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Attorneys for Plaintiff Sheila Little

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SHEILA LITTLE, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

WYNN LAS VEGAS, LLC; EMPLOYEE(S)/AGENT(S) DOES 1-10; and ROE CORPORATIONS 11-20, inclusive;

Defendants.

Case No.: 2:23-cv-01150-APG-VCF

PLAINTIFF'S MOTION TO CERTIFY A COLLECTIVE ACTION PER THE FLSA, 29 U.S.C. § 216(b)

PLAINTIFF'S MOTION TO PRELIMINARILY CERTIFY A COLLECTIVE ACTION PER THE FLSA, 29 U.S.C. § 216(b)

Plaintiff Sheila Little ("Plaintiff" or "Little"), by and through her attorneys of record, hereby files this Motion to Certify a Collective Action per the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

This Motion is made and based upon the below Memorandum of Points and Authorities, any exhibit attached hereto, the other papers and pleadings in this action, and any oral argument this Honorable Court may entertain.

DATED this 14th day of November 2023.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts and Background

As this Court is aware, Defendant Wynn Las Vegas, LLC ("Defendant" or "Wynn") operates a sophisticated and hugely profitable casino on the Las Vegas Strip. *See* https://wynnresortslimited.gcs-web.com/. Wynn represents to the general public that just like its guests, its "employees get Five Star service, too!" *See* https://www.wynnlasvegas.com/careers?_gl=1*bbr11s*_gcl_au*OTE5OTAxMzQ3LjE2OTI2Njc1Njk. Wynn further represents that it "owes its success to one group of people: our employees." *See id*.

Unfortunately, what Wynn does not broadcast to the world and does not represent to the public is that they also maintain an illegal and unlawful tip sharing policy which forces Plaintiff Sheila Little, an hourly employee Wynn pays less than $20/hour, and her low wage line-level coworkers, to illegally turn over their hard-earned tips to company management, in complete violation of law. *See* ECF No. 4-1, pp. 3-15. However, Wynn does represent internally, but not to the world, that its "tip pool program" constitutes wage theft because managers and/or supervisors routinely absconded with five to fifteen percent of the line-level employees' earned tips. *See id*. At p. 7.

Notably, the U.S. Department of Labor, Wage and Hour Division (the "DOL") has even investigated the Wynn unlawful slot department's tip pool and specifically found Plaintiff Sheila Little's allegations before it to be "substantiated." *See* Exhibit II[1]. Plaintiff Little's allegations herein and also in the U.S. DOL matter are that Wynn's "managers were participating in the tip pool and were receiving

[1] Plaintiff contends that this Court may properly consider such DOL Narrative Report attached as Exhibit II pursuant to Fed R. Evid. 902(5) and 803(8). *See Schmutte v. Resort Condominiums Int'l, L.L.C.*, No. 1:05-CV-0311-LJM-WTL, 2006 WL 3462656, at *14–15 (S.D. Ind. Nov. 29, 2006) (holding a DOL file to be admissible); *see also Quinn v. Everett Safe & Lock, Inc.*, 53 F. Supp. 3d 1335, 1339 (W.D. Wash. 2014).

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tips from the tip pool." *Id*. The finding by the DOL stated the following: (1) Wynn owed Little and her similarly situated co-employees $958,839.71 (not paid to date); (2) Wynn was found to be in violation of Section 203(m)(2)(B) of the FLSA by the DOL for managers unlawfully participating in the tip pool; (3) the DOL cited 64 violations for Wynn's unlawful tip pool; (4) the DOL assessed Civil Monetary Violations for the unlawful tip pool under the FLSA in the amount of $9,856.00; and (5) Wynn represented to the DOL that it would comply with the FLSA in the future. *Id*. However, to date Wynn has not followed the full findings of the DOL's investigation and has not paid Little and other employees working in the slot department any restitution for their losses due to Wynn's unlawful tip scheme. Wynn's decision not to pay restitution for loss of earnings due to its unlawful tip pool brings Plaintiff to this Honorable Court seeking relief as alleged in her pending Complaint.

Wynn has attempted to preclude Plaintiff and her low-hourly-wage working employees from seeking relief under our state law entirely via its previous Motion to Dismiss (ECF No. 14). Such matter has been fully briefed (*see, e.g.*, ECF Nos. 21 and 22) and Plaintiff looks forward to such Motion to Dismiss being denied in its entirety.

However, at this stage, no adequate reason exists why this action cannot immediately proceed to first-tier certification under federal law to allow Plaintiff's similarly-situated, low-wage, frontline workers to join in this action in pursuit of their confiscated tips. Summarily, Plaintiff respectfully requests this Honorable Court:

1) grant this motion for conditional certification;

2) approve Plaintiff's proposed notice form and authorize the mailing;

3) order Defendant to produce the names and addresses of putative plaintiffs within 10 days of the order granting conditional certification;

4) order Defendant to post notice at a conspicuous place inside its business location; and

5) grant equitable tolling from the date of this motion for potential opt-in plaintiffs to submit their respective consents to join.

Plaintiff further respectfully requests any additional relief this Court finds appropriate.

II. Legal Standard

A. The FLSA's Two-Stage Certification Process

The Ninth Circuit addressed the widely used two-step approach to FLSA collective action certification, while noting its near consensus use among federal district courts:

> [I]t is now the near-universal practice to evaluate the propriety of the collective action mechanism—in particular, plaintiffs' satisfaction of the 'similarly situated' requirement—by way of a two-step 'certification' process.

Campbell v. City of Los Angeles, 903 F.3d 1090, 1100 (9th Cir. 2018) (citations omitted).

At the first stage, also called the "notice stage," the district court determines whether potential plaintiffs ought to receive notice of the collective action and an opportunity to join. *Campbell*, 903 F.3d at 1109. "At this early stage of the litigation, the district court's analysis is typically focused on a review of the pleadings, but may sometimes be supplemented by declarations or limited other evidence." *Id.* The level of consideration at this stage should be "lenient." *Id.* The showing a plaintiff must make is to "simply provide substantial allegations, supported by declarations or discovery." *Luque v. AT&T Corp.*, No. C 09-05885 CRB, 2010 WL 4807088, *3 (N.D. Cal. Nov. 19, 2010) (internal quotations omitted).

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Typically, courts do not even consider evidence provided by defendants at the first stage. See *Kress v. PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 628 (E.D. Cal. 2009). District courts have found the first-stage standard is met if the plaintiff's allegations, supplemented by declarations or other evidence, show "the putative class members were together the victims of a single decision, policy, or plan." *Gerlach v. Wells Fargo & Co.*, No. 05-0585, 2006 WL 824652, *2-3 (N.D. Cal. Mar. 28, 2006) (quoting *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1120 (10th Cir. 2001).[2] Moreover, district courts do not skip to the second stage while discovery is ongoing. See *Kress*, 263 F.R.D. at 629. Even where "extensive discovery has already taken place," courts still follow the two-tiered approach. *Leuthold v. Destination Am., Inc*. 224 F.R.D. 462, 466 (N.D. Cal. 2004).

Typically, the second stage is prompted by the defendant's motion for decertification following the close of discovery, or alternatively by the plaintiff's motion for final collective-action certification. At this stage, the district court makes a final determination on whether the named plaintiff (and any opt-in plaintiffs) are "similarly situated" under a more demanding standard than the first-stage review. *See e.g., Luque*, 2010 WL 4807088, *3 (citing *Kress*, 263 F.R.D. at 627). Should the court determine that the plaintiffs are "similarly situated" upon second stage review, then the case can proceed to trial on a collective basis.

[2] *Accord Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 483 (E.D. Cal. 2006) (relying on four employee declarations establishing a common policy of not paying overtime and standardized job qualifications and duties); *Morton v. Valley Farm Transport, Inc.*, No. C 06-2933 SI, 2007 WL 1113999, *2 (N.D. Cal. 2010) (relying on evidence of a uniform practice of requiring participation in an initial training but not paying for time spent in the training); *Harris v. Vector Marketing Corp.*, No. C-08-5198, 2010 WL 1998768 (N.D. Cal. May 18, 2010) (relying on the complaint's allegations and exhibits attached thereto showing putative collection action members were subject to a single decision, policy, or plan); *Newton v. Schwarzenegger*, No. C-09-5887, 2010 WL 2280532 (N.D. Cal. June 1, 2010) (same).

B. 29 U.S.C. § 203(m)(2)(B)

Section 203(m)(2)(B) of the FLSA, effective March 23, 2018, provides in pertinent part:

> An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

29 U.S.C. § 203(m)(2)(B). Field Assistance Bulletin No. 2018-3, issued by the Wage and Hour Division of the United States Department of Labor on April 6, 2018, provides that the duties test found in 29 C.F.R. § 541.100(a)(2)-(4) is used to determine whether an employee is a manager or supervisor for the purpose of § 203(m), and thus prohibited from taking tips from a tip pool. Section 541.100(a)(2)-(4) provides in pertinent part:

> (a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:
> . . .
> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> (3) Who customarily and regularly directs the work of two or more other employees; and
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a)(2)-(4). Most relevant to this case, the DOL issued a final regulation with respect to whether manager and supervisor may retain tips. 29 CFR § 531.52(b)(2), the relevant regulation at issue here, provides as follows:

> An employer may not allow managers and supervisors to keep any portion of an employee's tips, regardless of whether the employer takes a tip credit. A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly and solely provides. For purposes of section 3(m)(2)(B), the term "manager" or "supervisor" shall mean any employee whose duties

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> match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101 of this chapter. [Emphasis added]

III. Argument

A. The Court should conditionally certify a collective action of all slot attendants who worked for Defendant on or after April 20, 2020

All of Wynn's slot attendants who worked while the illegal tip pool policy was in place are similarly situated and should be invited to join this litigation. At the notice stage, plaintiff must only make a modest factual showing sufficient to demonstrate that they and the potential opt-in plaintiffs were together victims of a common policy or plan that violated the FLSA. *Gerlach*, 2006 WL 824652, at *2-3. In making this determination, the Court should consider whether there is evidence that the individual plaintiffs had similar "factual and employment settings" and whether there was a "common policy or plan" that affected each of the potential opt-in plaintiffs. *See, e.g.*, *Richardson v. Wells Fargo Bank, N.A.*, No. 4:11-cv-00738, 2012 WL 334038, at *2 (S.D. Tex. Feb. 2, 2012) (quotations omitted).

In this case, Wynn maintains a mandatory tip pool policy that impacted all of its slot attendants in the same manner. By allowing slot leads, managers, and/or management to participate, Defendant's policy effectively forced the slot attendants to subsidize Wynn's payroll by remitting a percentage of their tips to employees who primarily performed management and supervisory duties, which is illegal under the FLSA.

The uniform nature of a tip-pooling policy makes this case especially appropriate for collective action certification. Indeed, conditional certification has been routinely granted in tip-pooling cases, even in cases that involve multiple locations or franchises. *See, e.g., Schear v. Food Scope Am., Inc.,* No. 12 Civ. 594, 2014 WL 123305 (S.D.N.Y. Jan. 10, 2014); *Chhab v. Darden Rests., Inc.,* No. 11 Civ. 8345, 2013 WL 5308004 (S.D.N.Y. Sept. 20, 2013); *Alequin v. Darden Rests., Inc.,* No. 12-61742, 2013 WL 3939373 (S.D. Fla. July 12, 2013); *Hardesty*

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v. Litton's Mkt. & Rest. Inc., No. 3:12-CV-60, 2012 WL 6046743 (E.D. Tenn. Sept. 28, 2012); *Torres v. Cache Cache, Ltd.,* No. 12-cv-00150, 2012 WL 6652856 (D. Colo. Dec. 21, 2012); *Morris v. R.A. Popp. Enters.,* No. 8:11CV263, 2012 WL 525501 (D. Neb. Jan. 20, 2012) (granting conditional certification for servers at multiple locations); *Eggelston v. Sawyer Sportsbar, Inc.,* No. 4:09-3529, 2010 WL 2639897 (S.D. Tex. June 28, 2010); *Pedigo v. 3003 S. Lamar, LLP,* 666 F. Supp. 2d 693 (W.D. Tex. 2009); *Scherrer v. S.J.G. Corp.,* No. A-08-CA-190-SS, 2008 WL 7003809 (W.D. Tex. Oct. 10, 2008). Indeed, courts have even certified tip-pooling cases based on the more stringent Rule 23 requirements. *See, e.g., Salim Shahriar v. Smith & Wollensky Rest. Gip., Inc.,* 659 F.3d 234, 253 (2d Cir. 2011); *Schear v. Food Scope Am., Inc.,* 297 F.R.D. 114, 123-27 (S.D.N.Y. Jan. 10, 2014).

Here, Plaintiff has met the lenient burden of showing that she, and her fellow employees, were victims of Defendant's single policy, plan, or decision. Throughout the pleadings, Plaintiff has demonstrated that Defendant's policy required all slot attendants to pool their tips with slot leads, managers, and/or management. Therefore, all slot attendants who worked for Wynn on or after April 20, 2020 are similarly situated under the FLSA and should be invited to join this action.

B. The Court should provide notice to potential opt-in plaintiffs.

The Supreme Court determined that district courts have the authority to manage the process of joining multiple parties, consider a motion for conditional certification, and issue court-approved notice in the "appropriate case." *See Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989). According to the Supreme Court, determining what is an "appropriate case" lies within the "discretion" of the district court. *Id.* at 170.

The benefits to the judicial system of FLSA collective actions "depend upon employees receiving accurate and timely notice concerning the pendency of the

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collective action, so that they can make informed decisions about whether to participate." *Id.* District courts are also encouraged to become involved in the notice process early to insure "timely, accurate, and informative" notice and to help maintain control of the litigation. *Id.* at 171-72.

This is an appropriate case for court-approved notice. Here, prompt Court action is needed because the statute of limitations is now running on the potential opt-in plaintiffs' claims. *See Redman v. U.S. W. Bus. Res.*, 153 F.3d 691, 695 (8th Cir. 1998); *Hoffmann v. Sbarro*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997). Unlike Rule 23 class actions, the statute of limitations for those who have not filed consent forms was not tolled with the commencement of this action. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996). Consequently, the statute of limitations continues to run on each individual's claim until they receive notice and file a consent form with the Court. *Shabazz v. Asurion Ins. Serv.*, No. 3:07-0653, 2008 WL 1730318, at *2 (M.D. Tenn. Apr. 10, 2008). Thus, each day that passes is a day of damages each potential opt-in plaintiff is unable to recover.

Plaintiff's proposed notice, attached as "Exhibit I," has been carefully drafted to mirror other judicial notice forms that have been approved by courts around the country. It is narrowly drawn to notify potential class members of the pending litigation, the composition of the class, their right to "opt in" to the litigation, the effect of their doing so or not, and the procedure for doing so. It makes no comment whatsoever on the merits of the case. As required, it is "timely, accurate, and informative." *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989). As such, the proposed notice achieves the ultimate goal of providing employees with accurate and timely notice concerning the pendency of the collective action.

Plaintiff proposes that to be timely, potential opt-in plaintiffs must return to Plaintiff's counsel their signed consent forms, received or postmarked within 90 days after the date on which the Notice and Opt-In Consent Forms are mailed.

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Plaintiff's counsel will file the Opt-In Consent Forms with the Court on an ongoing basis, but not later than two weeks after the end of this 90-day notice period.

C. The Court should order Defendants to produce the names and addresses of the potential opt-ins to effectuate notice.

As discussed above, all slot attendants who were employed by Wynn during the applicable time period are "similarly situated" for purposes of the FLSA. Thus, their identification to Plaintiff is necessary in order to provide them with notice of the action as contemplated by the FLSA. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). This is precisely the reason why the production of a mailing list containing potential opt-ins is routinely required in FLSA collective actions; such lists are necessary to facilitate notice. *Id.* at 165; *see also Shabazz*, 2008 WL 1730318, at *6; *Henry v. Quicken Loans Inc.*, No. 04-40346, 2006 WL 2811291, at *7 (E.D. Mich. Sept. 28, 2006) ("Having granted conditional class certification to Plaintiffs, this Court has the discretion to compel the production of the list of loan consultants in order to facilitate notice."). Likewise, the Court should order Defendant to provide Plaintiff a list of all potential opt-in plaintiffs to effectuate notice. This list should contain the last known contact information for each potential opt-in plaintiff, including his/her name, last known address, telephone number, dates of employment, and email address.

In addition to ordering mailed notice, the Court should also require Defendants to post notice of this lawsuit at a conspicuous place in its business location. *See Garcia v. Salamanca Grp.*, No. 07C4665, 2008 WL 818532, at *5 (N.D. Ill. March 24, 2008) (authorizing notice to be sent by mail and posted at the defendant's restaurants); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493 (E.D. Cal. 2006) (finding that first class mail combined with posting provided for the "best notice practicable" to the potential class).

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D. The Court should toll the statute of limitations in this action for the period of time that this Motion is pending and during the notice period.

For opt-in plaintiffs in a collective action under § 216(b) the statute of limitations is not tolled until the date on which the opt-in plaintiff's written consent is filed with the court. *See* 29 U.S.C. 256(a); *Lee v. Vance Exec. Prot., Inc.*, 2001 WL 108760 (4th Cir. Feb. 8, 2001) (providing that FLSA action commences for limitations purposes for opt-in plaintiffs on date consent-to-join is filed); *Hoffman v. Sbarro*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997) (noting employees' claims "die daily" until the employee opts into the action.). nder the FLSA the statute of limitations on each individual "opt-in" plaintiff's claim continues to run until their consent to joinder is filed with the court unless the statute is tolled by a court in view of equitable circumstances. *See* 29 U.S.C. § 256 ("[A]n action . . . shall be considered commenced [by an "opt-in" plaintiff] . . . in the case of a collective or class action under the [FLSA] . . . (b) . . . on the subsequent date on which such written consent is filed in the court in which the action was commenced."); *see e.g., Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 410-11 (D.N.J. 1988), aff'd in part and appeal dismissed in part, 862 F.2d 439 (3d Cir. 1988), aff'd and remanded, 493 U.S. 165 (1989); *Owens v. Bethlehem Mines Corp.*, 630 F. Supp. 309, 311 (S.D.W. Va. 1986); *Reich v. Southern New Eng. Telecomms. Corp.*, 892 F. Supp. 389, 404 (D. Conn. 1995). Courts may extend the limitations period for filing consent to join under the doctrine of equitable tolling. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *see also Partlow v. Jewish Orphans' Home of S. Cal., Inc.* 645 F.2d 757, 760 (9th Cir. 1981), *abrogated on other grounds by Hoffman La-Roche, Inc. v. Sperling*, 862 F.2d 439, 440 (3d Cir. 1988) (same), aff'd 493 U.S. 165 (1989); *Woodward v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 193 (M.D. Pa. 2008) (same). Further, under certain circumstances, courts may equitably toll the statute of limitations during a period in which motions are

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pending. *See Sickle v. SCI Western Mkt. Support Ctr.*, 2008 WL 4446539, at *21-23 (D. Ariz. Sept. 30, 2008) (tolling plaintiffs' claims due to pendency of employer's motion to dismiss). Unlike Rule 23 class actions, there is no class-wide toll on the running of the statute of limitations.

Plaintiffs acknowledge that federal courts apply equitable tolling when plaintiffs are prevented from asserting claims due to wrongful conduct by defendant, or when circumstance beyond a plaintiff's control make it impossible to file claims on time (*Davis*, supra at *14). It is also true that federal courts in this District have granted equitable tolling based on the reasoning that "the time required for a court to rule on a motion … for certification of a collective action in an FLSA case[] may be deemed 'extraordinary circumstance' justifying application of the equitable tolling doctrine." *Small v. University Medical Center of So. Nevada*, 2013 WL 3043454, at *3 (D. Nev. June 14, 2013) *citing Yahraes v. Restaurant Assocs. Events Corp.*, 2011 WL 844963, at *2 (E.D.N.Y. 2011). In *Small* the court reasoned that "potential opt-in plaintiffs could be unfairly prejudiced by the court's delay in resolving the Motion" and that defendant was "not unfairly prejudiced because the potential scope of its liability was known when the Complaint was filed." Id. at *4.

A toll on the statute of limitations would prevent Defendants from receiving any benefit from unsuccessfully opposing Plaintiffs' motion to circulate notice. Indeed, allowing the FLSA's statute of limitations for potential plaintiffs to continue running while a motion for circulation of FLSA notice is being decided encourages a defendant to oppose such motions irrespective of the merits of the motion, because even if the defendant loses and notice is ultimately sent out, defendant will be subject to a shorter liability period as a result of its opposition.

Additionally, Ninth Circuit courts also apply equitable tolling when circumstances of justice require. In applying equitable tolling, the Ninth Circuit Court of Appeals stated, "[a]s with other general equitable principles, application

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of the tolling doctrine requires a balancing of the injustice to the plaintiffs occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the limitations statute." *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1185 (9th Cir. 2009). The Court noted that other courts have "permitted a plaintiff to take advantage of tolling based on the filing of a prior class action." *Id.* Further, "equities demand that tolling be permitted because the substantive class [] claims were sufficiently similar to give the defendant notice of the litigation for purposes of applying the tolling rule." *Id.* at 1186. The same rationale applies here; although the present motion involves a collective action class rather than a Rule 23 class, Defendants were on notice of these similar claims such that equity demands a tolling be applied to preserve the FLSA statute for the benefit of the putative collective class members. Thus, Plaintiffs request that the statute of limitations be tolled while this motion is pending and during the notice period.

IV. Conclusion

Plaintiff has met the lenient burden of showing she and the potential opt-in plaintiffs were victims of a common policy. Pursuant to that common policy, slot attendants were required to pool their tips with slot leads, managers, and/or management in violation of the FLSA. Accordingly, slot attendants are similarly situated as each has an analogous claim under the FLSA. Therefore, Plaintiff respectfully requests the Court:

1) grant Plaintiff's motion for conditional certification;
2) approve Plaintiff's proposed notice form and authorize the mailing;
3) order Defendant to produce the names and addresses of putative plaintiffs within 10 days of the order granting conditional certification; and,
4) order Defendant to post notice at a conspicuous place inside its business location.

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Plaintiff further respectfully requests any additional relief this Court finds appropriate.

DATED this 14th day of November 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I hereby certify that the following parties by electronic means on this 14th day of November 2023 have been served with this **PLAINTIFF'S MOTION TO PRELIMINARILY CERTIFY A COLLECTIVE ACTION PER THE FLSA, 29 U.S.C. § 216(b)**:

All parties registered through the Court's CM/ECF system.

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