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

LATOYA FERGUSON, individually and on behalf of all others similarly situated, **Plaintiffs,** **v.** **BURTON CLAIM SERVICE, INC., and SEIBELS CLAIMS SOLUTIONS, INC.,** **Defendants.**	**Case No. 3:21-cv-00580-SAL**

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

TABLE OF CONTENTS

INTRODUCTION 1

FACTS 2

1. BURTON AND SEIBELS ACTED AS EMPLOYERS OF CLAIMS ADJUSTERS 2

2. BURTON AND SEIBELS FAILED TO PAY CLAIMS ADJUSTERS FOR ALL HOURS THEY WORKED 5

3. BURTON AND SEIBELS FAILED TO PAY CLAIMS ADJUSTERS AN OVERTIME PREMIUM 5

ARGUMENT 6

1. CERTIFICATION OF AN FLSA COLLECTIVE ACTION IS APPROPRIATE 6

A. The FLSA Is a Remedial Statute 6

B. Workers May Bring Collective Actions Under the FLSA 7

C. Courts Use a Two-Step Process to Certify FLSA Collective Actions 7

D. First Stage Standard of Proof Is Lenient, Requiring Minimal Evidence 10

E. Plaintiff and the Proposed Collective Are Similarly Situated 11

2. THE COURT SHOULD APPROVE PLAINTIFFS' PROPOSED NOTICE PROCEDURES 14

A. Notice Should Issue Via U.S. Mail, Email, and Text Message 15

B. Reminders at the Midpoint of the Notice Period Are Appropriate 17

C. The Court Should Allow Skip Tracing When Notice Is Returned Undeliverable 18

D. The Court Should Allow 60 Days for FLSA Collective Members to Opt-in 19

3. THE COURT SHOULD APPROVE PLAINTIFFS' PROPOSED NOTICE 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

A.H. Phillips v. Walling,
324 U.S. 490 (1945).....6

Akins v. Worley Catastrophe Response, LLC,
12 Civ. 2401, 2013 WL 1412371 (E.D. La. Apr. 8, 2013).....14

Barrentine v. Arkansas-Best Freight Sys. Inc.,
450 U.S. 728 (1981).....6

Benshoff v. City of Va. Beach,
180 F.3d 136 (4th Cir. 1999).....7

Bouthner v. Cleveland Constr., Inc.,
11 Civ. 0244, 2012 WL 738578 (D. Md. Mar. 5, 2012).....10

Branson v. All. Coal, LLC,
4:19 Civ. 00155-JHM, 2021 WL 1550571 (W.D. Ky. Apr. 20, 2021).....9

Brewer v. All. Coal, LLC,
7:20 Civ. 0041, 2021 WL 1307721 (E.D. Ky. Apr. 6, 2021).....8

Byard v. Verizon W. Virginia, Inc.,
287 F.R.D. 365 (N.D.W. Va. 2012).....19

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013).....8

Campbell v. City of Los Angeles,
903 F.3d 1090 (9th Cir. 2019).....8

Cervantes v. CRST International, Inc.,
1:20 Civ. 00075 (N.D. Iowa Jan. 25, 2021).....8

Clark v. Williamson,
1:16 Civ. 1413, 2018 WL 1626305 (M.D.N.C. Mar. 30, 2018).....18

Curtis v. Time Warner Ent.- Adv./Newhouse Partn.,
3:12 Civ. 2370, 2013 WL 1874848 (D.S.C. May 3, 2013).....10, 11, 15, 19

Degidio v. Crazy Horse Saloon & Rest., Inc.,
4:13 Civ. 02136, 2015 WL 5834280 (D.S.C. Sept. 30, 2015).....13, 18

Eley v. Stadium Group, LLC,
14 Civ. 1594, 2015 WL 5611331 (D.D.C. Sept. 22, 2015).....16

Frykenberg v. Captain George's of S.C., LP,
4:19 Civ. 02971 SAL, 2020 WL 5757678 (D.S.C. Sept. 28, 2020) ..... *passim*

Gordon v. TBC Retail Group, Inc.,
134 F. Supp. 3d 1027 (D.S.C. 2015).....8, 9, 10

Hansen v. Waste Pro of S.C., Inc.,
2:17 Civ. 02654, 2020 WL 1892243 (D.S.C. Apr. 16, 2020).....16, 17

Hargrove v. Ryla Teleservices, Inc.,
2:11 Civ. 344, 2012 WL 463442 (E.D. Va. Feb. 13, 2012).....18, 19

Harris v. Med. Transportation Mgt., Inc.,
317 F. Supp. 3d 421 (D.D.C. 2018).....17

Hart v. Barbeque Integrated, Inc.,
299 F. Supp. 3d 762 (D.S.C. 2017).....15

Hart v. U.S. Bank NA,
12 Civ. 2471, 2013 WL 5965637 (D. Ariz. Nov. 8, 2013).....18

Helton v. Factor 5, Inc.,
10 Civ. 04927, 2012 WL 2428219 (N.D. Cal. June 26, 2012).....18

Hewitt v. Helix Energy Sols. Group, Inc.,
19 Civ. 20023, 2021 WL 4099598 (5th Cir. Sept. 9, 2021).....12

Higgins v. James Doran Co., Inc.,
2:16 Civ. 2149, 2017 WL 3207722 (D.S.C. July 28, 2017) 11

Hoffman–La Roche Inc. v. Sperling,
493 U.S. 165 (1989)..... *passim*

Holder v. A&L Home Care and Training Ctr., LLC,
1:20-CV-757, 2021 WL 3400654 (S.D. Ohio Aug. 4, 2021) 8

Houston v. URS Corp.,
591 F.Supp.2d 827 (E.D.Va.2008) 13

Irvine v. Destination Wild Dunes Mgt., Inc.,
132 F. Supp. 3d 707 (D.S.C. 2015).....16

Lockwood v. CIS Servs., LLC,
3:16 Civ. 965, 2017 WL 6335955 (M.D. Fla. Sept. 26, 2017).....13, 14

Long v. CPI Sec. Sys., Inc.,
292 F.R.D. 296 (W.D.N.C. 2013).....11

McColley v. Casey's Gen. Stores, Inc.,
2:18 Civ. 72, 2021 WL 1207564 (N.D. Ind. Mar. 31, 2021) 9

McCoy v. Elkhart Products Corp.,
5:20 Civ. 05176, 2021 WL 510626 (W.D. Ark. Feb. 11, 2021) 8

McCoy v. RP, Inc.,
2:14 Civ. 3171, 2015 WL 6157306 (D.S.C. Oct. 19, 2015) 16, 20

McCoy v. Transdev Services, Inc.,
19 Civ. 2137, 2020 WL 2319117 (D. Md. May 11, 2020) 10

McCurley v. Flowers Foods, Inc.,
5:16 Civ. 00194, 2016 WL 6155740 (D.S.C. Oct. 24, 2016) 13

Montoya v. S.C.C.P. Painting Contractors, Inc.,
07 Civ. 455, 2008 WL 554114 (D. Md. Feb. 26, 2008) 13

Moodie v. Kiawah Island Inn Co., LLC,
2:15 Civ. 1097, 2015 WL 12805169 (D.S.C. July 27, 2015) 9

Morgan v. Family Dollar Stores,
551 F.3d 1233 (11th Cir. 2008) 8

Morris v. Barefoot Commc'ns, Inc.,
4:15 Civ. 01115, 2017 WL 698612 (D.S.C. Feb. 22, 2017) 16, 19

Morris v. Lettire Const., Corp.,
896 F. Supp. 2d 265 (S.D.N.Y. 2012).....17

Pecora v. Big M Casino, Inc.,
4:18 Civ. 01422, 2019 WL 302592 (D.S.C. Jan. 23, 2019).....15, 20

Piazza v. New Albertsons, LP,
20 Civ. 03187, 2021 WL 365771 (N.D. Ill. Feb. 3, 2021).....8

Piazza, v. New Albertsons, Inc., et al.,
20 Civ. 03187, 2021 WL 3645526 (N.D. Ill. Aug. 16, 2021).....9

Privette v. Waste Pro of N. Carolina, Inc.,
2:19 Civ. 3221, 2020 WL 1892167 (D.S.C. Apr. 16, 2020).....17

Regan v. City of Charleston, S.C.,
2:13 Civ. 3046, 2014 WL 3530135 (D.S.C. July 16, 2014) 10, 14

Regan v. City of Hanahan,
2:16 Civ. 1077, 2017 WL 1386334 (D.S.C. Apr. 18, 2017).....16, 20

Rehberg v. Flowers Foods, Inc.,
3:12 Civ. 596, 2013 WL 1190290 (W.D.N.C. Mar. 22, 2013) 19

Ridgeway v. Planet Pizza 2016, Inc.,
3:17 Civ. 03064, 2019 WL 804883 (D.S.C. Feb. 21, 2019) ..... *passim*

Salinas v. Com. Interiors, Inc.,
848 F.3d 125 (4th Cir. 2017) 6, 12

Schmidt v. Charleston Collision Holdings Corp.,
2:14 Civ. 01094, 2015 WL 3767436 (D.S.C. June 17, 2015) 10

Scott v. Chipotle Mexican Grill, Inc.,
954 F.3d 502 (2d Cir. 2020) 8

Smith v. Alamo Claim Serv.,
13 Civ. 1481, 2015 WL 13594414 (C.D. Ill. Mar. 31, 2015) 14

Swales v. KLLM Transport Services, L.L.C.,
985 F.3d 430 (5th Cir. 2021) 8

Thiessen v. Gen. Elec. Capital Corp.,
267 F.3d 1095 (10th Cir. 2001) 8

Turner v. BFI Waste Services, LLC,
268 F. Supp. 3d 831 (D.S.C. 2017) 8, 9, 10

Visco v. Aiken County, S.C.,
974 F. Supp. 2d 908 (D.S.C. 2013) 10

Walters v. Buffets, Inc.,
6:13 Civ. 02995, 2016 WL 4203851 (D.S.C. Mar. 1, 2016) 17, 18

Weckesser v. Knight Enterprises S.E., LLC,
2:16 Civ. 02053, 2018 WL 4087931 (D.S.C. Aug. 27, 2018) 13, 16, 19

White v. Baptist Mem'l Health Care Corp.,
699 F.3d 869 (6th Cir. 2012) 8

Wright v. Waste Pro USA, Inc.,
0:19 Civ. 62051, 2021 WL 1290299 (S.D. Fla. Apr. 6, 2021) 9

Statutes

29 U.S.C. § 201 1

29 U.S.C. § 202 6

29 U.S.C. § 207(a)(1) 6

29 U.S.C. § 216(b) 1, 7

Regulations

29 C.F.R. § 541.100 12

29 C.F.R. § 541.604(b) 12

INTRODUCTION

Plaintiff Latoya Ferguson 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 Defendants, Burton Claim Service, Inc. and Seibels Claims Solutions, Inc.,[1] (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 Ferguson now moves for an order conditionally certifying her FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b) and authorizing notice to be sent to the class of similarly situated people:

> All persons who worked for Burton Claim 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 more than 40 in a workweek at any time between February 26, 2018, 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 class of Claims Adjusters 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 without premium compensation for overtime hours. In support of this motion, Plaintiffs offer Defendants' documents and records, including time sheets and pay stubs, testimony from four Claims Adjusters, and the allegations set forth in the Complaint.

[1] Defendant Burton Claim Service, Inc. ("Burton") is a for-profit Florida corporation that provides insurance adjustment services to companies such as Seibels. Complaint, Doc. 1 ¶ 9. Defendant Seibels Claims Solutions, Inc. ("Seibels") is a for-profit South Carolina corporation. *Id.* at ¶ 12.

To facilitate notice to the remaining handful of Claims Adjusters,[2] the Court should: 1) approve Plaintiffs' proposed Notice and Reminder Notice; 2) approve Plaintiffs' proposed method of distribution of the Notices, which is consistent with those approved by this District and courts around the country; and 3) direct the Defendants to provide to Plaintiffs' Counsel with the information necessary for Plaintiffs to distribute notice, in an electronic spreadsheet format such as Excel, for each member Claims Adjuster, including names, mailing addresses, email addresses, dates of employment, telephone numbers, and 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 Claims Adjusters 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 issuing the 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

1. BURTON AND SEIBELS ACTED AS EMPLOYERS OF CLAIMS ADJUSTERS

Burton hired Claims Adjusters, including Plaintiff Ferguson, to work for Seibels in Seibels' office in Columbia, South Carolina. Declaration of Latoya Ferguson ("Ferguson Dec.") at Ex. 5. Claims Adjusters worked for Defendants in Seibels' Columbia office, including Plaintiff Ferguson, from approximately September 2018 until December 2019. Ferguson Dec. at ¶ 2; Declaration of Jacqueline Acevedo ("Acevedo Dec.") at ¶ 2 (worked for Defendants from October 2018 to February 2019); Declaration of Kalada Dubose ("Dubose Dec.") at ¶ 2 (worked for Defendants from October 2018 to October 2019); and Declaration of Mecola Hunte ("Hunte

[2] Nine of the 18 putative class members have filed a consent to sue in the case.

Dec.") at ¶ 2 (worked for Defendants from October 30, 2019 to November 2019. At any one time, Defendants employed many other Claims Adjusters. Ferguson Dec. at ¶ 4; Acevedo Dec. at ¶ 4; Dubose Dec. at ¶ 4; Hunte Dec. at ¶ 4. 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").[3] Ferguson Dec. at ¶ 4; Acevedo Dec. at ¶ 4; Dubose Dec. at ¶ 4; Hunte Dec. at ¶ 4.

Defendants classified Claims Adjusters, including Plaintiff Ferguson, as independent contractors. Ferguson Dec. at ¶ 6; Acevedo Dec. at ¶ 6; Dubose Dec. at ¶ 6; Hunte Dec. at ¶ 6. Defendants reported Claims Adjusters' pay on an IRS Form 1099 as independent contractors. Ferguson Dec. at ¶ 6; Acevedo Dec. at ¶ 6; Dubose Dec. at ¶ 6; Hunte Dec. at ¶ 6.

Claims Adjusters all performed the same essential job duties, which were the same essential job duties that Seibels' Staff Adjusters performed. Ferguson Dec. at ¶ 7; Acevedo Dec. at ¶¶ 7, 10; Dubose Dec. at ¶¶ 7, 10; Hunte Dec. at ¶ 7. Claims Adjusters, as well as Seibels' Staff Adjusters, all processed insurance claims, which involved obtaining facts from the insured and entering those facts into Seibels' computer systems. Ferguson Dec. at ¶ 7; Acevedo Dec. at ¶¶ 7, 10; Dubose Dec. at ¶¶ 7, 10; Hunte Dec. at ¶ 7. Seibels provided Claims Adjusters with all the tools necessary to perform their work, including computers, software, phones, e-mail accounts, company letterhead, and desks. Ferguson Dec. at ¶ 8; Acevedo Dec. at ¶ 8; Dubose Dec. at ¶ 8; Hunte Dec. at ¶ 8. Claims Adjusters worked alongside Seibels' Staff Adjusters as

[3] In addition to the Claims Adjusters and Employee claims adjusters, also working in Seibels' office in Columbia were individuals performing claims adjusting services who were hired through companies other than Burton, and whom Seibels classified as independent contractors. *See Amoko v. N&C Claims Service, Inc., Nicholas F. Ierulli; Pam Ierulli; and Seibels Claims Solutions, Inc.*, 3:20 Civ. 04346-SAL.

they all performed the same insurance claim-handling tasks. Ferguson Dec. at ¶ 7; Acevedo Dec. at ¶ 7, 10; Dubose Dec. at ¶ ¶ 7, 10; Hunte Dec. at ¶ 7.

Defendants exercised and maintained control over Claims Adjusters' work. Burton and Seibels had the authority to hire, discipline, and fire Claims Adjusters. Ferguson Dec. at ¶ 12; Acevedo Dec. at ¶ 13; Dubose Dec. at ¶ 13; Hunte Dec. at ¶ 12. When Claims Adjusters first arrived at Seibels' office, Seibels employees trained them to use Seibels' equipment and software. Ferguson Dec. at ¶ 9; Acevedo Dec. at ¶ 9; Dubose Dec. at ¶ 9; Hunte Dec. at ¶ 9. Burton and Seibels set the Human Resources policies applicable to Claims Adjusters. Ferguson Dec. at ¶ 13; Acevedo Dec. at ¶ 14; Dubose Dec. at ¶ 14; Hunte Dec. at ¶ 13. For example, Seibels' Human Resources Department emailed Claims Adjusters and Staff Adjusters, explaining that Seibels required workers to record and report their work time, including work start time, start and end times for lunch, and end work time by clocking in and out via the Paylocity website. Ferguson Dec. at ¶ 16, Ex. 1; Dubose Dec. at ¶ 18. Failure to follow the guidelines could result in termination. Ferguson Dec., Ex. 2. Burton and Seibels also required Claims Adjusters to report their work time on weekly timesheets. Ferguson Dec. at ¶ 16; Acevedo Dec. at ¶ 17; Dubose Dec. at ¶ 17; Hunte Dec. at ¶ 16. While working for Burton and Seibels, Claims Adjusters provided insurance claims services only to insurance companies Burton and Seibels assigned. Ferguson Dec. at ¶ 10; Acevedo Dec. at ¶ 11; Dubose Dec. at ¶ 11; Hunte Dec. at ¶ 10. Claims Adjusters also could not and did not hire others to perform the work Burton and Seibels assigned to Claims Adjusters. Ferguson Dec. at ¶ 11; Acevedo Dec. at ¶ 12; Dubose Dec. at ¶ 12; Hunte Dec. at ¶ 11.

2. BURTON AND SEIBELS FAILED TO PAY CLAIMS ADJUSTERS FOR ALL HOURS THEY WORKED

Defendants paid all Claims Adjusters the same way. Initially, Burton told Ferguson 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. Ferguson Dec. at ¶ 17; Acevedo Dec. at ¶ 18; Dubose Dec. at ¶ 19; Hunte Dec. at ¶ 17. In reality, Burton did not pay them a day rate. Instead, Burton and Seibels made deductions to the day rate if the Claims Adjusters worked fewer than their scheduled hours, reducing the rate of pay on a pro rata basis. Ferguson Dec. at ¶ 17, Ex. 3, 4; Acevedo Dec. at ¶ 18; Dubose Dec. at ¶ 19, Ex. 1, 2; Hunte Dec. at ¶ 17. When Claims Adjusters worked more than their scheduled hours, Burton and Seibels did not pay them for the additional time. Ferguson Dec. at ¶ 18; Acevedo Dec. at ¶ 19; Dubose Dec. at ¶ 20; Hunte Dec. at ¶ 18. Burton and Seibels also did not pay Claims Adjusters for any day that they did not work, regardless of the reason, and failed to pay the day rate for each day Claims Adjusters worked. Ferguson Dec. at ¶ 18; Acevedo Dec. at ¶ 19; Dubose Dec. at ¶ 20; Hunte Dec. at ¶ 18.

3. BURTON AND SEIBELS FAILED TO PAY CLAIMS ADJUSTERS AN OVERTIME PREMIUM

At all times, Burton 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. Ferguson Dec. at ¶ 20; Acevedo Dec. at ¶ 21; Dubose Dec. at ¶ 22; Hunte Dec. at ¶ 20. Burton and Seibels initially scheduled Claims Adjusters to twelve hours of work each day, seven days per week. Ferguson Dec. at ¶ 21, Ex. 5; Acevedo Dec. at ¶ 22; Dubose Dec. at ¶ 23; Hunte Dec. at ¶ 21. Before approximately November 2019, Claims Adjusters regularly were scheduled for eleven-and-a-half-hour shifts each day, Monday through Friday, which included a one-hour lunch break during the workday. Ferguson Dec. at ¶ 22, Ex. 6; Acevedo Dec. at ¶ 23; Dubose Dec. at ¶ 24; Hunte Dec. at ¶ 22. After approximately November 2019, Claims Adjusters

were regularly scheduled to and did, in fact, work eight hours per day, Monday through Friday. Ferguson Dec. at ¶ 23. Claims Adjusters also had the option to work on the weekend as well. Ferguson Dec. at ¶ 23.

Burton 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 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 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. Complaint ¶ 61, 64; Ferguson Dec. at ¶¶ 20, 24, Ex. 7, 8; Acevedo Dec. at ¶¶ 21, 24; Dubose Dec. at ¶¶ 22, 25; Hunte Dec. at ¶¶ 20, 23.

ARGUMENT

1. CERTIFICATION OF AN FLSA COLLECTIVE ACTION IS APPROPRIATE

A. The FLSA Is a Remedial Statute

In 1938, Congress enacted the 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). To protect against excessive hours of work, the FLSA requires that employers pay employees for hours more than 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); *see also Salinas v. Com. Interiors,*

Inc., 848 F.3d 125, 141 (4th Cir. 2017) (noting that Congress enacted the FLSA during the Great Depression "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'") (citing *Benshoff v. City of Va. Beach*, 180 F.3d 136, 140 (4th Cir. 1999) (citation omitted). And 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). The FLSA provides that an action for a violation of its overtime provisions may be brought against an employer in federal court "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). 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.* 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. Those potential plaintiffs may then join the case by filing a consent to sue. 29 U.S.C. § 216(b).

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

Most courts throughout the nation, including courts within this District, have adopted a two-step approach to FLSA collective actions. *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); *see also Ridgeway*

v. Planet Pizza 2016, Inc., 3:17 Civ. 03064, 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"); *see also Turner v. BFI Waste Services, 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 Los Angeles*, 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).

Defendants may argue that the Court should follow an outlying decision from the Fifth Circuit, which rejected the two-step approach. *See Swales v. KLLM Transport Services, L.L.C.*, 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 McCoy v. Elkhart Products Corp.*, 5:20 Civ. 05176, 2021 WL 510626, at *2 (W.D. Ark. Feb. 11, 2021) (rejecting the new process for certification adopted in *Swales*, and instead holding that "[t]he Court will follow the historical, two-stage approach, which has proven to be an efficient means of resolution of this issue"); *see also Piazza v. New Albertsons, LP*, 20 Civ. 03187, 2021 WL 365771, at *5 (N.D. Ill. Feb. 3, 2021) (rejecting the defendant's invitation to follow the *Swales* decision); *see also Holder v. A&L Home Care and Training Ctr., LLC*, 1:20-CV-757, 2021 WL 3400654, at *6 (S.D. Ohio Aug. 4, 2021) (same); *see also Cervantes v. CRST International, Inc.*, 1:20 Civ. 00075, at *6 (N.D. Iowa Jan. 25, 2021) (same) (attached as Exhibit

D); *see also Brewer v. All. Coal, LLC*, 7:20 Civ. 0041, 2021 WL 1307721, at *1 (E.D. Ky. Apr. 6, 2021) (same); *Branson v. All. Coal, LLC*, 4:19 Civ. 00155-JHM, 2021 WL 1550571, at *4 (W.D. Ky. Apr. 20, 2021) (declining defendant's invitation to follow the *Swales* decision, holding "two-step certification is the best method to facilitate an orderly process in this case"); *see also McColley v. Casey's Gen. Stores, Inc.*, 2:18 Civ. 72, 2021 WL 1207564, at *3 (N.D. Ind. Mar. 31, 2021) (declining to follow the *Swales* decision); *see also Piazza, v. New Albertsons, Inc., et al.*, 20 Civ. 03187, 2021 WL 3645526, at *4 (N.D. Ill. Aug. 16, 2021) (denying defendant's motion to certify a question for interlocutory appeal, noting that "Swales is an outlier and limited to its facts"); *Wright v. Waste Pro USA, Inc.*, 19 Civ. 62051, 2021 WL 1290299, at *3 (S.D. Fla. Apr. 6, 2021) (denying defendants' motion to reconsider its Conditional Certification Order certifying the class in light of the *Swales* decision, noting that "no court outside of the Fifth Circuit has followed the Swales opinion in the three months since it was issued").

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— it is important to issue notice early in the litigation. *Moodie v. Kiawah Island Inn Co., LLC*, 2:15 Civ. 1097, 2015 WL 12805169, at *2 (D.S.C. July 27, 2015) (noting that "[b]ecause the statute is running for potential opt-in Plaintiffs, the Court finds the need for prompt notice to potential plaintiffs"). Indeed, "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, 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 County, S.C.*, 974 F. Supp. 2d 908, 915 (D.S.C. 2013) (noting that "at 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'") (citation omitted). Plaintiffs do not need to show that they are "identically situated," just that they are *similarly* situated. *McCoy v. Transdev Services, Inc.*, 19 Civ. 2137, 2020 WL 2319117, at *3 (D. Md. May 11, 2020) (citing *Bouthner v. Cleveland Constr., Inc.*, 11 Civ. 0244, 2012 WL 738578, at *4 (D. Md. Mar. 5, 2012)); *see also Turner*, 268 F. Supp. 3d at 835 (noting that "plaintiffs must simply demonstrate that there is 'some identifiable factual nexus which binds the named plaintiffs and the potential class members together'") (citation omitted). To meet this burden at the first stage, the court reviews the plaintiffs' pleadings, declarations, and any supporting documents. *Schmidt v. Charleston Collision Holdings Corp.*, 2:14 Civ. 01094, 2015 WL 3767436, at *3 (D.S.C. June 17, 2015); *see also Regan v. City of Charleston, S.C.*, 2:13 Civ. 3046, 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 occurs if "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 "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., Inc.*, 2:16 Civ. 2149, 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, Ferguson has demonstrated that she is similarly situated to the other Claims Adjusters, because they are all victims of the same unlawful policies—i.e., Burton and Seibels misclassified Claims Adjusters as independent

contractors and paid them a day rate without overtime wages, even though, as a matter of economic reality, Claims Adjusters were employees of Burton and Seibels.[4] Ferguson alleges and has supplied more than sufficient evidence, including numerous declarations and Defendants' documents, showing that Defendants misclassified her and all Claims Adjusters as independent contractors, purported to pay them a day rate but prorated their pay if they did not work an entire shift, and at no time paid Ferguson and the Claims Adjusters overtime wages for hours worked over 40 in a workweek in violation of the FLSA, 29 U.S.C. § 207. Moreover, Ferguson 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 Ferguson and Claims Adjusters were all subject to the same illegal pay policy.[5]

These allegations and evidence are sufficient to show that Ferguson and Claims Adjusters were subject to a common pay policy—one which is illegal. By challenging a uniform policy applicable to all the putative collective action members, Ferguson necessarily satisfies the

[4] Burton and Seibels jointly employed Claims Adjusters, including Plaintiff Ferguson. *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").

[5] 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 professional administrative, and executive exemptions. 29 C.F.R. §§ 541.100 (executive), 541.200 (administrative), and 541.300 (professional); *see also Hewitt v. Helix Energy Sols. Group, Inc.*, 19 Civ. 20023, 2021 WL 4099598, at *4 (5th Cir. Sept. 9, 2021) (citing 29 C.F.R. § 541.604(b)) (holding that in order to satisfy the salary-basis test while paying a daily rate, the employer must show the "'employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked and a reasonable relationship exists between the guaranteed amount and the amount actually earned'").

"similarly situated" standard. District Courts in this Circuit and across the country have found certification to be appropriate for the same independent contractor misclassification claims. *See, e.g., Weckesser v. Knight Enterprises S.E., LLC*, 2:16 Civ. 02053, 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"); *see, e.g., McCurley v. Flowers Foods, Inc.*, 5:16 Civ. 00194, 2016 WL 6155740, at *5 (D.S.C. Oct. 24, 2016) (granting conditional certification after concluding that "Plaintiff has demonstrated that he and the proposed class members are similarly situated as to their alleged misclassification as independent contractors"); *see e.g., Montoya v. S.C.C.P. Painting Contractors, Inc.*, 07 Civ. 455, 2008 WL 554114, at *3 (D. Md. Feb. 26, 2008) ("the potential misclassification of the plaintiffs, in violation of FLSA's mandate that 'employee' be interpreted broadly, could be enough for class certification"); *see e.g., Houston v. URS Corp.*, 591 F.Supp.2d 827, 833–34 (E.D.Va.2008) (finding that "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, 2015 WL 5834280, at *19 (D.S.C. Sept. 30, 2015) (collecting cases).

Courts have found certification to be appropriate in other cases with the same or similar claims regarding insurance claims adjusters as those alleged here. For example, the Plaintiff in *Lockwood v. CIS Servs., LLC*, 3:16 Civ. 965, 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—the same allegations that Ferguson

makes in this case. Just as Ferguson claims, 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.* Judge Davis conditionally certified the collective for treatment as a FLSA collective in *Lockwood* because they 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 four declarations, the complaint, and Defendants' documents that Ferguson offers in support of her claims are at least as strong, if not stronger, as the complaint and declarations Judge Davis found sufficient for conditional certification and notice. *See also Akins v. Worley Catastrophe Response, LLC*, 12 Civ. 2401, 2013 WL 1412371, at *6 (E.D. La. Apr. 8, 2013) (conditionally certifying an FLSA collective of insurance claims adjusters as similarly situated because they were paid a day rate without overtime pay); *Smith v. Alamo Claim Serv.*, 13 Civ. 1481, 2015 WL 13594414, at *1 (C.D. Ill. Mar. 31, 2015) (same).

Taken together, Plaintiff Ferguson 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.

2. 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 to the remaining few Claims Adjusters, 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 February 26, 2018: name, address, email address, phone number, 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 mail, email, and text message. *See Pecora v. Big M Casino, Inc.*, 4:18 Civ. 01422, 2019 WL 302592, at *5 (D.S.C. Jan. 23, 2019) ("In order to ensure proper notice is effectuated and to allow potential members to make an informed decision about whether to participate, this Court will require Big M to provide the TPA with any e-mail address on file in its records for potential class members."); *see also Hansen v. Waste Pro of S.C., Inc.*, 2:17 Civ. 02654, 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."); *see also McCoy v. RP, Inc.*, 2:14 Civ. 3171, 2015 WL 6157306, at *5 (D.S.C. Oct. 19, 2015) (granting plaintiff's request to distribute notice by mail and email); *Morris v. Barefoot Commc'ns, Inc.*, 4:15 Civ. 01115, 2017 WL 698612, at *3 (D.S.C. Feb. 22, 2017); *Eley v. Stadium Group, LLC*, 14 Civ. 1594, 2015 WL 5611331, at *3 (D.D.C. Sept. 22, 2015) (authorizing plaintiff to distribute notice via text message, mail, email, and posting in the employees' dressing room).

The Claims Adjusters in this case are comprised of members who turnover frequently, regularly change their mailing addresses, and are away from home for long periods. Ferguson Dec. at ¶ 25; Acevedo Dec. at ¶ 25; Dubose Dec. at ¶ 26; Hunte Dec. at ¶ 24. 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 are working away from home. *See Weckesser*, 2018 WL 4087931, at *4 ("The Court finds that notice via email is appropriate in today's mobile society."). 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, 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"); *Harris v. Med. Transportation Mgt., Inc.*, 317 F. Supp. 3d 421, 426 (D.D.C. 2018) (granting plaintiffs' request to send notice by text).

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

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

Additionally, Plaintiffs request that the Court permit Plaintiffs' Counsel to send a reminder Notice halfway through the notice period to those Claims Adjusters who have not responded. Such follow-up notices contribute to dissemination among similarly situated employees and serves 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 are a common way to ensure that collective members receive effective notice and to make sure that collective members who are interested in joining the action do so within the opt in period. *See Walters v. Buffets, Inc.*, 6:13 Civ. 02995, 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).

Accordingly, district 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 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. Carolina, Inc.*, 2:19 Civ. 3221, 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 Teleservices, Inc.*, 2:11 Civ. 344, 2012 WL 463442, *1 (E.D. Va. Feb. 13, 2012) (same); *see also Helton v. Factor 5, Inc.*, 10 Civ. 04927, 2012 WL 2428219, *7 (N.D. Cal. June 26, 2012) (same); *Hart v. U.S. Bank NA*, 12 Civ. 2471, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013) (authorizing a reminder postcard).

Thus, 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

Furthermore, 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 assist with location efforts, for those Claims Adjusters whose notice is returned as undeliverable, or skip tracing 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"); *see also, Ridgeway*, 2019 WL 804883, at *5 (granting plaintiff's request for the "names, addresses, email addresses and telephone numbers" of putative collective members); *see also, Clark v. Williamson*, 1:16 Civ. 1413, 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"); *see also, Rehberg v. Flowers Foods, Inc.*, 3:12 Civ. 596, 2013 WL 1190290, *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 (granting motion for conditional certification and 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."); *see also, Byard v. Verizon W. Virginia, Inc.*, 287 F.R.D. 365, 377 (N.D.W. Va. 2012) (ordering defendants to produce putative collective members' last four digits of their social security numbers when their notice has been returned as undeliverable). This information would only be used to 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 Atlanta, or Miami, using standard "skip trace" databases to which counsel has access.

D. The Court Should Allow 60 Days for FLSA Collective Members to Opt-in

Plaintiffs request that Claims Adjusters have a minimum of 60 days to return their consent to sue form. Courts routinely permit an opt-in period of 60 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 60-day notice period.

3. 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. The Notice is based on the version approved by this Court in *Frykenberg v. Captain George's of S.C., LP*, 4:19 Civ. 02971 SAL (D.S.C. Oct. 29, 2020) (attached as Exhibit E). 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 be sent via text message as the initial notice to Claims Adjusters and approve the form of the postcard, email

[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 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) (attached as Exhibit F).
[8] The contents of the reminder postcard will be used in the reminder email to Claims Adjusters.

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.

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 person who worked for Burton Claim 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 more than 40 in a week at any time between February 26, 2018 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: name, address, email address, phone number, and unique employee 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: September 28, 2021

Respectfully submitted,

/s/ Blaney A. Coskrey, III

Blaney A. Coskrey, III (Fed. ID No. 05421)
Coskrey Law Office
1201 Main Street, Suite 1980
Columbia, SC 29201
Telephone: (803) 748-1202
Fax: (803) 748-1302
coskrey@coskreylaw.com

Local Counsel for Plaintiffs and the Putative Collective

and

Rebecca King (*Pro Hac Vice*)
Matt Dunn (*Pro Hac Vice*)
GETMAN, SWEENEY& DUNN, PLLC
260 Fair Street
Kingston, New York 12401
Telephone: (845) 255-9370
Fax (845) 255-8649
mdunn@getmansweeney.com

Attorneys for Plaintiffs and the Putative Collective