IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Derrick Thomas, *On behalf of himself and those similarly situated*, Plaintiff, v. Papa John's International, Inc., et al, Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY AN FLSA COLLECTIVE ACTION AND TO AUTHORIZE NOTICE

Pursuant to 29 U.S.C. § 216(b), Plaintiff Derrick Thomas moves this Court for an Order conditionally certifying this action as a collective action under the Fair Labor Standards Act and designating Plaintiff as representative of the following Collective:

> All non-owner, non-employer delivery drivers who worked for Defendants at any of the "It's Only" Papa John's restaurants in the Cincinnati, Ohio area from June 16, 2014 to present.

In connection with this conditional certification, Plaintiff further moves this Court for an Order authorizing Plaintiff to send notices of this lawsuit to putative Collective members that will inform similarly situated individuals of their rights and provide them with an opportunity to join the action consistent with the Proposed Notice of Collective Action attached as Exhibit 6.

As set forth in the accompanying memorandum, this action meets each of the prerequisites for conditional collective action certification. Accordingly, Plaintiff respectfully asks that this Court grant this Motion.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO CONDITIONALLY CERTIFY AN FLSA COLLECTIVE ACTION AND TO AUTHORIZE NOTICE

1. Introduction

Plaintiff Derrick Thomas filed this action to recover unpaid minimum wages and unreimbursed expenses for delivery drivers who worked at any of the approximately twenty-seven Papa John's Pizza restaurants owned and controlled by Defendants Papa John's International, Inc., It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II, Inc., It's Only Pizza, Inc., It's Only Papa's Pizza LLC, and Michael Hutmier. Through this motion, Plaintiff seeks to take the first step in protecting the rights of his fellow delivery drivers by sending them Court-approved notice of this action and letting the workers decide whether to seek unpaid wages under the Fair Labor Standards Act ("FLSA").

Plaintiff meets the "fairly lenient standard" for conditional certification. *Feustel v. CareerStaff Unlimited, Inc.*, No. 1:14-cv-264, 2015 WL 13021897, *3 (S.D. Ohio Mar. 25, 2015) (Barrett, J). Through the Complaint's allegations, Plaintiff's declaration, Plaintiff's employment documents, and Defendants' representations, Plaintiff meets his modest burden to show that the proposed Collective members are similarly-situated to Plaintiff. Accordingly, conditional collective action certification is appropriate, and the Court should authorize notice pursuant to 29 U.S.C. § 216(b).

2. Factual and Legal Background of the Claims at Issue

2.1. The Parties

The proposed FLSA collective class ("the Collective") consists of all delivery drivers who worked at any of the approximately twenty-seven Papa John's Pizza restaurants in the Cincinnati, Ohio area from June 16, 2014 to present. Plaintiff is representative of the Collective and has been subjected to each of the wage and hour violations alleged herein. Plaintiff worked as a delivery driver for Defendants at their Montgomery Road store from February to May 2017. *See* Ex. 1, Declaration of Derrick Thomas ("Thomas Decl."); Ex. 2, Thomas Pay Records.

Defendants It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II, Inc., It's Only Pizza, Inc., and It's Only Papa's Pizza LLC own and operate the approximately 27 Cincinnati-area "It's Only" Papa John's restaurants. *See* Complaint, ¶ 82. Each of the "It's Only" Papa John's restaurant entities is owned and managed by Michael Hutmier. *See* Ex. 3, Sampling of "It's Only" Secretary of State Filings. Mr. Hutmier has been a Papa John's franchisee in the Cincinnati, Ohio area since 1992. *See* Ex. 4, Michael Hutmier Twitter Page. On his LinkedIn page, Mr. Hutmier lists himself as the "czar" of "It's Only." *See* Ex. 5, Michael Hutmier LinkedIn Page. Mr. Hutmier is individually liable to Plaintiff and the putative Collective under the FLSA. *See, e.g.*, 29 U.S.C. 203(d); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991). Defendant Papa John's International, Inc. is the franchisor of the "It's Only" Papa John's restaurants, and all other Papa John's franchises. *See* Complaint, ¶¶ 20-36, 129-208. Papa John's International, Inc. is liable to Plaintiff and the putative Collective as a joint employer under the FLSA. *See, e.g.*, 29 C.F.R. § 791.2; *Petition*, *People v. Domino's Inc., et al.* (Sup. Ct. New York County May 23, 2016) (No. 450627-2016) (action by the New York Attorney General asserting liability against Domino's Pizza, Inc. and related entities for wage violations committed by its franchisees); *Keeton v. Time Warner Cable, Inc.*, No. 2:09-cv-1085, 2011 WL 2618926 (S.D. Ohio July 1, 2011)

(denying Time Warner's motion for summary judgment on joint employer claim made by cable technicians ostensibly employed by subcontractor).

2.2. Defendants' compensation policies and practices violate the FLSA.

Plaintiff worked for Defendants as a delivery driver on Montgomery Road in Cincinnati, Ohio. *See* Ex. 1, Thomas Decl. Throughout his employment, Plaintiff was paid $8.15 per hour while working inside the restaurant, and $4.08 per hour while on the road making deliveries. *Id.* at ¶ 7. In other words, while they were on the road, Defendants paid Plaintiff and their fellow delivery drivers less than full minimum wage and relied on counting some of Plaintiff's tips to make up the difference between what Defendants paid and full minimum wage; this is commonly referred to as taking a "tip credit." However, Defendants never informed Plaintiff of their intention to take a tip credit. *Id.* at ¶ 14. Additionally, throughout Plaintiff's employment, Defendants paid Plaintiff and his fellow delivery drivers a flat per-delivery reimbursement amount for each delivery they completed. *See* Complaint, ¶¶ 96, 122; Ex. 1, Thomas Decl., ¶¶ 15-16. Defendants also took deductions from Plaintiff's wages for a "UNIFORM FEE," that resulted in his wages falling below minimum wage. *See* Ex. 2, Thomas Paystub.

2.2.1. Plaintiff and the putative Collective are under-reimbursed for their delivery-related expenses.

Plaintiff delivered pizza and other food items to Defendants' customers. *See* Ex. 1, Thomas Decl., ¶ 5. Plaintiff estimates that he delivered approximately two to three orders per hour. *Id.* at ¶ 17. For each delivery he completed, Plaintiff was reimbursed $1.20 for delivery-related expenses for each delivery, no matter how many miles Plaintiff had to travel to complete the delivery or what costs he had to cover. *Id.* at ¶ 15. Plaintiff estimates that he regularly drove between four and five miles per delivery. *Id.* at ¶ 18. The IRS business mileage reimbursement

rate was $.56 in 2014, $.575 in 2015, $.54 in 2016, and $.535 in 2017. *See* http://www.irs.gov/Tax-Professionals/Standard-Mileage-Rates. Plaintiff incurred more in delivery-related expenses than he received in reimbursements from Defendants. *See* Ex. 1, Thomas Decl., ¶ 22. Plaintiff is also aware that other employees are also paid a tipped wage rate, and receive a flat rate per delivery, because it was his co-workers—Doug and Harley—who explained to him how he would be paid. *Id*. at ¶ 16. Because Plaintiff and other delivery drivers incurred expenses for the benefit of Defendants, and those expenses caused the delivery drivers' effective hourly pay rate to drop below minimum wage, Defendants violated the FLSA. *See* 29 C.F.R. § 531.35; *Perrin v. Papa John's Int'l, Inc.*, 114 F. Supp. 3d 707 (E.D. Mo. 2015) (granting summary judgment in favor of delivery drivers asserting similar under-reimbursement claims as those Plaintiff advances here).

Courts have routinely conditionally certified collective actions based on allegations similar to those made here. *See, e.g., Brandenburg v. Cousin Vinny's Pizza, LLC,* No. 3:16-cv-516, 2017 WL 3500411 (S.D. Ohio Aug. 15, 2017); *Perrin v. Papa John's Int'l, Inc.*, Case No. 4:09-cv-1335, 2013 WL 6885334 (E.D. Mo. Dec. 31, 2013) (granting Rule 23 class certification); *Perrin v. Papa John's Int'l USA, Inc.*, Case No. 4:09-cv-1335, 2011 WL 4089251 (E.D. Mo. Sept. 14, 2011) (granting conditional certification for all drivers working at Papa John's); *Wass v. NPC Intern., Inc.*, Case No. 09-cv-224, 2011 WL 1118774 (D. Kansas Mar. 28, 2011) (granting conditional certification to plaintiff delivery drivers); *Darrow v. WKRP Management, LLC*, Case No. 09-cv-1613, 2012 WL 638119 (D. Colo. Feb. 28, 2012) (same); *Bass v. PJComn Acquisition Corp.*, Case No. 09-cv-1614, 2010 WL 3720217 (D. Colo. Sept. 15, 2010) (same); *Luiken v. Domino's Pizza,*

LLC, Case No. 09-cv-516, 2010 WL 2545875 (D. Minn. June 21, 2010) (same); *Smith v. Pizza Hut, Inc.*, Case No. 09-cv-1632, 2012 WL 1414325 (D. Colo. April 21, 2012) (same).

2.2.2. Defendants' took unlawful "kickbacks" as deductions from Plaintiff and the putative Collective's wages.

Defendants made deductions from Plaintiff's paycheck for a "UNIFORM FEE." *See* Ex. 2, Thomas Paystubs. Since Plaintiff was paid minimum wage minus a tip credit for his tipped duties, and minimum wage for non-tipped duties, the deductions caused his effective hourly pay rate to drop below minimum wage. *See* 29 C.F.R. § 531.35. "Deductions from employees' paychecks, for whatever reason, that bring the employees' pay under the minimum wage violate [the FLSA]." *Landry v. Swire Oilfield Servs., L.L.C.*, No. 16-cv-621, 2017 WL 1709695, at *21 (D.N.M. May 2, 2017).

A number of district courts have conditionally certified a collective action based on allegations similar to those made here. *See, e.g., Quintanilla v. A & R Demolitina, Inc.*, No. 4:04-cv-01965, 2005 WL 2095104, at *2 (S.D. Tex. Aug. 30, 2005) (certifying collective action where improper deductions for damaged equipment—regardless of fault or individual responsibility—resulted in wages falling below minimum wage); *Mejia v. Bros. Petroleum, LLC*, No. 2:12-cv-02842, 2014 WL 3530362, at *1 (E.D. La. July 16, 2014) (deductions for name tags and uniforms resulted in wages slipping below minimum wage); *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696 (E.D.N.C. 2009) (deductions for costs of replacement knives brought employees' effective hourly rate below minimum).; *Poehler v. Fenwick*, No. 2:15-cv-01161 JWS, 2015 WL 9258448, at *1 (D. Ariz. Dec. 18, 2015); *Morris v. R.A. Popp Enterprises, Inc.*, No. 8:11-cv-263, 2012 WL 525502 (D. Neb. Feb. 16, 2012); *Kautsch v. Premier Commc'ns*, No. 06-CV-04035-

NKL, 2008 WL 294271, at *5 (W.D. Mo. Jan. 31, 2008); *Williams v. Rowell Investments, Inc.*, No. 3:14-cv-1469-P, 2015 WL 12533010, at *2 (N.D. Tex. May 15, 2015).

2.2.3. Plaintiff and the putative Collective were not informed of the tip credit provisions of the FLSA.

Finally, employers are not permitted to take a tip credit from the wages of tipped employees in the first place unless they comply with the requirements spelled out in the FLSA. One requirement is that the employer provides their employees with notice of the tip credit. "The preceding 2 sentences (allowing for the tip credit) shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection." 29 U.S.C. § 203(m). The notice requirement is "strictly construed," and must be complied with even if the employee receives tips at least equivalent to minimum wage. *See Chung v. New Silver Palace Restaurant, Inc.*, 246 F.Supp.2d 220, 229 (S.D.N.Y. Sept. 13, 2002). Here, Plaintiff was not informed about the tip credit provisions of the FLSA, or given any other information about his compensation from Defendants' management. *See* Ex. 1, Thomas Decl., ¶ 14. Plaintiff also never saw anyone else be informed of the FLSA tip credit requirements. *Id.*

Because they failed to inform Plaintiff and other delivery drivers of the tip credit provisions of the FLSA, Defendants were not permitted to take a tip credit from their wages. *See, e.g., Solis v. Min Fang Yang,* 345 Fed.Appx. 35, 38 (6th Cir. 2009) (holding that Defendants failed to provide tip credit notice where Defendants had explained that employees' pay would consist almost exclusively of tips, but did not discuss its minimum wage obligation or explain that it was applying a tip credit against that obligation); *Martin v. Tango's Restaurant, Inc.*, 969 F.2d 1319, 1322 ("It is insufficient that the employees know that they receive tips and one-half of the applicable minimum wage."); *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F.Supp.2d 253, 288

(S.D.N.Y. May 27, 2011) (holding that posting of tip-related information on DOL poster on employer's premises was insufficient to meet the notice requirement of 203(m)).

3. Law & Argument

3.1. Legal Standard for Conditional Collective Action Certification

The FLSA empowers Plaintiff to maintain an action for unpaid wages on behalf of themselves and "similarly situated employees." 29 U.S.C. 216(b). Before a similarly situated employee may become a party plaintiff to this lawsuit for purposes of their FLSA claims, he or she must file a written consent with the Court. *Id.* This distinct "opt-in" structure heightens the need for employees to "receiv[e] accurate and timely notice concerning the pendency of the collective action." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The statute therefore vests district courts with "discretion to implement 29 U.S.C. § 216(b) … by facilitating notice to potential plaintiffs." *Id.* at 169.

The Sixth Circuit has "implicitly upheld a two-step procedure for determining whether an FLSA case should proceed as a collective action." *Heibel v. U.S. Bank Nat'l Association*, No. 2:11-cv-593, 2012 WL 4463771, at *2 (S.D. Ohio Sept 27, 2012) (internal citations omitted). First, at the "initial notice" stage, "the Court must determine whether to conditionally certify the collective class and whether notice of the lawsuit should be given to putative class members." *Swigart v. Fifth Third Bank*, 276 F.R.D. 210, 213 (S.D. Ohio Aug. 31, 2011) (citations omitted). The second stage of the FLSA collective action analysis occurs once discovery is complete, when "the defendant may file a motion to decertify the class if appropriate to do so based on the individualized nature of the plaintiff's claims." *Id.*

Plaintiff's Motion deals with the first stage. For Plaintiff to prevail at the initial notice stage, he must only make a "modest showing" that they are similarly-situated to the putative class. *Laichev v. JBM*, 269 F.R.D. 633, 637 (S.D. Ohio June 19, 2008) (Barrett, J.). "The first step occurs at the beginning of discovery, and employs a fairly lenient standard that typically results in conditional certification of a representative class." *Feustel*, 2015 WL 13021897, *3 (quotations omitted). At this stage, Plaintiff must show only that her "position is similar, not identical, to the positions held by the putative class members." *Comer*, 454 F.3d at 546-47 (internal quotation marks omitted). A FLSA collective class may be conditionally certified where the potential plaintiffs are "unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 585 (6th Cir. 2009). Nevertheless, "[s]howing a 'unified policy' of violations is not required [.]" *Id.* at 584. When conducting the analysis, courts do not evaluate the merits of the claims, factual disputes, nor credibility. *Id.*

Finally, courts "should not apply a Rule 23 type analysis as to whether individualized questions will predominate." *Wade v. Werner Trucking Co.*, Case No. 2:10-cv-270, 2012 WL 5378311, at *4 (S.D. Ohio Oct. 31, 2012), citing *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584-85 (6th Cir. 2009). The "similarly situated" standard is also "less stringent than Rule 20(a)['s] requirement that claims 'arise out of the same action or occurrence' for joinder to be proper, or even Rule 23(b)(3)'s requirement that common questions predominate for a 23(b)(3) class to be certified." *O'Brien*, 575 F.3d at 584 (internal citations omitted).

3.2. Plaintiff is similarly situated to the putative Collective.

Plaintiff seeks to represent the following collective action class, the members of which have been harmed by Defendants' unlawful pay policies and practices:

> All non-owner, non-employer delivery drivers who worked for Defendants at any "It's Only" Papa John's Pizza location from June 16, 2014 to present.

Defendants' delivery drivers have been denied minimum wages and overtime wages as a result of Defendants' uniform compensation policies of under-reimbursing delivery drivers for delivery-related expenses with flat rate per delivery payments no matter how many miles the driver travels, taking "kickbacks" from the wages of Plaintiff and other delivery drivers, and failing to inform Plaintiff and other delivery drivers of the FLSA tip credit requirements. Plaintiff learned about how he would be compensated from his fellow delivery drivers—Doug and Harley—who confirmed that all delivery drivers are paid a tipped wage on the road and minimum wage inside. Doug also explained to Plaintiff how the delivery reimbursement process works—that the drivers receive $1.20 or some other flat rate per delivery. Further, Plaintiff observed as other delivery drivers drove their own cars for work, and were generally subject to the same terms and conditions of employment has he was. *See generally*, Ex. 1, Thomas Decl.

While showing a unified policy demonstrates that Plaintiff is similarly-situated to the members of the Collective, this showing is more than is required. *O'Brien*, 575 F.3d at 584. Moreover, Plaintiff is not required to show that a policy that violates the FLSA as to one plaintiff proves a violation for all members of the Collective. *Id*. at 585. Plaintiff has demonstrated these nonetheless.

Further, the putative Collective's causes of action accrued at about the same time and place, and in the approximate manner as Plaintiff's causes of action. *O'Brien*, 575 F.3d at 584.

Although the wage and hour violations need only to be similar to justify conditional certification, the putative Collective members' and Plaintiff's positions in this case are nearly identical—Defendants' wage and hour practices are violations as to Plaintiff in the exact same way as they are violations as to the putative Collective members. Further, Plaintiff and the putative Collective members are similarly-situated because their claims are "unified by common theories of defendants' statutory violations." *Swigart*, 276 F.R.D. at 213 (internal citations omitted). There is simply no daylight between Plaintiff's theories of Defendants' statutory violations and the putative Collective's theories—the same statutory violations are at issue for all. Courts routinely certify collective actions for any of the pay practices at issue in this case. *See supra*, Section 2.

Here, Plaintiff has identified a clearly definable Collective that Defendants injured in the same way—through pay policies that were uniformly applied to all members of the Collective. The Collective is manageable and easily defined because the members are specifically identified in Defendants' payroll records. Moreover, the Collective's damages are calculable from Defendants' time, payroll, and delivery records. Plaintiff has more than made the "modest factual showing" required at this stage. Accordingly, Plaintiff respectfully asks this Court to conditionally certify this case as a collective action.

3.3. Court-authorized notice is appropriate in this case.

In combination with an order conditionally certifying this collective action, Plaintiff also requests that the Court authorize that notice be disseminated to all individuals who worked at Defendants' Domino's locations as delivery drivers since June 16, 2014. Plaintiff seeks permission to send the notice through regular mail in addition to email, text message, and the posting of the notice at all of Defendants' "It's Only" Papa John's restaurants. Finally, Plaintiff

seeks permission to allow putative Collective members to opt into the case via electronic signature, if they choose. Plaintiff's proposed notice and opt-in methods are in line with the FLSA's remedial purpose.

3.3.1. Plaintiff's proposed notices.

Attached as Exhibit 6 is Plaintiff's proposed Judicial Notice. Plaintiff's proposed notice has been carefully drafted to achieve "the goals of the notice: to make as many potential plaintiffs as possible aware of this action and their right to opt in without devolving into a fishing expedition or imposing undue burden on the defendants." *Elmajdoub v. MDO Development Corp.*, No. 12-cv-5239, 2013 WL 6620685, at *4 (S.D.N.Y. Dec. 11, 2013).

Once notice is sent, Plaintiff requests that members of the Collective be granted 90 days in which to return an opt-in form. *See, e.g., Fenley v. Wood Group Mustang, Inc.*, 170 F. Supp. 3d 1063, 1076 (S.D. Ohio 2016) ("Courts in this District have found 90 days to be an appropriate notice period on many occasions.").

Plaintiff further requests that the notice be posted at each of the "It's Only" Papa John's Pizza restaurants. *See, e.g., Cousin Vinny's Pizza,* 2017 WL 3500411, *6 ("The Court is persuaded that posting the notice at Cousin Vinny's locations is a low-cost, non-invasive way to ensure that timely and accurate notice of the lawsuit is conveyed to putative collective members.").

3.3.2. Email notice is appropriate.

The Supreme Court has held that "District Courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b)…by facilitating notice to potential plaintiffs." *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 169 (1989). In exercising this discretion, districts courts are to

"provid[e] accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* Explaining further, the notice must be "orderly, sensible, and not otherwise contrary to statutory commands." *Id*. at 170. In 1989, when the Supreme Court made this decision, there is little doubt that notice via first class mail was the best way to provide notice in "an efficient and proper way." *Id*. at 171. But the Supreme Court was intentionally vague in defining the manner and form of the notice to be sent: "We confirm the existence of the trial court's discretion, *not the details of its exercise*." *Id*. at 170 (emphasis added).

In 2017, receiving important information electronically is now the norm. As one example, when this Court issues an Order on the present motion, counsel for the parties will be notified about it via email, not regular mail. Regular mail may not arrive at its destination because it may be misdelivered, misplaced, taken from shared mailboxes, left unopened (especially when it is sent from an unrecognized source), and/or sent to an inaccurate mailing address. Although regular mail can often go ignored, a great many Americans are connected to their smart phones at all hours of the day. For this reason, notice via email is appropriate to properly effectuate notice.

Email notice is "in line with the current nationwide trend. Moreover, it advances the remedial purpose of the FLSA, because service of the notice by two separate methods increases the likelihood that all potential opt-in plaintiffs will receive notice of the lawsuit, and of their opportunity to participate." *Atkinson*, 2015 WL 853234, **4-5 (permitting email notice to all putative class members); *see also, e.g., Cousin Vinny's Pizza*, 2017 WL 3500411, *5 (permitting email notice); *Petty v. Russell Cellular, Inc.*, No. 2:13-cv-1110, 2014 WL 1308692, *6 (S.D. Ohio Mar. 28, 2014) (permitting email notice to all members of the putative collective); *Struck*, 2013

WL 571849, *20 (allowing court-authorized notice via regular mail and email to former employees); *Wolfram v. PHH Corp.*, No. 1:12-cv-599, 2012 WL 6676778, *10 (S.D. Ohio Dec. 21, 2012) (same); *Swigart*, 276 F.R.D. at 215 (same); *O'Neal v. Emery Federal Credit Union*, No. 1:13-cv-22, 2014 WL 842948, *7 (S.D. Ohio Mar. 4, 2014). Plaintiff's proposed email is attached as Exhibit 7.

3.3.3. Backup Notice

In *Cousin Vinny's*, the Court rejected the plaintiff's request to send notice via text message, holding that "notice via text message is premature." 2017 WL 3500411, at *5. In doing so, the Court left open the possibility of text message notice: "Plaintiff may not notify potential opt-in collective members of the lawsuit via text message, unless they can show that notice via postal and electronic mail is insufficient as to a given potential member." *Id.*

Following the Court's guidance in *Cousin Vinny's*, Plaintiff asks to use text message notice only if any one of the following conditions are met for any particular putative class member:

- Defendants do not have a mailing address for the class member;
- Defendants do not have an email address for the class member;
- A postal mailing is returned as undeliverable with no forwarding address; or
- An email notice is "bounced" as undeliverable.

In other words, text message notice becomes an important backup to one of the other two primary forms of notice.

Plaintiff notes that text message notice is likely to be highly effective in the restaurant and especially delivery driver industries. *See, e.g., Irvine v. Destination Wild Dunes Mgmt., Inc.*, 132 F.Supp.3d 707, 711 (D.S.C. Sept. 14, 2015) (holding that notice via direct mail, email, and text

was "eminently reasonable," because "[t]his has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication."); *Bhumithanarn v. 22 Noodle Market Corp.*, No. 14 Civ. 2625, 2015 WL 4240985, at *5 (S.D.N.Y. July 13, 2015) ("Given the high turnover characteristic of the restaurant industry … notice via text message is likely to be a viable and efficient means of communicating with many prospective members."); *Regan v. City of Hanahan*, No. 2:16-cv-1077, 2017 WL 1386334, at *3 (D.S.C. Apr. 17, 2017) ("Mail, email and text message notice is reasonable because, in today's mobile society, individuals are likely to retain their mobile numbers and email addresses even when they move."). Mobile phones are by far the most accessible communication tool for many hourly workers, and, for delivery drivers, an actual or virtual requirement. It is widely recognized that many young people do not even use email, but instead rely almost exclusively on other electronic communication tools like text messaging.[1] Here, the use of text message is especially appropriate because Defendants likely communicate with their delivery drivers while they are out completing deliveries by calling their cell phones.

Plaintiff requests that the following text message notice be approved, to be used under the above conditions:

> NOTICE AUTHORIZED BY UNITED STATES DISTRICT COURT: You are receiving this notice because records show that you worked as a delivery driver for Papa John's and may have the opportunity to join a lawsuit for unpaid wages. Please review the full lawsuit notice at [website address].

3.4. Expedited disclosure of names and contact information is appropriate.

In order to provide potential opt-in plaintiffs with notice of the pendency of this lawsuit, Plaintiff requires discovery of the names and contact information for those individuals. *See, e.g.*,

[1] For Generation Z, Email has Become a Rite of Passage, (April 11, 2016) *The Wall Street Journal* (attached hereto as Exhibit 8).

Heaps v. Safelite Solutions, LLC, No. 2:10-cv-729, 2011 WL 1325207, *17 (S.D. Ohio Apr. 5, 2011) (ordering production of putative class members' names, last known addresses, telephone numbers, and email addresses within ten days of the court's order). Accordingly, Plaintiff requests that the Court direct Defendants to produce a computer-readable list of the names, last known addresses, telephone numbers, e-mail addresses, dates of employment, and job titles for all persons employed at the "It's Only" Papa John's Pizza restaurants as delivery drivers between June 16, 2014 and the present within 10 days of its Order.

4. Conclusion

For the foregoing reasons, Plaintiff requests the Court to (1) conditionally certify a collective action consisting of Defendants' current and former delivery drivers, (2) approve the Plaintiff's proposed notice of the action, (3) order Defendants to provide name and contact information for all potential Collective members, (4) authorize Plaintiff to send the notices via first class mail, email, and text message, (5) require Defendants to post the notice in their work locations, and (6) allow members of the Collective 90 days to return opt-in form.

Respectfully submitted,

/s/ Andrew Kimble

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Defendants through the Court's ECF system.

/s/ Andrew Kimble
Andrew Kimble