UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN SMITH; and ROSEANN MIRACOLA, SCOTTY POARCH, and MARK YOUNG, on behalf of themselves and those similarly situated persons, **Plaintiffs,** **v.** **KELLOGG COMPANY and KELLOGG SALES COMPANY,** **Defendants.**	**1:18-cv-01341-PLM-RSK** **District Judge Paul L. Maloney** **Magistrate Judge Ray Kent**

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

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INTRODUCTION

Plaintiffs Miracola, Poarch, and Young request that the Court conditionally certify this case as a Fair Labor Standards Act ("FLSA") collective action on behalf of the following similarly situated Kellogg[1] workers:

> All persons who have worked for Kellogg in the Snacks division at any time in the three years prior to the filing of the complaint in this case and were required to move snack products from the storeroom to the store shelf and 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 without limitation Retail Sales Representatives, Territory Managers, Kellogg Sales Representatives, and Retail Sales Managers (collectively, "RSRs").

Conditional certification of a FLSA class for purposes of issuing notice to class members, which would allow class members to file their consent to sue and preserve their claims, is proper when the plaintiffs are similarly situated to the class of workers that they seek to represent. Here, all RSRs work in retail grocery stores across the country, perform the same job duties, work more than 40 hours a week, are paid a salary and bonuses, and are not paid overtime compensation. Based on the Complaint, RSRs' testimony, and evidence from the *Thomas v. Kellogg* case (3:13-cv-05136-RBL (W.D. Wash.)), there is more than sufficient evidence to establish that the Named Plaintiffs are similarly situated to a nationwide group of RSRs. Thus, conditional certification of a FLSA class is warranted.

Plaintiffs also requests that the Court: (1) authorize Plaintiffs to issue notice to the class by mail and email and to issue a reminder to those RSRs who have not responded within 30 days; and (2) require Kellogg to provide Plaintiffs with putative class members' names, last known addresses, employer ID numbers, email addresses, and, for class members whose notice is undeliverable, partial Social Security Numbers and birth dates (for skip tracing).[2]

[1] Kellogg refers to Defendants.
[2] Exhibit 1 is the proposed Notice.

FACTS

A. Kellogg sells its products at the corporate level.

Kellogg, based in Michigan, manufactures and markets ready-to-eat cereal and convenience foods. Dkt. 226, Answer ¶ 45. Kellogg sells its products to grocery chains on the corporate level. *Thomas*, 2016 WL 7057218, at *1 (W.D. Wash. Dec. 5, 2016). After Kellogg establishes corporate sales agreements, it distributes its snack products from its warehouses directly to individual chain stores throughout the country.[3] Ex. 4, Bussell Decl. ¶¶ 3, 5-6.

B. RSRs perform the same job duties throughout the U.S.

Over the past three years, Kellogg has employed RSRs to service its corporate-level sales agreements in customers' retail stores throughout the country. *Thomas*, 2016 WL 7057218, at *1. RSRs across the country all perform the same job duties. These job duties include loading Kellogg's product onto a cart; bringing product from backroom to store floor; pulling, facing, and rotating product on store shelves; noting what inventory to bring out on the store floor; organizing the back stock area; hanging signs on shelves; placing coupons on product; transferring product from shelf to display; building, relocating, and removing displays; recording inventory levels; replenishing inventory and processing returns; interacting with Kellogg personnel; and cleaning up trash and disposing of it. Smith Decl. ¶ 8; Miracola Decl. ¶ 6; Poarch Decl. ¶ 7; Young Decl. ¶ 7; Johnson Decl. ¶ 8; Medina Decl. ¶ 8; Vehlewald Decl. ¶ 8; Spadaro Decl. ¶ 8; *Thomas*, 2016 WL 7057218, at *3.

Kellogg regularly conducts industrial studies of job tasks RSRs around the country perform and the time required to perform those tasks. Compl. ¶ 63, ECF 209; *Thomas*, 2016 WL 7057218, at *2. Kellogg performs these studies to understand "the tasks that occur on a daily

[3] These chain stores include Target, Wal-Mart, Meijer, Safeway, and Kroger.

basis and how long those tasks take." *Thomas*, 2016 WL 7057218, at *2. Kellogg applies the studies' results and findings to all RSRs, using the studies to develop nationwide labor standards and system-wide best practices. Ex. 7, Groulx Dep. 22:24-25:8; Ex. 5, Holton Dep. 457:2-8, 459:19-460:2, 641:7-642:24; Ex. 9, Workload Itinerary (showing assigned stores, work to do in each store, and planned work hours). Kellogg uses the results of the industrial studies as the building blocks to assign work to RSRs around the country. Ex. 5, Holton Dep. 350:9-352:5, 457:2-8, 466:24-467:11, 468:20-23; Ex. 8, Pennington Dep. 33:13-18; Ex. 6, Bussell Dep. 147:23-149:14. Those studies show the job duties RSRs perform, and that RSRs perform the same duties throughout the country. *Thomas*, 2016 WL 7057218, at *2 ("Kellogg's studies show that [RSRs'] job duties are uniform").

C. RSRs are not paid overtime premium pay for their overtime hours.

RSRs have to work more than 40 hours a week regularly to keep up with their work. Indeed, Kellogg designed the RSR job for 44 to 45 hours per week. Ex. 5, Holton Dep. 603:17-604:10. RSRs testified that they regularly worked more than 40 hours a week. Smith Decl. ¶ 9 (50 hours); Miracola Decl. ¶ 8 (55-60); Poarch Decl. ¶ 9 (60-70); Young Decl. ¶ 11 (55-65); Johnson Decl. ¶ 9 (58-65); Medina Decl. ¶ 9 (60); Vehlewald Decl. ¶ 9 (55); Spadaro Decl. ¶ 9 (55-60).

Kellogg pays RSRs a salary and bonuses. Smith Decl. ¶ 13; Miracola Decl. ¶ 12; Poarch Decl. ¶ 12; Young Decl. ¶ 13; Johnson Decl. ¶ 13; Medina Decl. ¶ 13; Vehlewald Decl. ¶ 13; Spadaro Decl. ¶ 13; Ex. 2, *Thomas* Pretrial Order ¶¶ 27, 33. Kellogg does not pay RSRs overtime wages at the rate of time and one-half the regular rate for working more than 40 hours in a workweek. Ex. 2, *Thomas* Pretrial Order ¶ 39; Ex. 3, *Thomas* Answer, ¶ 4. Kellogg classifies RSRs as exempt from the FLSA's overtime pay provisions under the outside sales exemption. Ex. 6, Bussell Dep. 45:24–46:22; *see* Dkt. 226, Answer, Affirmative Defense ¶ 7 .

ARGUMENT

A. Courts send FLSA notices early in a litigation to give effect to the FLSA's remedial purpose.

Section 216(b) of the FLSA provides that a person may maintain an action on "behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." 29 U.S.C. § 216(b). Thus, there are only two requirements to proceed as a collective action: (1) plaintiffs must be similarly situated; and (2) a current or former employee must consent in writing to join the suit. This latter requirement means that a collective action follows an "opt-in" rather than "opt-out" class procedure. *See Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007). "Certification" at this stage only means that notice will be issued to putative class members.

While the "FLSA does not define the term 'similarly situated,'" the Sixth Circuit has held that "plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). As then-District Court Judge Sotomayor explained:

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

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

Courts in this District follow a two-stage procedure for determining whether a case should proceed as an FLSA collective action. *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546

(6th Cir. 2006). The first step is conducted early in the litigation when the court has limited evidence regarding the similarly situated issue. *Shabazz v. Asurion Ins. Serv.*, 2008 WL 1730318, at *2 (M.D. Tenn. Apr. 10, 2008). The court grants conditional certification at this stage for purposes of issuing notice, so class members can preserve their federal overtime claims, after which, the parties conduct discovery. *Dallas v. Alcatel-Lucent USA, Inc.*, 2012 WL 424878, *1 (E.D. Mich. Feb. 9, 2012). Because at this stage the court has minimal evidence, it applies a lenient standard which typically results in conditional certification of a collective class. *Comer*, 454 F.3d at 547. Courts rely on the complaint and supporting declarations to meet this lenient standard. *Bradford v. Logan's Roadhouse, Inc.*, 137 F. Supp. 3d 1064, 1071 (M.D. Tenn. 2015). At this stage, the court requires little more than substantive allegations, supported by declarations or discovery, that the putative class members "suffer from a single, FLSA-violating policy." *O'Brien*, 575 F.3d at 585; *White v. MPW Indus. Servs., Inc.*, 236 F.R.D. 363, 373 (E.D. Tenn.2006) ("substantial allegations supported by declarations are 'all that is required'"). If the court conditionally certifies the class, potential class members are given notice and the opportunity to opt-in. *Pacheco v. Boar's Head Provisions Co.*, 671 F. Supp. 2d 957, 959 (W.D. Mich. 2009).

The second stage of review occurs after discovery is complete and is typically precipitated by defendant's decertification motion. *Toliver v. JBS Plainwell, Inc.*, 1:11-cv-302-PLM, 2014 WL 12279517, at *2 (W.D. Mich. May 2, 2014). If the opt-ins are similarly situated, the court allows the collective action to proceed. If not, the court decertifies the class and dismisses the opt-in plaintiffs without prejudice. *Kutzback v. LMS Intellibound, LLC*, 301 F. Supp. 3d 807, 817 (W.D. Tenn. 2018) (citing *O'Brien*, 575 F.3d at 585; *Comer*, 454 F.3d at 546). This determination takes place on the fuller record developed after discovery is complete. *Comer*, 454 F.3d at 547.

The reason for this two-step process, with its relatively liberal first-stage standard for assessing whether class members are similarly situated, is that, unlike a Rule 23 class action, the statute of limitations is not tolled for putative FLSA class members *until they affirmatively opt into the action*. 29 U.S.C. § 216(b). **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 belief that class members may be similarly situated.** *See Roberts v. Corr. Corp. of Am.*, 2015 WL 3905088, at *15 (M.D. Tenn. June 25, 2015) (citing *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The statute of limitations is not tolled for any individual class member until that individual has filed a written consent to join form with the court. 29 C.F.R. § 790.21(b)(2)."); *Gaffers v. Kelly Servs., Inc.*, 2016 WL 8919156, at *2 (E.D. Mich. Oct. 13, 2016) ("[P]otential opt-in plaintiffs will be irreparably harmed if . . . notice is not sent promptly to them, because the limitations period on their claims was not tolled by either the filing of the complaint or the conditional certification of the collective litigation." (citations omitted)). Thus, the two-stage procedure balances the interests of the parties; it ensures workers receive prompt and timely notice of their right to vindicate their FLSA rights while simultaneously ensuring that only claims of genuinely similarly-situated individuals will be handled in the action.

Courts facilitate notice early in the action to ensure that employees and courts alike benefit from the litigation of similar claims in a single case. *See Hoffmann-La Roche Inc.*, 493 U.S. at 172. Collective actions allow employees to pool expenses and efficiently litigate claims, and allow courts to avoid a multiplicity of suits. *Id.* Court-facilitated notice also affords access to justice for current employees and others who might be unwilling or unable to independently secure private counsel to sue wealthy companies. Court-supervised notice also allows the court to ensure that employees receive information that is "timely, accurate, and informative" as well as

neutral. *Sperling*, 493 U.S. at 172. Courts in this District regularly certify collective actions and facilitate the class notice procedure. *See, e.g.*, *Toliver*, 2014 WL 12279517, at *1; *Duran v. Sara Lee Corp*, 2012 WL 12854881, at *1 (W.D. Mich. Mar. 23, 2012); *Jesiek v. Fire Pros, Inc.*, 275 F.R.D. 242, 243 (W.D. Mich. 2011) (Maloney, J.); *Carlson v. Leprino Foods Co.*, 2006 WL 1851245, at *6 (W.D. Mich. June 30, 2006). At this point, the terms of such notices are standard.

B. Courts regularly conditionally certify FLSA misclassification cases.

Courts in this Circuit and throughout the country regularly award conditional certification in misclassification cases. *See, e.g.*, *Killion v. KeHE Distribs.*, 2012 WL 5385190, at *8 (N.D. Ohio Oct. 31, 2012) (conditionally certifying collective action of sales representatives alleging misclassification as outside sales employees); *Burdine v. Covidien, Inc.*, 2011 WL 2976929, at *1 (E.D. Tenn. June 22, 2011), *R&R adopted in part*, 2011 WL 2971186 (E.D. Tenn. July 21, 2011) (recommending conditional certification of pharmaceutical sales representatives alleging misclassification); *Amos, v. Lincoln Property Co.*, 2017 WL 2935834, at *3 (M.D. Tenn. July 7, 2017) (conditional certification of business managers who were classified as exempt); *Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 844 (N.D. Cal. 2010) (granting conditional certification for sales representatives classified as independent contractors). In a case similar to this one, a California district court conditionally certified a nationwide FLSA collective action on behalf of a group of RSRs that Hershey classified as exempt from the FLSA. There, Hershey's workers stocked shelves, sorted product, built displays, and tagged Hershey products. *Campanelli v. Hershey Co.*, 2010 WL 3219501, *2-5 (N.D. Cal. Aug. 13, 2010). Indeed, more than five years ago, a district court in Washington conditionally certified an FLSA collective action for Kellogg's RSRs, and subsequently denied decertification. *Thomas*, 2014 WL 716152 (W.D. Wash. Jan. 9, 2014) (granting conditional certification of Kellogg RSRs); *Thomas*, 2016 WL 7057218 (denying

decertification).

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

Plaintiffs and the class they seek to represent are similarly situated. As explained in Plaintiffs' declarations, Kellogg employed all putative class members as RSRs. All RSRs performed the same work, i.e., servicing Kellogg's corporate sales agreeements. All putative class members regularly worked more than 40 hours in a workweek. All RSRs were paid a salary and bonuses. All were treated by Kellogg as FLSA exempt under the outside sales exemption, and thus all were denied overtime premium pay at the rate of time and one-half the regular rate. Kellogg's failure to pay overtime premium pay to workers with similar job responsibilities makes workers similarly situated for FLSA purposes. *Thomas*, 2014 WL 716152. Therefore, conditional certification is appropriate.[4]

D. Plaintiffs should mail and email the Notice to the FLSA class.

Issuing Notice of the case, along with a Consent to Sue form, is an important component to providing the best notice practicable. In this modern electronic age, "courts within the Sixth Circuit have routinely approved dual notification through regular mail and email." *McClain v. First Acceptance Corp.*, 2017 WL 3268026, at *4 (M.D. Tenn. Aug. 1, 2017) (citation omitted); *see also Anderson v. Minacs Grp. (USA) Inc.*, 2017 WL 1856276, at *9 (E.D. Mich. May 9, 2017) (finding notice by both regular mail and email "comports with a trend toward greater use of e-mail (and corresponding less use of ordinary mail) for most types of communications"); *Williams*

[4] If Kellogg argues that the second-step analysis applies based on the discovery conducted in the *Thomas* case, then this Court should find that having fully litigated the issue once, Kellogg is bound by the *Thomas* Court's denial of its second-step motion for decertication in. *See United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

v. King Bee Delivery, LLC, 2017 WL 987452, at *7 (E.D. Ky. Mar. 14, 2017). Email makes sense as a supplementary form of notice because it is an efficient and inexpensive way to notify and reach some class members who have changed their physical address. *Pippins v. KPMG LLP*, 2012 WL 19379, at *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").

E. Notice should be sent to all RSRs.

RSRs who were sent notice in the *Thomas* case, but who did not opt into the case, should be sent notice in this case. *See Fitzpatrick v. Cuyahoga Cty.*, 2017 WL 5178266, at *3 (N.D. Ohio Nov. 8, 2017) (allowing notice to be sent to employees who may have received notice in substantially similar prior case because "there is nothing within the language of the FLSA or the Portal-to-Portal Act that prohibits successive collective actions"). There are myriad reasons why an RSR may not have opted into the previous lawsuit, including that they may still have been working for Kellogg at the time and feared retaliation (*see* ECF 34, seeking TRO), they may have been overcome by the effort required to opt-in, or they may not have received notice of the *Thomas* case. *See Rutti v. Lojack Corp.*, 2012 WL 3151077, at *5-6 (C.D. Cal. July 31, 2012) ("[T]here are strong disincentives for employees to participate in a class action against their current or former employer, particularly when the suit requires an affirmative opt-in, as does the FLSA.") (listing reasons). As there is no reason that RSRs who were sent notice but did not join the *Thomas* case should be excluded here, they should be sent notice to join this case.

Additionally, that some putative class members may have signed an arbitration agreement is not a basis for denying conditional certification and notice to similarly situated workers. Courts in this Circuit are clear that whether potential opt-in plaintiffs are required to arbitrate their claims

is not a reason to deny notice to similarly situated workers, and the issue should be left for after conditional certification. *Colley v. Scherzinger Corp.*, 176 F. Supp. 3d 730, 735 (S.D. Ohio 2016) (granting conditional certification despite some putative class members having executed arbitration agreements because all class members had same job title, were subject to same pay scale at same time, and court had not yet addressed whether arbitration agreements were valid and binding); *Taylor v. Pilot Corp.*, 2016 WL 4524310, at *2 (W.D. Tenn. Mar. 3, 2016), *aff'd*, 697 F. App'x 854 (6th Cir. 2017) ("[T]he existence of signed arbitration agreements does not alter the potential class encompassed by the Conditional Certification. . . . The effect of the arbitration agreements will be addressed at the final certification stage."). The Court should address any arbitration issues after the collective is defined; it may resolve the issue of whether any agreement compels arbitration, and if so in what form, at that time. *Taylor*, 2016 WL 4524310, at *5 ("Defendants may raise the issue of the arbitration agreements during final certification when the identities of the potential plaintiffs are more fully developed and more discovery has been conducted. The Court will then address any issues raised by the arbitration agreements.").

F. Nonresponsive Class Members should receive a reminder Notice.

Plaintiffs request authorization to distribute a reminder postcard (Exhibit 10) to RSRs who have not yet responded halfway through the notice period. Courts routinely direct dissemination of a reminder to putative class members who have not responded after issuing the initial notice. This follow-up notice contributes to awareness of the duration of the opt-in period and serves what the Supreme Court 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." *Hoffman-La Roche v. Sperling* 493 U.S. 165, 172. The reminder also serves "to inform as many potential

plaintiffs as possible of the collective action and their right to opt-in." *Chhab v. Darden Rests., Inc.*, 2013 WL 5308004, at *16 (S.D.N.Y. Sept. 20, 2013).

For these reasons, courts regularly approve the sending of reminder notices to class members who have not responded after issuing the initial notice. *See, e.g., Sharp v. Mecca Campus Sch., Inc.*, 2017 WL 1968684, at *3 (W.D. Tenn. May 11, 2017) (approving reminder postcard to be sent following the mailing and emailing of the notice); *Kutzback v. LMS Intellibound, LLC*, 2014 WL 7187006, at *12 (W.D. Tenn. Dec. 16, 2014) (allowing reminder postcard, citing "the concern that all potential opt-in plaintiffs properly receive notification of the collective action"), *aff'd by* 2015 WL 1393414, at *7 (W.D. Tenn. Mar. 25, 2015).

G. Kellogg should provide Plaintiffs with Class Members' information.

Kellogg should promptly provide Plaintiffs with all Class Members' names, last known addresses, and email addresses to facilitate Notice. The information should be provided in a manipulable electronic format such as Excel. When conditionally certifying an FLSA action, courts routinely direct employers to supply contact information necessary to issue the best practicable notice. *Hoffman-LaRoche,* 493 U.S. at 170; *Evans v. Caregivers, Inc.*, 3:17-cv-0402, 2017 WL 2212977, at *7 (M.D. Tenn. May 19, 2017) (ordering defendant produce names, last known mailing addresses, and email addresses for all putative class members); *McClain*, 2017 WL 3268026, at *5 (same); *Thomas*, 2014 WL 716152 (ordering Kellogg to produce "names, last known addresses, telephone numbers, and email addresses of all potential class members in . . . Excel").

H. Employee identification numbers.

Kellogg should produce Class Members' employee identification numbers in order to maintain accuracy of each person's identity as litigation progresses. Unique employee identifiers

are used to ensure database integrity in producing payroll records and are essential to making sure that Plaintiffs' and Kellogg's databases match. *Thomas*, 2014 WL 716152 (ordering Kellogg to produce unique employee ID number). Providing unique identifiers will allow Plaintiffs to sync the resulting database of clients with Kellogg's databases for use in determining merits and damages issues. If Plaintiffs do not receive unique identifiers, Plaintiffs cannot know whether the Robert Doe submitting his Consent to Sue is Robert Doe Jr., Robert Doe Sr., Rob Doe, or other similar names in the class list. Providing unique identifiers removes countless database management issues that could make handling a case of this type far more complex and time-consuming than necessary. For this reason, courts routinely order production of unique identifiers. *See Ali v. Piron, LLC*, 2018 WL 1358044, at *5 (E.D. Mich. Mar. 16, 2018) (ordering production of unique employee ID number); *McKinstry v. Dev. Essential Servs., Inc.*, 2017 WL 815666, at *3 (E.D. Mich. Mar. 2, 2017) (same); *Thomas*, 2014 WL 716152 (same).

I. Birth dates and last four digits of Class Members' social security number for Notices that are returned without a forwarding address.

Kellogg should produce birth dates and the last four digits of social security numbers of the Class Members whose Notices are returned without forwarding addresses. When a Notice is returned as undeliverable by the post office, this information will assist with the "skip tracing" process to find the most current address for that individual and to reissue the Notice. This typically would occur if a person moved without leaving a forwarding address, or if a forwarding order has expired (after one year). Kellogg would provide the last four digits of a social security number only after Notice is undeliverable. Plaintiffs then would use the partial social security numbers only to assist in "skip tracing"—e.g., to find out whether the John Smith who used to live in Los Angeles is now the John Smith living in Traverse City.

Using partial social security numbers for skip tracing returned notices is common in FLSA collective actions. *See, e.g.*, *Thomas*, 2014 WL 716152; *Lewis v. Nev. Property 1, LLC*, 2013 WL 237098, at *17 (D. Nev. Jan. 22, 2013); *Swarthout v. Ryla Teleservices, Inc.*, 2011 WL 6152347, at *5 (N.D. Ind. Dec. 12, 2011). The birth dates are used with the last four digits of the social security numbers to ensure that skip traces are as accurate as possible.

J. Plaintiffs' proposed Notice is neutral and should be approved.

Plaintiffs propose to send the Notice (Exhibit 1) to the Class Members. This Notice informs Class Members in simple, neutral language of the nature of this action, their right to participate in the case by filing a Consent to Sue form with the Court, and the consequences of their joining or not joining the action. The Notice informs Class Members that they have the right to hire their own attorney and that the Notice is not a solicitation by the attorneys.

Plaintiffs request that Class Members have a minimum of 60 days to return their Consent to Sue form. Courts routinely allow 60 days, and indeed some approve longer periods of time. *Ware v. T-Mobile USA*, 828 F. Supp. 2d 948, 956 (M.D. Tenn. 2011) (120-day opt-in period for call center employees); *Amos v. Lincoln Property Co.*, 2017 WL 2935834, at *4 (M.D. Tenn. July 7, 2017) (90-day opt-in period for business managers for residential property management company); *Thomas*, 2014 WL 716152, at *3 (W.D. Wash. Jan. 9, 2014) (60-day opt-in period for RSRs).

Plaintiffs will bear the cost of mailing the Notices and reminders.

CONCLUSION

The Court should conditionally certify this action as a collective action on behalf of RSRs who Kellogg employed three years before the filing of the complaint, and authorize Plaintiffs' counsel to issue the proposed Notice and reminder by regular mail and email. The Court also

should order Kellogg to provide Plaintiffs with names, last known addresses, unique employee ID numbers, email addresses, and for returned Notices only, partial social security numbers and birth dates, so that Plaintiffs may issue the Notice to potential class members.

Dated: January 16, 2019

Respectfully Submitted,

/s/ Matt Dunn

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF ATTEMPT TO OBTAIN CONCURRENCE

Pursuant to Local Civil Rule 7.1(d), I certify that on January 4, 2019, I informed counsel for Defendants via email that Plaintiffs intended to file the instant motion and asked whether they would consent to conditional certification and issuance of notice. I further certify that on January 7, 2019, I unsuccessfully attempted to reach counsel for Defendants by phone and that I received an email from Defendants' counsel confirming that they would not consent to conditional certification.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.3(b)(ii), I certify that the preceding brief contains 4,299 words including headings, footnotes, citations and quotations. The word processing software used to perform the word count is Microsoft Word 2013.

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