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1
2 UNITED STATES DISTRICT COURT
3 CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

4 SALVADOR CANAVA, individually
5 and on behalf of others similarly
6 situated,

7 Plaintiff,

8 v.
9

10 RAIL DELIVERY SERVICES,
11 INCORPORATED AND GREG P.
12 STEFFLRE, JUDI GIRARD
13 STEFFLRE,

14 Defendants.
15

Case No. 5:19-cv-00401-JGB (KKx)

**PLAINTIFF’S MEMORANDUM IN
SUPPORT OF MOTION TO
APPROVE NOTICE TO THE
CLASS AND COLLECTIVE
ACTION MEMBERS; TO
APPROVE METHOD OF
DISTRIBUTION OF NOTICE; AND
TO TOLL FLSA STATUTE OF
LIMITATIONS**

Hearing Date: November 25, 2019

Time: 9:00 a.m.

Judge: Honorable Jesus G. Bernal

Location: U.S. Courthouse
3470 Twelfth Street
Riverside, CA 92501

Courtroom: 1

Complaint filed: March 4, 2019
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16 2010).....7

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18 844963 (E.D.N.Y. Mar. 8, 2011)6

19 **Rules**

20 Fed. R. Civ. P. 231

1 Plaintiff moves the Court to approve the notice to the collective and class
2 action members, attached hereto as Exhibit 1, to approve the method of distribution
3 and for other relief to effectuate the distribution of the notice. Plaintiff also moves
4 for equitable tolling of FLSA limitations during the notice period.

5 **I. CLASS NOTICE AND DISTRIBUTION**

6 **A. Content of Notice**

7 Plaintiff proposes to send a combined FLSA and Rule 23 notice to the
8 class/collective action members. Such combined notice is permissible in cases
9 involving both FLSA and Rule 23 classes. *Rangel v. PLS Check Cashers of Calif.,*
10 *Inc.*, 899 F.3d 1106, 1111 fn 4 (9th Cir. 2018); *Millan v. Cascade Water Services,*
11 *Inc.*, 310 F.R.D 595 (E.D. Cal. 2015). The combined notice describes Plaintiff's
12 claims in neutral terms, states that Defendants deny any wrongdoing, and states that
13 the Court has made no decision on the correctness of Plaintiff's claims. The FLSA
14 portion of the combined notice explains to the class members their right to participate
15 in the lawsuit by filing a consent to sue form, and the consequences of joining or not
16 joining the action. This Court has approved similar FLSA notices. *Reyes v. Pier*
17 *Enterprises Group, Inc.*, EDCV 15-2108 JGB (DTBx), 2017 WL 10619856 at *5
18 (C.D. Cal. June 9, 2017). The Notice also sets forth all of the required notice
19 elements set forth in Rule 23(c)(2)(B) including the right and procedure for class
20 members to exclude themselves from the class.

21 **B. Method of Distribution of Notice**

22 Rule 23(c) requires that class members receive "the best notice practicable
23 under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The FLSA does not contain a
24 similar description of the method of notice but it too should be the best notice
25 practicable. In order to achieve that goal Plaintiff proposes:

- 26 a. Defendants be ordered to provide Plaintiff with the first name, last name,
27
28

1 last known mailing address, unique employee number¹ and dates of employment of
2 class and collective action members so that Plaintiff can mail English and Spanish-
3 translated notice by first class mail.² This request is routinely granted by courts
4 including this Court. *Reyes*, 2017 WL 10619856 at *5; *Ortega v. Spearmint Rhino*
5 *Companies Worldwide, Inc.*, No. EDCV17206 JGB(KKx), 2019 WL 2871156 (C.D.
6 Cal. May 15, 2019) at *8.

7 b. Defendants should be ordered to provide the last known email address for
8 class members for whom it has such information. Distribution by email is now
9 recognized as a routine part of the best notice practicable and has been approved by
10 this Court and is expressly included in amended Rule 23(c)(2)(B). *Ortega*, 2019 WL
11 2871156 at *8 (approving email and text message notice).

12 c. Defendants should also be ordered to issue a brief notice on their electronic
13 communication system with drivers to all currently employed class members
14 informing them of the existence of this case and where they may receive a copy of
15 the notice. RDS requires all currently employed class members to have a computer
16 communication device in their truck which is used to transmit and receive written
17 communications from RDS. *See* Doc. 53 at 39-40 of 48 (Canava ICA) (referencing
18 communication device). RDS should be ordered to post a message through its
19

21 ¹ Unique IDs are critical for matching RDS's employee data with those of the class
22 and collective action members. Unique IDs let both sides pair similar and identical
23 names (a company may have 2 John Smiths for example) and help ensure that data
24 is correctly correlated with an individual class member. They also preserve the
25 identity of a single person when that person changes names. *See e.g. Jackson v.*
26 *Bloomberg, L.P.*, 13 CIV. 2001 JPO, 2014 WL 1088001 (S.D.N.Y. Mar. 19,
2014)(“unique identifiers ... common in wage and hour actions to facilitate the
27 notice process”).

28 ² Much of the class is primarily Spanish-Speaking. Getman Decl. (Doc. 73) ¶ 4.

1 system, without pulling the message, once a week within a 9am to 5pm window
2 during the notice period.³ This is an important and non-burdensome way to ensure
3 that current Drivers receive notice of the action and their right to opt-in (or out); it
4 is especially important as a means of providing notice to truck drivers who may be
5 away from home (and mail delivery) for extended periods. *See Doe 1 v. Swift Transp.*
6 *Co.*, No. 2:10cv899 JWS, 2017 WL 735376 at *7 (D. Ariz. Feb. 24, 2017) (ordering
7 curative notice to be sent to putative class members via Qualcomm truck
8 communication device); *Petrone v. Werner Enters. Inc.*, No. 8:11 cv401, 2013 WL
9 12176452 at *2 (D. Neb. Apr. 1, 2013) (ordering FLSA notice to be sent to putative
10 class members via Qualcomm because defendant “use[d] its Qualcomm messaging
11 system as a means of regular communication” with drivers). This electronic notice
12 is similar to, but less burdensome than, the notice this Court ordered in *Reyes*, 2017
13 WL 10619856 at *5 (ordering notice to be posted in DC’s distribution facilities or
14 in the alternative to include the notice in current drivers’ paychecks). *See also*
15 *Carrillo v. Schneider Logistics, Inc.*, No. CV11-8557 CAS (DTBx), 2012 WL
16 556309 at *13 (C.D. Cal. Jan. 7, 2013) (approving inclusion of notice in pay
17 envelopes).

18 c. Defendants should be ordered to supply telephone numbers, dates of birth,
19 and the last four digits of social security numbers for those collective and class action
20 members whose mail notice is returned as undeliverable to assist with locating
21 current addresses through phone calls and trace efforts so that notice can then be re-
22 mailed. Courts routinely order defendants to provide this information for the purpose
23

24 ³ Upon information and belief, RDS can deliver the notice to current lease operators,
25 but can also pull it off the screens of recipients. Thus, RDS should be directed not to
26 pull the advisory once sent. Further, if such delivery is made at night, it might be
27 missed by the driver the next day, when followed by the numerous other instructions
28 and information which are transmitted to drivers around the clock.

1 of locating putative class members. *See Reyes*, 2017 WL 10619856 at *5 (ordering
2 defendant to produce dates of birth and partial social security numbers for class
3 members whose initial notice is returned by mail); *Rees v. Souza's Milk Transp., Co.*,
4 No. 1:05-cv-00297 AWI TAG, 2006 WL 3251829, at *1 (E.D. Cal. Nov. 08, 2006)
5 (ordering defendant to disclose social security numbers for eleven FLSA class
6 members for whom mailing to a last known address was insufficient); *Gieseke v.*
7 *First Horizon Home Loan Corp.*, No. 04-2511-CM-GLR, 2007 WL 445202, at *4
8 (D. Kan. Feb. 7, 2007), *aff'd as modified*, No. CIV.A. 04-2511-CM, 2007 WL
9 1201493 (D. Kan. Apr. 23, 2007) (“[D]istrict courts appear to routinely order
10 defendants in FLSA collective actions to produce information, including social
11 security numbers, necessary for locating putative class members.”)

12 d. Plaintiff should be authorized to send follow-up postcard reminders to
13 collective action members who do not respond to the FLSA notice. The reminder
14 also serves the purpose “to inform as many potential plaintiffs as possible of the
15 collective action and their right to opt-in.” *Chhab v. Darden Restaurants, Inc.*, 11
16 Civ. 8345(NRB), 2013 WL 5308004, *16 (S.D.N.Y. Sept. 20, 2013). For this reason,
17 courts, including this Court, have approved the sending of a reminder notice to
18 collective action members who have not responded after the mailing of the initial
19 notice. *See, e.g., Ortega*, 2019 WL 2871156 at *8 (approving mail, email and text
20 reminder to all collective action members who had not opted in 45 days after the
21 initial mailing); *Reyes*, 2107 WL 10619856 at *5 (approving follow-up postcard
22 mailed 30 days after initial mailing); *Helton v. Factor 5, Inc.*, 10 Civ. 04927, 2012
23 WL 2428219, *7 (N.D. Cal. June 26, 2012) (approving post card reminder); *Sanchez*
24 *v. Sephora USA, Inc.*, No. 11-CV-3396, 2012 WL 2945753, at *6 (N.D. Cal. July
25 18, 2012) (“[C]ourts have recognized that a second notice or reminder is appropriate
26 in an FLSA action since the individual is not part of the class unless he or she opts-
27 in.”); *Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010)
28

1 (“Particularly since the FLSA requires an opt-in procedure, the sending of a postcard
2 is appropriate.”).

3 **C. Opt-in/Opt-out Period**

4
5 Plaintiff requests that the notice period extend to 120 days. Although opt-in
6 periods are sometimes shorter, many courts extend the opt-in period for truck drivers
7 because special factors exist making it difficult for all class members to receive
8 notice and join. *See, e.g., Gatdula v. CRST International, Inc.*, 2012 WL 12884919
9 at *7 (C.D. Cal. Aug 21, 2012) (setting 90-day opt-in period for class of truck
10 drivers); *Mowdy v. Beneto Bulk Transp.*, No. C06-5682 MHP, 2008 WL 901546 at
11 *11 (N.D. Cal. Mar. 31, 2008) (truck drivers 90 days). *See also Brown v. Phenix*
12 *Transp. W. Inc.*, 3:13cv781-WHB-RHW, 2016 WL 3648274 at *5 (S.D. Miss. Mar.
13 31, 2016) (truck drivers 150 days); *Huddleston v. John Christner Trucking, LLC.*,
14 17cv549-GFK-FHM, 2018 WL 7373644 at *3 (N.D. Okla. May 1 2018) (truck
15 drivers 90 days). Plaintiff requests that the notice period extend to 120 days because
16 the class includes interstate drivers, and those who have left RDS may well be
17 employed as over-the-road drivers which means they could be away from home for
18 months at a time. Defendants will not be prejudiced by proposed notice period.
19 Because individuals who do not opt-in are not precluded from bringing their own
20 individual FLSA actions later, an extended notice period serves to consolidate claims
21 and avoid a multiplicity of redundant litigation. Accordingly, Plaintiff respectfully
22 requests the Court to grant the Plaintiff a 120-day notice period.

23 **II. EQUITABLE TOLLING DURING NOTICE PERIOD**

24 Plaintiff moves the Court to toll the FLSA statute of limitations for collective
25 action class members from the date of filing of Plaintiff’s motion to certify the
26 collective action until the end of the notice period. This Court granted similar relief
27 in *Reyes*, explaining:

28 [T]here is a delay, caused by the time required for the resolution of

1 a motion for conditional certification in a FLSA collective action,
2 that diminishes the potential claims of the potential plaintiffs.
3 *Small v. United Medical Centr. Of S. Nev.*, 2013 WL 3043454 at
4 *3-4 (D. Nev. June 14 2013) (tolling the statute of limitations for a
5 portion of the time required for the court to rule on the motion for
6 certification of a FLSA collective action in order to avoid prejudice
7 to potential opt-in plaintiffs); *see also Dualan v. Jacob*
8 *Transportation Services, LLC*, 172 F.Supp.3d 1138, 1153-54 (D.
9 Nev. 2016) (same); *Yaharaes v. Restaurant Assocs Events Corp.*,
10 No. 10cv935 (SLT), 2011 WL 844963 at *2 (E.D.N.Y. Mar. 8,
11 2011) (noting the time required for a court to rule on a motion for
12 certification of a FLSA collective action may be sufficient to grant
13 equitable tolling because the unique procedural posture of the
14 action has been found to prejudice potential opt-in plaintiffs).
15 Accordingly, because the Court determines it necessary to protect
16 the diminishing rights of potential plaintiffs, and concludes DC and
17 BBSI will suffer no prejudice from a short tolling because they've
18 had notice of the claims and potential scope of their liability for
19 some time, the doctrine of equitable tolling applies. Accordingly,
20 the Court GRANTS Plaintiffs' request to toll the statute of
21 limitations from May 1, 2017 until 90 days after the putative
22 class members receive notice of this lawsuit.

23 *Reyes*, 2017 WL 10619856 at *5; *Gatdula*, 2012 WL 12884919 at *6 (granting
24 tolling during pendency of the notification process). *See also Mitchell v. Acosta*
25 *Sales, LLC*, 841 F. Supp. 2d 1105 (C.D. Cal. 2011) at 1120 (tolling limitations from
26 filing of action to date of certification order because "Plaintiffs have diligently
27 pursued their legal rights and are without fault for the delay."); *Ward v. Costco*
28

1 *Wholesale Corp.*, 2010 WL 11407215 at *5 (C.D. Cal. May 21, 2010) (tolling
2 limitations from the original hearing date on the motion for conditional certification
3 to the date the order granting certification was entered); *Helgren v. Amgen, Inc.*,
4 2010 WL 1152368 at *8-9 (C.D. Cal. Dec. 29, 2010) (tolling limitations during
5 period collective motion was under advisement).

6 **CONCLUSION**

7 For all of the foregoing reasons, Plaintiff respectfully requests that the Court
8 enter an order:

- 9 (1) Directing Defendants to provide in an electronic spreadsheet format such
10 as Excel, the following information, each contained in a separate column:
11 names, addresses, email addresses, an employee identification number or
12 unique identifier, and dates of employment of collective and class action
13 members;
- 14 (2) Approving the Plaintiff's proposed FLSA and Class Action Notice (Ex 1)
15 with an opt-in/opt-out period of 120 days and authorize Plaintiff to
16 disseminate the notice by first class mail, and email;
- 17 (3) Directing Defendants to disseminate to class and collective action members
18 currently working for Defendants a brief notice on their electronic
19 communication system with drivers informing them of the existence of this
20 case and where they may obtain the Notice;
- 21 (4) Directing Defendants to promptly provide the telephone number and last
22 four digits of the social security number for any class member whose notice
23 is returned as undeliverable or collective action member who does not opt-in
24 within 30 days and authorizing Plaintiff to use that information to obtain a
25 current address/email address to which the Notice may be re-mailed.
- 26 (5) Authorizing Plaintiff's counsel to mail and email reminder postcards and
27 emails 21 days before the expiration of the opt-in period to those putative
28

1 collective action members who have not opted into the collective action at that
2 point.

3 (6) Tolling the FLSA statute of limitations for the period from the date of
4 from the date of filing of Plaintiff's motion to certify the collective action until
5 the close of the opt-in period.

6 Respectfully submitted this 24th day of September, 2019.

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