶ 49.

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 40 in a week. Moreover, Class Members all performed the same job—processing insurance claims for State Farm. Any variation 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.[21]

[21] Class Members are not exempt from the FLSA's overtime protections because Alamo and State Farm did not pay any of them on a salary or fee basis as required by the professional,

C. Equitable Tolling of the Statute of Limitations Is Appropriate

Under the FLSA, the statute of limitations for each individual class member is not tolled until he or she files a written consent to join the action, or until the court issues an equitable tolling order. 29 U.S.C. § 256(b); *Alvarez v. City of Chicago*, 605 F.3d 445, 448 (7th Cir. 2010); *Bergman v. Kindred Healthcare, Inc.*, No. 10 C 191, 2013 WL 2632596, *8 (N.D. Ill. June 11, 2013). The purpose of the statute of limitations is to provide fairness to a defendant. *Hodgson v. Lodge 851, Intern. Ass'n of Machinists and Aerospace Hodgson v. Lodge 851, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 454 F.2d 545 (7th Cir. 1971). The statute of limitations ensures that a defendant "receive notice of claims within a reasonable time, and thus are not impaired in their defense by evidence that is lost or diminished in its clarity because of the undue passage of time". *Olech v. Village of Willowbrook*, 138 F.Supp.2d 1036, 1041 (N.D. Ill. 2000).

Courts equitably toll the statute of limitations in order to protect class members' FLSA claims when they were unable to join a lawsuit. Typically a plaintiff must show "that (1) the party has diligently pursued his or her rights and (2) some extraordinary circumstance stood in the way and prevented timely filing." *Bergman v. Kindred Healthcare, Inc.*, No. 10 C 191, 2013 WL 2632596, *7 (N.D. Ill. June 11, 2013). The equitable tolling standard is met when class members, through no fault of their own, have been unable to join the lawsuit. For example, courts toll the statute of limitations when defendants refused to provide the names and addresses for class members. *Mitchell v. Acosta Sales, LLC*, 841 F.Supp.2d 1105, 1120 (C.D. Cal. 2011) (tolling the statute of limitation because defendant failed to provide class member contact

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administrative, and executive exemptions. 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), and 541.300 (professional).

information); *Baldozier v. Am. Family Mut. Ins. Co.*, 375 F. Supp. 2d 1089, 1093 (D. Colo. 2005) (same); *Adams v. Inter-Con Sec. Sys., Inc.*,242 F.R.D. 530, 543 (N.D. Cal. 2007) (same); *see also, Yahraes v. Restaurant Associates Events Corp.*, 10 Civ. 935 (SLT), 2011 WL 844963, *9-10 (E.D.N.Y. March 8, 2011) (stating that the "plaintiffs have vigorously pursued their claims and, through no fault of their own, have been delayed in prosecuting their action and distributing 216(b) notice to potential opt-in plaintiffs" defendants' actions, which were not due to "trickery" "have frustrated plaintiffs' diligent attempts to ensure that claims did not expire").

Here, Plaintiffs meet the equitable tolling standard because Alamo and State Farm have not provided Plaintiffs with Class Members' contact information. Plaintiffs have diligently sought to pursue the rights of potential Class Members. Plaintiffs asked Alamo and State Farm to voluntarily produce potential Class Members' contact information.[22] But Alamo refused to provide their contact information[23] and State Farm[24] has simply not responded. Because Alamo and State Farm have not produced the information, this prevented potential Class Members from learning of this case and of their ability to opt-in. As a result, potential plaintiffs have not received any notice about the case or their right to join, and therefore have had no opportunity to opt-in and preserve their overtime claims.

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[22] *See*, Ex. 10, Letters to defense counsel.

[23] Alamo Claim Service's defense counsel stated in an email: "We have reviewed your request with our clients and decline to provide the information at this time. In light of the pendency of the venue motions, we believe your request to be premature." Ex. 11. CIS Alamo's defense counsel stated "I've also reviewed your request with our clients and they decline to provide this information as well at this time in light of the venue and jurisdiction motions. They also are not agreeable to tolling the statute of limitations. I appreciate your patience in this regard." Ex. 12.

[24] *See*, Dunn Dec. ¶ 14 and Ex. 13.

Further, tolling the statute of limitations does not prejudice Alamo and State Farm. Alamo and State Farm have been on notice of Class Members claims since August 2012 when the *Belton* case was filed. And when Plaintiffs filed this case in October 2013 as a collective action, Plaintiffs raised the same claims as the plaintiffs in *Belton*. Any concern that evidence will grow stale is unwarranted because Alamo and State Farm maintain records of Class Members job duties, hours worked, employment contracts, and hours worked.

Thus, equitable tolling is warranted. *Baldozier*, 375 F. Supp. 2d at 1093.

D. Alamo and State Farm 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.[25] 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 Alamo and State Farm to provide names, the last known mailing and email addresses, and telephone numbers of the Class Members in order to assist with

[25] *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.

the issuance of the notice in a manipulable electronic format such as Microsoft Excel. Plaintiffs also ask for an order requiring State Farm to provide their counsel with the dates of birth and partial social security numbers (last four numbers) only for 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 where the address provided by Alamo and State Farm is incorrect. *See, e.g.*, *Swarthout v. Ryla Teleservices, Inc.*, 11 Civ. 21, 2011 WL 6152347, *5 (N.D. Ind. Dec. 12, 2011) (defendant ordered to produce the name, last known address, telephone number, dates of employment, location of employment, last four digits of their social security number, and date of birth for each class member); *Kelly v. Bank of America, N.A.*, 10 Civ. 5332, 2011 WL 7718421 (N.D. Ill. Sept. 23, 2011) (plaintiff received the names, addresses, social security numbers, telephone numbers, and email addresses); *Thompson v. K.R. Denth Trucking, Inc.*, 10 Civ. 0135, 2011 WL 4760393 (S.D. Ind. June 15, 2011) (defendant ordered to produce the names, addresses, telephone numbers, dates of employment, location of employment, and dates of birth of all potential plaintiffs); *Anyere v. Wells Fargo, Co., Inc.*, 09 Civ. 2769, 2010 WL 1542180 (N.D. Ill. Apr. 12, 2010) (defendant ordered to produce names, addresses, e-mail addresses, telephone numbers, and social security numbers).

Plaintiffs ask the Court to authorize Plaintiffs to distribute the notice by first-class mail and by email and allow Class Members 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, *14 (S.D. N.Y. Jan. 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, *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, *5 (D. Colo. Sept. 15, 2010) (same). Distribution by email in addition to regular mail also increases the chances that Class Members will receive notice. Due to the nature of claims adjusting industry Class Members often travel for work and frequently work and live away from their home for long periods of time. As a result they may not receive the first class mailing before the opt-in period ends. However, Class Members have access to their email accounts even if they are not home.[26] Because email addresses tend to remain the same even when a person's physical address changes or when the person lives away from home, notice by email is will help ensure that Class Members receive prompt and timely notice. 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 email reminder to any Class Members who have not responded thirty days after the mailing of the

[26] Alamo maintains Class Members' email addresses. For example, when claims adjusters register with Alamo, they are required to provide Alamo with their email addresses. See, Ex. 14, Alamo claims adjuster registration form.

initial notice. Such follow-up notice 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. The reminder also serves the purpose "to inform as many potential plaintiffs as possible of the collective action and their right to opt-in". *Chhab v. Darden Restaurants, Inc.*, 11 Civ. 8345(NRB), 2013 WL 5308004, *16 (S.D.N.Y. Sept. 20, 2013). Accordingly, courts have approved the sending of a reminder notice to class members who have not responded to the initial notice. *See, e.g., Chhab v. Darden Restaurants, Inc.*, 2013 WL 5308004 at *16 (approving reminder letter); *Guzelgurgenli v. Prime Time Specials Inc.*, 883 F.Supp.2d 340, 357-8 (E.D. N.Y. 2012) (listing cases); *Helton v. Factor 5, Inc.*, 10 Civ. 04927, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012) (approving follow-up notice); *Graham v. Overland Solutions, Inc.*, 10 Civ. 672 , 2011 WL 1769737, *4 (S.D. Cal. May 9, 2011) (same); *In re Janney Montgomery Scott LLC Financial Consultant Litigation*, 06 Civ. 3202, 2009 WL 2137224 (E.D. Pa. July 16, 2009) (same).

E. 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, *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 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.*, Dunn Dec. ¶ 16; Ex. 15, Approved Notices. Thus, the Court should order that Plaintiffs' proposed notice be sent to the Class.

III. 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 have worked for Alamo Claim Service or CIS Alamo in State Farm offices, outside of Illinois, as claims adjusters who were classified as independent contractors, paid a day rate, and not paid overtime premium pay for working more than 40 hours in a workweek during any period during the three years prior to the filing of this complaint and the date of final judgment in this matter (the "FLSA Collective Members")., (2) authorize Plaintiffs' counsel to issue the notice that is attached to the Declaration of Matt Dunn as Exhibit 1 and to send the follow-up email that is attached to the Declaration of Matt Dunn as Exhibit 2 to any Class Members who have not responded thirty days after the mailing of the initial notice, (3) order Alamo and State Farm to provide Plaintiffs' counsel with the names and last known mail and email addresses of all Class Members in a manipulable electronic format such as Microsoft Excel within seven days of the Court's order conditionally certifying this FLSA collective action, (4) order Alamo and State Farm to provide 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 3 days of receiving the returned

notice, (5) give Class Members 60 days from the date that notice is issued to opt-into the Collective Action; and (6) toll the statute of limitations from January 10, 2014 until notice is issued.

Dated: January 17, 2014

Respectfully Submitted,

s/ Michael J.D. Sweeney

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Attorneys for Plaintiffs

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 6,102 words therefore complies with Local Rule 7.1(B)(4).

By: *s/ Michael J.D. Sweeney*

Michael J.D. Sweeney