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** **DEFENDANT SEIBELS CLAIMS SOLUTIONS, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION AND TO ISSUE NOTICE**

Defendant, Seibels Claims Solutions, Inc. ("Seibels"), by and through its undersigned counsel, hereby submits its Response in Opposition to Plaintiff's Motion to Conditionally Certify Collective Action and to Issue Notice and Memorandum in Law in Support of Same (Dkts. 48, 49) ("Motion to Conditionally Certify"), and in support thereof states as follows:

I. FACTUAL BACKGROUND

Plaintiff, Anessia Amoko, ("Plaintiff") individually and on behalf of all others similarly situated, filed an Amended Complaint against N&C Claims Service, Inc. ("N&C"), Nicholas F. Ierulli, Pam Ierulli, and Seibels Claims Solutions, Inc. ("Seibels") alleging violations of the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* ("FLSA") and the South Carolina Payment of Wages Act ("SCPWA"). Dkt. 15. Plaintiff is a former claims adjuster who was assigned by N&C to work at Seibels. Declaration of Jim Brophy, *Exhibit A*.

Seibels, located in Columbia, South Carolina, provides claims handling solutions to its insurance industry clients. During the relevant time period, Seibels engaged N&C to provide

insurance claims adjusting services and entered into a Claims Adjusting Services Agreement ("Services Agreement") with N&C which outlined the terms of the arrangement. Dkt. 48-4; Brophy Dec. ¶4. Under the Services Agreement, the services that N&C provided to Seibels would be "in the capacity of an independent contractor and not as an employee or agent" of Seibels. Dkt. 48-4, Sec. 11.1; Brophy Dec. ¶4. In accordance with the Services Agreement, N&C would "control the conditions, time, details, and means" by which it performed services for Seibels. *Id.* As a matter of contract, N&C was explicitly and solely responsible for complying with all applicable laws and regulations and for paying its employees and contractors all taxes, FICA, unemployment insurance contributions, and similar fees with regard to the insurance claims adjusters it provided to Seibels. Dkt. 48-4, Secs. 2.2, 11.3, and 14.

N&C utilized the work of individual claims adjusters to provide the claims adjusting services to Seibels pursuant to the Services Agreement. Brophy Dec. ¶3. Given the responsibilities that N&C maintained under the applicable Services Agreement, Seibels does not know the details of the relationships between the claims adjusters and N&C. Seibels did not screen, interview, or hire the claims adjusters utilized by N&C. Brophy Dec. ¶5. Seibels does not know whether some of the claims adjusters utilized by N&C were associated with another company that, in turn, contracted with N&C. *Id.* In fact, it is significant to note that according to Exhibit 1 of the Affidavit of Sheri Mosley, which was provided in purported support of Plaintiff's Motion to Conditionally Certify, Ms. Mosley entered into an agreement with N&C not individually, but through a separate consulting company entitled "SSM Consulting, LLC." Dkt. 49-7. Seibels does not know whether other claims adjusters were similarly associated with a separate entity that, in turn, contracted with N&C. Brophy Dec. ¶5. Although Seibels learned that N&C claims adjusters were contractually prohibited from accepting employment with Seibels,

Seibels was not involved in reaching any agreements of this kind between N&C and the claims adjusters. *Id.* Seibels had no control over or involvement in the manner or amount of compensation provided to claims adjusters utilized by N&C. *Id.* Although the claims adjusters utilized by N&C performed some work on-site at Seibels' Columbia, South Carolina office, an N&C supervisor oversaw their work. *Id.* Seibels did not discipline or terminate the claims adjusters utilized by N&C, and does not know whether and how N&C evaluated the performance of, or disciplined, the claims adjusters. *Id.*

Without any discovery between the parties whatsoever, and with only near-identical affidavits that generalize and group together the conduct of N&C and Seibels, Plaintiff seeks to conditionally certify a class and authorize notice to "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." Dkt. 48, 49. As set forth below, however, conditional certification should be denied.

II. ARGUMENT AND AUTHORITY

A. Conditional certification is not appropriate until the threshold question of independent contractor status is properly considered. It is undisputed that whether claims adjusters were appropriately classified as independent contractors is a threshold question that is central to Plaintiff's Motion to Conditionally Certify. The answer to this question will depend, not only upon the economic realities[1] of the relationships of the putative class members with N&C,

[1] The Fourth Circuit has adopted a six-factor "economic realities" test to determine whether a worker is an employee or an independent contractor. The factors considered are: (1) degree of control over the manner in which the work is performed; (2) the worker's opportunities for profit or loss; (3) the worker's investment in equipment or material; (4) the degree of skill required; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business. *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006).

but also with Seibels. As illustrated by both its written Services Agreement, and its practices, Seibels relied upon N&C to appropriately classify claims adjusters and to meet all legal obligations with respect to the claims adjusters. In large part, therefore, it is N&C and the claims adjusters, not Seibels, who have the information relevant to discussion of independent contractor status. Seibels will obtain this information only after an opportunity to engage in discovery. Therefore, Seibels respectfully requests that the Court deny Plaintiff's Motion and allow discovery and development of the record so that the Court can properly consider this threshold issue before ordering notice.

1. The two-step approach is inappropriate because independent contractor status is a threshold issue. In her Motion to Conditionally Certify, Plaintiff argues that the Court should apply a two-step approach to determine whether conditional certification is appropriate. This two-step approach was first enunciated by New Jersey District Court in 1987 in *Lusardi v. Xerox Corporation*, 118 F.R.D. 351 (D.N.J. 1987). Under this two-step approach urged by Plaintiff, courts first apply a "lenient" standard and require "only a modest factual showing" that members of the putative class are similarly situated for purposes of conditional certification. *Id.*; *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). This is referred to as the initial or "notice stage." At the second stage, following conditional certification and once a defendant files a motion to decertify the class, courts apply a more stringent standard to determine whether the named plaintiffs and opt-in plaintiffs are similarly situated to proceed to trial as a collective. *Thiessen,* 267 F.3d at 1102. While Seibels acknowledges that district courts within the Fourth Circuit have relied upon this two-step approach, the United States Court of Appeals for the Fourth Circuit has not adopted the two-step approach to conditional certification. See, e.g. *Lupardus v. Elk Energy Services, LLC*, 2020 WL 4342221 at *2 (S.D. W.V. 2020) (noting that the

Court of Appeals for the Fourth Circuit has not settled on a specific test to evaluate conditional certification).

Indeed, neither controlling precedent, nor the FLSA requires this Court to utilize the two-stage approach in the instant case. Although the FLSA provides that employees may sue in a representative capacity for other "similarly situated" employees, it says nothing of the criteria or process by which the "similarly situated" standard is to be judged. *See* 29 U.S.C. §216(b). Rather, the decision to create an opt-in class remains soundly within the discretion of the district court. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 – 172 (1989). Here, the Court should use that discretion to allow discovery and make an appropriate determination about independent contractor status before awarding conditional certification.

2. The threshold question of independent contractor status should be considered before conditional certification. In the instant case, given the threshold issue of independent contractor status vis-à-vis not only N&C, but also Seibels, the Court should reject the lenient standard under the two-stage *Lusardi* approach and in favor of the approach recently articulated by the United States Court of Appeals for the Fifth Circuit in *Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430 (5th Circ. 2021). In *Swales*, the court rejected the *Lusardi* approach where, as in the instant case, a threshold question was whether the putative plaintiffs were properly classified as independent contractors. 985 F.3d 441-443. The *Swales* plaintiffs were truck drivers who were classified by KLLM as independent contractors and paid on a per mile basis. *Id.* at 438. The plaintiffs in *Swales* argued that they were misclassified as independent contractors and sued for violation of the FLSA's minimum wage requirements. *Id.* The district court, in granting the plaintiffs' motion for conditional certification, concluded that because "the claims and defenses largely turn on . . . whether the drivers were misclassified as independent contractors," conditional

certification was appropriate. *Id.* The Fifth Circuit, however, took issue with this approach because the district court refused to consider any arguments related to the economic realities test – that is, the test used to determine how much control the putative employer had over the worker and whether each worker was, in fact, an independent contractor or employee. *Id.* at 442. The court noted that whether plaintiffs were misclassified as independent contractors was a threshold matter that depended on the economic realities of the relationships. *Id.* (emphasis added). The *Swale*s Court held, therefore, that a district court needed to consider this threshold question at the conditional certification stage. *Id.* If the question requires an individualized inquiry, as the economic realities test often does, it would be improper to conditionally certify. *Id.* Doing so would result in conditional certification "devolv[ing] into a cacophony of individual actions." *Id.* at 441.

Significantly, the *Swales* decision is not the first decision to hold that dispositive, threshold issues must be considered in determining whether to conditionally certify a class. In *In re JPMorgan Chase & Company*, the United States Court of Appeals for the Fifth Circuit held that the district court abused its discretion when it ordered notice to be sent to employees who were not actually eligible to participate in the suit because they had signed arbitration agreements. 916 F.3d 501, 502 (5th Cir. 2019). *See also Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020) (concluding that a court may not authorize notice to individuals who have entered into arbitration agreements and the court must give defendant the opportunity to make that showing). In *JPMorgan*, the Fifth Circuit rejected the idea that courts should not consider merits-based issues like the existence of arbitration agreements at the conditional certification stage. *Id.* at 501. Instead, the court in *JPMorgan*, like the court in *Swales*, held that it was entirely proper, and in fact necessary, for the court to determine whether the individuals to whom plaintiff sought to send

notice were, in fact, proper potential plaintiffs in the suit. Likewise, in *Bigger*, the United States Court of Appeals for the Seventh Circuit held that before granting conditional certification, a defendant must be given the opportunity to show whether putative plaintiffs have entered into arbitration agreements and therefore, whether they can properly participate in the suit. *Bigger*, 947 F.3d at 1050. Failing to adequately consider threshold issues such as these at the initial certification stage, the *JPMorgan* court noted, risks merely "stir[ring] up litigation" by notifying those who cannot ultimately participate in the collective something that the Supreme Court in *Hoffmann-LaRoche* warned against. *Hoffmann-LaRoche*, 493 at 174.

3. **Discovery is required before the threshold question of independent contractor status can be properly considered.** In the instant case, whether the putative class members urged by Plaintiff are actually eligible to participate in the suit can only be determined after allowing for development of the record regarding the economic realities of the relationships between the putative plaintiffs with both N&C and Seibels. Unquestionably, the economic realities test demands a case-by-case, fact intensive inquiry into the relationships of the claims adjusters and each defendant. *See, e.g., Ellington v. City of East Cleveland,* 689 F.3d 549, 555 (6th Cir. 2012) (the economic reality standard is "not a precise test susceptible to formulaic application"); *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (the economic realities test "prescribes a case-by-case approach"); *Zamora v. Washington Home Services, LLC*, 2011 WL 6297941 at *2 (D. Md. 2011) (noting the fact-intensive nature of whether a worker is an employee under the FLSA); *Smith v. ABC Training Center of Maryland, Inc.,* 2013 WL 3984630 at *8 (D. Md. 2013) (applying economic realities to assess employer/employee relationship, and noting that the degree of control exerted by individual defendants is necessarily a fact intensive inquiry). This fact-

intensive inquiry, combined with the presence of two distinct defendants, makes the instant case particularly ill-suited for conditional certification at this very early stage of litigation.

To be clear, Seibels is not, with its Response in Opposition, suggesting that the question of whether the claims adjusters were appropriately classified as independent contractors is one that must be decided before conditional certification is granted. Instead, Seibels submits that the Court should determine whether this question can be answered collectively, or whether it will require independent analyses. *See Swales*, 985 F.3d 430 at 442 ("the district court needed to consider the evidence relating to this threshold [independent contractor] question in order to determine whether the economic realities test could be applied on a collective basis.") No such determination can be made until discovery is permitted.

B. The proposed notice and consent forms should be modified. District courts play an important role in ensuring that notices to potential class members are "timely, accurate, and informative." *Hoffman-LaRoche*, 493 U.S. at 170-72. Assuming, arguendo, that the Court grants conditional certification, the Plaintiff's proposed notice and consent forms should be revised to address the issues outlined below.

1. Mailing of the notice and consent forms is sufficient, and there is no special need for sending the notice via email and text message, or for a reminder notice. Plaintiff seeks authorization to send the notice forms not only via mail, but also via email and text message and requests telephone numbers for all putative class members. It is well-settled, however, that telephone numbers are only appropriate upon a showing of "special need." *See, e.g.*, *Hart v. Barbeque Integrated, Inc.*, 299 F.Supp.3d 762, 772 (D. S.C. 2017) ("district courts in this circuit have required a showing of a "special need" before requiring the disclosure of telephone

numbers"). Plaintiff has not established the requisite "special need" to send the notice three different ways – mail, email, and text.

Not only does Plaintiff seek to send the notice out three different ways, but she also requests a fourth communication be sent in the form of a reminder. A reminder notice is wholly unwarranted and, as noted by the district court in *Irvine v. Destination Wild Dunes Mgmt., Inc.*, takes on an element of harassment. 132 F.Supp.3d 707, 711 (D. S.C. 2015). Accordingly, no reminder notice or similar communication should be authorized.

2. The text of the notice and consent forms should be revised to more fairly and accurately reflect the parties' claims and defenses. The notice should include Seibels' position that it was not the employer of any claims adjuster assigned to it by N&C as set forth in the attached proposed notice forms. *See Exhibit B*. In addition, the definition of the class in the notice form should remove the reference to individuals who "worked for" Seibels and, instead, refer to individuals "assigned to" Seibels. Plaintiff's proposed wording impermissibly suggests that the individuals were employed by Seibels, which Defendant Seibels disputes. Also, the consent form should not refer to the putative class as individuals who worked for "any other associated parties." This reference is inconsistent with Plaintiff's proposed definition of the class and suggests that individuals not associated with either defendant would be appropriately included in the class.

The notice and consent forms should also inform potential plaintiffs that they may be required to provide sworn deposition and trial testimony. This Court has acknowledged that this type of information is appropriate, for example, when class members are located across several states and may need to appear in another state for their deposition or for trial. *Frykenberg v. Captain George's of South Carolina, LP*, 2020 WL 5757678 at *5 (D. S.C. 2020). Here, the same reasoning makes it appropriate to include this information in the notice and consent forms.

Plaintiff indicates in her Motion that the putative class members regularly travel and are away from home for long periods of time. Dkt. 49 at p. 24. Therefore, it is appropriate to inform the putative class members that they may be required to travel to South Carolina to appear for a deposition or trial.

The notice and consent forms should inform potential plaintiffs that "If the case is not successful or does not result in a settlement, you may be required to pay certain costs." Courts in this district have approved of text related to costs and expenses as reasonable and appropriate. *See, e.g, Frykenberg*, 2020 WL 5757678 at *5 (D. S.C. 2020) (*citing Turner v. BFI Waste Servs., Inc.*, 268 F. Supp. 3d 831 (D. S.C. 2017) and *McCoy v. RP, Inc.*, 2015 WL 6157306 (D.S.C. 2015)).

Seibels concurs with the arguments articulated by Defendants N&C, Nicholas Ierulli, and Pam Ierulli in Section II of its Response to Plaintiff's Motion to Conditionally Certify FLSA Collective Action, pertaining to Plaintiff's proposed notice documents. Dkt. 58. Seibels has provided, as *Exhibit B* to its Response in Opposition, the model Notice and Consent forms agreed to by the other defendants, which account for and correct the above-described issues, along with other issues. Should the Court grant conditional certification, Seibels submits that the attached forms should be used. *See Ex. B.*

WHEREFORE, for the aforementioned reasons, Defendant Seibels Claims Solutions, Inc., respectfully requests that the Court deny Plaintiff's Motion to Conditionally Certify FLSA Collective Action and to Issue Notice. Alternatively, Seibels requests that any notice be issued via mail only, in accordance with the documents provided in *Exhibit B*.

Dated: May 27, 2021.

Respectfully submitted,

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