UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 13-CV-00391-DWF-SER

Michelle Le, Jane Geiger, Lindsay Kallenbach, Rachel Thunstrom, Jamie Widmer, individually and on behalf of all other similarly situated individuals, and the Proposed Minnesota Rule 23 Class,

Plaintiffs,

v.

Regency Corporation, d/b/a Regency Beauty Institute, and J. Hayes Batson,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CONDITIONAL CLASS CERTIFICATION, COURT AUTHORIZED NOTICE, AND TOLLING OF STATUTE OF LIMITATIONS

INTRODUCTION

Through 2010, Defendants required their Admissions and Admissions Agreement Representatives to work 45-55 hours per week, sometimes more, in order to meet constantly increasing recruitment goals. Defendants avoided paying overtime compensation to these employees by paying them on a salaried basis.

In November 2010, Regency's Vice-President of Human Resources announced that Regency would be implementing a time clock system that all hourly employees, including Admissions and Admissions Agreement Representatives, would need to use to log their hours. Several representatives pointed out that they were salaried employees, not hourly. Regency's Vice-President of Human Resources responded: "No. You've always been hourly employees. Always." When employees then protested and inquired

regarding back pay for their overtime hours, Defendants' supervisors and leadership responded, "You don't want to go down that road."

After installing a time clock in January 2011, Defendants continued to avoid paying overtime by requiring Admissions and Admissions Agreement Representatives to work prior to clocking in, after clocking out, on nights, and on weekends. Defendants instituted a policy whereby their employees were not allowed to clock in or out more than 5 minutes before or after a scheduled shift, despite Defendants' knowledge that their employees were working – sometimes for hours – before and after their shifts on Defendants' premises.

Plaintiffs bring this action to recover their earned overtime compensation and bring light to Defendants' unlawful practices. Plaintiffs respectfully request that the Court grant this Motion for Conditional Class Certification so that other employees who were denied overtime pay may be notified of this action and make informed decisions regarding whether to participate. Plaintiffs additionally request that the Court toll the statue of limitations for a brief period to prevent Defendants from benefitting through their concerted efforts to intimidate and dissuade putative class members from pursuing causes of action.

STATEMENT OF FACTS

I. Plaintiffs worked as Admissions and Admissions Agreement Representatives for Defendants from February 18, 2010 to present.

Regency is a for-profit business that provides cosmetology education to students for annual tuition of approximately $20,000.00. See Ex. 1 at ¶ 2; Ex. 2 at ¶ 2; Ex. 3 at ¶ 2;

Ex. 4 at ¶ 2; Ex. 5 at ¶ 2. On information and belief, Regency has eighty-nine campuses across the country and is the second largest cosmetology education business in the United States. See id.

Defendants prospect for and recruit new students through their Admissions Representatives. See Ex. 1 at ¶¶ 3-4; Ex. 2 at ¶¶ 3-4; Ex. 3 at ¶¶ 3-4; Ex. 4 at ¶¶ 3-4; Ex. 5 at ¶¶ 3-4. Admissions Representatives such as Plaintiffs made (and make) telephone calls and follow up calls to prospective customers in an attempt to convert them into Regency students – Admissions Representatives are Defendants' sales representatives.[1] See id. Admissions Representatives recruit new students by calling through lists of prospects, giving a set speech about Regency to prospects who answer their calls, and attempting to arrange campus visits for interested prospects. See id. Defendants provided constant and direct supervision by setting rigorous recruitment goals and monitoring almost every moment of Plaintiffs' time to ensure satisfaction of those goals. See Ex. 1 at ¶¶ 5; Ex. 2 at ¶¶ 5; Ex. 3 at ¶¶ 5; Ex. 4 at ¶¶ 5; Ex. 5 at ¶¶ 5. All Admissions Representatives worked at a centralized location at Defendants' main office in Brooklyn Park – and now, St. Louis Park. See Ex. 1 at ¶ 6; Ex. 2 at ¶ 6; Ex. 3 at ¶ 6; Ex. 4 at ¶ 6;

[1] Admissions Representatives did not manage or supervise other employees, had no input into the job status of other employees, were not required to have a four year college degree, did not exercise independent judgment and discretion about matters of significance, had no authority to formulate or interpret company policies, did not have authority to deviate from company policy without approval, did not have authority to commit Regency in matters of significant financial impact, and did not provide expert consultation or advice to management. See Ex. 1 at ¶ 7; Ex. 2 at ¶ 7; Ex. 3 at ¶ 7; Ex. 4 at ¶ 7; Ex. 5 at ¶ 7.

Ex. 5 at ¶ 6. Indeed, Admissions Representatives worked together in one of two rooms set up as call centers at Defendants' office. See id.

Admissions Agreement Representatives such as Plaintiffs handled (and handle) the incoming process for students enrolled by Admissions Representatives. See Ex. 1 at ¶ 8; Ex. 2 at ¶ 8; Ex. 3 at ¶ 8; Ex. 4 at ¶ 8; Ex. 5 at ¶ 8. Their work included: coordinating with Admissions Representatives and Campus Managers to ensure that students were properly set to start in class on time, with all paperwork in order; gathering and ensuring completion of necessary documents so that students' financial aid arrived on time; answering questions for incoming students; taking incoming calls from prospective students; meeting weekly with Financial Aid Advisors; tracking various documents for incoming students; doing a monthly "kit count" – managing the supplies that incoming students would need through calls, meetings, and spreadsheets; prospecting for new students and calling students in Regency's "pipeline"; writing and completing various reports; helping the high school team with recruitment; and participating in routine one-on-one meetings with their supervisors.[2] See id.

[2] Admissions Agreement Representatives: did not manage or supervise other employees; had no input into the job status of other employees; were not required to have a four year college degree; did not exercise independent judgment and discretion about matters of significance; had no authority to formulate or interpret company policies; did not have authority to deviate from company policy without approval; did not have authority to commit Regency in matters of significant financial impact; and did not provide expert consultation or advice to management. See Ex. 1 at ¶ 9; Ex. 2 at ¶ 9; Ex. 3 at ¶ 9; Ex. 4 at ¶ 9; Ex. 5 at ¶ 9.

II. Plaintiffs consistently worked uncompensated overtime hours at the direction of Defendants.

Through December 2010, Defendants did not use a time clock, time cards, or any other way of tracking the hours worked by its Admissions and Admissions Agreement Representatives. See Ex. 1 at ¶ 10; Ex. 2 at ¶ 12; Ex. 3 at ¶ 9; Ex. 4 at ¶ 11; Ex. 5 at ¶ 12. Defendants paid Plaintiffs on a salary basis and demanded that Plaintiffs work as many hours as necessary to complete all assigned tasks and meet constantly increasing recruitment goals. See Ex. 1 at ¶ 11; Ex. 2 at ¶¶ 12-13; Ex. 3 at ¶¶ 9-10; Ex. 4 at ¶¶ 11-12; Ex. 5 at ¶¶ 12-13. Plaintiffs worked nights and weekends to meet Defendants' recruitment goals and generally averaged 45-55 hours of work per week. See Ex. 1 at ¶ 12; Ex. 2 at ¶ 10; Ex. 3 at ¶ 8; Ex. 4 at ¶ 10; Ex. 5 at ¶ 10. Because Defendants paid Plaintiffs and the similarly situated individuals by salary, Plaintiffs were not compensated for their overtime work. See Ex. 1 at ¶ 11; Ex. 2 at ¶ 12; Ex. 3 at ¶ 9; Ex. 4 at ¶ 11; Ex. 5 at ¶ 12.

A. Plaintiff Le worked 45-55 hours per week without overtime compensation.

Through December 2010, Plaintiff Le routinely worked 45-55 hours per week as an Admissions Representative and Admissions Agreement Representative, though she worked approximately 60 hours per week during Regency's "busy season," from January through March and July through October. See Ex. 1 at ¶ 12. She came in to work prior to the start of her scheduled shift and stayed late almost daily. See id. She additionally worked from home – Defendants provided Le with home portal log-in technology, so that Le could log in to her work computer account from home and perform work for

Defendants at nights and on weekends. See id. at 13. Defendants strongly pressured Le to meet daily, weekly, and monthly admissions goals to enroll more and more students. See id. Defendants knew that Le was working uncompensated overtime because they witnessed, encouraged, and required her to do so. See id.

B. Plaintiff Thunstrom worked 50-55 hours per week without overtime compensation.

Through December 2010, Plaintiff Thunstrom worked approximately 50-55 hours per week for Defendants as an Admissions Representative and Admissions Agreement Representative, except that during busy season, she worked approximately 60 hours per week. See Ex. 4 at ¶ 10. Defendants encouraged Thunstrom to work through meal and rest breaks. See id at ¶ 12. In fact, during busy season, Defendants brought carts to Thunstrom and similarly situated individuals' desks so that they could eat at their desks without break. See id. Defendants expected Thunstrom to arrive early for work, leave late, and work weekends in order to meet Defendants' admissions goals and confirm campus tours and visits. See id.

Defendants also required Thunstrom and other similarly situated individuals to attend uncompensated two day, weekend "Summits." See id. at ¶ 13. Defendants encouraged and required Thunstrom to bring her work home to meet their admissions goals. See id. at ¶ 14. Defendants praised Thunstrom for taking her work home and working on weekends, stating, "You're changing lives every day." See id. Defendants' Vice President of Admissions, Roxanne Chihos, encouraged Thunstrom to work weekends in order to, among other things, confirm class attendance on Monday morning

for new students. See id. When Thunstrom protested that she had church on Sundays, Chihos instructed Thunstrom to come in after church. See id. Defendants encouraged Thunstrom to enroll students over the telephone over the weekends, asking "How many phone enrollments can you get over the weekend for the start of Monday?" See id. Defendants discouraged Thunstrom from taking rest or restroom breaks: during busy season, she was questioned by supervisors for taking even two minute restroom breaks, as she was not cold calling during that time. See id. at ¶ 15.

C. Plaintiff Widmer worked 50-55 hours per week without overtime compensation.

Through December 2010, Plaintiff Widmer worked as much as three uncompensated hours per day for Defendants as an Admissions Representative and Admissions Agreement Representative. See Ex. 5 at ¶ 10. She worked approximately 50-55 hours per week for Defendants, and more than 60 hours per week during busy season. See id. Defendants encouraged and permitted Widmer to work through meal and rest breaks. See id. at ¶ 11. Defendants required Widmer to work on weekends, outside of her scheduled shifts. See id. When Widmer protested that she had church and children to care for, Chihos instructed Widmer to come in after church and find a baby sitter because "you're salaried – you'll find a way to get it done." See id. Defendants encouraged Widmer to enroll students over the telephone over the weekends, asking "How many phone enrollments can you get over the weekend for the start of Monday?" See id.

D. Plaintiff Geiger worked 50-60 hours per week without overtime compensation.

Through December 2010, Plaintiff Geiger worked 50-60 hours per week for Defendants as an Admissions Representative and Admissions Agreement Representative, arriving at 7:30 or 8:00 a.m. for a scheduled 9:00 a.m. shift, and leaving between 6:00 and 7:30 p.m. (though often later) for a scheduled 5:00 p.m. end of shift. See Ex. 2 at ¶ 10. When she arrived home, Geiger logged in to work through remote access and continued working for another 1-2 hours, at least three days per week. See id. Geiger's supervisors, including Vice President Chihos, observed her working extra hours and inquired about her arrival and departure times from work. See id. at ¶ 11. Defendants routinely told Geiger to "do what it takes to hit your numbers." See id. Geiger understood Defendants' instructions to mean that she should continue working – uncompensated – during nights and weekends. See id.

E. Plaintiff Kallenbach worked 45-50 hours per week without overtime compensation.

Through December 2010, Plaintiff Kallenbach worked approximately 45–50 hours per week for Defendants as an Admissions Representative. See Ex. 3 at ¶ 8. During that time period, Defendants regularly and routinely encouraged, and, at times, required Kallenbach to work through meal and rest breaks. See id.

III. Defendants announced in November 2010 that Admissions Representatives and Admissions Agreement Representatives were hourly employees and had "always been" hourly employees.

In November 2010, Defendants' Vice-President of Human Resources, Stacey Cunningham, held a mandatory meeting for all employees. See Ex. 2 at ¶ 14; Ex. 3 at ¶

11; Ex. 4 at ¶ 17; Ex. 5 at ¶ 14. Ms. Cunningham informed Plaintiffs and other similarly situated individuals that Defendants would soon be implementing a time clock system that would require Admissions Representatives, Admissions Agreement Representatives, and other "hourly employees" to clock in and clock out for shifts. See id. When Plaintiff Widmer and other similarly situated individuals stated that they were in fact salaried employees, Ms. Cunningham responded, "No. You've always been hourly employees. Always." See id. Defendants re-classified Plaintiffs and the other similarly situated individuals without providing back pay for unpaid hours and unpaid overtime. See id.; see also Ex. 1 at ¶ 14.

IV. Defendants discouraged Plaintiffs and similarly situated employees from pursuing claims for their unpaid overtime wages.

After Ms. Cunningham told Plaintiff Widmer that she had "always been" an hourly employee, Widmer protested that she had not been paid for all of her hours worked, or her overtime. See Ex. 5 at ¶¶ 14-15. Vice-President Cunningham instructed Widmer to talk to her supervisor after the meeting. See id. When Widmer approached her supervisor, JoDee Hunter, Ms. Hunter stated: "If you want to maintain a job here, then you don't want to go down that road." Widmer raised the issue with several other supervisors, and all responded the same way: "You don't want to go down that road." See id.

Plaintiff Le asked her supervisor, "What about all the money that I was never paid for all the overtime I worked for the last three or four years?" See Ex. 1 at ¶ 14. Her supervisor responded, "You don't want to go down that road. You don't want to burn

bridges." See id. at ¶ 14. Le talked to the same supervisor again and multiple other supervisors and was told each time that she shouldn't burn bridges by pursuing the issue. See id.

Plaintiff Geiger set a meeting with Human Resources Representative Ranae Hendrickson to meet to discuss her overtime pay after Vice-President Cunningham's announcement. See Ex. 2 at ¶ 15. Hendrickson told Geiger: "It all comes out in the wash. You probably left early when it wasn't busy, and maybe you stayed later on some days." See id. Geiger told Hendrickson that her statement wasn't true, as in fact, Geiger and other similarly situated employees nearly always came to work early and stayed late – not the reverse. See id. Geiger's supervisor, Kris Kelbrants, said, in response to Geiger's inquiry, "It's for your benefit – you want a better work/life balance, don't you?" See id.

On information and belief, particularly given the striking similarity of responses from a multitude of supervisors to various employees at different times, Defendants coached their supervisors on how to respond to employee inquiries regarding minimum wage and overtime compensation after they instituted their time clock policy. See e.g., Ex. 1 at ¶ 14; Ex. 2 at ¶ 15; Ex. 5 at ¶ 15. Defendants' supervisors and leadership patrolled the employee lunch room and broke up conversations amongst employees about the implementation of the time clock and payment of back wages and overtime. See Ex. 1 at ¶ 15.

V. Even after implementation of a time clock, Defendants encouraged and required Plaintiffs and similarly situated employees to perform uncompensated work off the clock.

Defendants installed a time clock in January 2011 and required hourly employees, including Admissions and Admissions Agreement Representatives, to clock in and out of their shifts. See Ex. 1 at ¶ 14, 16; Ex. 2 at ¶¶ 14, 16; Ex. 3 at ¶¶ 11-12; Ex. 4 at ¶¶ 17-18; Ex. 5 at ¶¶ 14, 16. Nonetheless, Defendants encouraged and required Plaintiffs and similarly situated individuals to perform uncompensated work "off the clock," including work before scheduled shifts, after scheduled shifts, and on weekends. See Ex. 1 at ¶¶ 16-18; Ex. 2 at ¶¶ 16-17; Ex. 3 at ¶¶ 12-15; Ex. 4 at ¶¶ 18-22; Ex. 5 at ¶¶ 16-19. Defendants did not pay overtime compensation (or any compensation) to Plaintiffs for work performed off the clock. See id.

A. Defendants required Plaintiff Thunstrom to continue working after clocking out and on weekends to meet their sales goals.

From January 2011 through September 2011, Defendants routinely and regularly required Plaintiff Thunstrom to perform uncompensated work "off the clock." See Ex. 4 at ¶ 18. Defendants required Plaintiff Thunstrom to clock out at the end of her shift but return to her desk to finish making phone calls to meet Defendants' sales goals. See id. Thunstrom was scheduled for forty hours per week; her work time spent after she clocked out was uncompensated overtime. See id.

Defendants ordered Thunstrom to make 120 calls per day. See id. at ¶ 19. Defendants further mandated that Thunstrom and similarly situated individuals actually reach and speak to a certain percentage of prospective students daily – employees who

reached that percentage were "in the white" and those who had not yet reached that percentage were "in the grey." See id. Defendants installed a computer program that allowed Thunstrom and similarly situated individuals to constantly check their reach percentage throughout the day to see if they were "in the white" or still "in the grey." See id. at ¶ 20. Supervisors monitored the software throughout the day to check which employees were "in the white" or still "in the grey." See id. If Thunstrom was still "in the grey" at the end of her shift, her supervisors required her to punch out, return to her desk, and continue making calls until she was "in the white." See id.

Approximately 10-20% of the time, Thunstrom worked on weekends, uncompensated, to attempt to meet Defendants' goals. See id. at ¶ 21. Her supervisors knew that she was performing uncompensated work on the weekends, and often commented, "Do what you have to do – I don't want to hear about it." See id. Defendants called Thunstrom on the telephone after her shift concluded, as she was on her way home to ask questions and give instructions on tasks that still needed to be accomplished – this time was also uncompensated. See id. at ¶ 22.

B. Defendants required Plaintiff Widmer to perform work prior to clocking in for her shifts.

From January 2011 through September 2012, Defendants routinely and regularly required Widmer to perform uncompensated work "off the clock." See Ex. 5 at ¶ 16. Widmer spent approximately three hours per week working off the clock for Defendants after January 2011. See id. This number increased during the busy season of July through September, where Widmer spent 1-2 hours per day working off the clock for

Defendants. See id. Widmer was scheduled for forty hours per week; her work time spent working off the clock was uncompensated overtime. See id.

Plaintiff Widmer was encouraged and required by Defendants to get to work at least 45 minutes before the start of her shift in order to complete reports regarding her calls from the previous day and respond to emails. See id. at ¶ 17. Her supervisor would not allow her to clock in, though Widmer was expected to work before her shift and her supervisor personally observed her working, responded to Widmer's emails, and asked her questions about work. See id. At the scheduled start of Widmer's shift, she would get up from her desk, punch in for her shift, and turn over her completed daily reports to her supervisor. See id. Though her supervisor encouraged Widmer to perform this work before clocking in, her supervisor attempted to claim plausible deniability by making statements like, "Well, I don't know what you're doing," though the supervisor observed Widmer working just a few feet away while not clocked in. See id.

Defendants prohibited Widmer and other similarly situated individuals from clocking in more than five minutes before their shifts or more than five minutes after their shifts, though they knew Widmer and the similarly situated individuals were working. See id. at ¶ 18.

Defendants encouraged and required Widmer to work off the clock at the end of her shift and on weekends as well. See id. at ¶ 19. If her work was not finished at the end of her scheduled shift, Defendants encouraged, permitted, and, at times, required Widmer to clock out and return to her desk and finish her work. See id. Widmer informed her supervisors that she occasionally had to take her work home and work off the clock or

work on the weekend off the clock. See id. Her supervisors responded by telling her, "I don't want to hear about it." See id.

C. Plaintiff Geiger worked 4 to 10 hours per week off the clock for Defendants.

From January 2011 through September 2012, Defendants routinely and regularly encouraged and permitted Plaintiff Geiger to perform uncompensated work "off the clock." See Ex. 2 at ¶ 16. During this time period, Geiger worked approximately 44-50 hours per week, without overtime compensation – or any compensation for hours worked in excess of forty. See id.

Plaintiff Geiger regularly came in 30-60 minutes prior to the start of her scheduled shift in order to complete the previous day's call volume and admissions conversion reports, which were due to her supervisor at the start of her shift. See id. at ¶ 17. Her supervisors observed Geiger sitting at her desk and working off the clock, as Defendants prohibited employees from clocking in more than five minutes prior to the start of their scheduled shift. See id. Geiger worked approximately 30 minutes daily off the clock at the end of her scheduled shift after she punched out, as she finished typing her notes or helped train new employees. See id. Geiger was scheduled for forty hours per week; her work time off the clock was uncompensated overtime. See id.

D. Plaintiff Le worked approximately 5 to 10 hours per week off the clock for Defendants.

From January 2011 through August 2011, Defendants routinely and regularly required Le to perform uncompensated work "off the clock." See Ex. 1 at ¶ 16. Defendants did provide overtime compensation to Le for hours worked in excess of forty.

See id. Le was scheduled for forty hours per week; her work time spent off the clock was uncompensated overtime. See id.

Le worked approximately 1-2 hours off the clock at the end of her scheduled shift after punching out, as she finished typing her notes or helped train new employees. See id. at ¶ 17. Defendants did not compensate Le for hours spent doing "campus visits." See id. Defendants sent Le to its campuses to meet with prospective students and provide tours of the campus, with an intent to enroll the students. See id. Le asked Ms. Hunter how she should get paid for her time, and Hunter responded, "Well, you need to clock out first; we'll talk about it later." See id.

Defendants additionally did not compensate Le for "school visits," where Le was sent to recruit prospective students from high schools or trade schools. See id. at ¶ 18. Le was not clocked in for any of the time spent at school or campus visits, and was required to come back to work and work her normal shifts after finishing school visits. See id.

E. Plaintiff Kallenbach performed uncompensated work for Defendants and was encouraged to skip restroom breaks.

After Defendants implemented their time clock, Plaintiff Kallenbach regularly and routinely arrived for work 45 minutes before her scheduled shift to complete her reports, which were due at the start of her shift. See Ex. 3 at ¶¶ 12-14. Defendants discouraged and prohibited her from clocking in more than five minutes before the start of her scheduled shift, so she was uncompensated for her time. See id. Kallenbach's supervisor, Tonna Jackson mandated that Kallenbach's daily reports be complete at the beginning of her shift and observed Kallenbach working prior to her shift, off the clock, to complete

those reports. See id. Jackson observed Kallenbach coming in to work, working at her computer, dropping the report off to her, then clocking in. See id. Kallenbach was scheduled for forty hours per week; her work time spent off the clock was uncompensated overtime. See id.

At the end of her scheduled shifts, Kallenbach clocked out so that Defendants wouldn't reprimand her for working overtime, then worked on a variety of tasks for Defendants, including setting up campus visits or coordinating with Campus Managers regarding incoming students. See id. Kallenbach regularly clocked out but returned to her desk to make more calls if she was still "in the grey," as Defendants did not allow Kallenbach and other similarly situated individuals to leave work if they were "in the grey." See id. Though Jackson saw Kallenbach making phone calls at the end of the day off the clock, Jackson attempted to maintain plausible deniability by saying, "I don't see you working and don't tell me about it, either. But good job for getting out of the grey." See id. Kallenbach worked approximately two hours per week off the clock after her shift concluded, in addition to the time she spent in the morning completing her reports off the clock. See id.

Because Kallenbach regularly clocked in five minutes before the start of her shift, and five minutes after the end of her scheduled shift, on one occasion, she ended up having nearly thirty five minutes of overtime for the week. See id. Her supervisor, Tonna Jackson, told her, "You've got to cut this off – it's not authorized. You need to figure out how to get this stuff done during the work day. You've done it before – why can't you do it now?" See id. When Kallenbach explained that the reason she was able to do it

before Defendants instituted time clocks was that she was working from home an extra (uncompensated) 2-4 hours per day, Jackson responded, "Figure it out." See id.

Defendants additionally discouraged Kallenbach from taking restroom or rest breaks during her shift. See id. at ¶ 15. Kallenbach occasionally performed work for Defendants on weekends, also off the clock and with the knowledge of her supervisor. See id.

ANALYSIS

I. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR CONDITIONAL CLASS CERTIFICATION.

A. The FLSA's collective action mechanism lowers litigation costs and decreases the burden on courts.

The FLSA authorizes employees to collectively pursue their claims:

> [An] action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction 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 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 US.C. § 216(b);[3] see Burch v. Qwest Comm. Int'l, 500 F. Supp. 2d 1181, 1190 (D. Minn. 2007) (Davis, C.J.) (permitting plaintiffs to proceed collectively through discovery

[3] The District of Minnesota routinely conditionally certifies FLSA actions. See e.g., Lyons v. Ameriprise Fin., Inc., 2010 WL 3733565 at *1 (D. Minn. 2010) (Kyle, J) (Ex. 6); Luiken v. Domino's Pizza, LLC, 2010 WL 2545875 at *1 (D. Minn. 2010) (Frank, J.) (Ex. 7); Ahle v. Veracity Research Co., 2009 WL 3103852 at *1 (D. Minn. 2009) (Montgomery, J.) (Ex. 8); Loomis v. CUSA LLC, 257 F.R.D. 674 (D. Minn. 2009) (Kyle, J.); Keef v. M.A. Mortenson Co., 2008 WL 3166302 at *2 (D. Minn. 2008) (Rosenbaum, J.) (Ex. 9); Brennan v. Qwest Comm. Int'l, Inc., 2008 WL 819773 at *3 (D. Minn. 2008) (Montgomery, J.) (Ex. 10); Roble v. Celestica Corp., 2007 WL 2669439 at *4 (D. Minn.

because the standard for similarly situated "is low" and plaintiffs submitted multiple affidavits alleging the same unlawful practices).

The FLSA's collective action mechanism serves the dual purpose of lowering litigation costs for individual plaintiffs and decreasing the burden on the courts through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989). "These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." Id. The district court "has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." Id. at 170-1.

B. Plaintiffs' burden for conditional class certification is low.

Like most other courts across the country, the District of Minnesota uses a two-step approach in determining whether a case should be certified as a collective action under § 216(b). See e.g., Jennings v. Cellco P-ship, 2012 WL 2568146, *3-4 (D. Minn. 2012) (Nelson, J.)[4]; Brennan, 2008 WL 819773, *3 ("Determining whether Plaintiffs are similarly situated to the proposed class requires a two-step inquiry"); Burch, 500 F. Supp.

2007) (Tunheim, J.) (Ex. 11); Dominquez v. MN Beef Indus., Inc., 2007 WL 2422837 at *2 (D. Minn. 2007) (Kyle, J.) (Ex. 12); Dege v. Hutchinson Tech., Inc., 2007 WL 586787 at *4 (D. Minn. 2007) (Frank, J.) (Ex. 13); Frank v. Goldn'n Plump Poultry, Inc., 2005 WL 2240336 at *5 (D. Minn. 2005) (Ericksen, J.) (Ex. 14); Kalish v. High Tech Inst., Inc., 2005 WL 1073645 at *1 (D. Minn. 2005) (Tunheim, J.) (Ex. 15); Abduallah v. Bank of Am., No. 04-2951, Order dated Jan. 20, 2005 (D. Minn.) (Ex. 16); Wilbur v. Chase Manhattan Mortg., No. 04-3172, Order dated December 22, 2004 (Ex. 17); Severtson v. Phillips Beverage Co., 141 F.R.D. 276, 279 (D. Minn. 1992) (Noel, M.J.).

[4] Ex. 18

2d at 1186; Lyons, 2010 WL 3733565 at *2; Luiken, 2010 WL 2545875 at *2; Frank, 2005 WL 2240336 at *2-3.

During the first step – the notice stage – the Court merely determines whether a collective action should be *conditionally* certified for the purpose of sending judicial notice and conducting discovery. Brennan, 2008 WL 819773 at *3; Burch, 500 F. Supp. 2d at 1186; Frank, 2005 WL 2240336 at *2. The first stage typically comes early in the litigation, before the parties have finished discovery. See e.g., Brennan, 2008 WL 819773 at *3 (finding the case to be in the first stage "because the parties have not completed discovery"); Frank, 2005 WL 2240336 at *2 (first stage analysis even though the parties engaged in some discovery). "At this conditional certification stage, the plaintiffs need only come forward with evidence establishing a colorable basis for their claim that the putative class members were together victims of a single decision, policy, or plan." Burch, 500 F. Supp.2d at 1186; Frank, 2005 WL 2240336 at *2, citing Severtson, 137 F.R.D. at 267.

"Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class." Burch, 500 F. Supp. 2d at 1190 (recognizing that the first stage notice standard is "low"); see Jennings, 2012 WL 2568146 at *3 ("Determination of class status at the notice stage is granted liberally because the court has minimal evidence for analyzing the class"); Loomis, 257 F.R.D. 676; Dominquez, 2007 WL 2422837 at *2 (D. Minn. 2007), quoting Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001). At the conditional certification stage, each plaintiff's employment circumstances need not be

identical. Burch, 500 F. Supp. 2d at 1187 (concluding that at the conditional certification stage, plaintiffs are not required to provide evidence that they are identically situated to putative class members in all respects); Loomis, 257 F.R.D. 674, 677 at n.4; In re RBC Rauscher Overtime Litig., 703 F. Supp. 2d 910, 963 (D. Minn. 2010) (Tunheim, J.).

Courts usually rely on the Complaint and any declarations or affidavits submitted by the plaintiffs in granting conditional certification. See Dege, 2007 WL 586787 at *2 (D. Minn. 2007) ("Plaintiffs' affidavits establish a colorable basis for their claim that the putative class members were victims of a common practice of not compensating employees"); Brennan, 2008 WL 819773 at *3 (relying on the plaintiffs' affidavits and allegations in granting conditional certification). No factual findings or credibility determinations are made in deciding whether conditional certification should be granted. Burch, 500 F. Supp. 2d at 1186; Dominquez, 2007 WL 2422837 at *3 (finding defendant's arguments on the merits inappropriate at the notice stage); Keef, 2008 WL 3166302 at *1 (referring to the second stage of the certification process as the "merits stage").

After discovery is complete and the case is ready for trial, the court may then make a second determination as to whether plaintiffs are similarly situated, usually precipitated by the defendant's motion for decertification. Loomis, 257 F.R.D. at 676. At the second stage, the Court has much more information upon which to make its decision and can make a factual determination based on the complete record. Burch, 677 F. Supp. 2d at 1113; Loomis, 257 F.R.D. at 676. During the second stage, the court conducts a fact specific inquiry into factors such as: 1) the extent and consequences of

disparate factual and employment settings; 2) defenses available to the defendant that appear to be individual to each plaintiff; and 3) other fairness and procedural considerations. Carlson v. CH Robinson Worldwide, Inc., 2006 WL 2830015 at *8 (D. Minn. 2006) (Ericksen, J.).[5] The court can then decide whether plaintiffs are "similarly situated" and can proceed to trial, or whether the case should be fully or partially decertified. See id. at 17.

C. Plaintiffs have met the "Similarly Situated" standard required at this early stage of litigation.

This case is in very early stages. The case was filed on February 18 and the parties have not engaged in discovery, or even had a Rule 16 conference with the Court; indeed, Defendants have not yet responded to the Complaint. Through the Complaint's allegations and the declarations to support these allegations, Plaintiffs have easily provided a sufficient basis for the Court to conclude that they and putative class members are "similarly situated."

Plaintiffs have met their lenient burden by establishing a colorable basis to support the claim that they and other Regency Admissions and Admissions Agreement Representatives were subject to a policy that denied them overtime pay that they earned. See Jewell v. Aaron's Inc., 2012 WL 2477039 at *1 (N.D. Ga. 2012) (certifying a nationwide class where employees alleged they were subject to a common de facto policy of receiving improper meal breaks)[6]; Jennings, 2012 WL 2568146 at * 5 (conditionally certifying a collective action where "Plaintiffs' declarations provide a colorable basis to

[5] Ex. 19
[6] Ex. 20

conclude that Defendant has a common practice of failing to pay its Representatives for time before and after their shifts"). Plaintiffs have established that they were similarly situated and victims of a common policy or plan in all of the following respects:

- They performed the same job duties at the same location;
- Through December 2010, Defendants paid all Plaintiffs on a salary basis and insisted that they work as many hours as necessary to complete assigned tasks – as a result, all Plaintiffs routinely worked between 45 and 55 hours per week, sometimes more;
- Defendants pressured Plaintiffs to meet increasing recruitment goals by coming in prior to the start of scheduled shifts, leaving after the scheduled end of shifts, and working weekends;
- Defendants provided home portal log-in technology for Plaintiffs so that they could work from home;
- Through December 2010, Defendants kept no records of the hours worked by any of the Plaintiffs;
- Defendants did not pay overtime compensation to any of the Plaintiffs for hours worked in excess of 40;
- Defendants encouraged Plaintiffs to work through meal and rest breaks;
- Defendants required Plaintiffs to attend summits and visit campuses and schools without any compensation at all;
- Defendants told all Plaintiffs that they were hourly employees in November 2010 and that they had "always been" hourly employees;
- Defendants did not provide back overtime compensation to any Plaintiff after their announcement;
- Defendants' supervisors provided the same response to Plaintiffs after employees complained about not receiving back overtime compensation: "You don't want to go down that road";

- After installing a time clock in January 2011, Defendants required Plaintiffs to complete reports and perform other work prior to clocking in;

- Defendants also required Plaintiffs to return to their desks and continue to make phone calls after clocking out if they were still "in the grey";

- Defendants attempted to maintain plausible deniability about Plaintiffs' off the clock work by making statements such as, "Do what you have to do; I don't want to hear about it"; and

- Defendants did not allow Plaintiffs to clock in more than 5 minutes prior to the start of their scheduled shift or more than 5 minutes after the end of their scheduled shift, regardless of whether Plaintiffs were performing work for Defendants – "It's not authorized."

These allegations apply across the board to all similarly situated individuals in the putative class. See Jewell, 2012 WL 2477039 at *3 (conditional certification is proper where "plaintiffs and the putative class members were all subject to the same unified policy, plan, or scheme that forms the basis of the alleged FLSA violation").

Plaintiffs' declarations offer more than their own experiences; they additionally demonstrate that others they knew and observed were similarly required to perform off the clock work without compensation. See Ruggles v. Wellpoint, Inc., 591 F. Supp.2d 150, 160 (N.D. N.Y. 2008) (granting conditional certification where plaintiffs' affidavits stated they were "informed" and/or "believed" that other employees were not being paid overtime and affidavits were "exceptionally similar"); Gjurovich v. Emmaneul's Marketplace, Inc., 282 F. Supp. 2d 91, 96 (S.D.N.Y. 2003) (granting conditional certification where Plaintiff identified other employees who "may not" have received overtime compensation); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 239 (N.D.N.Y. 2002) (granting conditional certification where Plaintiff's affidavit stated

that he "observed" that other employees were not paid overtime). Indeed, seven other members of the putative class have already filed their consent to participate in this action – even prior to having received formal notice from the Court. See Doc. Nos. 5, 6, 7, 8, 10, 12.

D. Factors Outside the "Similarly Situated" Analysis Should Not Be Considered at this Notice Stage.

Plaintiffs anticipate that Defendants will raise arguments against court-authorized notice that have been rightly rejected by this Court time and time again. For example, Regency will likely challenge Plaintiffs' motion by arguing the merits of their claims and its defenses. Arguments on the substance and underlying merits of the lawsuit, however, are not considered at conditional certification. Burch, 500 F. Supp.2d at 1186, citing Dege, 2007 WL 586787 at *1; Lyons, 20XX WL 3733565 at *4 (refusing to consider argument concerning merits of plaintiffs' claims on motion for conditional certification). Regency may also contend that determining whether Plaintiffs were exempt employees is an "individualized inquiry" that should preclude conditional certification. But, again, whether an individualized inquiry will be needed to determine the merits of Plaintiffs and the putative class members' claims is not considered at this stage. See Dominguez, 2007 WL 2422837 at *3 ("[Defendant's] arguments concerning the "individualized inquiries required and the merits of Plaintiffs' claims are inappropriate at this [first] stage of the proceeding"); Brennan, 2008 WL 819773 at *4 (rejecting the defendant's argument that plaintiffs were not similarly situated because of "individualized determinations"); see also Harris v. Vector Marketing Corp., 716 F. Supp.2d 835, 838-47 (N.D. Cal. 2010);

Labrie v. UPS Supply Chain Solutions, Inc., 2009 WL 723599 at *6 (N.D. Cal. 2009)[7]; McCaffrey v. Mortgage Sources, Corp., 2009 WL 2778085 at *4 (D. Kan. 2009).[8]

> Defendant's arguments concerning the individualized inquiries required and the merits of Plaintiffs' claims are inappropriate at this stage of the proceeding. These arguments can be raised before the Court at the second, or decertification stage. Plaintiffs have come forward with sufficient evidence that they and other prospective plaintiffs are similarly situated for purposes of conditional certification and facilitation of notice at this early stage of the litigation. Conditional certification of a class does not signal agreement or disagreement with Plaintiffs' claims. It merely allows Plaintiffs to determine whether other workers are interested in pursuing this claim.

Jennings, 2012 WL 2568146 at *6 (Nelson, J.).

II. PLAINTIFFS' CASE IS APPROPRIATE FOR JUDICIAL NOTICE.

A. Court approved notice is necessary to inform putative plaintiffs of their rights and preserve their claims.

To serve the FLSA's "broad remedial purpose," district courts have the discretionary power to order notice to other potentially similarly situated employees to inform them of their right to opt in to the case. Hoffman-La Roche, 493 U.S. at 173; see also Luiken, 2010 WL 2545875 at *3 (Frank, J.). Court-supervised notice stands as the preferred method for managing the notification process because it: 1) avoids a "multiplicity of duplicative suits"; 2) allows the court to set deadlines to advance the disposition of an action; 3) furthers the "wisdom and necessity for early judicial intervention" in multi-party actions; 4) prevents plaintiffs' claims from expiring under the statute of limitations; and 5) ensures that plaintiffs receive accurate and timely notice so

[7] Ex. 21
[8] Ex. 22

they can make informed decisions regarding whether to join the suit. Hoffman-La Roche, 493 U.S. at 170-3; see also Luiken, 2010 WL 2545875 at *3 (recognizing that judicial notice will promote judicial economy by minimizing the proliferation of individual lawsuits). Ultimately, the purpose of judicial notice is to give employees accurate and timely notice of a pendency of the collective action so they can make an informed decision about whether to participate. Hoffman-La Roche, 493 U.S. at 170.

Prompt judicial notice is needed because claims of the potential opt-in plaintiffs are diminished, if not extinguished, due to the running of the statute of limitations. Grayson v. K Mart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996). Court-facilitated notice will prevent such erosion of claims while the parties work to resolve this litigation. See id. Further, giving these workers the opportunity to pursue their claims in one forum will facilitate the significant judicial economies identified in Hoffman-La Roche. Because identical issues of fact and law exist amongst all of Defendants' Admissions and Admissions Agreement Representatives, one action benefits the judicial system by resolving this case collectively – it would make little sense for this District and others to hear hundreds of identical cases against Defendants. See Hoffman-LaRoche, 493 U.S. at 170.

Judicial notice is also warranted to ease fears about participating in this action. At present, there are potentially hundreds of putative class members. Judicial notice would serve as a neutral voice, assuring putative class members that retaliation is illegal, and that they have a right to join this case if they so choose.

B. Plaintiffs' proposed judicial notice is accurate and informative and should be approved.

Judicially authorized notice of a collective action under § 216(b) must be "timely, accurate, and informative." Hoffman-La Roche, 493 U.S. at 172. Plaintiffs' proposed judicial notice ("Notice") will provide employees with an accurate description of this lawsuit, as well as their rights under the FLSA. See Ex. 23. As such, the proposed Notice achieves the ultimate goal of providing employees accurate and timely notice concerning the pendency of the collective action and should be adopted.

Plaintiffs request that the Court order a 180 day notice period for putative class members to join the case. Such requests have been repeatedly accepted by courts around the country as reasonable in similar cases. Resendiz-Ramirez v. P&H Forestry, LLC, 515 F. Supp. 2d 937, 943 (W.D. Ark. 2007) (authorizing 180 day notice period); Carillo v. Schnieder Logistics, Inc., 2012 WL 556309 at *15 (C.D. Cal. 2012).

C. The Court should authorize two reminder letters during the proposed 180 day notice period.

Plaintiffs request that the Court authorize Plaintiffs' counsel to send two reminder notices to the FLSA putative class after the initial Notice is mailed. This proposed document is attached as Ex. 24. With Court permission, Plaintiffs' counsel would send out this reminder notice to those who had not yet opted into the case on or about the 60th and 120th day of the 180 day notice period. Sending reminder letters serves both to remind those persons who wish to join to do so within the notice period and ensure that those whose notices were misplaced, not received, or unopened still have a fair opportunity to join. Reminder letters, moreover, will reduce the number of late opt-ins,

thus reducing the burden on the Court in deciding whether late opt-ins should be allowed to join. See e.g., Harris v. Vector Mktg. Corp., 2010 WL 1998768 (N.D. Cal. 2010) (granting conditional certification and finding the mailing of a reminder notice appropriate); Oliver v. Aegis Comm. Group, Inc., 2008 WL 7483891 at *4 (N.D. Tex. 2008) (granting conditional certification and allowing plaintiffs' counsel to send subsequent notices during the notice period).

Without a reminder notice, the number of late opt-ins may be higher and the Court will be burdened with deciding whether late opt-ins should be allowed to proceed in the action with their similarly situated colleagues or whether they should be dismissed, thereby forcing them to file their own similar action elsewhere, burdening other courts and creating duplicative litigation. Other courts have recognized the importance of a reminder notice, and Plaintiffs request that this Court authorize it as well. See e.g., Jennings, 2012 WL 2568146 at *6; Hargrove v. Ryla Teleservices, Inc., 2012 WL 463442 at *1 (E.D. Va. 2012)[9]; Swarthout v. Ryla Teleservices, Inc., 2011 WL 6152347 at *5 (N.D. Ind. 2011)[10]; Gee v. Suntrust Mortg., Inc., 2011 WL 722111 at *4 (N.D. Cal. 2011)[11]; Harris v. Vector Mktg. Corp., 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010); Loomis, 257 F.R.D. at 676; Monroe v. FTS USA, LLC, 2:08-CV-02100-BBD-DK, Order

[9] Ex. 25
[10] Ex. 26
[11] Ex. 27

dated June 23, 2009 (W.D. Tenn.)[12]; Oliver v. Aegis Comm., Group, Inc., 2008 WL 7483891 at *4 (N.D. Tex. 2008)[13].

Defendants will suffer no prejudice by ensuring putative class members receive timely notice and giving them a fair opportunity to join the case in a timely manner. There is no cost to Defendants and no delay to the disposition of this matter if putative class members are reminded of the deadline to join. Simply put, reminder letters should be permitted because they are a sensible, efficient way of informing recipients of the approaching deadline.

D. Production of a list of Regency Admissions Representatives and Admissions Agreement Representatives is necessary to facilitate Notice.

Prompt disclosure of the names and contact information of those similarly situated is necessary for Plaintiffs to provide those individuals with notice of the action as contemplated by law. See Hoffman-La Roche, 493 U.S. at 170; Burch, 500 F. Supp. 2d at 1191. Plaintiffs respectfully request that, in addition to entering an order granting conditional certification and approving Plaintiffs' Notice, the Court order Defendants to produce a list, in importable Excel format, to Plaintiffs' counsel within 10 calendar days of its Order containing the last known contact information for each putative class member, including for each individual: full name; last known address; all telephone numbers on file; email address; position; and dates of employment.

The benefits of a collective action – lower individual costs and efficient resolution of common issues of law and fact in one action – are furthered by not only a Court-

[12] Ex. 29
[13] Ex. 30

authorized notice being mailed, but also by posting the notice at Regency's headquarters. The Court should require Regency to post the notice at its headquarters in St. Louis Park. See Johnson v. ECT Contracting, LLC, No. 09-0130 (M.D. Tenn. 2010)[14]; Garcia v. Salamanca Group, 2008 WL 818532 at *5 (N.D. Ill. 2008) (authorizing notice to be sent by mail and posted at defendant's restaurants)[15]; 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); Veliz v. Cintas, Corp., 2004 WL 2623909 at *2 (N.D. Cal. 2004) (requiring employer to post notice and consent forms in all of its work sites).[16]

III. THE COURT SHOULD TOLL THE STATUTE OF LIMITATIONS UNTIL 90 DAYS AFTER THE POTENTIAL CLASS RECEIVES NOTICE OF THE INSTANT LAWSUIT.

The principles of equitable estoppel and equitable tolling stand applicable to this case and favor tolling of the three-year statute of limitations until 90 days after the potential class receives notice of the instant lawsuit. The broad remedial purpose of the FLSA also supports tolling in order to mitigate substantial prejudice to Plaintiffs and similarly situated individuals. Tolling will not prejudice Defendants, as they have already benefited from the lengthy amount of time that has passed until the filing of the Complaint.

[14] The Johnson Order outlining the procedure to follow in carrying out notice is attached as Ex. 28.
[15] Ex. 31
[16] Ex. 32

A. Equitable estoppel prevents Defendants from benefiting as a result of their concerted efforts to prevent Plaintiffs from pursuing their rights.

Equitable estoppel "comes into play when a defendant takes active steps to prevent a plaintiff from suing on time." McDonnell Douglas Corp., at 58 F.3d at 1329 (citing Chakonas, 42 F.3d at 1136). The Eighth Circuit has repeatedly held "that statute of limitations periods may be modified on the basis of equitable estoppel if 'the employee's failure to file in timely fashion is the consequence of either a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" McDonnell Douglas Corp., at 58 F.3d at 1329 (citing Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-59 (8th Cir.) (quoting Price v. Litton Business Sys. Inc., 694 F.2d 963, 965 (4th Cir.1982)), cert. denied, 469 U.S. 1036 (1984).

Much of the delay in bringing this lawsuit can be attributed to Defendants' concerted efforts to intimidate and dissuade their employees from taking action to pursue their rights. Plaintiffs and similarly situated employees requested back pay and overtime compensation immediately after Vice-President Cunningham informed them that they had "always been" hourly employees. Multiple supervisors told multiple employees on separate occasions that "You don't want to go down that road. You don't want to burn bridges," and "Do you really want to pursue that and ruin everything you've worked for in this industry?" Giving the striking similarity of responses from multiple supervisors to separate inquiries, it stands likely that Defendants coached their leadership on how to respond to employee inquiries and dissuade them from further action. Defendants'

supervisors went so far as to patrol the employee lunch room to break up conversations amongst employees about the implementation of the time clock and payment of back wages and overtime. Defendants, of course, knew that many of their Admissions and Admissions Agreement Representatives were financially dependent on their positions, did not have college degrees, and sought to make long term careers in the industry – Defendants' misrepresentations were perfectly tailored for their audience.

As a result of Defendants' misrepresentations, many employees with legitimate overtime compensation claims likely delayed – or didn't bring – causes of action. Understandably concerned about going "down that road" or "burning bridges," employees concerned for their financial security and career prospects have reduced, or even already eliminated, their rights to recovery under the FLSA's three year statute of limitations. Defendants should not be allowed to continue to benefit from their repeated misrepresentations to their employees. Equitable estoppel, while not undoing most of the damage already done through Defendants' efforts, will slightly mitigate the continuing effects and allow employees with causes of action still remaining to receive notice and make informed decisions regarding participation without their rights being reduced or eliminated with each passing day.

B. Equitable tolling is proper in FLSA cases and should be granted in this matter**.**

Equitable tolling is a doctrine that permits courts to extend statutes of limitations on a case-by-case basis in order to prevent inequity. See Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998). The equitable tolling doctrine is read into every federal

statute, including the FLSA. See U.S. v. $57,960.00 in U.S. Currency, 58 F. Supp. 2d 660, 664 (D.S.C. 1999) (citing Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)). The decision to invoke equitable tolling in a particular case lies exclusively within the sound discretion of the trial court. See Truitt, 148 F.3d at 648. The doctrine of equitable tolling does not require any misconduct on the part of the Defendant. See Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1330 (8th Cir. 1995); Lampf et al. v. Gilbertson, 501 U.S. 350, 363 (1991); Holmberg, 327 U.S. at 397. "Equitable tolling focuses on the employee's ignorance, not on any possible misconduct by the employer." Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir.) cert. denied, 502 U.S. 868 (1991).

The United States Supreme Court has held that early notice of the lawsuit is most critical to the effectiveness of the FLSA collective action process. See Hoffman-La Roche, 493 U.S. at 170 (the "benefits [of a collective action under Section 216(b) of the FLSA] depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate"). Although early notice in a collective action is clearly favored, the realities of litigation and each situation are such that this is not always possible. When this happens, the unintended and rather harsh consequence to the potential collective action member is that the person's FLSA claims are diminished.

Accordingly, to protect against diminishing claims and preserve the claims of "opt-in" members, Courts routinely grant requests for tolling of the statute of limitations in FLSA cases. See Castle v. Wells Fargo Financial, Inc., 2007 WL 1105118 (N.D. Cal. 2007) (observing that courts "have equitably tolled the statute of limitations… when

doing so is in the interest of justice")[17]; see also Stransky v. HealthONE of Denver, Inc., 868 F. Supp. 2d 1178, 1181 (D. Colo. 2012) (cataloguing several decisions that concluded FLSA tolling was appropriate for varied reasons, including time lost in court ruling on class certification); Roslies-Perez v. Superior Forestry Service, Inc., 652 F. Supp. 2d 887, 898 (M.D. Tenn. 2009); Baden-Winterwood v. Life Time Fitness, 484 F.Supp.2d 822 (S.D. Ohio 2007); Saunders v. ACE Mortgage Inc., 2005 WL3054594 (D. Minn. 2005) (Frank, J.)[18]; Cisneros v. Jinny Beauty Supply Co., 2004 WL 524482 (N.D. Ill 2004).[19]

Tolling stands especially appropriate where, as here, time spent obtaining court-supervised notice to potential class members is not attributable to any delay caused by Plaintiffs. See, e.g., Partlow v. Jewish Orphans' Home of Southern Cal., Inc., 645 F.2d 757, 760-61 (9th Cir. 1981) (equitable tolling proper where plaintiffs were without fault and "practical effect of not tolling the statute would be to bar forever any claim" the employees had against defendant); Castle, 2007 WL 1105118, *1; Cisneros, 2004 WL 524482, *1; Myers v. Copper Cellar Corp., 1996 WL 766505 (E.D. Tenn. 1996)[20]; Owens v. Bethlehem Mines Corp., 630 F. Supp. 309, 312-13 (S.D. W. Va. 1986) (tolling appropriate because of delay in ruling on certification); Baden-Winterwood v. Life Time Fitness, 484 F. Supp. 2d 822, 826 (S.D. Ohio 2007); Dixon v. Gonzales, 481 F.3d 324, 331 (6th Cir. 2007) (tolling appropriate where claim was delayed by "circumstances

[17] Ex. 33
[18] Ex. 34
[19] Ex. 35
[20] Ex. 36

beyond [plaintiff's] control").

Plaintiffs have proceeded with their Motion for Class Certification with speed and purpose. The Complaint in this action was filed just one month prior to Plaintiffs filing their motion. Plaintiffs have additionally attempted to spread notice of this action to their friends and coworkers through word of mouth; seven putative class members have already filed notices of consent. Defendants refused to agree to even a two week tolling period in exchange for the extension to Answer given by Plaintiffs. Given Plaintiffs' diligence in prosecuting this matter and their lack of control regarding the amount of time necessary for Defendants to respond to the Complaint and the Court to hear and decide this motion, Plaintiffs respectfully request that the statute of limitations be tolled from the date of this motion until 90 days after class members have received notice.

C. The FLSA's broad remedial purposes further support the requested relief.

The FLSA is a remedial statute intended to protect employees from substandard wages and provide workers an improved quality of life. See 29 U.S.C. §202; see also Hoffman-La Roche, 493 U.S. at 173 (recognizing "[t]he broad remedial goal of the [FLSA]"). By equitably tolling the limitations period, the Court will help mitigate the fear of "opt-ins" seeing their claims diminished over the time that it will necessarily take to hear and decide the certification issue under the existing schedule and the Court's stated practices. In this way, the Court will allow potential collective action members the full benefits to which they are entitled under the FLSA.

D. Defendants will not be prejudiced by the requested relief.

Defendants have already enjoyed undeniable benefits in this case in terms of reducing their exposure for the claims of potential collective action members because of time that has already passed. Defendants will not be prejudiced by the requested relief in any way. See Baden-Winterwood, 484 F. Supp. 2d at 828-29 (stating that a defendant is fully aware of the scope of its potential liability and is not prejudiced by the tolling of "opt-in" member claims when Plaintiffs' complaint provides notice that the case is brought for all persons similarly situated, as a collective action). No witnesses or documents will become unavailable, Defendants will incur no extra costs or fees, and no previous work will be rendered moot. The only result of a brief tolling will be that some deserving class members who choose to participate in this action may preserve more of their rights for a slightly longer period.

CONCLUSION

Having previously decided many conditional certification motions, this Court is well-versed on the standard applied at the first step of the § 216(b) similarly situated analysis. Through their Complaint and supporting declarations, Plaintiffs have easily established a "colorable basis" for their claim that they were improperly denied overtime compensation. Plaintiffs respectfully request that the Court: 1) conditionally certify this case as a collective action; 2) order Defendants to identify all Admissions and Admissions Agreement Representatives during the statutory period; 3) authorize the issuance of Plaintiffs' proposed notice to be mailed by Plaintiffs' counsel to all potential opt-in plaintiffs; 4) require Regency to post the notice at its headquarters; 5) permit

Plaintiffs to send subsequent reminder letters; and 6) toll the statute of limitations from the date of this motion until 90 days after class members receive Court authorized notice of this action.

Dated: March 22, 2013

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