

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KHAN KUDO, Individually and on Behalf of All Other
Persons Similarly Situated,

Plaintiffs,

- against -

PANDA RESTAURANT GROUP, INC. and PANDA
EXPRESS, INC.,

Defendants.
-----X

DECISION AND ORDER

No. 09-CV-0712 (CS)

Appearances:

Mary E. Brady Marzolla
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Counsel for Plaintiffs

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Seibel, J.

Before the Court is Plaintiffs' motion pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 207(a)(1), 216(b), for conditional certification of a collective action and court-authorized notice to potential opt-in plaintiffs, as well as for Defendants' production of contact information for potential opt-in plaintiffs.

I. BACKGROUND

On January 26, 2009, Plaintiff Khan Kudo brought suit on behalf of himself and others similarly situated against his former employers, Defendants Panda Restaurant Group, Inc. and Panda Express, Inc. (collectively, “Panda Express”),¹ alleging that Defendants failed to pay him and other restaurant General Managers overtime compensation in accordance with the Fair Labor Standards Act (“FLSA”).² (Doc. 1.) Defendants own and operate over 1000 Panda Express restaurants nationwide. (Marzolla Aff. ¶ 6.)³ Each Panda Express restaurant has one General Manager (“GM”) as well as various back-of-the-house and front-of-the-house workers, and some restaurants also have an Assistant Manager and/or Chef. (*Id.*) Each GM reports up Defendants’ hierarchy to Multi-Unit Managers and Area Coaches of Operations (“ACOs”), who report to Regional Directors of Operations (“RDOs”), and so on, up to the Chairman and CEO. (*Id.* ¶ 7.) Kudo worked as a GM for Panda Express for ten years, from 1998 to 2009, at various restaurant locations, including in Jersey City, New Jersey, Cleveland, Ohio, Columbus, Ohio, and West Nyack, New York. (Compl. ¶ 8; Kudo Decl. ¶¶ 6–8.)⁴

¹ Kudo alleges that “Panda Restaurant Group, Inc.[] directs the operations and decision-making of . . . Panda Express, Inc., and also maintains the interrelationship of operations, centralized control of labor relations, common management and/or common ownership and financial control with and over Panda Express, Inc.” (Complaint (“Compl.”), (Doc. 1), ¶ 11.)

² Kudo also asserted claims on behalf of himself and others similarly situated for violation of New York Labor Law and unjust enrichment, as well as an individual claim for retaliation. The instant motion, however, applies only to the FLSA claim.

³ “Marzolla Aff.” refers to the Affidavit of Mary E. Brady Marzolla, dated August 26, 2010 and filed under seal.

⁴ “Kudo Decl.” refers to the Declaration of Khan Kudo, dated August 24, 2010 and filed under seal.

Kudo maintains that Defendants misclassified him and other GMs located outside California⁵ as executive employees who were exempt from the FLSA's overtime provisions when, in fact, they were performing primarily non-managerial work and were entitled to overtime pay. (Compl. ¶¶ 27–28, 35; Marzolla Aff. ¶¶ 9–10.) Specifically, Kudo maintains that Panda Express expected him to work, and he did in fact work, in excess of 50 hours per week, (Compl. ¶ 27), and that he spent at least 80 percent of those working hours performing non-managerial activities, such as “preparing food, taking and filling customers’ orders, taking inventory, receiving customers’ money in payment for their food and making appropriate change, removing trash, and cleaning,” (*id.* ¶ 28). Defendants, Kudo alleges, permitted him “little to no discretion” because corporate manuals and regional supervisors controlled virtually every aspect of his day-to-day responsibilities. (*Id.* ¶¶ 29–30, 32.)

In 2009 and 2010, six other individuals who had worked as GMs for Defendants filed forms with the Court consenting to be party plaintiffs pursuant to the FLSA's opt-in provision, 29 U.S.C. § 216(b).⁶ Those plaintiffs worked as GMs at various Panda Express restaurants

⁵ Plaintiffs specify that “[t]he proposed collective class includes all GMs who worked at any time for Panda Express from January 2006 to date nationwide, *except for the State of California*[,] where such GMs are already classified as non-exempt, are paid hourly, and receive overtime pay.” (Plaintiffs’ Memorandum of Law in Support of Motion for Conditional Certification Pursuant to 29 U.S.C. § 216(b) and for Collective-Action Notice (“Pls.’ Mem.”), dated August 25, 2010 and filed under seal, at 1 (emphasis added).) Plaintiffs maintain that “[t]he only difference between the non-exempt California[-]based GMs and exempt non-California GMs is their classification status.” (*Id.*) Defendants counter that they “pay overtime to their California-based [GMs] to ensure compliance with *California* law, and not because they consider them to be nonexempt under *federal* law.” (Defendants’ Brief in Opposition to Plaintiffs’ Motion for Conditional Certification (“Defs.’ Opp’n”), dated September 27, 2010 and filed under seal, at 19 n.4 (emphasis in original).)

⁶ Those plaintiffs who have opted in are Cristina Lelesch, Jeffrey Countryman, Alex Liu, Keittisak Nachampassack, Norman Feng, and Rei Ryan (together with Kudo, “Plaintiffs”).

around the country, including in Florida, New Jersey, North Carolina, Ohio, and Texas, (Marzolla Aff. ¶ 8), and have sworn, like Kudo, to having performed non-managerial work and not having been paid overtime compensation. On August 26, 2010, Plaintiffs filed the instant motion to conditionally certify the FLSA claim as a collective action in accordance with 29 U.S.C. § 216(b), to authorize notice to be sent to potential opt-in plaintiffs, and to direct production of potential opt-in plaintiffs' contact information.

II. DISCUSSION

A. Legal Standards

1. FLSA Overtime Compensation Requirements and the "Bona Fide Executive" Exemption

The FLSA requires employers to pay their employees at a rate of "not less than one and one-half times the regular rate at which [the employee] is employed" for each hour worked in excess of 40 hours in a single week. 29 U.S.C. § 207(a)(1). Certain employees, however, are exempt from this requirement. The relevant exemption, for the purposes of this case, is for employees "employed in a bona fide executive, administrative, or professional capacity." *Id.* § 213(a)(1). "The 'bona fide executive' exemption is an affirmative defense on which the defendant bears the burden of proof and is narrowly construed against the employer." *Damassia v. Duane Reade, Inc.*, No. 04-8819, 2006 WL 2853971, at *2 (S.D.N.Y. Oct. 5, 2006) (citation omitted). Federal regulations make clear that this exemption may only be applied to those employees who are

- (1) [c]ompensated on a salary basis at a rate of not less than \$455 per week . . . ;
- (2) [w]hose primary duty is management of the enterprise in which the employee[s] are employed or of a customarily recognized department or

(Docs. 11, 13–16, 48.) Former GM Julie Chang opted in on February 12, 2009, (Doc. 2), but was terminated from the case for lack of prosecution on October 26, 2010, (Doc. 53).

subdivision thereof; (3) [w]ho customarily and regularly direct[] the work of two or more other employees; and (4) [w]ho [have] 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).⁷ But the exemption is not available for employees “who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.” *Id.* § 541.704.

2. FLSA Collective Actions and Court-Authorized Notice

The FLSA provides that a collective action “may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). Under the FLSA, potentially similarly situated employees must opt in to the collective action and become party plaintiffs by filing a written consent form with the Court. *Id.* “This stands in contrast to class action suits under [Federal Rule of Civil Procedure] 23, in which individuals are deemed members of the class unless they opt out of the suit.” *Cunningham v. Elec. Data Sys. Corp.*, 754 F. Supp. 2d 638, 643 (S.D.N.Y. 2010). “The ‘similarly situated’ standard is far more lenient, and indeed, materially different, than the standard for granting class certification under [Rule] 23.” *Id.* (internal quotation marks omitted). Under the FLSA, “unlike class certification under [Rule] 23, no showing of numerosity, typicality, commonality and representativeness need be made for certification of a

⁷ Federal regulations provide guidance to courts applying 29 C.F.R. § 541.100(a) by defining several of its key terms in detail. *See, e.g., id.* §§ 541.102 (defining “management”), 541.103 (defining “department or subdivision”), 541.105 (defining “particular weight”), 541.700 (defining “primary duty”). As explained below, however, the merits of Plaintiffs’ claims as determined by application of the relevant regulatory definitions need not be resolved at this stage, and the regulations are provided herein only to aid in analyzing the instant motion.

representative action.” *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 632 (S.D.N.Y. 2007) (internal quotation marks omitted).

Although the FLSA “does not expressly provide for court-authorized notice to potential opt-in plaintiffs in a collective action, it is well settled that district courts have the power to authorize an FLSA plaintiff to send such notice.” *Damassia*, 2006 WL 2853971, at *2 (internal quotation marks omitted); see *Braunstein v. E. Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1978) (court-authorized notice in an appropriate case “comports with the broad remedial purpose of the [FLSA], . . . as well as with the interest of the courts in avoiding multiplicity of suits”). Similarly, a district court may “require an employer to disclose the names and addresses of potential plaintiffs” to whom notice might be sent. *Damassia*, 2006 WL 2853971, at *2.

District courts in this Circuit employ a two-step process in analyzing motions to certify collective actions. *Myers v. Hertz Corp.*, 624 F.3d 537, 554–55 (2d Cir. 2010). At the first step, the court must make a “preliminary determination” that the potential opt-in plaintiffs are sufficiently “similarly situated” to the named plaintiffs that notice of the collective action may be sent to them. *Cunningham*, 754 F. Supp. 2d at 644; *Indergit v. Rite Aid Corp.*, Nos. 08-9361, 08-11364, 2010 WL 2465488, at *3 (S.D.N.Y. June 16, 2010); *Damassia*, 2006 WL 2853971, at *3. At this stage, the named plaintiffs need only make a “modest factual showing” that, along with the potential opt-in plaintiffs, they “together were victims of a common policy or plan that violated the law.” *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997); see *Indergit*, 2010 WL 2465488, at *3. The required “modest factual showing” is a “relatively lenient evidentiary standard.” *Francis v. A&E Stores, Inc.*, No. 06-1638, 2008 WL 4619858, at *2 (S.D.N.Y. Oct. 16, 2008) (internal quotation marks omitted) (adopting report and recommendation). Indeed, various courts have described the plaintiffs’ burden at this stage as

“minimal.” *See, e.g., Indergit*, 2010 WL 2465488, at *3; *Francis*, 2008 WL 4619858, at *3; *Lynch v. United Servs. Auto. Ass’n*, 491 F. Supp. 2d 357, 368 (S.D.N.Y. 2007); *Damassia*, 2006 WL 2853971, at *3; *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 197 (S.D.N.Y. 2006). And while “[t]he ‘modest factual showing’ cannot be satisfied simply by unsupported assertions, . . . it should remain a low standard of proof because the purpose of this first stage is merely to determine *whether* ‘similarly situated’ plaintiffs do in fact exist.” *Cunningham*, 754 F. Supp. 2d at 644 (emphasis in original) (citing *Myers*, 624 F.3d at 555). As such, “[a]t this procedural stage, the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations”—that is, it does not “weigh the merits of the underlying claims in determining whether potential opt-in plaintiffs may be similarly situated.” *Lynch*, 491 F. Supp. 2d at 368. It need only determine whether a plaintiff has “demonstrate[d] a ‘factual nexus’ between his or her situation and the situation of other current and former employees.” *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (quoting *Hoffmann*, 982 F. Supp. at 262).

“At the second stage, the district court will, on a fuller record, determine whether a so-called ‘collective action’ may go forward by determining whether the plaintiffs who have opted in are in fact ‘similarly situated’ to the named plaintiffs.” *Cunningham*, 754 F. Supp. 2d at 644 (internal quotation marks omitted) (citing *Myers*, 624 F.3d at 555). This is often referred to as the “decertification” stage. *See Damassia*, 2006 WL 2853971, at *3 (“If the factual record reveals that the additional plaintiffs are not similarly situated to the original plaintiffs, the collective action is ‘decertified,’ and the claims of the opt-in plaintiffs are dismissed without prejudice.”). At this stage, the Court utilizes a “more stringent factual determination as to whether members of the class are, in fact, similarly situated.” *Lynch*, 491 F. Supp. 2d at 368.

Defendants argue that because Plaintiffs have undertaken substantial discovery prior to moving for conditional certification and court-authorized notice, they should be held to a heightened standard of analysis at the certification stage. (Defs.' Sur-Reply at 1 n.1.)⁸ In support of their argument, however, Defendants point only to authority from outside the Second Circuit. (*See id.* (collecting cases from courts located in the Third, Sixth, and Eighth Circuits).) The authority within this Circuit supporting the application of a heightened standard to post-discovery conditional certification motions is much thinner. It is true that one fairly recent case in this District supports Defendants' argument. In *Torres v. Gristede's Operating Corp.*, No. 04-3316, 2006 WL 2819730 (S.D.N.Y. Sept. 29, 2006), the Court held that "[p]ost-discovery, as is the case with the instant motion, the Court applies heightened scrutiny to this inquiry as compared to pre-discovery." *Id.* at *9. *Torres*, however, finds little support within the Circuit and, in fact, the Eastern District of New York in *Gortat v. Capala Bros., Inc.* recently declined to apply *Torres* under identical circumstances. *See* No. 07-3629, 2010 WL 1423018, at *9 n.12 (E.D.N.Y. Apr. 9, 2010). As the Court in *Gortat* observed,

Torres adopts this standard without discussion, and the case cited in support, *Harrington v. Educ. Mgmt. Corp.*, No. 02 Civ. 0787 (HB), 2002 U.S. Dist. LEXIS 8823, at *4-5, 2002 WL 1009463 (S.D.N.Y. May 17, 2002), holds only that "[i]t is only later down the road that the court need engage in a second more heightened stage of scrutiny as to whether the plaintiffs are similarly situated for the purposes of maintaining the collective action," and citing in turn two cases more consistent with the view that heightened scrutiny is appropriate only after notice and opportunity to opt in. *See Jackson v. N.Y. Tel. Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995) ("The inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted."); *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 480 (E.D.N.Y. 2001) (distinguishing the lenient standard "at the notice stage" from the second stage when "the case is ready for trial").

⁸ "Defs.' Sur-Reply" refers to Defendants' Sur-Reply Memorandum in Opposition to Plaintiffs' Motion for Conditional Certification. (Doc. 54.)

Id.; see *Cunningham*, 754 F. Supp. 2d at 646. (observing that not all courts in this Circuit have followed *Torres*).

Nor has the Second Circuit adopted a heightened standard for post-discovery motions. Indeed, in *Myers v. Hertz Corp.*, which was decided after *Torres*, the Second Circuit reaffirmed the traditional two-step class certification process described above, observing that “the district courts of this Circuit appear to have coalesced around a two-step method, a method which, while . . . not required by the terms of FLSA or the Supreme Court’s cases, we think is sensible.” 624 F.3d at 554–55. *Myers* strongly suggests that the “modest factual showing” standard should apply so long as the motion for conditional certification is made before the Court authorizes notice to be sent to potential opt-in plaintiffs. *Id.* at 555 (“The court may send this notice *after* plaintiffs make a ‘modest factual showing’”) (emphasis added). This is consistent with caselaw at the district court level. As the Court in *Gortat* noted,

The heightened scrutiny standard is only appropriate after the opt-in period has ended and the court is able to examine whether the *actual* plaintiffs brought into the case are similarly situated. It would not sensibly serve the purposes of the two-step scheme to impose on plaintiffs a heightened burden of proving that as-yet-unknown plaintiffs are similarly situated.

2010 WL 1423018, at *10 (emphasis in original) (citing *Davis v. Lenox Hill Hosp.*, No. 03-3746, 2004 WL 1926086, at *7 (S.D.N.Y. Aug. 31, 2004); *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F. Supp. 2d 101, 105 (S.D.N.Y. 2003); *Chowdhury v. Duane Reade, Inc.*, No. 06-2295, 2007 WL 2873929, at *3 (S.D.N.Y. Oct. 2, 2007)); see *Brickey v. Dolgencorp., Inc.*, No. 06-6084, 2011 WL 643256, at *3 (W.D.N.Y. Feb. 23, 2011) (applying “modest factual showing” standard at notice stage, even though plaintiff had already engaged in “an unusually significant amount of pre-certification discovery”); *Cunningham*, 754 F. Supp. 2d at 645 (observing that “[e]ven where

the parties have undertaken substantial discovery, our courts have continued to use the first-stage certification analysis,” and collecting cases). Indeed, relevant language in many other district court cases in this Circuit comports with this analysis. *See, e.g., Indergit*, 2010 WL 2465488, at *4 (“*After plaintiffs have opted in* and after discovery, courts conduct a more stringent “second tier” analysis upon a full record to decide whether the additional plaintiffs are similarly situated to the original plaintiffs.”) (emphasis added); *Lynch*, 491 F. Supp. 2d at 368 (“Once the court determines that potential opt-in plaintiffs may be ‘similarly situated’ *for the purposes of authorizing notice*, the court ‘conditionally certifies’ the collective action, and the plaintiff sends court-approved notice to potential members.”) (emphasis added); *Guzman v. VLM, Inc.*, No. 07-1126, 2007 WL 2994278, at *2 (E.D.N.Y. Oct. 11, 2007) (“Due to the conditional nature of the certification *contemplated at the notice stage*, the burden on plaintiffs is not a stringent one, and the court need only reach a preliminary determination that potential plaintiffs are similarly situated.”) (emphasis added) (internal quotation marks omitted).

Finding *Gortat* persuasive, and declining to depart from the well-established two-step process described *Myers v. Hertz Corp.*, I apply the more lenient “modest factual showing” standard to Plaintiffs’ motion. As discovery has been conducted, however, I consider in that analysis the evidence obtained and submitted by both parties. *See Cuzco*, 477 F. Supp. 2d at 632 n.3.

B. Plaintiffs Have Made a Modest Factual Showing that They Are “Similarly Situated” to Potential Opt-In Plaintiffs

Plaintiffs’ motion is supported by, among other things, the allegations in Kudo’s complaint, his own declaration and that of four opt-in plaintiffs (Lelesch, Countryman, Feng, and Ryan), deposition testimony of Defendants’ higher-level employees (most notably, Director of

Learning and Development James Abraham and ACO Sheila Yap), and voluminous internal corporate documents, including job descriptions, training materials, and operation manuals. Courts in this district have routinely conditionally certified collective actions and authorized notice to putative class members on more modest records than in this case. *See, e.g., Indergit*, 2010 WL 2465488, at *6 (basing conditional certification on three affidavits and corporate documentation); *Frederick v. Dreiser Loop Supermarket Corp.*, No. 06-15341, 2008 WL 4724721, at *1 (S.D.N.Y. Oct. 24, 2008) (three employees' declarations and one defendant's deposition); *Lynch*, 491 F. Supp. 2d at 369 (complaint's allegations, four opt-in plaintiffs' and defendant's 30(b)(6) representative's depositions, and three opt-in plaintiffs' declarations); *Sipas v. Sammy's Fishbox, Inc.*, No. 05-10319, 2006 WL 1084556, at *2 (S.D.N.Y. Apr. 24, 2006) (three affidavits and complaint's allegations); *Masson v. Ecolab, Inc.*, No. 04-4488, 2005 WL 2000133, at *14 (S.D.N.Y. Aug. 17, 2005) (complaint, three plaintiff declarations, and admission by defendant).

Plaintiffs' declarations support their claim that all Panda Express GMs outside of California—regardless of geographic location or restaurant venue—performed the same duties and were exempted from overtime compensation. Plaintiffs demonstrate personal experience as GMs, as well as observation of other GMs, across a range of Panda Express restaurants. (*See* Kudo Decl. ¶¶ 6–9 (trained in mall venues in New Jersey and Ohio; worked in mall venue in New York; observed operations at stand-alone and casino venues in New Jersey, Pennsylvania, and Maryland); Lelesch Decl. ¶¶ 6–8 (trained in New Jersey mall venue and Ohio drive-thru venue; worked in Ohio mall venues); Countryman Decl. ¶¶ 5, 7 (trained and worked in mall and stand-alone venues in Florida); Feng Decl. ¶¶ 5, 7–10 (trained and worked at mall, drive-thru, and theme park venues in North Carolina); Ryan Decl. ¶¶ 5–6 (trained and worked at mall and

drive-thru venues in Texas).⁹ Regardless of differences in restaurant location or type, both training for the GM position and actual GM responsibilities were uniform. (See Kudo Decl. ¶¶ 9, 11, 16; Lelesch Decl. ¶¶ 8–10; Countryman Decl. ¶¶ 5–7; Feng Decl. ¶¶ 6–12; Ryan Decl. ¶¶ 5–6, 8). Plaintiffs have also sworn to the fact that their discretion as GMs was substantially limited. Specifically, they note that though a barrage of emails and highly detailed corporate policies, Plaintiffs’ superiors controlled virtually every aspect of restaurants’ day-to-day operations, including hours of operation, food preparation, cleaning methods, store layout, pricing, payroll budgets, recruiting, staffing, and scheduling. (See Kudo Decl. ¶¶ 18, 23; Lelesch Decl. ¶¶ 14–15; Countryman Decl. ¶¶ 15–16; Feng Decl. ¶ 18–19; Ryan Decl. ¶¶ 12–13.) Finally, Plaintiffs were directed to and regularly did work over 40 hours per week and never received overtime compensation. (See Kudo Decl. ¶ 3 (worked at least 60 hours/week); Lelesch Decl. ¶ 3 (same); Countryman Decl. ¶ 3 (worked from 50–90 hours/week); Feng Decl. ¶ 3 (directed to work at least 45 hours/week); Ryan Decl. ¶ 3 (worked at least 50–60 hours/week).) Such sworn statements have been held sufficient to warrant conditional certification and the issuance of court-authorized notice. See, e.g., *Cohen v. Gerson Lehrman Grp., Inc.*, 686 F. Supp. 2d 317, 331 (S.D.N.Y. 2010) (“The Complaint and the [plaintiff’s] Affidavit are sufficient to warrant preliminary certification of a collective action in this case. In so concluding, I reiterate that there is a low bar for allegations required for collective action certification, that a plaintiff’s burden is minimal, and that a court making a preliminary certification determination does not resolve

⁹ “Lelesch Decl.” refers to the Declaration of Cristina Lelesch, dated August 17, 2010. “Countryman Decl.” refers to the Declaration of Jeffrey Countryman, dated August 18, 2010. “Feng Decl.” refers to the Declaration of Norman Feng, dated August 16, 2010. “Ryan Decl.” refers to the Declaration of Rei Ryan, dated August 16, 2010. Each has been submitted with Plaintiffs’ moving papers and, along with Kudo’s declaration, filed under seal.

factual disputes, decide ultimate issues on the merits, or make credibility determinations.”) (internal quotation marks and citations omitted); *Harrington v. Educ. Mgmt. Corp.*, No. 02-0787, 2002 WL 1009463, at *2 (S.D.N.Y. May 17, 2002) (plaintiff’s statement in affidavit that “in response to his complaints to management that he was regularly denied overtime pay, his supervisors informed him that it was the defendants’ policy not to pay assistant directors overtime compensation because the position was classified as exempt” deemed sufficient).

In addition to their declarations, Plaintiffs have offered evidence of Defendants’ official job description for Panda Express GMs, which does not distinguish among GMs at different geographic locations or restaurant types. (*See* Marzolla Aff. Ex. G.) Indeed, Defendants’ Director of Learning and Development, James Abraham, confirmed that the job description described the GM position as it existed throughout the restaurant chain. (*See* Abraham Dep. at 81–82; *see also* Yap Dep. at 107–10 (GM job description viewable by all GMs in electronic form through companywide computer system in place during relevant time period).)¹⁰

A trove of other internal corporate documents support Plaintiffs’ claim that GM training and responsibilities were uniform and highly controlled. For example, Plaintiffs point to corporate training materials for GMs, (*see* Marzolla Aff. Ex. J, at PX0162176–203), which Defendants admit are uniform across the company, (*see* Abraham Dep. at 25 (“training leadership programs” are “national in scope in the sense that [GMs] from all over the country” undergo them), 79 (classroom training and support center are “the same” for GMs “all over the company”)); Chai Dep. at 21 (all GMs “receive same training” because they have the “same

¹⁰ “Abraham Dep.” refers to the Deposition of James Abraham, taken on December 17, 2009. (Marzolla Aff. Ex. C.) “Yap Dep.” refers to the Deposition of Sheila Yap, taken on November 10, 2009. (*Id.* Ex. D.)

duties”); Marzolla Aff. Ex. E, at 3 (Defendants’ admission, in response to Plaintiffs’ request for admissions, that training materials to which Plaintiffs point “were available for training to Panda Express, Inc. personnel who were training leaders and used in the ordinary course of business”)).¹¹ Moreover, Plaintiffs point to a series of operation manuals issued by Defendants dictating policies and procedures to be followed at all Panda Express restaurants, including, among other things: task checklists, (Marzolla Aff. Ex. P); guest service guidelines, (*id.* Ex. Q); labor deployment charts, (*id.* Ex. R); cleaning standards, (*id.* Ex. S); cleaning schedules, (*id.* Ex. T); maintenance standards, (*id.* Ex. U); equipment repair manuals, (*id.* Ex. V); food safety standards, (*id.* Ex. Y); cash handling policies, (*id.* Ex. Z); invoice processing procedures, (*id.* Ex. AA); service call procedures, (*id.* Ex. BB); security policies and procedures, (*id.* Ex. CC); and pricing policies, (*id.* Ex. DD). (*See id.* Ex. E, at 4 (Defendants’ admission, in response to Plaintiffs’ request for admissions, that operations manuals were “available to Panda Express, Inc.[] General Managers and used in the ordinary course of business).)

Further demonstrating that such policies and procedures were applied nationwide, Plaintiffs have produced a series of emails from their superiors and other corporate managers distributed not to particular restaurants or even particular geographic regions, but rather to several geographic regions across the country, directing the implementation of several of the above-listed policies and practices as well as various other policies and practices regarding day-to-day operation of Panda Express restaurants. (*See id.* Ex. MM.) Such internal documents “demonstrate that [Defendants’] corporate management exercises a great degree of control over

¹¹ “Chai Dep.” refers to the Deposition of Charlie Chai, taken on March 10, 2010, in the case *Zhang v. Panda Restaurant Group, Inc.*, No. 09-0711 (S.D.N.Y. filed Jan. 26, 2009). (Marzolla Aff. Ex. M.) Chai is a former ACO and current GM and Training Leader for Defendants. (*Id.* ¶ 17.)

the operation of” individual restaurants, which makes it “highly likely” that GMs at each restaurant “perform similar duties.” *Indergit*, 2010 WL 2465488, at *5 (addressing defendant’s internal documents, including “Store Management Guide,” which “provide[d] store managers with step-by-step instructions on how to perform common tasks”).

Plaintiffs also provide outside support for their sworn statements that they were directed to work over 40 hours per week and denied overtime compensation. For example, Plaintiffs have provided evidence that in 2004 Defendants implemented a program in accordance with which GMs around the country were required to work a minimum 45-hour workweek. (*See* Marzolla Aff. Ex. EE (internal presentation on program).) In fact, for scheduling purposes, GMs were directed to plan for 50-hour workweeks—45 hours for scheduled work, and 5 hours for “non-scheduled, unplanned work.” (*Id.*) Abraham admitted in his deposition that the program, though having been initiated in California, was rolled out nationwide and applied to all GMs. (Abraham Dep. at 219 (stating that Defendants were “looking to keep the same work schedule that was expected of everyone throughout” the country).) Despite this requirement, as Defendants have admitted several times, all Panda Express GMs outside of California were classified as exempt from overtime compensation. (*See id.* at 233; *see also* Marzolla Aff. Ex. F, at 6–7 (Defendants’ response to Plaintiffs’ interrogatory: “[Defendants have] always maintained that [their] General Managers are exempt employees, and the treatment of General Managers as exempt employees has always been the practice/norm. The one exception to this is California, where since 2005, although meeting the qualifications for exempt status under the [FLSA], all General Managers have received overtime.”); Yap Dep. at 37 (GMs “don’t clock in and clock out”).) This further supports conditional certification and court-authorized notice. *See, e.g., Gorey v. Manheim Servs. Corp.*, No. 10-1132, 2010 WL 5866258, at *4 (S.D.N.Y. Nov. 10,

2010) (certification appropriate where plaintiff's declaration attesting to uniform duties and required overtime hours supported by "Defendants' admission that it classifies all outside sales representatives and some dealer sales representatives as FLSA exempt"); *Francis*, 2008 WL 4619858, at *3 (certification appropriate where plaintiff's declaration attesting to required overtime hours supported by "deposition testimony of the vice-president of operations and the district manager establish[ing] that it is at least a widespread practice to classify as exempt [assistant store managers] hired from outside the company"); *see also Indergit*, 2010 WL 2465488, at *5 (certification appropriate where job description document "indicate[d] that the decision to classify Rite Aid store managers as exempt was made at the national level; the job description list[ed] the 'FLSA status' as 'exempt'").

Defendants' arguments to the contrary are unavailing. Defendants devote much of their briefs to pointing out micro-level differences in GMs' daily tasks. They argue that Panda Express restaurants differ in location, venue, size, and sales volume, therefore requiring different numbers and combinations of restaurant personnel and necessitating different tasks and divisions of labor. (Defs.' Opp'n at 2.) Citing to excerpts of Plaintiffs' deposition testimony, (*see Margello Decl. Exs. 12-16*),¹² as well as declarations from mostly higher level employees, such as ACOs and RDOs, (*see id. Exs. 1-3, 5-9*),¹³ they argue that such differences translate into

¹² "Margello Decl." refers to the Declaration of Sharon Margello in Support of Defendants' Opposition to Motion for Class Certification, dated September 27, 2010.

¹³ Defendants also provide the declaration of current GM and former ACO Joe Ho. (*See Margello Decl. Ex. 4.*) Plaintiffs argue that Ho's testimony is suspect because he was presumably demoted within the company, (*see Plaintiffs' Memorandum of Law in Reply to Defendants' Opposition to Plaintiffs' Motion for Certification*, dated October 12, 2010 and filed under seal, at 3), but, as noted above, the Court does not make credibility determinations when deciding whether to conditionally certify a collective action and issue notice to potential opt-in

disparities in “(a) store concept; (b) training and supervision of employees; (c) employee selection; (d) scheduling; (e) the performance of duties such as cooking, cleaning, and serving customers; and (f) marketing.” (Defs.’ Opp’n at 2–3; *see id.* at 3–11, 19–21.) For example, they point out that GMs at drive-thru locations must clean the surrounding parking lot area, while GMs at airport locations must adapt to fluctuations in business caused by travel delays, (*id.* at 4); that some GMs also served as Training Leaders and therefore spent more time than other GMs training employees, (*id.* at 6); that some GMs have final authority in hiring, firing, or scheduling decisions, while others must consult with their ACOs, (*id.* at 7–9); and that GMs devoted different percentages of their workdays to cooking and serving food, (*id.* at 9–10). As a result, they argue, “[t]reating a [GM] as an exempt employee *may* violate the law, but only if that employee’s *actual duties* fail to meet any of the tests set forth in the FLSA,” and that “to determine whether Defendants are liable for overtime violations, the Court will need to conduct an individualized inquiry into the time spent by each opt-in plaintiff.” (*Id.* at 12 (emphasis in original).)

Defendants’ argument is both common and commonly rejected at this stage of an FLSA collective action. For example, in *Damassia v. Duane Reade, Inc.*, the defendant put forth a similar argument regarding minor differences in plaintiffs’ responsibilities among the defendants various stores. 2006 WL 2853971, at *6. Specifically, the defendants pointed to deposition testimony demonstrating, among other things,

that some plaintiffs took breaks more often than others; that some plaintiffs had the authority to arrange store displays, while others did not; and that there was

plaintiffs. For the same reason, I disregard the parties’ arguments in reply and sur-reply regarding the credibility of each others’ witnesses. (*See* Defs.’ Sur-Reply at 2–4; Affidavit of Mary E. Brady Marzolla in Reply to Defendants’ Opposition, dated October 12, 2010, ¶¶ 5–14.)

variation among the stores at which plaintiffs worked with respect to the stores' location, their layout, their hours of operation, the amount of customer traffic, the amount of office space, . . . the amount of money in the safe, . . . and the frequency with which outside cleaning crews visited the store.

Id. The Court, however, rejected the notion that such differences were relevant to a determination of whether the plaintiffs were common victims of an illegal application of the FLSA's "bona fide executive" exemption. *Id.* It noted that "[o]n defendant's logic, no group of opt-in plaintiffs would ever be 'similarly situated' unless they were clones of one another working in completely identical stores, in identical neighborhoods, with identical clientele." *Id.*; *see, e.g., Indergit*, 2010 WL 2465488, at *8 ("[Plaintiff] is not required to demonstrate at this early stage that his duties were identical to those of all other store managers. Instead, he must show that he was similarly situated to other store managers with respect to the claimed violation of the FLSA.");¹⁴ *Frederick*, 2008 WL 4724721, at *1 ("Although, as Defendants note, the proposed recipients of notice differ in job responsibilities, hours worked, and other details of employment, these differences do not undermine Plaintiffs' showing that they share a common claim that Defendants violated the FLSA."). That logic applies with equal force here: Plaintiffs need not show that GMs' duties were identical—only that there were sufficiently "similarly situated" with respect to Defendants' allegedly illegal employment practices.¹⁵

¹⁴ In *Indergit*, the defendant pointed to similar differences among the stores at which the plaintiffs worked, including differences in "store size and sales volume, total number of employees to be managed, each store's hours of operation, amount of customer traffic, nature of the store's clientele, number of truck deliveries, whether the store employs a cleaning crew, and physical differences of stores." 2010 WL 2465488, at *8 (internal quotation marks omitted).

¹⁵ Further, the evidence to which Defendants point in describing differences in GMs' day-to-day responsibilities demonstrates that where such differences are not attributable to restaurant size, venue, or sales volume, they are instead due to differences in the managerial styles of the GM's intermediate supervisors—their ACOs. In other words, if certain GMs were permitted

The common job descriptions, policies, and practices to which Plaintiffs point and personally attest are more than sufficient to meet the modest factual showing required at this stage. Indeed, where “there is evidence that the duties of the job are largely defined by comprehensive corporate procedures and policies, district courts have routinely certified classes of employees challenging their classification as exempt, despite arguments about ‘individualized’ differences in job responsibilities.” *Cohen*, 686 F. Supp. 2d at 330 (internal quotation marks omitted). Whatever “[d]isparate factual and employment settings” may exist among GMs “should be considered at the second stage of analysis.” *Francis*, 2008 WL 4619858, at *3 (internal quotation marks omitted). Where, as here, plaintiffs have met the minimal burden in place at the certification and notice stage, “Defendant[s] cannot overcome Plaintiff[s]’ showing by arguing that individual issues may dominate; rather, if after notice to the putative plaintiffs it appears that individual issues do in fact dominate, the Defendant may move the Court to decertify the class.” *Id.* (internal quotation marks omitted).

Defendants’ opposition seems to evince a misunderstanding of the “similarly situated” inquiry at this stage of the litigation. Defendants take effort to differentiate GMs’ duties from those of the hourly employees who worked under them, and to analogize their duties to those of higher level employees. (*See, e.g.*, Defs.’ Opp’n at 2–3, 5–9.) The question at this stage, however, is not whether the duties of Panda Express GMs outside California were, in fact, non-managerial in nature, or whether they were similar to those of hourly employees—that is, the question at this stage is not whether GMs outside California were properly or improperly

greater leeway in, for example, hiring, firing, or scheduling, it was because particular ACOs permitted such leeway, (*see* Defs.’ Opp’n at 6–9)—that is, because some ACOs departed from company policies applicable to GMs—not because Defendants’ corporate policies differentiated between GMs.

exempted from overtime compensation. That is a question relating to the merits of Plaintiffs' claim, which is to be answered at a later stage of this litigation. *See Francis*, 2008 WL 4619858, at *3. The question here is simply whether there is "some identifiable factual nexus which binds" Plaintiffs to other GMs outside California "as victims of a particular alleged discrimination," *Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988)—and Plaintiffs have demonstrated such nexus.¹⁶

Defendants' argument that determining the named plaintiffs' and potential opt-in plaintiffs' exemption status here "requires individualized inquiries into their job duties," (Defs.' Opp'n at 11), also ignores the purposes of the FLSA. "The FLSA envisions a collective action process in which claims of similarly situated workers are adjudicated collectively rather than individually." *Indergit*, 2010 WL 2465488, at *9 (citing *Hoffman La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). Were this Court to credit Defendants' argument, "no FLSA action that is premised upon an alleged misclassification under the executive exemption could be resolved through the collective action process, thereby defeating the stated purpose of the FLSA and

¹⁶ Plaintiffs too seem to misunderstand the distinction between the inquiry at this stage and the merits inquiry. They assert in their declarations that they spent a substantial amount of time performing the same tasks as hourly associates. (*See* Kudo Decl. ¶ 24 (at least 70% of time spent performing same tasks); Lelesch Decl. ¶ 20 (at least 90%); Countryman Decl. ¶ 20 (same); Feng Decl. ¶ 20 (at least 80%); Ryan Decl. ¶ 14 (at least 95%).) They have attested to the fact that corporate pressure regarding payroll budgeting—the satisfaction of which would ensure their supervisors' bonuses—resulted in them decreasing hourly employees' scheduling and performing the balance of the necessary work. (*See* Kudo Decl. ¶¶ 20–21; Lelesch Decl. ¶¶ 17–18; Countryman Decl. ¶¶ 8–9; Ryan Decl. ¶¶ 9–10.) And they have produced sample emails from their superiors evincing the pressure that was exerted on GMs to decrease hourly employees' scheduling. (*See* Marzolla Aff. Ex. FF.) While these facts are relevant insofar as they demonstrate that Plaintiffs endured similar working conditions, they are more properly considered at later stages of the litigation.

wasting judicial resources by requiring courts to consider each individual plaintiff's claims in a separate lawsuit." *Id.*

The cases to which Defendants cite in support of their argument are inapposite. In those cases, either the plaintiffs made a slimmer evidentiary showing of being "similarly situated" or the court applied a different standard altogether—or both. (*See* Defs.' Opp'n at 13–16.) Defendants, for example, rely heavily upon *Mike v. Safeco Insurance Co. of America*, 274 F. Supp. 2d 216 (D. Conn. 2003). (*See* Defs.' Opp'n at 12, 13, 18). In *Mike*, the plaintiff was employed as an insurance "Field Claims Representative" and classified as exempt from overtime compensation. *Id.* at 218–19. Despite the fact that all Field Claims Representatives employed by the defendant—like all Panda Express GMs—were subject to "a common job description and were expected to perform the tasks enumerated in that specific job description," the plaintiff did not "rely on [this] job description as evidence in support of his claim; in fact, [he] expressly disavow[ed] this job description and claim[ed] that, on a task-to-task, day-to-day basis, he spent the balance of his time performing non-administrative functions despite the fact that his job description call[ed] for him to perform some administrative functions." *Id.* at 221. The plaintiff sought to certify a collective action comprised not of Field Claims Representatives, but rather of any employees who primarily performed certain non-administrative functions—namely those who appraised damaged automobiles. *Id.* at 220–21. As a result, the "merits of [plaintiff's] claim [would] turn upon evidence relating to [plaintiff's] day-to-day tasks, and not upon any . . . company policy or decision," and, the court reasoned, would require it to "engage in an ad hoc inquiry for each proposed plaintiff to determine whether his or her job responsibilities were similar to" the named plaintiff's responsibilities. *Id.* at 221. The court therefore denied conditional certification. *Id.* Clearly, then, *Mike* does not apply here, as Plaintiffs do not

disavow Defendants' job description or company policies, but rather premise their claim on them. Indeed, no ad hoc inquiry for potential opt-in plaintiffs is necessary, as GMs outside of California are linked by uniformly applicable job descriptions, policies, and FLSA classifications. *See Aros v. United Rentals, Inc.*, 269 F.R.D. 176, 182–83 (D. Conn. 2010) (distinguishing *Mike* on same grounds); *Morrison v. Ocean State Jobbers, Inc.*, No. 09-1285, 2010 WL 1991553, at *4 (D. Conn. May 17, 2010) (same).

Similarly, in *Diaz v. Electronics Boutique of America, Inc.*, No. 04-0840, 2005 WL 2654270 (W.D.N.Y. Oct. 17, 2005), the court held that because “the responsibilities of [store managers] var[ied] in number and types of employees supervised and in types of stores managed—in terms of physical space, sales volume and geographic location”—“a highly fact-specific and detailed analysis of each [store manager’s] duties [was] required, making class treatment inappropriate.” *Id.* at *4. The plaintiffs in *Diaz*, however, failed to make any factual showing regarding employees other than themselves, and failed to point either to corporate documents demonstrating uniform policies applied to putative class members, or to admissions by the defendants regarding the same. *Id.* at *4–5. In any event, this Court has previously rejected *Diaz* as “against the weight of authority in undertaking [an individualized] analysis at the first stage of the certification process, rather than evaluating at the decertification stage whether the need for individual analysis makes a collective action inappropriate.” *Francis*, 2008 WL 4619858, at *3 n.3; *see Cohen*, 686 F. Supp. 2d at 329 (refusing to follow *Diaz* on same grounds); *see also Searson v. Concord Mortg. Corp.*, No. 07-3909, 2009 WL 3063316, at *6 (E.D.N.Y. Sept. 24, 2009) (distinguishing *Diaz* as addressing a putative collective action

involving two different types of employees each asserting a different wrong, as opposed to one type of employee to which a uniform policy was applicable).¹⁷

Similarly off base is *Morisky v. Public Service Electric & Gas Co.*, 111 F. Supp. 2d 493 (D.N.J. 2000). As in *Diaz*, the court in *Morisky* held that “[t]o determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee’s job responsibilities.” *Id.* at 498. In contrast to the instant case, however, the named plaintiffs consisted not of employees with common job responsibilities, but rather a range of technical employees—including a technical procedure writer, a nuclear plant pipe designer, a senior engineer who worked on leak rate testing, a senior staff engineer who worked on design change packages, and an installation and test engineer. *Id.* at 495–96. Moreover, the named plaintiffs made no showing that their job responsibilities were the same as or even similar to those of the potential opt-in plaintiffs. *Id.* at 498. In fact, rather than providing the court, as Plaintiffs did here, with a job description that was applicable to all potential opt-in plaintiffs, the plaintiffs in *Morisky* “d[id] not even discuss the job responsibilities of the opt-in plaintiffs. Instead, [they] reference[d] an extremely broad ‘general connection’ all plaintiffs [had] to the production of electricity.” *Id.* Further, despite being at the certification stage, the court did not apply the “modest factual showing” standard, but rather a heightened

¹⁷ Defendants also cite to *Myers v. Hertz Corp.*, No. 02-4325, 2007 WL 2126264 (E.D.N.Y. July 24, 2007), *aff’d*, 624 F.3d 537, which did not even address a conditional certification motion under the FLSA, but rather a motion for class certification under Rule 23, which requires an entirely different and much more stringent standard of analysis. *Id.* at *1. Although the opinion did discuss a previous decision on an FLSA conditional certification motion in the same case, it is clear that the previous decision applied the wrong standard, as *Myers* notes that the motion was denied due to a lack of “individualized proof” regarding “each potential plaintiff’s employment status,” and subsequently cites to *Diaz* for the proposition that “proof of exemption would require individualized factual inquiry.” *Id.* at *4.

standard of analysis, *id.* at 497–98—indeed, the same standard applied in *Torres* and that I decline to apply here. *See Aros*, 269 F.R.D. at 186 (refusing to follow *Morisky* on same grounds).¹⁸

Finally, Defendants challenge the admissibility of Plaintiffs' evidence. They argue that Plaintiffs' counsel's statement that Panda Express GMs perform the same work in different restaurants is inadmissible because she has no personal knowledge of such work. (Defs.' Opp'n at 17.) Similarly, they point out that Plaintiffs' statements in their declarations to the same effect are based on conversations with other, unidentified GMs and are therefore inadmissible as hearsay. (*Id.* at 18.) Assuming without deciding that such statements are inadmissible, Plaintiffs nonetheless proffer a myriad of admissible evidence in the form of Defendants' business records, as well as statements based on personal knowledge. Indeed, as discussed above, Defendants' internal documents depict highly detailed policies and procedures applicable to all GMs, irrespective of restaurant location, venue, size, or sales volume, and Plaintiffs have attested to uniform training in and application of such policies and procedures based both on their personal experiences while serving as GMs in different restaurants and on their own observations of GMs in other restaurants they visited and/or at which they trained.

¹⁸ Various other cases that Defendants include in string cites and that apply similar standards to the cases cited above have also been expressly rejected by courts in this Circuit. *See, e.g., Cohen*, 686 F. Supp. 2d at 329 (rejecting *Aguirre v. SBC Commc'ns, Inc.*, No. 05-3198, 2007 WL 772756 (S.D. Tex. Mar. 12, 2007), and *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265 (M.D. Ala. 2004), as applying same test as in *Diaz*); *Neary v. Metro. Prop. & Cas. Ins. Co.*, 517 F. Supp. 2d 606, 621 n.6 (D. Conn. 2007) (distinguishing and refusing to follow *King v. West Corp.*, No. 04-0318, 2006 WL 118577 (D. Neb. Jan. 13, 2006) due to application of heightened standard at certification stage).

As Plaintiffs have made a “modest factual showing” that, along with the potential opt-in plaintiffs, they were victims of a common policy or plan that violated the law, I hereby grant Plaintiffs’ motion for conditional certification of the collective action and for court-authorized notice.

C. Form of the Notice

Plaintiffs have included a proposed notice to be sent to potential class members, but Defendants have indicated that they object to the form of the notice. (*Id.* at 2 n.1.) As the parties did not address the issue of the propriety of the notice in their papers, I decline to address the issue at this time. *See Cunningham*, 2010 WL 5076703, at *13. The parties are hereby ORDERED to confer about the form and content of the notice that will be sent to potential opt-in plaintiffs. A joint proposed notice shall be submitted to this Court within three weeks of the date of this decision. If the parties cannot agree on a form of notice, they shall submit to the Court letter memoranda not to exceed three (3) pages by that date.

D. Production of Contact Information for Potential Opt-In Plaintiffs

Plaintiffs also move for an order directing the production of “a list of names and updated addresses of . . . all GMs employed by the Defendants from January 2006 to date in electronic format on an expedited basis.” (Pls.’ Mem. at 1.) Defendants have not opposed this request. Plaintiffs’ selection of January 2006 as the outside date for potential opt-in plaintiffs appears to be premised on the FLSA’s three-year statute of limitations, given that this case was filed on January 26, 2009. *See* 29 U.S.C. § 255. The statute, however, continues to run with respect to each potential plaintiff’s collective action claim until that plaintiff files the written consent form opting into the suit. *See Lee*, 236 F.R.D. at 198–99. Because of this, courts generally order plaintiffs to send notice to those employed during the three-year period prior to the date of the

order authorizing notice or prior to the mailing of the notice, rather than three years prior to the commencement of the lawsuit. See *Whitehorn v. Wolfgang's Steakhouse, Inc.*, No. 09-1148, 2011 WL 420528, at *5 (S.D.N.Y. Feb. 8, 2011). So as to best avoid future challenges to the timeliness of individual opt-in plaintiffs' actions, I hereby grant Plaintiffs' motion for the production of contact information, with the modification that such information be produced only for GMs employed by Defendants during the three-year period prior to the date of this Order, and that notice, once approved, be sent only to GMs employed by Defendants during the three-year period prior to the mailing of court-authorized notice.

III. CONCLUSION

For the foregoing reasons, I hereby GRANT Plaintiffs' motion for conditional certification of a collective action. I also GRANT in part Plaintiffs' motion for production of contact information for potential opt-in plaintiffs. I reserve decision on the form of the notice. No notices shall be sent until the Court authorizes the same in a separate order following the submissions discussed on page 25 above.

SO ORDERED.

Dated: June 3, 2011
White Plains, New York



CATHY SEIBEL, U.S.D.J.