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

Anessia Amoko, on behalf of herself and others similarly situated, Plaintiff, v. N&C Claims Service, Inc.; Nicholas F. Ierulli; Pam Ierulli; and Seibels Claims Solutions, Inc., Defendants.	C/A No. 3:20-cv-04346-SAL **ORDER**

This matter is before the court on Plaintiff Anessia Amoko's ("Plaintiff")[1] Motion for Conditional Certification of a Collective Action (the "Motion") pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). [ECF No. 48.] For the reasons set forth herein, the Motion is granted.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff alleges she was employed by Defendant N&C Claims Services, Inc. ("N&C") as an insurance claims adjuster in Defendant Seibels Claims Solutions, Inc.'s ("Seibels") Columbia, South Carolina office. [ECF No. 15, Am. Compl.] Plaintiff claims she was incorrectly classified as an independent contractor, promised (but not paid) a day rate for each day work, and when moved from a day-rate system to an hourly wage, was not paid for all hours worked. *Id.* According to Plaintiff, at no time was she paid overtime wages. On December 16, 2020, Plaintiff filed this collective action on behalf of herself and others similarly situated. [ECF No. 1.] Plaintiff seeks damages for alleged violation of the FLSA and the South Carolina Wage Payment Act.

[1] Three other individuals consented to join the suit. [ECF No. 1-1.]

Plaintiff filed the current Motion seeking conditional certification on May 3, 2021. [ECF No. 48.] Defendants N&C, Nicholas F. Ierulli, and Pam Ierulli (together "N&C Defendants") filed an opposition on May 27, 2021. [ECF No. 58.] Therein, the N&C Defendants do not argue against the customarily applied two-step approach to conditional certification; instead, they challenge the appropriateness of Plaintiff's proposed notice. Seibels also filed its opposition on May 27, 2021, but it opposed both the two-step approach to conditional certification and Plaintiff's proposed notice. [ECF No. 59.] Plaintiff filed a reply on June 10, 2021, and the court held a hearing December 3, 2021. [ECF Nos. 63, 75.] Accordingly, the Motion is ripe for resolution by the court.

LEGAL STANDARD

The FLSA permits a plaintiff to bring a collective action on behalf of herself and other employees that are "similarly situated" to the plaintiff. *See* 29 U.S.C. § 216(b). The collective action provision provides,

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b). "In order to expedite the manner in which collective actions under the FLSA are assembled, 'district courts have discretion in appropriate cases to implement . . . § 216(b) . . . by facilitating notice to potential plaintiffs.'" *Purdham v. Fairfax Cty. Pub. Schs*., 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (quoting *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989)).

In this District, certification of an FLSA collective action is a two-step process. *See Turner v. BFI Waste Servs., LLC*, 268 F. Supp. 3d 831, 840–41 (D.S.C. 2017). First, "a plaintiff seeks conditional certification by the district court in order to provide notice to similarly situated

plaintiffs" that they can "opt-in" to the collective action. *See Pelczynski v. Orange Lake Country Club, Inc*., 284 F.R.D. 364, 367–68 (D.S.C. 2012). At this "notice stage," the court reviews the pleadings and affidavits to determine whether the plaintiff has carried her burden of showing she is similarly situated to the proposed class members. *Id.* at 368. If the court determines that the proposed class members are similarly situated, the court will conditionally certify the class. *Id.* at 841. The putative class members are then given notice and the opportunity to "opt-in," and the action proceeds as a representative action throughout discovery. *Higgins v. James Doran Co., Inc*., No. 2:16-cv-2149, 2017 WL 3207722, at *1 (D.S.C. July 28, 2017).

Then, in the second stage of collective certification, a defendant may move to decertify the collective action after discovery by "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." *Id.* at *2. Upon such a motion, the court will apply a heightened standard to the "similarly situated" analysis. *Steinberg v. TQ Logistics, Inc*., No. 0:10-cv-2507, 2011 WL 1335191, at *2 (D.S.C. Apr. 7, 2011). For example, the court may consider "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Curtis v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 3:12-cv-2370, 2013 WL 1874848, at *3 (D.S.C. May 3, 2013) (internal quotation marks and alterations omitted). If the court finds that the plaintiffs are not, in fact, similarly situated, the court may decertify the class, dismiss without prejudice the opt-in plaintiffs' claims, and permit the named plaintiff to proceed on her individual claims. *Id.*

DISCUSSION

Unless the court adopts the position urged by Seibels in its opposition, the present matter is before the court pursuant to the first step of the two-step process. Before determining whether Plaintiff has met her burden for conditional certification and addressing the appropriateness of her proposed notice, the court will, thus, address whether it will employ the two-step process here or adopt the approach argued by Seibels. Once the court establishes the appropriate standard, it will determine whether Plaintiff has met that standard and, if she has, turn to the appropriateness of her proposed notice to the collective.

I. What is the Appropriate Standard for Conditional Certification?

As outlined in the "Standard" section above, courts in this District employ a two-step certification analysis to FLSA collective actions. Plaintiff submits this court should apply that same analysis here. Specifically, at step one, Plaintiff argues this court need only decide whether she has met her relatively low burden of showing the putative members are similarly situated. [ECF No. 49 at 9–13.]

Seibels disagrees with the two-step approach in this case. It submits that conditional certification is not appropriate until the "threshold question" of whether claims adjusters were appropriately classified as independent contractors is satisfied. [ECF No. 59 at 3–8.] Seibels's argument is tied to an approach recently articulated by the Fifth Circuit Court of Appeals in *Swales v. KLLM Transport Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). There, the Fifth Circuit concluded the district court erred by failing to consider a "potentially dispositive, threshold matter[]" prior to conditionally certifying pursuant to step one. *Id.* at 441. The court then set forth a new standard for conditional certification, one that requires the district court to "at the outset of the case,"

identify "what facts and legal considerations will be material in determining whether a group of 'employees' is 'similarly situated.'" *Id.*

The Fifth Circuit reasoned that in some cases "a district court will not likely need mountains of discovery to decide whether notice is appropriate," but in others, "where Plaintiffs have demonstrably different work experiences, the district court will necessarily need more discovery to determine whether notice is going out to those 'similarly situated.'" *Id.* at 442. The *Swales* case fell into the second category. There were "numerous variations among the Plaintiffs and Opt-ins who joined before any notice." *Id.* Thus, the court concluded that the district court should have answered the threshold question of whether those plaintiffs—whose employment situations varied so differently—were (all or some) independent contractors as opposed to employees before finding they were similarly situated for purposes of conditional certification.

Swales, however, is not binding on this court. Moreover, Seibels has not presented the court with a single application of *Swales* by a district court within the Fourth Circuit. In fact, as recently as December 17, 2021, the Honorable Robert C. Chambers in the United States District Court for the Southern District of West Virginia considered *Swales* and found "no reason to depart from the two-step approach that has long been applied" in that district. *Ison v. Markwest Energy Partners, LP*, No. 3:21-cv-0333, 2021 WL 5989084, at *4 (S.D. W. Va. Dec. 17, 2021). This court follows Judge Chambers's lead and declines to abandon the lenient standard adopted by courts in this District and throughout the Fourth Circuit.[2]

[2] Plaintiff's reply argument regarding the fact-intensive nature of the economic realities test is also well taken. [ECF No. 63 at 5.] In *Swales*, the Fifth Circuit emphasized the fact-intensive nature of the economic realities test because, there, the defendant "pointed to numerous variations among the Plaintiffs and Opt-ins who joined before any notice." 985 F.3d at 442. The application of the economic realities test to those "potential opt-in's circumstances" would be a "highly individualized" one. *Id.* Here, Plaintiff agrees that the economic realities test is a factual one but notes that it is "flawed to suggest that a fact-intensive inquiry equates to an individualized one."

II. Has Plaintiff Met her Burden?

Having declined to adopt *Swales* in place of the more lenient approach to the first step of the two-step analysis, the court turns to determining whether Plaintiff has met her burden pursuant to that more lenient standard. A court should conditionally certify a collective action and authorize notice where the members "share common underlying facts and do not require substantial individualized determinations for each class member[.]" *Turner*, 268 F. Supp. 3d at 835 (citing *Purdham*, 629 F. Supp. 2d at 549). At this first stage, the burden of demonstrating that a plaintiff and putative class members are "similarly situated" is fairly lenient and requires "only a modest factual showing that members of the proposed class are 'victims of a common policy or plan that violated the law.'" *Higgins*, 2017 WL 3207722, at *1 (citing *Purdham*, 629 F. Supp. 2d at 548). The court looks to "the pleadings and affidavits to determine whether the plaintiff has carried his burden." *Schmidt v. Charleston Collision Holdings Corp.*, No. 2:14-cv-01094, 2015 WL 3767436, at *3 (D.S.C. June 17, 2015).

In this case, Plaintiff alleges that she and similarly situated individuals were employed as independent claims adjusters in Seibels's Columbia, South Carolina office, misclassified as independent contractors, told they would be paid a day rate and then they were not, scheduled for more than 40 hours per week, and ultimately not paid for overtime. [ECF No. 15.] In support of the Motion, Plaintiff submitted seven declarations attesting to these allegations. [ECF Nos. 49-1 to 49-7.] Based on the allegations in the Amended Complaint and the seven declarations, the court

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[ECF No. 63 at 5.] Where *Swales* involved differing contracts and employment situations, Plaintiff here points to "the same form contract," the "same job duties," and the "same pay policies and practices." *Id.* The court ultimately need not determine the economic realities at this juncture. Suffice it to say that Plaintiff sufficiently distinguished *Swales* for purposes of the conditional certification analysis.

finds that Plaintiff has met the lenient standard at this stage for demonstrating that the potential opt-in plaintiffs are similarly situated. Therefore, the court grants conditional certification.

III. Is the Form and Manner of Notice Appropriate?

Once a court determines conditional certification is appropriate, it turns to evaluating the proposed notice and the manner of distribution. While the parties initially disagreed on many aspects of Plaintiff's proposed notice, they have since come to an agreement of many, but not all, points. The court outlines many of the points of agreement[3] below but focuses its attention on those remaining points of disagreement.

A. Opt-in Period and Reminder.

Plaintiff initially requested a 60-day opt-in period with a mid-point reminder. [ECF No. 49 at 25–26, 27.] Defendants proposed a 30-day period and argued the reminder is inappropriate. [ECF No. 58 at 11, 15–16; *see also* ECF No. 59.] At the start of the hearing, the parties informed the court that they came to an agreement to a 45-day opt-in period. Thus, the opt-in period is resolved by agreement of the parties: 45 days. *See Regan v. City of Charleston, S.C.*, No. 2:13-cv-3046, 2014 WL 3530135, at *10 (D.S.C. July 16, 2014) ("[D]istrict courts in the Fourth Circuit regularly authorize opt-in periods between thirty and sixty days."). The mid-point reminder, however, remained a point of disagreement.

The court declines to allow a mid-point reminder. As acknowledged by Plaintiff, many of the putative members have already opted into the action. Further, the notice period is a relatively short one, only 45 days. A mid-point reminder would come just three weeks after the initial notice. Given the circumstances of this case, the court finds "a reminder notice would be unnecessary and

[3] The parties filed a joint stipulation memorializing the points of agreement in a revised notice. [ECF No. 76.]

could potentially be perceived 'as encouragement by the court to join the lawsuit.'" *Rodgers v. Abbster Enters., LLC*, No. 3:16-cv-106, 2017 WL 402055, at *4 (N.D. W. Va. Jan. 30, 2017) (citing *Witteman v. Wis. Bell, Inc.*, No. 09-cv-440, 2010 WL 446033, at *3 (W.D. Wis. Feb. 2, 2010)).

B. Method of Distribution.

Plaintiff's initial request included postcard, email, and text message methods of distribution. [ECF No. 49 at 23–24.] Defendants opposed the request for multiple methods of distribution. But this too is a point on which the parties were able to reach agreement[4] prior to the start of the hearing. The parties agreed to the notice being distributed by email. The court finds this is an appropriate compromise and authorizes distribution of the notice by email.

C. The Notice.

The remaining points of disagreement involve the content of the proposed notice. A collective action notice is intended to give potential opt-in plaintiffs "accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffman-LaRoche*, 493 U.S. at 170. The court may approve a notice that is "timely, accurate, and informative." *Id.* at 172. It has "broad discretion regarding the details of the notice sent to potential opt-in plaintiffs." *Regan*, 2014 WL 3530135, at *7. "[W]hen exercising its broad discretion to craft appropriate notices in individual cases, District Courts should consider the overarching policies of the FLSA's collective suit provisions." *Id.* These policies "require that the proposed notice provide accurate and timely notice concerning the pendency of the collective

[4] The agreement was with the exception of the reminder notice. Plaintiff maintained that a reminder notice should be sent via email or text message. This court already addressed the reminder notice; thus, all that remains is the method of distribution of the initial notice.

action, so that potential plaintiffs can make informed decisions about whether to participate." *Id.* (quoting *Butler,* 876 F. Supp. 2d at 574).

"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." *Hose v. Henry Indus., Inc*., 49 F. Supp. 3d 906, 919 (D. Kan. 2014), *order clarified by* No. 13-2490, 2014 WL 5510927 (D. Kan. Oct. 31, 2014) (quoting *Sylvester v. Wintrust Fin. Corp.,* 12 C 01899, 2013 WL 5433593, at *6 (N.D. Ill. Sept. 30, 2013)). Defendants object to Plaintiff's proposed notice in several respects.

1. Defense counsel information.

Defendants argue that the notice should include the names and contact information for the attorneys representing each of the defendants in the case. Essentially, Defendants argue the names and contact information creates a more complete notice. Plaintiff opposes the request arguing it is "unnecessary and likely would serve only to confuse or intimidate Claims Adjusters." [ECF No. 63 at 10–11.] Neither side cites authority from this District or the Fourth Circuit in support of its position, and "[c]ourts around the country are split, with some supporting exclusion of defense counsel information . . . and some including defense counsel information[.]" *Arevalo v. D.J.'s Underground, Inc.*, No. 09-3199, 2010 WL 2639888, at *3 (D. Md. June 29, 2010).

This court is persuaded by the reasoning of courts in the District of Maryland, which have allowed limited defense counsel information—names and addresses. *See, e.g., Mendoza v. Mo's Fisherman Exchange, Inc*., No. 15-1427, 2016 WL 3440007, at *19 (D. Md. June 22, 2016); *Aytch v. Trulife Health Servs., LLC*, No. 17-2769, 2018 WL 1784461, at *6 (D. Md. Apr. 12, 2018). Plaintiff is directed to revise Section 2 of the notice, ECF No. 76-1, to include the names and addresses of defense counsel. For the sake of balance, Plaintiff may include the name and address of Plaintiff's counsel in that same section. The court trusts that the parties can come to an

agreement regarding the appropriate placement of such information within the context of Section 2 of the notice. If the parties come to an agreement regarding an alternate placement for such information, they are to inform the court of the proposed change within 7 days of the date of this order.

2. Section 3. What are my options?

Defendants also argue for the inclusion of certain language in Section 3 of the notice. Defendants seek to add: (1) a line in the "opt-in" box that states the individual may hire the lawyer of his choice and/or clarify the fact that potential members do not have to be represented by Plaintiff's counsel; (2) language regarding the attorneys' fees to be paid to Plaintiff's counsel; (3) possible discovery and trial obligations; and (4) the possibility of later exclusion. Plaintiff responds that the language regarding a plaintiff's right to hire his own lawyer already appears in Section 3, the attorneys' fee language appears in the consent form, and the discovery/trial/exclusion language is unnecessary and confusing. The court addresses each proposed addition, in turn, below.

First, the court agrees with Defendants that the current language regarding representation in the "opt-in" box needs clarification The problem identified by Defendants exists separate and apart from the line providing that potential members "have the option to obtain your own counsel to advise you on your rights and file suit on your behalf should you choose to do so." [ECF No. 76-1.] The problem, according to Defendants, is that the language in the "opt-in" box suggests that potential members *must* be represented by Plaintiff's counsel to join this action. The language in the opt-in box provides:

> If you choose to join the lawsuit, *you will be represented by* the Representative Plaintiff through her attorneys, Getman, Sweeney & Dunn, PLLC as Class Counsel, along with Coskrey Law Office as Local Counsel, who will represent you on a contingent fee basis. . . .

> If Plaintiffs are successful at trial or the case results in a settlement, then the Defendants will pay Class Counsel and Local Counsel either their hourly fees plus litigation costs as awarded by the Court, or one-third of the overall recovery in the case, whichever is greater.

[ECF No. 76-1 at 2 (emphasis added).]

A similar issue was addressed in a case out of the Southern District of Texas, *Ratliff v. Pason Systems USA Corp.*, 196 F. Supp. 3d 699 (S.D. Tex. 2016). There, the proposed notice affirmatively stated that if the members chose to join the lawsuit, that members were also choosing "to have Plaintiff Ratliff's attorneys represent [them]." *Id.* at 701. The notice went on to state that as an alternative, the members could consult with their own attorneys and discuss their options. *Id.* at 702. The *Ratliff* court was concerned that the notice did not make clear that the members could retain their own counsel to represent them in the litigation, as an alternative to Plaintiff Ratliff's attorneys. *Id.* The court opted to modify the notice to read: "If you choose to join this lawsuit, you may choose to have Plaintiff Ratliff's attorneys represent you. Alternatively, you may consult your own attorney and, on proper motion, . . . the Court will consider adding that attorney as co-counsel." *Id.* And the consent form was modified to provide two options related to counsel: (1) member agrees to have Plaintiff Ratliff's attorneys represent him or (2) member intends to consult with other counsel *Id.* at 703.

This court finds that similar modifications to the notice and consent to sue forms are appropriate here. The paragraph beginning "If you choose to join the lawsuit" under "Effect on Your Legal Rights" shall be modified as follows:

> If you choose to join the lawsuit, you have the option to be represented by the Representative Plaintiff's attorneys, Getman, Sweeney & Dunn, PLLC, as Class Counsel, along with Coskrey Law Office as Local Counsel. Under that option, the Representative Plaintiff's Class Counsel and Local Counsel will represent you on a contingent fee basis. That is, win or lose, you will not have to pay the Representative Plaintiff's lawyers directly.

> You also have the option to obtain your own counsel to advise you on your rights, file a suit on your behalf should you choose to do so, or represent you in joining the Representative Plaintiff's lawsuit.
>
> Whether you choose to be represented by Representative Plaintiff's attorneys or your own counsel, if Plaintiffs are successful at trial or the case results in a settlement, Defendants will pay the attorneys' hourly fees plus litigation costs as awarded by the Court, or one-third of the overall recovery in the case, whichever is greater.

Because the information related to a member's right to obtain his own counsel is being moved inside the "opt-in" box, it may be deleted before Section 4.

Further, the consent to sue form should be modified to reflect the two options. The first paragraph of the consent to sue form shall remain the same. The second paragraph should be deleted and replaced with the following:

> Check one:
>
> □ I authorize Getman, Sweeney & Dunn, PLLC, and any associated attorneys, as well as any successors or assigns, ("Plaintiffs' Counsel" or "Class Counsel"), along with Coskrey Law Office ("Local Counsel"), to represent me in this case. By signing and returning this consent to sue form, I understand that, if accepted for representation, I will be represented by Plaintiffs' Counsel without prepayment of costs or attorneys' fees. I understand that if Plaintiffs are successful, costs expended by attorneys on my behalf will be deducted from my settlement or judgment amount on a pro rata basis with all other Plaintiffs. I understand that the attorneys may petition the Court on my behalf for an award of fees and costs to be paid by Defendants. I understand that the fees retained by Plaintiffs' Counsel will be either (a) the amount of fees received from Defendants as approved by the Court, or (b) 1/3 of the gross settlement or judgment amount, whichever is greater. I understand and agree that fees and costs recovered by the attorneys in this case will be divided between Plaintiffs' Counsel and Local Counsel in proportion to the work performed. If the case is not successful, I will not be obligated to pay any fees or costs to Plaintiffs' Counsel or Local Counsel.
>
> □ I do not agree to have Plaintiffs' Counsel represent me in this case, and I intend to consult with other counsel. My counsel will file a

> motion to represent me and be added to the case by ____ (45 days from the date the Notice is emailed].

Second, Defendants seek to move the explanation of the attorneys' fees from the consent to sue to the notice form. The court notes that the notice itself includes reference to a "contingent fee basis." To accommodate Defendants' concern, the court directs Plaintiff to add one additional line following "contingent fee basis." It shall read: "For additional information regarding the attorneys' fees, please see the attached consent to sue form."

Third, Defendants propose an addition to the notice. They seek to add language regarding a potential member's discovery and trial obligations. [ECF No. 58 at 9; *see also* ECF No. 59.] Specifically, Defendants want the notice to notify recipients that they "may be required by the court, at Defendants' request, to produce documents, respond to written interrogatories, testify under oath at a deposition, and testify at trial in Columbia, South Carolina." *Id.* In that regard, Defendants note that "many of the remaining members of the potential class live outside of South Carolina," and they should be made aware of the possibility of having to come to South Carolina for purposes of the lawsuit. *Id.* at 9–10. Plaintiff opposes the requested addition, arguing it is unnecessary given that all of the potential plaintiffs worked in the Columbia, South Carolina office. [ECF No. 63 at 15–16.]

While Defendants' point is well taken, the court declines to require the line regarding participation in discovery and trial. All potential plaintiffs were members of the Columbia, South Carolina office, and this is not a situation where they would be expected to appear for deposition or trial in an unexpected location. *See, e.g., Whitlow v. Crescent Consulting, LLC*, 322 F.R.D. 417, 423 (W.D. Okla. 2017) (agreeing to include language in a nationwide case).

Finally, Defendants ask that the notice include a line regarding the possibility that plaintiffs who join may later be excluded. [ECF No. 58 at 10.] Plaintiff also opposes this request a

"unnecessary." [ECF No. 63 at 16.] The court agrees with Plaintiff. Defendants have not persuaded the court that the potential for exclusion at step two of the two-step certification process is relevant for purposes of an accurate and informative notice.

D. Production of Contact Information.

For purposes of dissemination of the notice, Plaintiff asks the court to require Defendants produce the following information: "first name, last name, street address, city, state, zip code, email address, phone number, and unique employee identification number." [ECF No. 48 at 2.] Plaintiff asks for the information in "electronic spreadsheet format such as Excel." Id. Further, Plaintiff asks for the "last four digits of the social security number for all collective action members whose notices are returned as undeliverable." *Id.* Defendants object to providing anything other than names and addresses. [ECF No. 58 at 12–14; *see also* ECF No. 59.]

In light of the parties' agreement for notice to go out solely via email, Defendants need only produce putative collective members' names and email addresses. The information must be provided in an electronic spreadsheet format within 15 days of the court's approval of the revised notice and consent to sue form.

CONCLUSION

For the foregoing reasons, the court **GRANTS** Plaintiff's Motion for Conditional Certification of a Collective Action. [ECF No. 48.] Plaintiff is directed to revise the notice and consent to sue form in accordance with the above rulings and submit the same to the court for final approval by January 10, 2022.

IT IS SO ORDERED.

/s/Sherri A. Lydon
United States District Judge

Florence, South Carolina
December 29, 2021