IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ANESSIA AMOKO, individually and on behalf of all others similarly situated, **Plaintiff,** **v.** **N&C CLAIMS SERVICE, INC., NICHOLAS F. IERULLI, PAM IERULLI, and SEIBELS CLAIMS SOLUTIONS, INC.,** **Defendants.**	**Case No: 3:20-cv-04346-SAL**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY FLSA COLLECTIVE ACTION AND TO ISSUE NOTICE

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Plaintiff Anessia Amoko filed this action on behalf of herself and all other similarly situated current and former employees pursuant to the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 201 *et seq*. She alleges that corporate defendants, N&C Claims Service, Inc. and Seibels Claims Solutions, Inc., and individual defendants, Nicholas F. Ierulli and Pam Ierulli, (collectively, "Defendants") misclassified her and a collective of similarly situated Claims Adjusters as independent contractors and failed to pay her and the collective overtime wages.

Plaintiff Amoko now moves for an order conditionally certifying her FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b) and directing notice be sent to the class of similarly situated people:

> All persons who worked for N&C Claims Service, Inc. and Seibels Claims Solutions, Inc. in South Carolina as insurance claims adjusters and who were classified as independent contractors and not paid overtime wages for hours worked over 40 in a workweek for which they were paid on a pay date at any time between December 11, 2016[1] and the date of final judgment in this matter

(hereafter, "Claims Adjusters"). Conditional certification of a FLSA action is proper when the class is similarly situated. Here, the members of the Collective are similarly situated in that they all (1) worked for defendants, (2) were misclassified as independent contractors, (3) regularly worked more than 40 hours per workweek, and (4) were paid a day rate or hourly rate without premium compensation for overtime hours. In support of this motion, Plaintiff offers Defendants' documents and records, including time sheets and pay stubs, testimony from seven Claims Adjusters, and the allegations set forth in the Amended Complaint.

[1] FLSA claims are subject to a two-year statute of limitations, with an additional year if the employers' violation was willful, 29 U.S.C. § 255(a), which Plaintiff has pled here. In the course of pre-litigation discussions, the Parties agreed to toll the statute of limitations starting November 1, 2019 through November 6, 2020, which adds an additional year plus five days to the limitations period.

To facilitate notice to the Collective, the Court should approve Plaintiff's proposed Notice and Reminder Notice; approve Plaintiff's proposed method of distribution of the Notices, which is consistent with those approved by this Court and courts around the country; and direct the Defendants to provide to Plaintiffs' Counsel the following information necessary for Plaintiff to distribute notice, in an electronic spreadsheet format such as Excel, for each member of the Collective: names, mailing addresses, email addresses, dates of employment, telephone numbers, and unique identifiers for each, such as unique employee numbers or unique identifiers for each. The Court also should direct Defendants to supply to Plaintiffs' Counsel the last four digits of the social security numbers for those members of the Collective whose Notice is returned as undeliverable, which will help Plaintiffs' Counsel obtain a current address for re-issuing undeliverable Notices. The proposed contents and method of Notice are designed to provide effective notice to Claims Adjusters of their rights and opportunity to join this action to pursue their FLSA unpaid overtime claims.

FACTS

A. Employment Facts

Defendant N&C Claims Service, Inc. ("N&C") is a for-profit Florida corporation that provides insurance adjustment services to companies such as Seibels. First Amended Complaint, Doc. 15 ("FAC") ¶ 13. Defendant Seibels Claims Solutions, Inc. ("Seibels") is a for-profit South Carolina corporation. FAC ¶ 22. Nicholas F. Ierulli is the President and a Principal of N&C, FAC ¶ 16, and Pam Ierulli is the Vice President and a Principal of N&C, FAC ¶ 19. N&C hired Claims Adjusters, including Plaintiff Amoko, to work for Seibels in Columbia, South Carolina. Amoko Decl. ¶ 2 & Ex. 1. N&C and Seibels entered into an agreement whereby N&C provided claims adjusting labor to Seibels, which provided claims adjusting services to insurance companies. Ex. D, N&C-Seibels Contract.

During the relevant time period, insurance claims adjusters who worked for N&C and Seibels ("Claims Adjusters") worked for Defendants in Seibels' office in Columbia, including Plaintiff Amoko, who worked there for Defendants from approximately March 2019 until September 2019 (FAC ¶ 9; Amoko Decl. ¶ 2); Jonathan Joyner who worked there for Defendants from May 2019 to December 2020 (Joyner Decl. ¶ 2); Roy Burns, who worked there for Defendants from March 2019 to September 2019 (Burns Decl. ¶ 2); Sheri Mosley, who worked there for Defendants from March 2019 to July 2019 (Mosley Decl. ¶ 2); Tommy Jordan, who worked there for Defendants from March 12, 2019 to November 22, 2019 (Jordan Decl. ¶ 2); Victoria Minor who worked there for Defendants from March 2019 to December 2020 (Minor Decl. ¶ 2); and Wanda Dade, who worked there for Defendants from September 2019 to January 2021 (Dade Decl. ¶ 2). At any given time, Defendants employed approximately 15-20 Claims Adjusters. Amoko Decl. ¶ 4; Joyner Decl. ¶ 4; Burns Decl. ¶ 4; Minor Decl. ¶ 4; Dade Decl. ¶ 4; *see also* Mosley Decl. ¶ 4 (10 or more); Jordan Decl. ¶ 4 (approximately 20-30). Also working in this office were individuals whom Seibels hired and employed to provide claims adjusting services, but whom Seibels classified as employees ("Staff Adjusters").[2] Amoko Decl. ¶ 4; Joyner Decl. ¶ 4; Burns Decl. ¶ 4; Mosley Decl. ¶ 4; Jordan Decl. ¶ 4; Minor Decl. ¶ 4; Dade Decl. ¶ 4.

Defendants classified Claims Adjusters, including Plaintiff Amoko, as independent contractors. Amoko Decl. ¶ 6; Joyner Decl. ¶ 6; Burns Decl. ¶ 6; Mosley Decl. ¶ 6; Jordan Decl. ¶ 6; Minor Decl. ¶ 6; Dade Decl. ¶ 6. Claims Adjusters were listed as 1099 employees on hiring communications, their pay was reported on IRS Form 1099 as independent contractors, and they

[2] In addition to the Claims Adjusters and Staff Adjusters, also working in Seibels' office in Columbia were individuals performing claims adjusting services who were hired through companies other than N&C, and whom Seibels classified as independent contractors. *See Ferguson v. Burton Claim Service, Inc. and Seibels Claims Solutions, Inc.*, 3:21 Civ. 00580 (SAL).

signed the same form independent contractor employment agreement from N&C, including any addendums. Amoko Decl. ¶ 6 & Ex. 1; Joyner Decl. ¶ 6 & Exs. 1-2; Burns Decl. ¶ 6 & Ex. 1; Mosley Decl. ¶ 6 & Exs. 1-2; Jordan Decl. ¶ 6 & Ex. 1; Minor Decl. ¶ 6 & Ex. 1; Dade Decl. ¶ 6. N&C and Seibels subjected Claims Adjusters to the same policies or practices which, among other things, misclassified Claims Adjusters as independent contractors, even though, as a matter of economic reality, Claims Adjusters were employees of N&C and Seibels.[3]

Claims Adjusters all performed the same essential job duties, which were the same essential job duties that Seibels' Employee claims adjusters performed. Claims Adjusters, as well as Seibels' employee Staff Adjusters, all processed insurance claims, which involved obtaining facts from the insured and entering those facts into Seibels' computer systems. Amoko Decl. ¶¶ 7, 10; Joyner Decl. ¶¶ 8, 11; Burns Decl. ¶¶ 7, 10; Mosley Decl. ¶¶ 7, 10; Jordan Decl. at ¶¶ 7, 10; Minor Decl. ¶¶ 8,11; Dade Decl. ¶¶ 8, 11. Seibels provided Claims Adjusters with all the tools necessary to perform their work, including computers, software, phones, e-mail accounts, and desks. Amoko Decl. ¶ 8; Joyner Decl. ¶ 9; Burns Decl. ¶ 8; Mosley Decl. ¶ 8; Jordan Decl. ¶ 8; Minor Decl. ¶ 9; Dade Decl. ¶ 9. Claims Adjusters worked alongside Seibels' employee Staff Adjusters, as they all performed the same insurance claim-handling tasks. Amoko Decl. ¶ 10; Joyner Decl. ¶ 11; Burns Decl. ¶ 10; Mosley Decl. ¶ 10; Jordan Decl. ¶ 10; Minor Decl. ¶ 11; Dade Decl. ¶ 11.

[3] N&C and Seibels jointly employed Claims Adjusters, including Plaintiff Amoko. *See Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017) (establishing the multifactor joint employment test, which determines "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment").

Defendants exercised and maintained control over Claims Adjusters' work. N&C and Seibels had the authority to hire, discipline, and fire Claims Adjusters. Amoko Decl. ¶ 13; Joyner Decl. ¶ 14; Burns Decl. ¶ 13; Mosley Decl. ¶ 13; Jordan Decl. ¶ 13; Minor Decl. ¶ 14; Dade Decl. ¶ 14. When Claims Adjusters first arrived at Seibels' office, Seibels employees trained them to use Seibels' equipment and software. Amoko Decl. ¶ 9; Joyner Decl. ¶ 10; Burns Decl. ¶ 9; Mosley Decl. ¶ 9 & Ex. 3; Jordan Decl. ¶ 9 & Ex. 2; Minor Decl. ¶ 10; Dade Decl. ¶ 10. N&C and Seibels set the Human Resources policies applicable to Claims Adjusters. Burns Decl. ¶ 14; Mosley Decl. ¶ 14; Jordan Decl. ¶ 14; Minor Decl. ¶ 15; Dade Decl. ¶ 15. N&C and Seibels actively directed and supervised Claims Adjusters' work, including when and where they worked. Amoko Decl. ¶ 14; Joyner Decl. ¶ 14; Burns Decl. ¶ 14; Mosley Decl. ¶ 14; Jordan Decl. ¶ 14 & Ex. 3; Minor Decl. ¶ 15; Dade Decl. ¶ 15. N&C and Seibels scheduled the days and hours Claims Adjusters worked and required Claims Adjusters to record and report their work time, including work start time, lunch start and end times, and work end time. Amoko Decl. at ¶¶ 15-16; Joyner Decl. ¶¶ 16-17; Burns Decl. ¶¶ 15-16; Mosley Decl. ¶¶ 15-16; Jordan Decl. ¶¶ 15-16; Minor Decl. ¶¶ 16-17; Dade Decl. ¶¶ 16-17. Claims Adjusters were required to report their work time to both N&C and Seibels through two different systems. Amoko Decl. ¶ 17 & Ex. 2; Joyner Decl. ¶ 18; Burns Decl. ¶ 17; Mosley Decl. ¶ 17 & Ex. 4; Jordan Decl. ¶ 17; Minor Decl. ¶ 18 & Ex. 3; Dade Decl. ¶ 18. While working for N&C and Seibels, Claims Adjusters provided insurance claims services only to insurance companies N&C and Seibels assigned. Amoko Decl. ¶ 11; Joyner Decl. ¶ 12; Burns Decl. ¶ 11; Mosley Decl. ¶ 11; Jordan Decl. ¶ 11; Minor Decl. ¶ 12; Dade Decl. ¶ 12. Claims Adjusters also could not and did not hire others to perform the work N&C and Seibels assigned to Claims Adjusters. Amoko Decl. ¶ 12; Joyner Decl. ¶ 13; Burns Decl. ¶ 12; Mosley Decl. ¶ 12; Jordan Decl. ¶ 12; Minor Decl. ¶ 13; Dade Decl. ¶ 13.

In or around July 2020, Defendants changed their policy and practice of classifying Claims Adjusters as independent contractors, and instead began classifying them as employees of N&C. Joyner Decl. ¶ 7& Ex. 3; Minor Decl. ¶ 7 & Ex. 2; Dade Decl. ¶ 7. The work Claims Adjusters performed when classified as independent contractors did not change once Defendants reclassified them as employees. Joyner Decl. ¶ 7 & Ex. 3; Minor Decl. ¶ 7 & Ex. 2; Dade Decl. ¶ 7. Claims Adjusters continued to perform the same job duties, continued to work the same scheduled hours, were subject to the same degree of supervision and control by Defendants, and continued to record and report their work time to both N&C and Seibels in the same manner as they did before Defendants reclassified them as employees. Joyner Decl. ¶ 7 & Ex. 3; Minor Decl. ¶ 7 & Ex. 2; Dade Decl. ¶ 7.

B. Unpaid Hours

Defendants paid all Claims Adjusters the same way. Initially, N&C told Amoko and Claims Adjusters that they would be paid a "day rate" for each day they worked, i.e., a set rate of pay per day regardless of the hours worked. Amoko Decl. ¶ 18; Joyner Decl. ¶ 19; Burns Decl. ¶ 18; Mosley Decl. ¶ 18; Jordan Decl. ¶ 18; Minor Decl. ¶ 19; Dade Decl. ¶ 19. In reality, N&C and Seibels did not pay them a day rate. Instead, N&C and Seibels made deductions from the day rate if the Claims Adjusters worked fewer than their scheduled hours, reducing the rate of pay on a pro rata basis. Amoko Decl. ¶ 18; Joyner Decl. ¶ 19; Burns Decl. ¶ 18; Mosley Decl. ¶ 18 & Ex. 5; Jordan Decl. ¶ 18; Minor Decl. ¶ 19; Dade Decl. ¶ 19. When Claims Adjusters worked more than their scheduled hours, N&C and Seibels did not pay them for the additional time. Amoko Decl. ¶ 19; Joyner Decl. ¶¶ 20-21 & Ex. 4; Burns Decl. ¶ 19; Mosley Decl. ¶ 19; Jordan Decl. ¶ 19; Minor Decl. ¶¶ 19, 22 & Exs. 4, 5; Dade Decl. ¶ 20.

Then, shortly after Claims Adjusters were hired, Defendants changed their method of pay from the day rate system to an hourly wage, yet Defendants continued their practice of not paying

Claims Adjusters for all hours worked. Generally, this change occurred about two months after the Claims Adjuster started working for Defendants, which for many, including Plaintiff Amoko, was in May of 2019. *See* FAC ¶ 81; *see also, e.g.*, Amoko Decl. ¶ 20. Burns Decl. ¶ 20; Mosley Decl. ¶ 20; Jordan Decl. ¶ 20; Minor Decl. ¶ 20. *But see* Dade Decl. ¶ 21 (change occurred in September 2019, the same month she started working for Defendants). Under the hourly pay method, Defendants agreed to pay Claims Adjusters "$50.00 per hour for 10 hours per day." Amoko Decl. at Ex. 1; Joyner Decl. at Ex. 1; Burns Decl. at Ex 1; Mosley Decl. at Ex. 2; Jordan Decl. at Ex. 2; Minor Decl. at Ex. 1. However, Defendants did not pay Claims Adjusters for more than 10 hours in a workday, even if Claims Adjusters performed more than 10 hours of compensable work time. Amoko Decl. ¶¶ 21, 24 & Exs. 3, 4; Joyner Decl. ¶¶ 20-21 & Ex. 4; Burns Decl. ¶ 20; Mosley Decl. ¶ 21 & Ex. 6; Jordan Decl. ¶ 21; Minor Decl. ¶¶ 20-22 & Exs. 4, 5; Dade Decl. ¶ 21.

C. Unpaid Overtime

Under both pay method policies, day rate and hourly rate, N&C and Seibels regularly scheduled Claims Adjusters to work more than 40 hours in a workweek, and Claims Adjusters did in fact regularly work more than 40 hours in a workweek. Amoko Decl. ¶ 23 & Ex. 3; Joyner Decl. ¶ 22; Burns Decl. ¶ 21; Mosley Decl. ¶ 22; Jordan Decl. ¶ 22; Minor Decl. ¶ 22 & Exs. 4, 5; Dade Decl. ¶ 22. Claims Adjusters regularly were scheduled for 11.5-hour shifts each weekday, Monday through Friday, which included a one-hour lunch break and two fifteen-minute breaks during the workday. Amoko Decl. ¶¶ 23-24 & Exs. 3, 4; Joyner Decl. ¶¶ 23-24 & Ex. 4; Burns Decl. ¶¶ 22-23; Mosley Decl. ¶¶ 23-24 & Ex. 6; Jordan Decl. ¶¶ 23-24; Minor Decl. ¶ 22 & Ex. 5; Dade Decl. ¶ 23. Defendants did not compensate Claims Adjusters for the one-hour lunch break or the two fifteen-minute breaks during the workday. Amoko Decl. ¶ 24 & Exs. 3, 4; Joyner Decl. ¶ 24 & Ex. 4; Burns Decl. ¶ 23; Mosley Decl. ¶ 24 & Ex. 6; Jordan Decl. ¶ 24; Minor Decl. ¶ 25 & Ex. 4; Dade Decl. ¶ 24. In most weeks, Claims Adjusters also were scheduled to work at least one

weekend day, typically for 8 hours. Amoko Decl. ¶ 23; Joyner Decl. ¶ 23 & Ex. 4; Burns Decl. ¶ 22; Mosley Decl. ¶ 23 & Ex. 6; Jordan Decl. ¶ 23; Minor Decl. ¶ 24 & Ex. 4; Dade Decl. ¶ 23.

N&C and Seibels had a uniform policy or practice not to pay Claims Adjusters the time-and-one-half overtime premium for hours worked over 40 as is required by the FLSA. Despite Defendants' scheduling Claims Adjusters to work more than 40 hours per week, and despite Defendants' knowledge that Claims Adjusters did in fact work more than 40 hours in many if not most workweeks, Defendants did not pay Claims Adjusters time-and-one-half overtime premium pay for those hours worked over 40 in a workweek. FAC ¶ 86, 90; Amoko Decl. ¶¶ 22, 25 & Ex. 4; Joyner Decl. ¶¶ 22, 25 & Ex. 4; Burns Decl. ¶¶ 21, 24; Mosley Decl. ¶¶ 22, 25 & Ex. 7; Jordan Decl. ¶¶ 22, 25 & Ex. 4: Minor Decl. ¶¶ 23, 26 & Ex. 5; Dade Decl. ¶¶ 22, 25.

ARGUMENT

CERTIFICATION OF AN FLSA COLLECTIVE ACTION IS APPROPRIATE

A. The FLSA Is a Remedial Statute

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA") to "eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a)–(b). The purpose of the FLSA was "to protect 'the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.'" *Salinas*, 848 F.3d at 133 (citing *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999) (citation omitted). To protect against excessive hours of work, the FLSA requires that employers pay employees for hours in excess of 40 in a week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The FLSA was designed "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (quotation marks omitted). 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 deficiency and general well-being of workers." *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981). "The broad remedial goal of the statute should be enforced to the full extent of its terms." *Hoffman–La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

B. Workers May Bring Collective Actions Under the FLSA.

Under the FLSA, employees may maintain a collective action on behalf of themselves and "other employees similarly situated." 29 U.S.C. § 216(b). Congress recognized that allowing individual employees subject to the same illegal practices to bring claims collectively is both fair and efficient. *Hoffmann-La Roche*, 493 U.S. at 170. "The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity." *Id.* Section 216(b) of the FLSA provides that an action for violation of its overtime provisions "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). The Supreme Court has held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." *Hoffmann–La Roche*, 493 U.S. at 169. The statute provides that an employee is not a "party plaintiff" unless and until they give "consent in writing." 29 U.S.C. § 216(b). Thus, issuing notice early in the litigation is important, because the statute of limitations continues to run for potential collective members until the collective member files a "consent to sue." *Moodie v. Kiawah Island Inn Co.*, 2:15 Civ. 1097 (RMG), 2015 WL 12805169, at *2 (D.S.C. July 27, 2015) ("Because the statute is running for potential opt-in Plaintiffs, the Court finds the need for prompt notice to potential plaintiffs[.]").

C. Courts Use a Two-Step Process to Certify FLSA Collective Actions.

The vast majority of courts throughout the nation, including district courts within the Fourth Circuit, have adopted a two-step approach to collective actions under the FLSA. *See e.g.*, *Frykenberg v. Captain George's of S.C., LP*, 4:19 Civ. 02971 (SAL), 2020 WL 5757678, at *1 (D.S.C. Sept. 28, 2020); *Ridgeway v. Planet Pizza 2016, Inc.*, 3:17 Civ. 03064 (MGL), 2019 WL 804883, at *2 (D.S.C. Feb. 21, 2019) (noting that district courts in the Fourth Circuit "appear to have coalesced around a two-step method, one the Court thinks is sensible"); *Turner v. BFI Waste Servs., LLC*, 268 F. Supp. 3d 831, 841 (D.S.C. 2017); *Gordon v. TBC Retail Group, Inc.*, 134 F. Supp. 3d 1027, 1031 (D.S.C. 2015); *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 517-20 (2d Cir. 2020); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012); *Campbell v. City of L.A.*, 903 F.3d 1090, 1109-10 (9th Cir. 2019); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1260 n.38 (11th Cir. 2008). The Fifth Circuit is the only circuit to reject the two-step approach. *See Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). This Court should not follow the *Swales* decision, as it is out-of-circuit and is contrary to the two-step approach to conditional certification taken by courts in the District of South Carolina and throughout the nation. Other courts have declined to follow *Swales* for the same reason. *See, e.g.*, *McCoy v. Elkhart Products Corp.*, 2021 WL 510626, at *2 (W.D. Ark. Feb. 11, 2021) (rejecting the new process for certification adopted in *Swales*, and instead holding, "The Court will follow the historical, two-stage approach, which has proven to be an efficient means of resolution of this issue"); *Piazza v. New Albertsons, LP*, 2021 WL 365771, at *5 (N.D. Ill. Feb. 3, 2021) (rejecting the defendant's invitation to follow the *Swales* decision); *Cervantes v. CRST Int'l, Inc.*, 1:20 Civ. 00075 (CJW)(KEM), Doc. 147 at 6 (N.D. Iowa Jan. 25, 2021) (same) (attached as Exhibit E).

In general, at the first stage, or notice stage, the court considers whether other similarly situated employees should be notified of the opportunity to join the action. *See Frykenberg*, 2020 WL 5757678, at *1; *see also Ridgeway*, 2019 WL 804883, at *2; *Turner*, 268 F. Supp. 3d at 841; *Gordon*, 134 F. Supp. 3d at 1031. Because the statute of limitations for each putative FLSA collective action member is tolled only upon the filing of their written consent to sue—not upon the filing of an FLSA collective action complaint, as is true for Rule 23 class actions—"courts have concluded that the objectives to be served through a collective action justify the conditional certification of a class of putative plaintiffs early in a proceeding, typically before any significant discovery, upon an initial showing that the members of the class are similarly situated." *Curtis v. Time Warner Ent.- Adv./Newhouse Partn.*, 3:12 Civ. 2370 (JFA), 2013 WL 1874848, at *2 (D.S.C. May 3, 2013) (citation omitted).

D. First Stage Standard of Proof is Lenient, Requiring Minimal Evidence

Courts have held that "plaintiff's burden at the conditional certification stage is fairly lenient, requiring only a modest factual showing that members of the proposed class are 'victims of a common policy or plan that violated the law.'" *Turner*, 268 F. Supp. 3d at 835 (citation omitted); *Ridgeway*, 2019 WL 804883, at *2; *Frykenberg*, 2020 WL 5757678, at *2; *Curtis*, 2013 WL 1874848 at *2; *Gordon*, 134 F. Supp. 3d at 1032; *see also Visco v. Aiken Cnty., S.C.*, 974 F. Supp. 2d 908, 915 (D.S.C. 2013) ("[A]t the conditional certification stage, courts 'appear to require nothing more than substantial allegations that the putative [plaintiffs] were together the victims of a single [challenged] decision, policy, or plan[.]'") (alterations in original; citation omitted). "Plaintiffs are required to establish that they are *similarly* situated, not *identically* situated." *McCoy v. Transdev Servs., Inc.*, 2020 WL 2319117, at *3 (D. Md. May 11, 2020) (emphasis in original) (citing *Bouthner v. Cleveland Constr., Inc.*, 2012 WL 738578, at *4 (D. Md. Mar. 5, 2012)); *see also Turner*, 268 F. Supp. 3d at 835 ("At the notice stage, plaintiffs must simply demonstrate that

there is 'some identifiable factual nexus which binds the named plaintiffs and the potential class members together.'") (citation omitted). At the first stage, the court "reviews the pleadings and affidavits to determine whether the plaintiff has carried his burden"; minimal evidence is required. *Schmidt v. Charleston Collision Holdings Corp.*, 2:14 Civ. 01094 (PMD), 2015 WL 3767436, at *3 (D.S.C. June 17, 2015); *see also Regan v. City of Charleston, S.C.*, 2:13 Civ. 3046 (PMD), 2014 WL 3530135, at *2 (D.S.C. July 16, 2014); *see also Gordon*, 134 F. Supp. 3d at 1032.

Applying a "fairly lenient standard," requiring "only minimal evidence," is "[c]onsistent with the underlying purpose of the FLSA's collective action procedure." *Ridgeway*, 2019 WL 804883, at *2 (citing *Long v. CPI Sec. Sys., Inc.*, 292 F.R.D. 296, 298–99 (W.D.N.C. 2013)). This "low standard of proof" at the first stage is appropriate, "because the district court is simply 'determining whether 'similarly situated' plaintiffs do in fact exist.'" *Curtis*, 2013 WL 1874848, at *2. "The primary focus in this inquiry is whether the potential plaintiffs are similarly situated with respect to the legal and, to a lesser extent, the factual issues to be determined." *Ridgeway*, 2019 WL 804883, at *2.

In the second stage, the Court will revisit the question of whether the members of the proposed collective are similarly situated with the benefit of evidence the parties have obtained in discovery. The second stage is triggered when "the defendant files a motion for decertification, usually after discovery is virtually complete." *Ridgeway*, 2019 WL 804883, at *3 (citation omitted); *see also Curtis*, 2013 WL 1874848, at *2 (noting that the second stage typically occurs "occurs just before the end of discovery, or at its close"). After discovery, defendants may take advantage of the second stage and move to decertify the collective action, "pointing to a more developed record to support its contention that the plaintiffs are not similarly situated to the extent that a collective action would be the appropriate vehicle for relief." *Higgins v. James Doran Co.*,

2:16 Civ. 2149 (RMG), 2017 WL 3207722, at *2 (D.S.C. July 28, 2017); *see also Frykenberg*, 2020 WL 5757678, at *2.

E. Plaintiff and the Proposed Collective are Similarly Situated.

Here, applying the lenient standard of the notice stage, Amoko has demonstrated that she is similarly situated to the other Claims Adjusters, because they are all victims of the same unlawful policies—i.e., Defendants' policy of misclassifying them as independent contractors and paying them a day rate and hourly rate without overtime wages. Amoko alleges and has supplied more than sufficient testimony and documentary evidence that Defendants: (1) misclassified Amoko and all Claims Adjusters as independent contractors; (2) initially purported to—but did not—pay Amoko and other Claims Adjusters a day rate because Defendants prorated Claims Adjusters' pay if they did not work an entire shift; (3) failed to pay Amoko and other Claims Adjusters for all hours worked; (4) scheduled Claims Adjusters regularly to work more than 40 hours in a workweek and knew or should have known that Claims Adjusters did in fact regularly work more than 40 hours in a workweek; and (5) failed to pay Amoko and other Claims Adjusters overtime wages for hours worked over 40 in a workweek in violation of the FLSA, 29 U.S.C. § 207. Moreover, Amoko and the Claims Adjusters all performed the same job—processing insurance claims for Defendants. Any variation that may exist among them is not dispositive to the "similarly situated" analysis at the notice stage, because Amoko and Claims Adjusters were all misclassified as independent contractors and subject to the same illegal pay policy.[4]

These allegations and evidence are sufficient to show that Amoko and Claims Adjusters were subject to a common pay policy—one which is illegal. By challenging a uniform policy

[4] Claims Adjusters are not exempt from the FLSA's overtime protections because Defendants did not pay any of them on a salary or fee basis as required by the "white collar" professional, administrative, and executive exemptions. 29 C.F.R. § 541.100 (executive); § 541.200 (administrative); and § 541.300 (professional).

applicable to all the putative collective action members, Amoko necessarily satisfies the "similarly situated" standard. District Courts in this Circuit and across the country have found certification to be appropriate for the same claims. *See, e.g., Weckesser v. Knight Enters. S.E.*, No. 2:16 Civ. 02053 (RMG), 2018 WL 4087931, at *2 (D.S.C. Aug. 27, 2018) (granting conditional certification to plaintiffs who allege that they "were all misclassified as independent contractors instead of employees because the Defendant controlled all aspects of their work"); *McCurley v. Flowers Foods, Inc.*, 5:16 Civ. 00194 (JMC), 2016 WL 6155740, at *5 (D.S.C. Oct. 24, 2016) (granting conditional certification because "Plaintiff has demonstrated that he and the proposed class members are similarly situated as to their alleged misclassification as independent contractors"); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 2008 WL 554114, at *3 (D. Md. Feb. 26, 2008) ("[T]he potential misclassification of the plaintiffs, in violation of FLSA's mandate that 'employee' be interpreted broadly, could be enough for class certification"); *Houston v. URS Corp.*, 591 F.Supp.2d 827, 833–34 (E.D. Va. 2008) ("Plaintiffs have sufficiently alleged a common policy or plan in that all inspectors were classified as independent contractors rather than employees"). "Numerous courts have found that a plaintiff's showing that employees were subject to a common practice of misclassification is sufficient to show that employees are similarly situated." *Degidio v. Crazy Horse Saloon & Rest., Inc.*, 4:13 Civ. 02136 (BHH), 2015 WL 5834280, at *19 (D.S.C. Sept. 30, 2015) (collecting cases).

Courts have found certification to be appropriate in other cases involving insurance claims adjusters raising the same or similar claims as those alleged here. For example, the Plaintiff in *Lockwood v. CIS Servs., LLC*, 2017 WL 6335955, at *3 (M.D. Fla. Sept. 26, 2017) alleged that the defendants classified her and a collective of insurance claims adjusters as independent contractors but treated them as employees—which is precisely what Amoko alleges in this case. Just as Amoko

does, Lockwood claimed that because she and the collective were employees, the defendants' practice of paying them a day rate with no overtime wages violated the FLSA's overtime provisions. *Id.* The *Lockwood* court conditionally certified an FLSA collective because the plaintiffs met the first-stage standard to show that they were all victims of the same illegal compensation plan—paying a day rate with no compensation for overtime hours worked. *Id.* The seven declarations that Amoko offers in support of her claims are at least as strong as the complaint and declarations the *Lockwood* court found sufficient for conditional certification and notice. *Id.* (approving conditional certification after reviewing the pleadings and plaintiff's five declarations from five former employees); *see also Akins v. Worley Catastrophe Response, LLC*, 2013 WL 1412371, at *6 (E.D. La. Apr. 8, 2013) (conditionally certifying FLSA collective of insurance claims adjusters because they were paid a day rate without overtime pay); *Smith v. Alamo Claim Serv.*, 2015 WL 13594414, at *1 (C.D. Ill. Mar. 31, 2015) (same).

Taken together, Plaintiff Amoko and the Claims Adjusters' substantive allegations of Defendants' misclassification as independent contractors, failure to pay for all hours worked, and failure to pay overtime wages are sufficient to meet the lenient standard for this first stage of certification. Accordingly, the putative Collective should be conditionally certified for purposes of notifying Claims Adjusters of the opportunity to join the action.

THE COURT SHOULD APPROVE PLAINTIFFS' PROPOSED NOTICE PROCEDURES

Courts have the discretion to facilitate notice to potential plaintiffs of their right to opt-into the action. *See Hoffman-La Roche,* 493 U.S. at 172. Court-ordered notice is the norm upon conditional certification. *See Frykenberg*, 2020 WL 5757678, at *2; *see also Regan*, 2014 WL 3530135, at *2. To facilitate notice, this Court should direct Defendants to provide Plaintiffs'

Counsel, in an electronic spreadsheet format such as Excel, the following information, each contained in a separate column, for each of the individuals described in the collective action definition who worked for Defendants since December 11, 2016:[5] first name, last name, street address, city, state, zip, email address, phone numbers, and unique identification number. Defendants alone are in possession of the information necessary to provide notice to Claims Adjusters, and courts uniformly require defendants to supply the names, street and email addresses, and unique employee identifiers for the administration of notice, as well as phone numbers for the administration of notice by text and to obtain updated addresses, where applicable. *Hoffman-LaRoche,* 493 U.S. at 170; *Frykenberg*, 2020 WL 5757678, at *7 (ordering defendants to produce potential collective members' names, last known addresses, and last known email addresses); *Hart v. Barbeque Integrated, Inc.*, 299 F. Supp. 3d 762, 772 (D.S.C. 2017) (directing defendants "to produce the putative class members' names, dates of employment, e-mail addresses, and home addresses"); *Curtis*, 2013 WL 1874848, at *2 (ordering defendants to produce "(1) the names of all members of this class; and (2) any contact information for such members, including, if available, their last known addresses and telephone numbers").

A. Notice Should Issue Via U.S. Mail, Email, and Text Message.

Additionally, in this modern electronic age, Courts in this District and throughout the country regularly authorize plaintiff's counsel to send a court approved notice via email and text message in addition to traditional mail. *See, e.g.*, *Hansen v. Waste Pro of S.C., Inc.*, 2:17 Civ. 02654 (DCN), 2020 WL 1892243, at *6 (D.S.C. Apr. 16, 2020) ("Courts in this district have found email to be an effective means of distribution that furthers the FLSA's broad remedial purpose."); *Pecora v. Big M Casino, Inc.*, 4:18 Civ. 01422 (RBH), 2019 WL 302592, at *5 (D.S.C. Jan. 23,

[5] *See* supra note 3 regarding the applicable statute of limitations period and tolling.

2019) (requiring defendant to provide plaintiffs "with any e-mail address on file in its records for potential class members"); *Weckesser*, 2018 WL 4087931, at *4 ("The Court finds that notice via email is appropriate in today's mobile society."); *Harris v. Med. Transp. Mgt., Inc.*, 317 F. Supp. 3d 421, 426 (D.D.C. 2018) (authorizing notice by text message); *Eley v. Stadium Grp., LLC*, 2015 WL 5611331, at *3 (D.D.C. Sept. 22, 2015) (authorizing notice via text message, mail, email, and posting in the employees' dressing room); *McCoy v. RP, Inc.*, 2:14 Civ. 3171 (PMD), 2015 WL 6157306, at *5 (D.S.C. Oct. 19, 2015) (authorizing notice by mail and email); *Morris v. Barefoot Commc'ns, Inc.*, No. 4:15 Civ. 01115 (RBH), 2017 WL 698612, at *3 (D.S.C. Feb. 22, 2017).

Notice via text message and email is especially important in a case such as this, where the FLSA Collective is comprised of members who work in an industry with a high turnover rate, who regularly change their mailing addresses and are away from home for long periods. Amoko Decl. ¶ 26; Joyner Decl. ¶ 26; Burns Decl. ¶ 25; Mosley Decl. ¶ 26; Jordan Decl. ¶ 26; Minor Decl. ¶ 27; Dade Decl. ¶ 26. Email and text message makes sense as a supplementary form of notice because it is an efficient and inexpensive way to give notice and may reach some Claims Adjusters who have changed their physical address or have limited access to their mail. *See Weckesser*, 2018 WL 4087931, at *4. Sending notice by email and text message is common in this age of electronic and wireless communications. *See, e.g., Irvine v. Destination Wild Dunes Mgt., Inc.*, 132 F. Supp. 3d 707, 711 (D.S.C. 2015) ("This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication."); *Regan v. City of Hanahan*, 2:16 Civ. 1077 (RMG), 2017 WL 1386334, at *3 (D.S.C. Apr. 18, 2017) (granting plaintiffs' request to send notice via text message and noting that "in today's mobile society, individuals are likely to retain their mobile numbers and email addresses even when they move").

Accordingly, Plaintiffs request that the Court permit notice to issue via email and text message in addition to the standard dissemination via U.S. Mail.

B. Reminders at the Midpoint of the Notice Period are Appropriate.

Plaintiffs also request that the Court permit Plaintiffs' Counsel to send a reminder Notice halfway through the notice period to those potential plaintiffs who have not responded. Such follow-up reminder notices serve what the Supreme Court in *Hoffmann-La Roche* recognized 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. Reminder notices help to ensure that collective members receive effective notice and that those who are interested in joining the action do so within the opt-in period. *See Walters v. Buffets, Inc.*, 6:13 Civ. 02995 (JMC), 2016 WL 4203851, at *1 (D.S.C. Mar. 1, 2016) (finding a reminder notice reasonable considering "the FLSA's intentions to inform as many plaintiffs as possible of their right to opt into a collective action"); *see also Morris v. Lettire Const., Corp.*, 896 F. Supp. 2d 265, 275 (S.D.N.Y. 2012).

For this reason, courts in this Circuit and throughout the country have regularly approved the sending of a reminder notice, including via text message, to collective members who have not responded after the mailing of the initial notice. *See, e.g.*, *Hansen*, 2020 WL 1892243, at *7 (D.S.C. Apr. 16, 2020) (authorizing a notice reminder via text message, U.S. mail, and/or email to be sent to all potential collective members who did not respond within thirty days of the initial notice); *Privette v. Waste Pro of N.C., Inc.*, 2:19 Civ. 3221 (DCN), 2020 WL 1892167, at *7 (D.S.C. Apr. 16, 2020) (same); *Walters*, 2016 WL 4203851, at *1 (ordering a reminder postcard sent to collective members who had not responded within thirty days of the initial notice); *Hargrove v. Ryla Teleservs., Inc.*, 2012 WL 463442, *1 (E.D. Va. Feb. 13, 2012) (ordering a reminder letter sent for collective members who had not responded within thirty days of the notice); *Helton v. Factor 5, Inc.*, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012) (authorizing a reminder postcard

to potential plaintiffs thirty (30) days prior to the deadline for opting into the action); *Hart v. U.S. Bank NA*, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013) (authorizing a reminder postcard to potential opt-ins between mailing the initial notice and the close of the opt-in period); *Sanchez v. Sephora USA, Inc.*, 2012 WL 2945753, at *6 (N.D. Cal. July 18, 2012) ("courts have recognized that a second notice or reminder is appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in").

Accordingly, Plaintiffs request that the Court permit them to send a reminder Notice in the form of a postcard, email, and text message.

C. The Court Should Allow Skip Tracing When Notice is Returned Undeliverable.

For Claims Adjusters whose notice is returned as undeliverable, this Court should direct Defendants to promptly supply dates of birth and the last four digits of social security numbers to Plaintiffs' Counsel to assist with location efforts of those Claims Adjusters and to find the current address for such individuals within the opt-in period, so that notice can then be re-mailed.

Courts routinely order defendants to provide this information for the purpose of locating putative collective members. *See, e.g.*, *Degidio*, 2015 WL 5834280, at *24 (ordering defendant "to produce the job title, last known mailing addresses, telephone numbers, dates of employment, and the last four digits of the Social Security numbers of all prospective plaintiffs in a computer readable format"); *Ridgeway*, 2019 WL 804883, at *5 (granting plaintiff's request for the "names, addresses, email addresses and telephone numbers" of putative collective members); *Clark v. Williamson*, 2018 WL 1626305, at *6 (M.D.N.C. Mar. 30, 2018) (ordering defendants to "produce telephone numbers, dates of birth, and partial social security numbers for any individual whose notice is returned undeliverable . . . for the limited purpose of locating the current address of those individuals"); *Rehberg v. Flowers Foods, Inc.*, 2013 WL 1190290, at *2 (W.D.N.C. Mar. 22, 2013) (granting motion for conditional certification and directing defendants to provide plaintiffs with

"names, last known addresses, dates of employment, job title, respective warehouse, phone numbers, last four digits of their Social Security numbers, and email addresses in an agreeable format for mailing"); *Hargrove*, 2012 WL 463442, at *1 (ordering defendant "to provide Plaintiffs a list, in Excel format, of all persons employed by Defendant . . . which list shall include each employee's name, last known address, telephone number, employment dates, employment location, last four digits of their social security number, and date of birth"); *Byard v. Verizon W. Va, Inc.*, 287 F.R.D. 365, 377 (N.D.W. Va. 2012) (ordering defendants to produce the last four digits of putative plaintiffs' social security numbers when their notice has been returned undeliverable). Plaintiffs' Counsel would use this information solely assist in "skip tracing" to find out if the John Smith who used to live in Charleston, South Carolina is now the John Smith in Los Angeles, or Manhattan, using standard "skip trace" databases to which counsel has access.

D. The Court Should Allow Sixty Days for FLSA Collective Members to Opt-in.

Plaintiffs request that Claims Adjusters have a minimum of sixty days to return their consent to sue form. Courts routinely permit an opt-in period of sixty days, and indeed some approve longer periods of time. *See Frykenberg*, 2020 WL 5757678, at *3 (60 days); *Weckesser*, 2018 WL 4087931, at *4 (60 days); *Curtis*, 2013 WL 1874848, at *8 (60 days); *Byard*, 287 F.R.D. at 373 (60 days); *Morris*, 2017 WL 698612, at *3 (90 days); *Ridgeway*, 2019 WL 804883, at *5 (declining "to depart from the collective wisdom of these other courts that have approved a ninety-day opt-in time period"). Accordingly, this Court should grant Plaintiffs a sixty-day notice period.

THE COURT SHOULD APPROVE PLAINTIFFS' PROPOSED NOTICE

"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." *Frykenberg*, 2020 WL 5757678 at *4 (citation omitted); *see also Pecora*, 2019 WL 302592, at *6 (citing *McCoy*, 2015 WL 6157306, at *5). The goals of the FLSA's collective action provision "depend on employees

receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170; *see also Frykenberg*, 2020 WL 5757678, at *3.

Copies of Plaintiffs' proposed mail, email, and text message notice and reminder postcard, email, and text message are attached to this motion as Exhibits A[6] (mail and email notice), B[7] (text message notice and reminder text message), and C[8] (reminder postcard and reminder email). This form of notice informs Claims Adjusters in neutral language of the nature of this action, of their right to participate in it by filing a consent to sue with the Court and the consequences of their joining or not joining the action.[9] The reminder notice succinctly reminds Claims Adjusters of the case and the deadline for returning the consent to sue.

Accordingly, Plaintiffs request that the Court approve the form of Notice attached as Exhibit A to be sent via mail and email, and the form of notice attached as Exhibit B to be sent via text message as the initial notice to Claims Adjusters; approve the form of the postcard and email, attached as Exhibit C, and reminder text message, including the same language as Exhibit B, to be sent as a reminder to Claims Adjusters who have not responded by midway through the notice process. Plaintiffs' Counsel will bear the cost of distributing the notices and reminder notices.

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[6] The same form of Notice will be mailed and emailed to Claims Adjusters.

[7] The contents of the text message notice and reminder text message are the same and are modeled on the text message notice approved in *Regan v. City of Hanahan*, 2:16 Civ. 1077 (RMG), 2017 WL 1386334 (D.S.C. Apr. 18, 2017).

[8] This content of the reminder postcard will be used in the reminder email to Claims Adjusters.

[9] This notice is modeled on the notice this Court approved in *Frykenberg v. Captain George's of S.C., LP*, 4:19 Civ. 02971 (SAL) (D.S.C. Oct. 29, 2020).

CONCLUSION

For all of the foregoing reasons, Plaintiffs requests that the Court:

(1) Grant conditional certification of an FLSA collective action on behalf of a collective defined as:

> All persons who worked for N&C Claims Service, Inc. and Seibels Claims Solutions, Inc. in South Carolina as insurance claims adjusters and who were classified as independent contractors and not paid overtime wages for hours worked over 40 in a workweek for which they were paid on a pay date at any time between December 11, 2016 and the date of final judgment in this matter.

(2) Order Defendants to provide Plaintiffs' Counsel the following information with respect to each individual within the above-defined collective: first name, last name, street address, city, state, zip, email address, phone number, and unique identification number. Defendants should also be ordered to produce the last four digits of the social security number for all Claims Adjusters whose notices are returned as undeliverable and for all Claims Adjusters who have the same names. All of this information should be provided in an electronic spreadsheet format such as Excel, and each item of information should be set forth in a separate column;

(3) Authorize Plaintiffs' Counsel to send the Notice attached as Exhibit A to Claims Adjusters through first-class mail and email, and Exhibit B through text message; authorize Plaintiffs' Counsel to send a reminder postcard and email attached as Exhibit C, and reminder text message including the same language as Exhibit B to Claims Adjusters who do not opt in within 30 days of the start of the opt-in period, and authorize Plaintiffs' Counsel to resend notice to Claims Adjusters whose notices are returned as undeliverable if a more accurate address can be found; and

(4) Approve an opt-in period of 60 days.

Dated: May 3, 2021

Respectfully submitted,

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