IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY FLSA AND D.C. MINIMUM WAGE ACT COLLECTIVE ACTIONS AND SEND NOTICE TO THE CLASS

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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I. DRISCOLL'S ALLEGATIONS ARE SUFFICIENT TO ESTABLISH THAT THE CLASS IS SIMILARLY SITUATED[1]

Plaintiff David Driscoll has sufficiently alleged that he and other class members were subject to The George Washington University's ("GWU" or "the University") common illegal pay policy and thus are similarly situated. Specifically, Driscoll contends that 1) GWU misclassified its Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates (collectively "Clerical Jobs"); 2) upon reclassification of the Clerical Jobs, GWU improperly calculated the back overtime wages under a "half-time" method that resulted in class members receiving only one-third or less of the full wages owed to them; 3) GWU unilaterally limited its back overtime liability to two years, even though the law imposes back wage liability going back three years; 4) GWU used an unrealistically low estimate of hours that ignored evidence of the actual hours that class members worked; and 5) GWU's payments did not include any interest or liquidated damages for its failure to pay the overtime wages when they were due. Driscoll further contends that he and all class members were subject to this illegal pay policy. GWU admits or does not contest the facts that support Driscoll's allegations of a common illegal pay policy.

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[1] As the Court denied the portion of Plaintiff's Cross Motion to Amend the Class Action Complaint that sought to amend the complaint to plead a Rule 23 class for claims brought under the D.C. Minimum Wage Act (see Docs. 19 & 20), the Court should now construe this motion as a motion to also conditionally certify a collective action under the D.C. Minimum Wage Act; the analysis made in conditionally certifying a collective action under the D.C. Minimum Wage Act is the same as it is under the Fair Labor Standards Act. *See Dinkel v. MedStar Health, Inc.*, --- F. Supp. 2d ----, 11–00998 (CKK), 2012 WL 3062461, *2 fn 3 (D.D.C. July 29, 2012); *Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440, 445 fn 3 (D.D.C. 2007). Similarly, the Court should approve the proposed notice attached to Plaintiffs' original brief as Exhibit 2. This proposed notice includes references to the D.C. Minimum Wage Act. Plaintiffs previously alerted the Court to this issue in its initial brief (see Doc. No. 17 at footnotes 1 & 3).

GWU does not contest that it misclassified the employees working in the Clerical Jobs.[2] Its Human Resources department explained to Jaime Lewis that "[t]he University is providing compensation to employees who have been mis-classified." The University even sent a form letter to people working in the Clerical Jobs informing them that they had been misclassified and would be reclassified and paid overtime wages going forward. *See* Exhibit A (Reclassification Letter) attached to *Lewis Decl.* [Doc. 17-2]; Exhibit B (Reclassification Letter) attached to *Driscoll Decl.* [Doc. 17-3].

GWU admits that it reclassified all exempt employees working in the Clerical Jobs to a non-exempt status. *Zaghal Decl.* [Doc. 23-1] at ¶ 1. The reclassification was University-wide and applied to all exempt employees working in one of the Clerical Jobs and encompassed all schools and departments. Exhibit C (Email from Merica Dito on 12/7/11) attached to *Driscoll Decl.* ("This was a University-wide examination across all classifications. All employees within certain classifications, including Executive Coordinators, are eligible for overtime going forward."); Exhibit B (Email from Reem Zaghal on 12/9/11) attached to *Lewis Decl.* ("What was the reason for the university to review the misclassification of my position? It was a University wide project.").

[2] GWU denies Driscoll's allegation that it misclassified Executive Aides and Executive Support Assistants, claiming that it had always classified those positions as non-exempt and paid them overtime. Factual disputes, however, should not prevent notice issuing to the class. Such disputes are more properly addressed at the second stage of the certification process. *See Dinkel*, 2012 WL 3062461 at *3 ("At [the first] stage, district courts should ordinarily refrain from resolving factual disputes and deciding matters going to the merits."). In any case, any Executive Aides and Executive Support Assistants who GWU paid overtime wages throughout the class period would not be part of the class by definition.

GWU admits that the reclassifications were based on a "review and assessment of [each class member's] position and … job duties" and "an in-depth review of [each class member's] actual job duties." Exhibit A (Reclassification Letter and "Employee Frequently Asked Questions") attached to *Lewis Decl.*; Exhibit B (Reclassification Letter and "Employee Frequently Asked Questions") attached to *Driscoll Decl.*; *see also Zaghal Decl.* at ¶ 12, *Dito Decl.* [Doc. 23-2] at ¶ 3. GWU does not contest that the people working in the Clerical Jobs performed clerical work as their primary work duty. *Driscoll Decl.* at ¶ 7; *Lewis Decl.* at ¶ 7. No class member's job duties changed as a result of the reclassification. Exhibit A (Reclassification Letter) attached to *Lewis Decl.* ("Your eligibility for overtime pay does not change in any way the nature or level of your work."); Exhibit B (Reclassification Letter) attached to *Driscoll Decl.* (same).

GWU also admits the facts that support Driscoll's allegations that upon reclassification, it improperly calculated the back overtime wages under a "half-time" method. Exhibit B (Email from Merica Dito on 12/5/11) attached to *Lewis Decl.* ("The estimated hours were done using a 'half-time' calculation"). It admits that it unilaterally limited its back overtime liability to two years. *Zaghal Decl.* at ¶ 16; *Dito Decl.* at ¶ 5. GWU admits that it used common guidelines for determining the back overtime hours class members worked. *Zaghal Decl.* at ¶ 16; *Dito Decl.* at ¶ 5. It does not contest that at least in the case of Driscoll and Lewis the guidelines resulted in an unrealistically low estimate of the overtime hours worked. Moreover, GWU does not contest that it did not pay any class members liquidated damages or interest for their back wages.

Driscoll has made extensive allegations, supported by documentary evidence, that he and other class members were subject to GWU's common illegal pay policy. GWU admits or does not deny the facts supporting these allegations. Thus, Driscoll has sufficiently shown that he and

the other class members are similarly situated. Accordingly, the putative class should be conditionally certified for purposes of notifying putative class members of the opportunity to join the action.

II. DRISCOLL'S CLASS DEFINITION IS APPROPRIATE

GWU argues that Driscoll's class definition is overbroad because it includes Executive Support Assistants and Executive Aides, who GWU alleges have always been classified as non-exempt and paid overtime. However, whether Executive Support Assistants and Executive Aides were paid overtime wages throughout the class period is a factual issue to be resolved after discovery is complete. *See Dinkel v. MedStar Health, Inc.*, 11–00998 (CKK), --- F. Supp. 2d ----, 2012 WL 3062461, *3 (D.D.C. July 29, 2012) ("At [the first] stage, district courts should ordinarily refrain from resolving factual disputes and deciding matters going to the merits."). The class definition only includes employees "who worked overtime hours but were not paid overtime wages." So Executive Support Assistants and Executive Aides who were in fact treated as non-exempt employees and paid overtime wages throughout the class period are not part of the class. If any mistakenly join, GWU can at that point move to exclude them from the class after discovery is complete. *See Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 6 (D.D.C. 2010) ("[D]efendants may move at the close of discovery to decertify the conditional class if the record establishes that the plaintiffs are not, in fact, similarly situated.").

Contrary to GWU's assertion, class members who were misclassified but left GWU's employment before the reclassification are proper members of the class, as they were subject to the same illegal pay policy outlined in Section I *supra* as the other class members. The factual and legal analysis of their claims is the same as that of class members who remained employed through the reclassification. Thus, keeping them in the class meets the efficiency and fairness

goals of the FLSA collective action provision. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170-171 (1989). Accordingly, the class as proposed should be conditionally certified and notice sent to putative class members.

III. DRISCOLL'S FACTUAL AND LEGAL ASSERTIONS ARE SOUND

GWU mistakenly argues that Driscoll relies only on GWU's act of reclassification to show that the class is similarly situated. That is simply not the case. As set forth in Section I, *supra*, Driscoll alleges a plethora of facts, including many admissions by GWU, that establish that the class was subject to a common illegal policy and is therefore similarly situated. Regardless of whether the fact of reclassification is determinative of a common illegal policy, it certainly can be an indicator of one. *See Wallace v. Countrywide Home Loans, Inc.*, SACV 08-1463 AG (MLGx), 2009 WL 4349534, *6 (C.D. Cal. Nov. 23, 2009) (whether reclassification was a concession that plaintiffs were misclassified is a factual issue). Driscoll's case is markedly different from *Myles v. Prosperity Mortg. Co.*, CCB–11–1234, 2012 WL 1963390 (D. Md. May 31, 2012), cited by GWU. There, the court denied conditional certification as to certain groups of loan officers because they did not allege sufficient facts to show a common illegal pay policy with respect to those groups. Here, Driscoll has alleged sufficient facts to show that GWU's multi-faceted illegal pay policy applied to all the reclassified Clerical Jobs.

GWU's attempts to contest the facts that Driscoll alleges are inappropriate at this stage in the litigation. *See Dinkel*, 2012 WL 3062461 at *3 ("At [the first] stage, district courts should ordinarily refrain from resolving factual disputes and deciding matters going to the merits."). For example, Ms. Zaghal's claim that GW did not conduct individualized reviews of job duties is directly contrary to the statement in the Reclassification Letter GWU sent to employees: "During a recent review and assessment of your position and your job duties, we have determined that

you are eligible to receive overtime pay" and to the "Employee Frequently Asked Questions" documents it sent to employees: "The reclassification of your position is the result of an in-depth review of your actual job duties." Exhibit A (Reclassification Letter and "Employee Frequently Asked Questions") attached to *Lewis Decl.*; Exhibit B (Reclassification Letter and "Employee Frequently Asked Questions") attached to *Driscoll Decl.* (emphasis added). Such factual disputes are not appropriate at the notice stage. The Parties will be able to raise the issue with the Court or the finder of fact after discovery has been completed. Consequently, the proposed class should be conditionally certified and notice sent to putative class members

IV. DRISCOLL HAS MET HIS BURDEN OF SHOWING THAT HE AND THE CLASS ARE SIMILARLY SITUATED

Driscoll has provided ample evidence that he and the class are similarly situated, *i.e.*, were all subject to a common illegal policy. Contrary to GWU's assertions, Driscoll has provided more than just conclusory statements or hearsay. For example, Driscoll has provided ample documentary evidence, including documents originating from GWU, in support of his allegations. *See* Section I, *supra*. Moreover, as set forth in Section I, *supra*, GWU admits many of these facts and does not deny others. Thus, Driscoll has met the "lenient" standard of showing that the class is similarly situated. *See McKinney v. United Stor-All Centers, Inc.*, 585 F. Supp. 2d 6, 8 (D.D.C. 2008); *see also Cryer v. Intersolutions, Inc.,* Civ. A. No. 06–2032, 2007 WL 1053214, *2 (D.D.C. Apr. 7, 2007) (Plaintiffs have an initial burden of a "modest factual showing" demonstrating that the named plaintiffs and potential as yet unnamed class members "were victims of a common policy or plan that violated the law."), *citing Hunter v. Sprint Corp.,* 346 F. Supp. 2d 113, 117 (D.D.C. 2004).

It is ironic that GWU challenges Driscoll's and Lewis's testimony as hearsay. As an initial matter, courts regularly consider hearsay at the notice stage of a FLSA collective action. Courts throughout the country recognize that they may rely on hearsay in order to grant conditional certification. Courts permit hearsay because they recognize that the degree of proof for the first-stage inquiry is lenient. As the court in *Aguayo v. Oldenkamp Trucking* explained,

> The declaration may not be sufficient to carry the burden of proof at trial, but it is sufficient to carry the burden on this motion. A reasonable inference from the evidence submitted is that Aguayo, as an employee of defendant, would learn, during the normal course of his employment, how the employer operates, where the employer operates, what other similar employees are doing, and where they are doing there [*sic*] jobs.

No. CV F 04-6279 ASI LJO, 2005 WL 2436477, *4 (E.D. Cal. Oct. 3, 2005); *see also, Robinson v. Empire Equity Group, Inc.*, WDQ–09–1603, 2009 WL 4018560 (D. Md. Nov. 18, 2009) ("Judges deciding motions for conditional certification in this district have considered hearsay in supporting affidavits. This is appropriate given the 'modest factual support' required at this stage."); *Hoffman v. Securitas Sec. Services*, No. CV 07-502-S-EJL, 2008 WL 5054684, *13 (D. Idaho Aug. 27, 2008) (refusing to strike hearsay allegations because of the lenient standard).

A requirement that pre-discovery declarations filed in support of a conditional certification motion must strictly adhere to the rules of evidence is contrary to the FLSA notice purposes. Under Defendants' argument, Plaintiffs would have to engage in discovery to provide non-hearsay evidence before moving for conditional certification. Such a requirement would "defeat the purpose of the two-stage analysis." *White v. MPW Industrial Services, Inc.*, 236 F.R.D. 363, 368 (E.D. Tenn. 2006); *see Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (notice of the right to opt-in should be issued promptly after the filing of the

case if there is a colorable basis for believing the class members may be similarly situated). *See also*, *Mullins v. City of New York*, 626 F.3d 47, 52 -53 (2d Cir. 2010) (finding that hearsay evidence may be considered by a district court when consistent where provisional relief is at issue).

Of course, after discovery is completed Defendants will have another opportunity to challenge Plaintiffs' evidence on a fuller record and after Plaintiffs have had an opportunity to depose and take discovery from Defendants and their witnesses. Thus, the Court can and should rely on all of the statements contained in Plaintiffs' declarations. *Aguayo*, 2005 WL 2436477 at *4.

Notably, while GWU claims hearsay should not be admitted, it relies heavily on hearsay in the *Zaghal Decl.* to oppose notice to the class. It would be improper to allow GWU to rely on hearsay but not Driscoll. As Driscoll has provided ample evidence that he and the class are similarly situated, the proposed class should be conditionally certified and notice sent to putative class members.

V. DIFFERENCES AMONG PUTATIVE MEMBERS DO NOT WEIGH IN FAVOR OF DENYING SENDING NOTICE TO THE CLASS

A. Driscoll Is Similarly Situated to the Class

Driscoll has shown that he and the class were subject to the same illegal pay policies—they were misclassified as exempt and not paid the overtime wages; although GWU eventually reclassified them, it did not pay them the back wages required by law for all the hours they worked and did not pay liquidated damages or interest on the back wages. *See* Section I, *supra*. Thus, Driscoll has shown that he and the class are similarly situated, warranting conditional certification of the collective action and notice to putative class members.

GWU's claim that Driscoll is unique because GWU requested an estimate of his overtime hours is irrelevant to the question of whether he is similarly situated to the class. The relevant inquiry that the Court must make at this point is whether Driscoll and the class members were "similarly situated." *Hoffman v. Sbarro, Inc.,* 982 F. Supp. 249, 261 (S.D.N.Y. 1997) (J. Sotomayor) ("The threshold issue in deciding whether to authorize class notice in an FLSA action is whether plaintiffs have demonstrated that potential class members are 'similarly situated.'"). While the FLSA does not define "similarly situated," courts understand it to require a showing that the plaintiffs "and potential plaintiffs together were victims of a common policy or plan that violated the law." *Encinas*, 265 F.R.D. at 6, *citing Castillo v. P & R Enterprises, Inc.*, 517 F. Supp. 2d 440, 445 (D.D.C. 2007). The fact that GWU may have requested an estimate of overtime hours from Driscoll does not change the fact that he was subjected to GWU's common illegal pay policy. As Driscoll has shown in Section I, *supra*, he and the class members were all the victims of GWU's common unlawful pay policy. Thus, he has shown that he is similarly situated to the class.

In addition to being irrelevant, GWU's claim is disingenuous. The evidence shows that Driscoll provided confirmation to GWU that his hours were inaccurately low and GWU did nothing about it. *See Driscoll Decl.* at ¶ 16; *see also* Exhibits D-1, D-2 and E attached to *Driscoll Decl.* When he persisted with his claim that GWU's estimate of his hours was low, he was fired. *See* Second Amended Complaint at ¶¶ 57-63. Moreover, GWU has not produced any evidence that it requested that Driscoll provide an estimate of his hours, despite all the e-mails between Driscoll and Zaghal and Dito.

B. Differences in Class Members' Job Duties Do Not Preclude a Finding that They Are Similarly Situated.

In a wage-and-hour class, it is not uncommon that class members' job duties differ. The relevant inquiry is whether the differences matter to the FLSA classification. *See Castillo*, 517 F. Supp. 2d at 446 (conditionally certifying collective action despite Defendant's arguments that class members have "different duties" and different "job titles" because plaintiffs had made an initial showing that they and potential plaintiffs were allegedly "victims of a common policy or plan that violated the law"); *see also*, *Zaniewski v. PRRC Inc.*, 848 F. Supp. 2d 213, 224 (D. Conn. 2012) ("The fact that the employees in the putative class performed different functions does not bar conditional certification. All of the employees who performed different functions were subjected to the same alleged unlawful policy that violated the FLSA."); *Heldman v. King Pharmaceuticals*, Inc., 3–10–1001, 2011 WL 465764, *3 (M.D. Tenn. Feb. 2, 2011) ("Defendant also argues that, contrary to Plaintiff's assertions, hospital representatives and retail representatives have significantly different job duties …at this stage of the certification process, the Court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations"); *Braun v. Superior Industries Intern., Inc.*, 09–2560–JWL, 2010 WL 3879498, *4 (D. Kan. Sept. 28, 2010) ("The proposed class need not be limited to certain job titles or job duties when plaintiffs' theory is that all non-exempt employees-regardless of job title or duties-were required to perform pre-and post-shift work without compensation."); *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."); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d

303, 306–07 (S.D.N.Y. 1998) (Sotomayor, J.) (granting conditional certification to employees at multiple restaurant locations, who collectively held positions as waiters, porters, dishwashers, cooks, back-waiters, bartenders, runners, pizza makers, busboys, and security guards).

Here, GWU itself treated the differences in class member specific job duties as irrelevant to their FLSA classification. GWU admits that it classified everyone working as Executive Assistants, Executive Associates, and Executive Coordinators as a group, determining that the general job duties of these job titles were similar enough that they all merited the same FLSA classification and were thus subject to the same common pay policy. (Driscoll makes the same allegation regarding the Executive Support Assistants and Executive Aides but GWU contests the allegation.) GWU then reclassified the job titles based on "an in-depth review of [each class member's] actual job duties" Exhibit A ("Employee Frequently Asked Questions") attached to *Lewis Decl.* Thus, even if a specific inquiry into each of the employees' job duties was required, as GWU asserts, GWU already performed this inquiry for each of the class members and determined that their job duties, which had not changed, made them eligible for overtime. Moreover, GWU has not contested Driscoll's allegation that class members were all clerical employees. *See* 29 C.F.R. § 541.202(e) ("The exercise of discretion and independent judgment [necessary to qualify for the administrative exemption] also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work."); *see also In re Enterprise Rent-a-Car Wage & Hour Employment Practices*, 09–1188, 2012 WL 4048845 (W.D. Pa. Sept. 13, 2012) ("Carrying out clerical duties, on the other hand, is not sufficient for administrative exemption, even if the duties involve a small amount of discretion."), *citing Goldstein v. Dabanian*, 291 F.2d 208, 210–11 (3d Cir. 1961). GWU claims the individual job duties prevent class treatment only now that it faces

liability for its illegal actions. GWU's admission that it reviewed the positions and related job duties and found them sufficiently similar for FLSA classification purposes is sufficient to support notice to the class. *See Hunter*, 346 F. Supp. 2d at 119.

Additionally, it is not appropriate to limit the class to Driscoll's department or location because Driscoll has provided substantial evidence, including GWU's admissions, that its illegal policies applied to class members University-wide. *See*, *Castillo*, 517 F. Supp. 2d at 446-448 (finding a class of employees who worked in different locations and held different job titles similarly situated for purposes of conditional certification and notice); *Encinas*, 265 F.R.D. at 7 (same). Accordingly, the proposed University-wide class should be conditionally certified and notice sent to putative class members.

C. GWU's Illegal Policies Applied Class-Wide

GWU does not contest that the reclassification, the calculation of back wages, the guidelines for estimating unpaid overtime hours, or the lack of liquidated damages or interest were class-wide practices. *See* Section I, *supra*. These policies applied to the entire class and Driscoll alleges that they are illegal. That is sufficient to establish the class is similarly situated and to support sending notice of a FLSA collective action to the class. *Encinas*, 265 F.R.D. at 6, *citing Castillo*, 517 F. Supp. 2d at 445. GWU's claim that there may have been differences in how the unpaid overtime hours were determined and that some putative class members may have already been paid all of their back overtime wages should not defeat notice. The precise number of unpaid overtime hours may be an individual inquiry, but it goes to damages and questions of damage do not defeat a motion for notice. As the District Court for the District of Maryland has noted,

> Although plaintiffs' claims may raise individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, those differences go to the damages that each employee is owed, not to the common question of Defendants' liability. Plaintiffs have alleged a common injury that is capable of class-wide resolution without inquiry into multiple employment decisions applicable to individual class members.

Myles, 2012 WL 1963390 at *6, fn 7, *citing Espinoza v. 953 Associates LLC*, 10 Civ. 5517(SAS), —— F.R.D. ——, 2011 WL 5574895, *12 (S.D.N.Y. Nov. 16, 2011); *see also Sherman v. American Eagle Exp., Inc.*, 09–575, 2012 WL 748400, *10 (E.D. Pa. Mar. 8, 2012) ("the need for individualized damages calculations is not a reason to deny class certification"); *Berger v. Cleveland Clinic Foundation*, 1:05 CV 1508, 2007 WL 2902907, *22 (N.D. Ohio Sept. 29, 2007) (rejecting defendant's argument for decertification of the collective action because "while each class member may have individualized damages, the court finds that the main inquiry is common to all, namely, what the CCF's policy was regarding interrupted lunches"). At this stage, Driscoll need only show that the proposed class is similarly situated in that they were subject to a common illegal pay policy. He has amply done so. *See* Section I, *supra*. Consequently, the proposed class should be conditionally certified and notice sent to putative class members.

D. Driscoll's Proposed Collective Action Is Manageable

GWU argues that conditional certification should be denied because individual determinations will be required to evaluate the claims of the class, making the class unmanageable. However, whether a proposed class is "manageable" is generally considered at the second stage of an FLSA collective action. *Myles*, 2012 WL 1963390 at *8; *see also Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 840 (N.D. Ohio 2011) ("Those questions of the breadth and manageability of the class are left until the second-stage analysis following the receipt of forms from all opt-in plaintiffs"). Further,

as explained in Sections V.B. and V.C., *supra*, these individual determinations are irrelevant to the issues of whether the proposed class is similarly situated and GWU's liability. Thus, the proposed class should be conditionally certified and notice sent to putative class members.

VI. THE COURT SHOULD APPROVE DRISCOLL'S PROPOSED NOTICE

Driscoll's form of notice has been approved in this and other Districts. While GWU has raised objections to the form of the notice, the Court can and should address these issues without additional delay. GWU's request for time to further address notice issues is unwarranted and only serves to prejudice the class as the statute of limitation runs on their claims. *See Castillo*, 517 F. Supp. 2d at 444-445, *citing Hoffmann–LaRoche*, 493 U.S. at 170; *Cryer*, 2007 WL 1053214 at *2. Further, the cases GWU cites to support its request that the parties work together to develop a notice are inapposite. In *Dinkel v. MedStar Health, Inc.*, the court ordered the parties to confer on a notice because plaintiffs had not submitted a proposed notice to the court with their motion for conditional certification. 2012 WL 3062461. In *Hunter v. Sprint Corp.*, the parties were already in the midst of developing a notice through mediation. 346 F. Supp. 2d 113, 121 (D.D.C. 2004). Here, Driscoll has submitted a proposed notice that is fair and accurate, and should therefore be approved.

Class notice should be issued under the case caption, as it is not misleading. It informs the class members that a case is pending in federal court and that they are able to join. It also ensures that putative class members do not mistake the notice for junk mail and immediately discard it, which would defeat the entire purpose of sending the notice. Courts have routinely found notice issuing under the case caption to be proper. *See, e.g., Shipes v. Amurcon Corp.*, 10–14943, 2012 WL 1720615, *1 (E.D. Mich. May 6, 2012) ("The case caption does not give the false impression that the Court endorses the litigation; rather, it serves the important purpose of

indicating that the Notice is not junk mail."); *Putnam v. Galaxy 1 Marketing, Inc.*, 276 F.R.D. 264, 277-278 (S.D. Iowa 2011) ("The Court finds that the notice is 'fair and accurate' because it is proper to include such basic identifying information"). In *Jirak v. Abbott Labs, Inc.*, the case cited by GWU to support its claim that inclusion of the caption and name of the Court is improper, the court actually ordered plaintiffs to include the case caption along with the name of the court so as not to suggest that the Court has lent its imprimatur to the merits of this case. 566 F. Supp. 2d 845 (N.D. Ill. 2008) ("Plaintiff must remove [the name of the court] from the notice or, alternatively, include the entire caption of the case so that it is clear the notice is a court document and not some type of letter from the Court.").

Moreover, any concern that class members will mistake the caption for the Court's endorsement of Driscoll's claims is met by the disclaimer on the proposed notice that "THE COURT HAS TAKEN NO POSITION IN THIS CASE REGARDING THE MERITS OF PLAINTIFFS' CLAIMS OR OF THE GWU'S DEFENSES." *Encinas*, 265 F.R.D. at 7 (approving notice that "makes abundantly clear that the court has not yet taken a position on the merits of the claim"); *see also Shipes*, 2012 WL 1720615 at *1 ("Further, any concern Defendant has about the appearance of judicial bias should be alleviated by paragraph 10 of the proposed Notice, entitled 'NO OPINION EXPRESSED AS TO MERITS OF LAWSUIT.'"); *Pack v. Investools, Inc.*, 2:09–CV–1042 TS, 2011 WL 5325290, *2 (D. Utah Nov. 3, 2011) ("As long as the notice also indicates that no opinion is given as to the merits of the case, affixing the name of the Court respects neutrality and accurately represents the Court's role in the notice process.")

The notice properly describes the claims in the action and GWU raises no objection. Its only objection is that the description does not include GWU's position. But the notice clearly states that "GWU [denies] Driscoll's allegations, and [denies] that [it is] liable for any back pay

or liquidated damages."[3] The description allows class members to make an informed decision about whether they were subject to the alleged policies knowing that GWU denies the allegations. If GWU's defenses are legitimate, it benefits from greater participation in the action as those that join will be bound by a judgment in its favor. Courts routinely approve such language. *See, e.g., Moore v. Eagle Sanitation, Inc.*, 276 F.R.D. 54, 61 (E.D.N.Y. 2011) (approving language of "[t]he defendants, deny the allegations made by the plaintiffs, and deny that they are liable to plaintiffs for any back pay, damages, costs or any attorneys' fees sought" and finding that "[a]ny further elucidation of legal arguments will likely confuse potential opt-in plaintiffs"); *Gomez v. H & R Gunlund Ranches, Inc.*, CV F 10–1163 LJO MJS, 2010 WL 5232973, *10 (E.D. Cal. Dec. 16, 2010) (requiring notice to include sentence "[defendant] denies all of the allegations in the lawsuit and denies that it owes or that plaintiffs are entitled to any other compensation or damages."); *Austin v. CUNA Mut. Ins. Soc.*, 232 F.R.D. 601, 608 (W.D. Wis. 2006) (approving language of "[defendant] denies that it violated the Fair Labor Standards Act.").

GWU's insistence on a warning that opt-ins may have to "sit for a deposition or otherwise participate in discovery" is designed to discourage participation in the collective action. Courts in this District regularly order notice without such language. *See* Exs. D & E to *Sweeney Decl*. As the District Court explained in *Prentice v. Fund for Public Interest Research, Inc.*,

> Such language is unnecessary and inappropriate. As Plaintiffs note, individualized discovery is rarely appropriate in FLSA collective

[3] The original proposed notice contained the following language "GWU deny Driscoll's allegations, and deny that they are liable for any back pay or liquidated damages." Plaintiffs would amend the notice to correct the sentence's grammar.

> actions… Including a warning about possible discovery when that discovery is unlikely will serve no purpose other than deterring potential plaintiffs from joining the suit based on unfounded concerns about the hassle of discovery.

C-06-7776 SC, 2007 WL 2729187, *5 (N.D. Cal. Sept. 18, 2007); *see also*, *Schwerdtfeger v. Demarchelier Management, Inc.*, 10 Civ. 7557(JGK), 2011 WL 2207517, *6 (S.D.N.Y. June 6, 2011); *Garcia v. Pancho Villa's of Huntington Village, Inc.*, 678 F. Supp. 2d 89, 95-96 (E.D.N.Y. 2010); *Delaney v. Geisha NYC, LLC*, 261 F.R.D. 55, 59 (S.D.N.Y. 2009); *Wren v. RGIS Inventory Specialists*, C–06–05778 JCS, 2009 WL 1705616, *2 (N.D. Cal. June 17, 2009). The class discovery obligations are unclear at this point. Indeed, almost all of the relevant discovery is in GWU's possession, *e.g.*, information on the reclassification, how back wages were calculated, how unpaid overtime hours were determined, and whether GWU paid liquidated damages or interest on the back wages. The only individual discovery issue is a damages issue, *i.e.*, the actual hours that class members worked. Class members' role in that discovery and how it will be conducted is undetermined at this time. Therefore, inclusion of any language regarding potential plaintiffs' participation in discovery is unnecessary and detrimental. For all the above reasons, Driscoll's notice should be approved as proposed.

GWU argues that a 30-day opt-in period is appropriate. However, 60 days is a typical opt-in period for a FLSA collective action; indeed it is even longer in this District. *See Cryer*, 2007 WL 1053214 at *2 ("The Court finds that ninety days from the date on the notice is a reasonable period of time for potential class members to respond to the class notice. A ninety-day period is more in keeping with the time periods used in other similar class actions in this Court than the defendants' proposed thirty-day period."). A 60-day period strikes a balance between the need to establish a cut-off for joinder that allows the case to proceed and a

reasonable amount of time for class members to receive notice, gather information, and make an informed decision. In counsel's experience, 30 days is simply too short an opt-in period that results in unnecessary motions to include people who seek to join after the 30-day period has run. Thus, a 60-day opt-in period is appropriate.

A third party administrator ("TPA") is neither necessary nor appropriate for issuing notice. Courts routinely order employers to provide contact information of class members to plaintiffs' counsel to send notice. *Hoffmann-La Roche*, 493 U.S. at 172; *Encinas*, 265 F.R.D. at 7; *Cryer*, 2007 WL 1053214; *Hunter*, 346 F. Supp. 2d at 121. Having Plaintiffs' counsel send out notice ensures that the notice process is properly administered and any issues are promptly addressed. *See Nobles v. State Farm Mut. Auto. Ins. Co.*, 2:10–CV–04175–NKL, 2011 WL 5563444, *3 (W.D. Mo. Nov. 15, 2011) ("The Court denies [defendant's] request to use a [third-party administrator]. [Defendant] makes no specific allegations of improper conduct on the part of Plaintiffs in managing privacy and logistic concerns, and excluding the Plaintiffs from any role in the administration of notice would likely promote delays without a concrete, corresponding benefit."). GWU's claim that using a TPA suggests a baseless claim that Plaintiff's counsel is untrustworthy. It has raised no extraordinary circumstances that would weigh in favor of departing from the normal practice. GWU misrepresents Driscoll's request for partial social security numbers and dates of birth. The request is for partial rather than complete social security numbers and only for class members whose notice is returned from the post office, not for the entire class. The additional information is intended to ensure that notice can be sent to an accurate address. *Davis v. Abercrombie & Fitch Co.*, 08 Civ. 1859(PKC), 2008 WL 4702840, *12 (S.D.N.Y. Oct. 23, 2008); *Lynch v. United Services Auto. Ass'n*, 491 F. Supp. 2d

357, 371-72 (S.D.N.Y. 2007). Accordingly, GWU should be ordered to provide all of the contact information requested by Driscoll.

GWU's request for an order that "Plaintiff's counsel may have no contact with putative collective action members other than through the first class mailing of notice one time, unless they file an opt-in consent form and select Plaintiff's counsel to represent them," is nonsensical and unwarranted. The restriction would prohibit Plaintiff's counsel from speaking with a putative class member who calls for additional information. Such a request is directed not at ensuring that the class receives effective notice, but at trying to deprive the class of the information needed to make an informed decision. Moreover, GWU's request would put an impermissible restriction on Driscoll's First Amendment rights. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-102 (1981). (court can limit communication between parties and potential class only upon "a clear record and specific findings" of abuse).

Finally, posting at the workplace in addition to mailing is simply an economical and effective way to ensure the best notice possible. *See, Castillo*, 517 F. Supp. 2d at 449 (ordering notice posted in "(1) Defendant's offices, or (2) office spaces designated for Defendant's use in third-party buildings"). GWU's claim that posting is unduly burdensome is not convincing. Federal and D.C. laws require all employers to post FLSA and D.C. wage-and-hour law information in the workplace. *See* 29 C.F.R. § 516.4; D.C. Code § 32-1009. GWU has offered absolutely no basis for its claim that this additional posting is overly burdensome. Consequently, GWU should be ordered to post Driscoll's proposed notice at all of GWU's worksites in the same areas in which it is required to post FLSA and D.C. wage-and-hour law notices.

VII. CONCLUSION

For all of the foregoing reasons, this Court should conditionally certify this action as a FLSA and D.C. Minimum Wage Act representative action on behalf of a class of all current and former Executive Aides, Executive Assistants, Executive Support Assistants, Executive Coordinators, and Executive Associates employed by the George Washington University after April 27, 2009 who worked overtime hours but were not paid overtime wages during all or part of their employment, authorize Plaintiffs' counsel to issue the notice that is attached to Plaintiffs' initial brief as Exhibit 2 and to send a follow-up postcard to any class members who have not responded thirty days after the mailing of the initial notice, and require GWU to post the notice of this lawsuit and consents to sue in a conspicuous location in the workplace. The Court should also order GWU to provide Plaintiffs' counsel with the last known addresses of all putative class members, and the telephone number, date of birth, and last four digits of the social security number of any potential class members whose notice is returned by the post office, so that Plaintiffs' counsel may provide effective notice to the class.

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Respectfully Submitted,

/s/ Michael J.D. Sweeney

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