UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KYLE VAN VLACK, *Individually and on behalf of all Others similarly situated,*
Plaintiff,

Case No: 8:22-cv-00539-SDM-AEP
216(b) Collective Action

v.

NINJARMM LLC, a foreign for profit Corporation, dba NINJAONE,
Defendant.
_____.

PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND FOR COURT SUPERVISED ISSUANCE OF NOTICE TO THE PUTATIVE CLASS AND SUPPORTING MEMORANDUM OF LAW

Plaintiff herein seeks an Order from this Honorable Court: conditionally certifying this case to proceed collectively pursuant to the Fair Labor Standards Act (FLSA) section 216b; requiring Defendant NINJARMM LLC (hereinafter Ninja or Defendant) to produce the required class list, and authorize Plaintiff and counsel to send notice of this action to all current or formerly employed Sales Development Representatives (SDR, and includes the singular and the plural) employed with Defendant and its predecessors within the preceding three (3) years to the present.

I. INTRODUCTION: FACTS AND BACKGROUND

Plaintiff KYLE VAN VLACK brought this FLSA 216b collective action against Defendant, alleging willful violations of the FLSA and a scheme to avoid paying

overtime wages to a group or "class" of all salaried, misclassified as exempt employees by permitting them to suffer to work overtime hours, with their knowledge, encouragement and pressure, all hours over 40 in each and every work week in order to complete their job duties and requirements in violation of the FLSA, 29 U.S.C. §207, (DE 1). Plaintiff and the class of similarly situated at issue were Inside Sales Representatives working under the title of Sales Development Representative (SDR) and worked at or worked remotely and reported to Defendant's offices in Clearwater, Florida or Austin, Texas.

Defendant utilizes a single set of job descriptions, and likewise post jobs for these positions demonstrating the job requirements are the same regardless of the locations in the U.S. See Exhibit 12, Ninja SDR job posting in Florida and Exhibit 13 Ninja SDR job posting in Texas. Likewise, all 9 Plaintiff SDR here, including the opt in plaintiffs, had the same standardized and routine job requirements: solicit businesses to schedule potential clients to attend a sales demonstration with one of Defendant's Account Executives who would then perform a demonstration of Defendant's software services in attempts to close and consummate a sale.

The job duties of SDR also includes qualifying or scrubbing leads, meaning looking up the companies on the internet and social media, finding out the IT personnel and key officers in which to target. Van Vlack is similarly situated to the Opt-In SDR who have joined and who he seeks to represent, as corroborated by

declarations of all Plaintiffs attached as Exhibits 4-11, 16 which demonstrates they are similarly situated as a single group, and which is evidenced by the following facts:

All SDR had the same job duties: solicit businesses with IT departments using outbound phone calls and emails in order to develop opportunities for Defendant's account executives or account managers in an attempt to close the deal on the sales of Defendant's products and services on a subscription basis (SaaS). *See* Decls of K. Van Vlack ¶ 4; Burke ¶ 4; Mallamo ¶ 4; S. Van Vlack ¶ 4; Dotson ¶ 4; Smith ¶ 4; Taylor ¶ 4; Slagle ¶ 4; Miccolis ¶ 4. *See also* Exhibit 12, Ninja SDR job posting in Florida and Exhibit 13 Ninja SDR job posting in Texas.

All SDR were paid the same compensation plan of a base salary plus the opportunity to earn a bonus. *See* Decls of K. Van Vlack ¶ 6; Burke ¶ 6; Mallamo ¶ 6; S. Van Vlack ¶ 6; Dotson ¶ 6; Smith ¶ 6; Taylor ¶ 6; Slagle ¶ 6; Miccolis ¶ 6; *See also* Exhibit 15.

All SDR were told they were salaried exempt employees that were not entitled to overtime compensation. *See* Decls. of K. Van Vlack ¶ 14; Burke ¶ 14; Mallamo ¶ 14; S. Van Vlack ¶ 14; Dotson ¶ 14; Smith ¶ 14; Taylor ¶ 14; Slagle ¶ 14; Miccolis ¶ 14.

All SDR had to work the same corporate set schedule; Monday through Friday, 8 am to 5 pm, with a one hour lunch break between 12 pm and 1 pm. *See* Decls of K. Van Vlack ¶ 7; Burke ¶ 7; Mallamo ¶ 7; S. Van Vlack ¶ 7; Dotson ¶ 7; Smith ¶ 7; Taylor ¶ 7; Slagle ¶ 7; Miccolis ¶ 7.

All SDR plaintiffs here state they routinely worked unpaid overtime hours. *See* Decls of K. Van Vlack ¶ 21; Burke ¶ 21; Mallamo ¶ 21; S. Van Vlack ¶ 21; Dotson ¶ 21; Smith ¶ 19; Taylor ¶ 21; Slagle ¶ 21; Miccolis ¶ 21.

All SDR were required to meet appointment or sales goals, and if not met, SDR were subject to discipline and termination. *See* Decls of K. Van Vlack ¶ 12, 13; Burke ¶ 12, 13; Mallamo ¶ 12, 13; S. Van Vlack ¶ 12, 13; Dotson ¶ 12, 13; Smith ¶ 12, 13; Taylor ¶ 12, 13; Slagle ¶ 12, 13; Miccolis ¶ 12, 13.

1. The named Plaintiff, the opt in Plaintiffs and all SDR are similarly situated, and the case should be certified as a single "class", as they were all subjected to a common, unlawful policy of Defendant's misclassification of the SDR position as exempt and permitted all SDR to work overtime hours without their lawful overtime compensation.

2. Based on turnover, the size of the collective is estimated to be 100 persons. Each week that goes by over 3 years from the present, class members lose their right to recover their unpaid or stolen wages as the Statute of Limitations (SOL) runs, and for some, by the time they are provided notice of this action, their wages have either been wholly wiped out or detrimentally impacted, creating a financial windfall and reward for Defendant and its years of unlawful pay practices stealing the hard earned wages of its employees in the name of millions of dollars in profits. Plaintiff appeals to the Court to expeditiously grant this Motion so SDR can protect their fleeting FLSA wage rights.

3. Plaintiff has met the lenient showing necessary under the Notice Stage of the 11th Circuit to proceed collectively pursuant to Section 216(b) of the FLSA and Plaintiff seeks to deliver the proposed Notice and Consent to Join form to the following Class or Classes of Similarly Situated persons:

> **All persons currently or formerly employed by NINJARMM LLC as a Sales Development Representative (SDR), or any other job title used to describe persons who performed the same work as an SDR, and who are currently employed or were previously employed**

working at or reporting remotely to offices in Clearwater, Florida, or Austin Texas, within the past three years preceding the filing of this lawsuit through to the date of trial.

MEMORANDUM OF LAW AND LEGAL ARGUMENT

II. Legal Standard for Conditional Cert. of Section 216(B) of the FLSA

A. Authority to Send Class Notice

The FLSA permits a plaintiff to bring a collective action on behalf of similarly situated persons subject to the requirement that each prospective plaintiff(s) file a written consent in the court where the action is brought. 29 U.S.C. §216(b); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001). Unlike a Rule 23 Class Action, the collective action includes only those plaintiffs who affirmatively opt into the action by filing their consent in writing in the court in which the action is brought. 29 U.S.C. §216(b); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1218–19 (11th Cir. 2007).

Courts have endorsed and encouraged the sending of notice early in the proceeding and prior to commencing in discovery as a means of facilitating the FLSA's broad remedial purpose and promoting efficient class management. *See Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335, 336 (2d Cir. 1978) (early notice "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits"); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 952 (11th

Cir. 2007). Collective actions are favored because they benefit the judicial system by enabling the "efficient resolution in one proceeding of common issues of law and fact," and provide plaintiffs with the opportunity to "lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Since the substantial benefits of FLSA collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action," the FLSA grants the Court authority to manage the process of joining such employees in the action, including the power to authorize notice and monitor preparation and distribution of the notice. *Hoffman-La Roche*, 493 U.S. at 169–70 ("The broad remedial goal of the statute should be enforced to the full extent of its terms."). This authority arises from the Court's broad discretionary power to manage the process of joining multiple parties in an orderly manner. *Id.* "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffman-La Roche*, 493 U.S. at 172.

In the absence of a court-authorized notification all similarly situated persons would likely (i) not receive timely, complete, and accurate information as to the pendency of this action, (ii) lack meaningful access to the court and (iii) have no practical or efficient method of vindicating their rights. *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979) (finding that notice was required through notions of

fundamental fairness). Courts are empowered and encouraged to issue notice early in the case to those similarly situated and should do so here.

B. The Eleventh Circuit Uses a Two-Tiered Approach To Decide Whether To Create An Opt In Class And Facilitate Notice

To grant conditional collective action certification and issue notice to putative class members, the Court must satisfy itself that there are other employees who (1) are similarly situated with regard to their job requirements and pay provisions, and who (2) desire to opt into the case. *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1567–68 (11th Cir. 1991). Regarding the first requirement, Plaintiffs bear the burden of proving that they, and the class they seek to represent, are similarly situated. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). "[D]etermining similarity, at this initial stage, [is] "not particularly stringent," *Hipp*, 252 F.3d at 1214, "fairly lenient," *id*. at 1218, "flexib[le]," Id. at 1219, "not heavy," *Grayson*, 79 F.3d at 1097, and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)," id. at 1096." *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1261 (11th Cir. 2008). Courts in the 11th Cir. utilize a two-tiered procedure that recognizes distinct burdens at different stages of the litigation process. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1243 n.2, (11th Cir. 2003). The first tier – the one at issue in the present Motion – is referred to as the "notice stage". *Id.* The primary question at this notice stage is whether

Defendant's "employees are similarly situated with respect to their job requirements and with regard to their pay provisions" and whether these individuals desire to opt-in. *Rojas v. Garda CL Se., Inc.*, 297 F.R.D. 669, *3 (SDFL 2013); *Kie v. IVox Solutions, LLC*, 2016 US Dist LEXIS 12223 (S.D. Fla. 2016); *Palma v. Metropcs Wireless, Inc.*, 2013 US DIST LEXIS 175934 (MDFL 2003); *De Oca v. Gus Machado Ford of Kendall, LLC*, 2011 U.S. Dist. LEXIS 157506 (SDFL 2011); *Thomas v. Waste Pro USA, Inc.*, 360 F. Supp. 3d 1313, 1316 (MDFL 2019).

The Court applies a "fairly lenient standard" at the notice stage in determining whether the class should be conditionally certified. *Hipp*, 252 F.3d at 1218. The rationale for this is that "at the early stages of litigation, plaintiffs have not had time to conduct discovery and marshal their best evidence." *Id.* At the notice stage, the district court decides – **usually based only on the pleadings and any affidavits which have solely been submitted by the Plaintiffs** – whether notice of the action should be given to potential class members. *Hipp*, 252 F.3d at 1218; *Simpkins v. Pulte Home Corp.*, 2008 U.S. Dist. LEXIS 64270 (MDFL Aug. 21, 2008). If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in" and the action proceeds as a representative action through discovery. *Id.* The second determination is typically precipitated by a motion for "decertification" filed by the defendant usually after discovery is largely complete and the matter is ready for trial. *Id.* To satisfy the initial modest burden,

"plaintiff[s] need only show that their positions are similar, not identical to the positions held by the putative class members." *Hipp*, 252 F.3d at 1217; *Morgan*, 551 F.3d at 1273.

The primary purpose of the court making the determination on whether to certify the class/collective action is strictly to locate other similarly situated employees who may wish to bring their claims to the court's attention before this litigation is resolved. *Alexander v. Cydcor, Inc.*, 2012 U.S. Dist. LEXIS 187258, *5 (NDGA 4/5/2012). The Court need only consider the declarations provided by Plaintiffs at stage 1, not those "happy camper" class members **not opting in**. *Metzler v. Case No Med. Mgmt. Int'l, Inc.*, No. 8:19-cv-2289-T-33CPT, LEXIS 62176 (MDFL 3/4/2020); *Lytle, supra; Carmody v. Fla. Ctr. for Recovery, Inc.*, 2006 U.S. Dist. LEXIS 81640 (S.D. Fla. 2006) (granting conditional certification).

Any analysis of factual variances is contrary to the inquiry followed by most courts at this stage. *IBEA v. Rite Aid Corp.*, 2012 U.S. Dist. LEXIS 4682, *8 (S.D.N.Y. Jan. 6, 2012). In *Evans v. Lowe's Home Ctrs., Inc.*, the court stated, "to require conclusive findings of 'similar situations' before providing notice [under § 216(b)] to absent class members 'would condemn any large class claim…to a chicken and egg limbo in which the class could only notify all its members to gather after it had gathered together all its members…" 2004 LEXIS 15716 (MDPA

6/17/2004). This Court should grant "conditional certification" and facilitate notice to the rest of the class of their rights to opt in without delay.[1]

Moreover, Courts in the 11th Cir. have declared that the lenient standard for stage 1 certification merely requires an "either" "or" the Plaintiffs have the same job requirements or claim the same unlawful pay practices: ***"a plaintiff only needs to show that the proposed collective members either (1) had similar duties; or (2) "were all subject to the same policy, plan, or scheme that forms the basis of the alleged FLSA violation."*** **A plaintiff does not have to establish both**." *Campo v. Granite Servs. Int'l*, No. 1:21-cv-223-AT, 2022 U.S. Dist. LEXIS 14585, (N.D. Ga. Jan. 24, 2022) (emphasis added); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) ("similarly situated" determination "requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan"). Regardless, both facts are satisfied here.

C. <u>The Plaintiffs and Putative Class are Similarly Situated</u>

When weighing the factors which courts may consider, it is absolutely clear that this action should be conditionally certified to proceed collectively as a single

[1] "[Wh]ether the requested class in this case actually includes similarly situated individuals (and thus serves judicial economy) is a question more appropriately addressed at the decertification stage, when more specific information will be available." *Reyes v. AT&T Mobility Servs. LLC,* 801 F. Supp. 2d 1350, 1360 (S.D. Fla. 2011).

class. First, all SDR had the same Job requirements. See Decls. of Plaintiffs, Exhibits 4-11, 16. Furthermore, Defendant's Job postings show descriptions for openings across the US are the same for each respective SDR position, regardless of the location. See Exhibits 12-13. Overall, the job postings are nearly identical to each other and the job duties section for a Florida SDR is the mirror image of the job duties section of a Texas SDR.

Second, all SDR and members of the putative class were paid on a salary basis plus the opportunity to earn a bonus. Attached as Exhibit 15 are the offer letters to K. Van Vlack and Dotson which evidence that SDR, being hired even 2 years apart, were offered the exact same compensation plan of a $35,000 base salary with the opportunity to earn $15,000 in bonus annually.

Lastly, the supporting Declarations, Exhibits 4-11, 16, show a common pay practice or scheme applied by Defendant to all of its SDR to avoid paying overtime compensation. Defendant willfully misclassified SDR as exempt employees and then made them suffer to work overtime hours without being paid a premium for all overtime hours worked. Defendant even admits in its Answer that ALL SDR were classified as exempt. DE 12 at ¶ 53.

The preceding facts paint a clear picture for the Court that the named and the Opt-In Plaintiffs are "similarly situated" with regard to their job requirements, compensation plan, and that they were the victims of a common misclassification of

their positions of SDR as being FLSA exempt as part of a scheme to avoid paying overtime wages such that Plaintiff and opt in Plaintiffs should be permitted to proceed collectively and notify all others similarly situated of this action and their right to join and file a claim. *See Garnick et al v. Verizon Connect Fleet USA LLC,*. 8:20-cv-01474-MSS-TGW (DE 110) (M.D. Fla. Aug. 30, 2021)(granting conditional Cert of class of employees that included BDR that performed the same job duties as the SDR in this case), attached as Exhibit 14. *See Norton v. Maximus Inc*., No. 1:14-30 WBS, 2014 U.S. Dist. LEXIS 191598, at *4 (D. Idaho Aug. 25, 2014) ("courts have found conditional certification proper where employees demonstrate uniform classification decisions and evidence of substantially similar job duties. *See Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 629-30 (E.D. Cal. 2009) (Karlton, J.)")

D. Plaintiffs Have Sufficiently Shown That Other Employees Wish to Opt Into This Action

In addition to showing that they are similarly situated with the group of employees they wish to represent, Plaintiff must establish a reasonable basis for the existence of other potential opt-in plaintiffs to justify certifying a conditional class. *Peña v. Handy Wash, Inc.*, 2014 U.S. Dist. LEXIS 88879 (SDFL 2014); *Mackenzie v. Kindred Hosps. E.*, 276 F. Supp. 2d 1211, 1220 (MDFL 2003) ("[A] showing that others desire to opt-in must be made before notice is authorized."). This burden is not onerous. *Rojas,* 297 F.R.D. at *5. "[T]he existence of just one other co-worker

who desires to join is sufficient to raise the Plaintiff's contention beyond one of pure speculation … Courts in this District have conditionally certified classes with as few as two affidavits from potential plaintiffs." *Id.*; *Ackley v. City of Fort Lauderdale*, Case No.: 0-:07-cv-60960, at Doc. 45 (S.D. Fla. Jan. 24, 2008) (granting conditional cert with only **two (2)** opt-in plaintiffs); *Beck v. Desoto Health and Rehab*, Case No.: 2:06-CV-226-FTM-34DNF, at Docs. 23, 34 (MDFL 1/24/2004) (granting conditional certification with only **one (1)** opt-in plaintiff). The fact that 8 people have Opted into this Case from each office stating they worked overtime hours while being misclassified as exempt evidences there are others interested in joining this suit.

Additionally, Plaintiff presents declarations stating that if given notice of this action, others will seek to join. See Decls of K. Van Vlack ¶ 23; Burke ¶ 23; Mallamo ¶ 23; S. Van Vlack ¶ 23; Dotson ¶ 23; Smith ¶ 21; Taylor ¶ 23; Slagle ¶ 23; Miccolis ¶ 23. Such declarations have been found to be sufficient to demonstrate interest in the lawsuit and to conditionally certify a class. *Stuven v. Tex. De Braz. Tampa Corp.*, 2013 LEXIS 22240 (MDFL 02/19/2013). "Even a single affidavit or consent to join submitted by another individual stating that they are similarly situated and wish to join the suit is enough to bring the Plaintiff's contentions above pure speculation." *Robbins-Pagel v. WM F. Puckett, Inc.*, 2006 U.S. Dist. LEXIS 85253, *6 (MDFL 11/22/2006). Likewise, in *Albert v. HGS Colibrium*, the Court

conditionally certified a class based upon just two (2) supporting declarations. Case No. 1:16-cv-3072-WSD, 2017 U.S. Dist. LEXIS 67180 (NDGA 05/3/2017). *See Sutherland v. Harbour Rest. Partners, LLC*, No. 16 Civ. 21400, 2016 U.S. Dist. LEXIS 132590, at *2-3, 6-7 (SDFL Sept. 23, 2020) (granting conditional certification for off-the-clock claims based upon declaration of named plaintiff and 4 opt-in plaintiffs regarding compensation and duties).

By providing the declarations of 8 Opt-In Plaintiffs alleging the same common policies, pay practices and job requirements, Plaintiff has demonstrated enough interest in this lawsuit to warrant conditional certification and for NOTICE to be delivered to those similarly situated.

In sum, Plaintiff has submitted substantial evidence (beyond modest) in support, including declarations of Van Vlack and 8 opt-ins, nearly identical Job Postings, Exhibits 12-13 showing a single, corporate mandated job requirements and job duties for all SDR, all of which demonstrate they are similarly situated. Defendant cannot dispute SDR had the same job duties, job titles and compensation plans for all SDR working from one of their 2 offices. *See also Sellers v. Sage Software, Inc.*, No. 1:17-CV-03614-ELR, 2018 U.S. Dist. LEXIS 188420, at *15-16 (N.D. Ga. May 25, 2018) (conditionally certifying class working from 2 offices). Most courts agree that if the plaintiffs and opt-in plaintiffs have the same compensation plans and same job requirements or job duties, they meet the lenient

standard or definition of similarly situated. *See Thomas v. Waste Pro USA, Inc.*, 360 F. Supp. 3d 1313 (MDFL 2019); *Wade v. Furmanite Am., Inc.*, 2018 U.S. Dist. LEXIS 75624 (SDTX 2018); *Gregory v. Stewart's Shops Corp.*, 2016 U.S. Dist. LEXIS 89576 (NDNY. July 8, 2016); *Jewell v. Aaron's, Inc.*, 2012 U.S. Dist. LEXIS 92285 (NDGA June 28, 2012); *Torres-Roman v. Burger King*, 2015 U.S. Dist. LEXIS 188963 Dkt. 66 (SD FL 2016), *Lytle v. Lowe's Home Ctrs. Inc.*, 2014 U.S. Dist. LEXIS 3227 (MDFL Jan. 10, 2014); *Austin v. N3 LLC*, No. 1:21-CV-1354-TWT, 2022 U.S. Dist. LEXIS 37013 (N.D. Ga. Mar. 2, 2022); *Campo, supra*. Further, Plaintiff has demonstrated in their supporting declarations that all SDR were subjected to Defendant's willful common policy and practice of misclassifying all SDR as FLSA exempt and permitting SDR to suffer to work overtime hours without being a paid a premium for all overtime hours worked. *McClean v. On the Half Shell A/K/A Aqua Grill*, 2018 U.S. Dist. LEXIS 234604 (*Harvey E. Schlesinger*). All factual disputes, and "happy camper" competing declarations are rejected at this stage. *Ciani v. Talk of the Town Rests., Inc*., 8:14-cv-2197-T-33AEP, 2015 LEXIS 5580 (MDFL 2015); *Pendlebury v. Starbucks Coffee Co.*, 2005 LEXIS 574 (SDFL 2005); *Lytle, supra.*

III. CLASS NOTICE

The opt-in provisions of the FLSA require a procedure for identifying and notifying potential class members. *Morden v. T-Mobile USA, Inc.*, 2006 WL

1727987, at *3 (WDWA June 22, 2006). "The first step is to identify those employees who may be similarly situated and who may therefore ultimately seek to opt in to the action." *Id.* An accurate employee list must be produced in FLSA collective actions because the lists are necessary to facilitate notice. *See Hoffman-La Roche*, 493 U.S. at 165. Courts in this Circuit compel defendants to produce the names, last known addresses, email addresses, and telephone numbers of putative class members in FLSA cases. *Lopez v. Valls Groups, Inc.*, 2008 U.S. Dist. LEXIS 124218 (SDFL 07/14/2008) (granting conditional certification and producing last known addresses, email addresses and last 4 digits of SS numbers); *Stuven v. Tex. De Braz. Tampa Corp.*, 2013 U.S. Dist. LEXIS 22240 (MDFL 2013); *Cooper v. E. Coast Assemblers, Inc.*, 2013 U.S. Dist. LEXIS 10435 (SDFL 2013) (approving notice by email and mail); *Abdul-Rasheed v. Kablelink Communs., LLC*, 2013 U.S. Dist. LEXIS 159632 (MDFL Nov. 7, 2013) (granting conditional cert and directing defendants to produce a list containing the names, last known addresses, phone numbers, and email addresses of putative class members). Plaintiff requests that Defendant be ordered to Produce a list of all SDR in Excel format containing (1) names, (2) U.S. address, (3) cell numbers, (4) personal email addresses, (5) dates of employment, and (6) last four social security numbers.[2] *See Garnick, supra, Torres-Roman, supra.*

[2] Partial Social Security Numbers will aid in correcting outdated contact info.

A. The Plaintiffs Proposed Notice Should Be Used

The Notice, text message and Consent to Join form (Exhibits 1-3), are typical of notices approved many times in this Circuit. *See Parrilla v. Allcom*, Case No.: 6:08-cv-01967-GAP-GJK Dkt. 69; *Simpkins v. Pulte Home Corp.*, No. 6:08-cv-130-Orl-19DAB, 2008 LEXIS 64270 (MDFL Aug. 21, 2008). Included in the notice is standard language, a description of the action and a basic statement of the law against retaliation by an employer if a putative plaintiff joins the case. In addition, no statement regarding a potential plaintiff's liability for costs should be included in the notice. *Abdul-Rasheed v. KableLink Communs., LLC*, 2013 U.S. Dist. LEXIS 167159, at *15 (MDFL Nov. 25, 2013) (warning of costs in Notice "would undermine the FLSA's goal of encouraging full enforcement of statutory rights because warning would dissuade people from joining the lawsuit.")

"[A]bsent reasonable objections by either the defendant or the Court, plaintiffs should be allowed to use the language of their choice in drafting the notice." *KING v. ITT Cont'l BAKING CO.*, No. 84 C 3410, 1986 U.S. Dist. LEXIS 29321, at *6 (N.D. Ill. Feb. 13, 1986). A court has discretionary authority over the notice-giving process for FLSA collective actions. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 174, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). Plaintiff's proposed Class Notice

is accurate, neutral, and has been adopted and approved by other courts[3]. Accordingly, Plaintiff's proposed Class Notice should be approved.

B. Notice Should Be Posted in each of Defendant's office break rooms.

Defendant must post the notice and consent form in the break rooms of its offices in Florida and Texas. Such requests are routinely granted and ensure increased likelihood that members of the putative class who must be notified that their rights may be affected by the action are so notified. *Didoni v. Columbus Rest., LLC,* 327 F.R.D. 475, 482 (S.D. Fla. 2018). See *Shoots v. iQor Holdings US Inc.*, 215 US DIST LEXIS 131617 *82 (posting notice in lunch/break rooms)*; Lora v. To-Rise, LLC,* No. 16-CV-3604 (RRM) (ST), 2017 U.S. Dist. LEXIS 112644, at *47 (E.D.N.Y. July 18, 2017)("Courts routinely order notice to be posted in employee common areas, even if potential class members have been notified by mail"); See *Collado v. J. & G. Transp., Inc.*, No. 14-80467-CIV-GOODMAN, 2014 U.S. Dist. LEXIS 152441, at *14 (SDFL 10/23/14) (ordering notice posted in a conspicuous location in each of the defendant's business offices).

C. Notice Should Be Delivered By Us Mail, Email And Text Message, Available On A Website & Consents Allowed To be Signed Electronically

Plaintiff seeks approval to deliver notice by US mail, email, and by text. Courts grant such requests as this increases the likelihood members of the class will

[3] *Shawn Martin, individually and on behalf of all others similarly situated v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (May 14, 2020 SDFL), DE 52

see the notice and not reject it as junk mail or spam which they may do if received in just one (1) form. *See Landry v. Swire Oilfield Servs.*, L.L.C., 252 F. Supp. 3d 1079, 1129, 2017 U.S. Dist. LEXIS 66497, *119-120, 2017 WL 1709695. Increasingly, courts permit issuance of the notice by TEXT message to cellular telephone numbers. *See Irvine v. Destination Wild Dunes Mgmt., Inc.*, 15-cv-980 (RMG), Dkt. No. 44-9 (D.S.C. July 23, 2015); *Dickensheets v. Arc Marine, LLC*, No. 3:19-CV-00322, 2020 U.S. Dist. LEXIS 32058, at *4-5 (S.D. Tex. Feb. 19, 2020) (notice via text message in addition to other traditional notice methods appropriate in modern society."). Opt-ins should be allowed to sign the consent to join form electronically as allowed in *Kraft v. Freight Handlers, Inc.*, No. 6:18-cv-1469-Orl-41GJK, 2019 U.S. Dist. LEXIS 128826, at *20 (MDFL May 21, 2019); see F.S. § 668.004. Further, the MDFL permits e-signatures on documents.

Plaintiff requests authorization to post the Notice and Consent forms on a website, a link to which will be contained in the email and text message sent to class members. Courts in FLSA cases allow similar websites. *See Sellers v. Sage Software, Inc.*, No. 1:17-CV-03614-ELR, 2018 U.S. Dist. LEXIS 188420, at *15-16 (N.D. Ga. May 25, 2018). The SDFL authorized Notice via US mail, email, and text message and that a reminder notice could be sent out via the same communication methods 30 days into the 60 day notice period. See *Shawn Martin et al v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (SDFL May 14, 2020). The court

also authorized posting of the notice and consent form to a newly created website and that consent forms could be signed electronically. *Id*. Similarly, Plaintiff requests authorization to deliver notice to putative class members via mail, email, and text message, that the Court approve the Notice and Consent forms be posted on a newly created website, and that opt-ins be permitted to sign their consent forms electronically. Plaintiff also proposes posting this website and link on social media, such as LinkedIn and Facebook so it becomes visible. *See Aguiar v. M.J. Peter & Assocs*., No. 20-CIV-60198-RAR, 2020 U.S. Dist. LEXIS 253390, at *7 (S.D. Fla. Sep. 10, 2020) (authorizing notice and reminder via mail, email, text message and website), *Beltran v. Interexchange, Inc.*, Civil Action No. 14-cv-03074-CMA-CBS, 2017 U.S. Dist. LEXIS 205079, at *19 (D. Colo. June 9, 2017)(notice via Facebook authorized).

D. 60 DAY NOTICE PERIOD and REMINDER NOTICE

A 60 day notice period courts agree is reasonable and appropriate here. *Pittman v. Comfort Sys. USA (Se.), Inc.*, No. 8:12-CV-2142-T-30TGW, 2013 U.S. Dist. LEXIS 19434, (M.D. Fla. Feb. 13, 2013). A reminder notice of duplicate notice also is reasonable. *See Shawn Martin et al v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (S.D. Fla. May 14, 2020.) Plaintiff requests the right to send an identical reminder notice after 30 by US mail.

E. A 3 Year Sol Should Be Used For Determining Who Receive Notice

The overwhelming majority of courts use a 3 year SOL period when plaintiffs allege a willful violation. *See Simpkins v. Pulte Home Corp.*, 2008 WL 3927275 at p. 9 (M.D. Fla. 2008), *Whitaker v. Kablelink Communications, LLC*, No. 8:13-cv-2093-T-30MAP, 2013 U.S. Dist. LEXIS 157675, 2013 WL 5919351, at *4 (M.D. Fla. Nov. 4, 2013); *Sellers v. Sage Software, Inc.*, No. 1:17-CV-03614-ELR, 2018 U.S. Dist. LEXIS 188420 (N.D. Ga. May 25, 2018). Plaintiff has sufficiently alleged in the Amended Complaint willful FLSA violations to warrant a (3) year SOL for Notice. *See Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1242 (S.D. Ala. 2008) (approving 3 year SOL when plaintiff alleged willfulness). Regardless, this Court should authorize notice to everyone employed within the 3 year period and Defendant can argue SOL later as Judge Moody ordered in *Swarthout v. Freightcenter, Inc.*, 8:20-cv-2910-JSM, 2021 U.S. Dist. LEXIS 139135, at *8 (M.D. Fla. May 10, 2021).

CONCLUSION AND RELIEF REQUESTED

Plaintiff has more than met the lenient burden to certify the action to conditionally proceed collectively under 11th Circuit precedent. The job duties and requirements are identical for all SDR working at or reporting to Defendant's Florida or Texas offices, all SDR were paid a base salary with the opportunity to earn bonus compensation, and all SDR were willfully misclassified as exempt and were permitted to work overtime hours with Defendant's knowledge but without being

paid a premium for all overtime hours worked. Thus, there are others who would seek to join and should be notified expeditiously of this action and their right to join. Accordingly, Plaintiff requests this Court conditionally certify a class of SDR, order Defendant to produce the class list within 14 days and authorize Plaintiff to send Notice in the manner and form requested above.

Respectfully submitted, May 27, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Parties may access this filing through the Court's System.

/s/ Mitchell L. Feldman
MITCHELL L. FELDMAN, ESQ.
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