IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Jason Patzfahl, on behalf of himself and those similarly situated, Plaintiff, v. FSM ZA, LLC, d/b/a Toppers Pizza; Perfect Timing, LLC; Garett Burns; Doe Corporation 1-10; John Doe 1-10, Defendants.	Court File No.: 2:20-cv-01202 Judge: Lynn S. Adelman **DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO SEND NOTICE TO SIMILARLY SITUATED EMPLOYEES**

I. INTRODUCTION

In Plaintiff Jason Patzfahl ("Plaintiff")'s Renewed Motion to Send Notice to Similarly Situated Employees ("Motion for Conditional Certification"), Plaintiff requests the Court authorize Plaintiff to take action which is contrary to the text and spirit of the FLSA as well as case law from this District: allow Plaintiff to send notice of a lawsuit to individuals employed by a company Plaintiff ***never*** worked for. Because this request is not only outside of the bounds of the FLSA, the directives of Fed. R. Civ. P. 4, and the basic principles underlying the doctrine of standing, Defendants FSM ZA, LLC ("FSM"), Perfect Timing, LLC ("Perfect Timing"), and Garett Burns ("Burns") (collectively "Defendants") urge the Court to deny Plaintiff's Motion for Conditional Certification in its entirety, and respectfully submit this Memorandum of Law in Opposition to Plaintiff's Motion.

Plaintiff is a former pizza delivery driver who claims that the per delivery expense reimbursement paid to him by Defendants was not enough to cover his actual vehicle

expenses, causing him to be paid less than minimum wage. Despite the fact that Perfect Timing never employed Plaintiff, and despite the fact that Plaintiff has not yet shown himself to be the victim of even one FLSA violation, Plaintiff now seeks to engage in a fishing expedition for additional claims, requesting the Court allow Plaintiff to send notice to a class of pizza delivery driver employees. In support of his Motion, Plaintiff submits only the Interrogatory Responses of Defendants FSM and Burns, and cites, in his Memorandum accompanying his Motion for Conditional Certification ("Plaintiff's Brief"), to Plaintiff's Declaration submitted with an earlier Motion. Neither of these submissions, alone or together, are a sufficient basis for the Court to find that Plaintiff has made a "modest factual showing" that he (1) was a victim of a common policy or plan which violated the FLSA; and (2) is similarly situated to the Class of delivery drivers he seeks to represent. While conditional certification typically presents a relatively low threshold, accepting Plaintiff's deficient allegations here would mean no standard exists. Plaintiff has failed to make the showing necessary for the Court to conditionally certify this action. On these grounds the Court must deny Plaintiff's Motion for Conditional Certification.

II. STATEMENT OF FACTS

A. PROCEDURAL HISTORY.

On August 6, 2020, Plaintiff filed his initial complaint against FSM and Burns, alleging Defendant's failure to reimburse Plaintiff at the IRS' standard business mileage rate caused Plaintiff's compensation to fall below the federal minimum wage rate in violation of the FLSA. ECF No. 1. On September 9, 2020, Plaintiff filed his Motion to Send Notice to Similarly Situated Employees ("Initial Motion for Conditional

Certification"). ECF No. 5. In support of this Motion, Plaintiff submitted a Declaration, generally attesting to various facts about the Franklin, Wisconsin Toppers Pizza store owned by FSM and Burns. *See generally*, Declaration of Jason Patzfahl ("Patzfahl Decl."), ECF No. 5-1. On September 22, 2020, Plaintiff served his initial Complaint and Initial Motion for Conditional Certification on Defendants FSM and Burns. ECF No. 8.

On October 9, 2020, Defendants FSM and Burns requested a stay be instituted regarding Plaintiff's Initial Motion for Conditional Certification (ECF No. 12); on October 14, 2020, the Court granted that request, noting that "FLSA cases almost always involve at least some discovery before resolution of a conditional certification motion." ECF No. 13. On November 20, 2020, the Court set a Scheduling Order (ECF No. 16), and the Parties engaged in limited discovery. On March 29, 2020, Plaintiff electronically filed his First Amended Complaint ("FAC"), adding Perfect Timing as a defendant to this action. ECF No. 18. One day later Plaintiff filed this Motion for Conditional Certification. ECF No. 19–20. Plaintiff has yet to serve Perfect Timing in accordance with Fed. R. Civ. P. 4.

B. PLAINTIFF.

Plaintiff attests in Plaintiff's Declaration that he was employed as a delivery driver at the Franklin, Wisconsin Toppers Pizza store operated by FSM and owned by Burns. Patzfahl Decl. ¶ 3. Plaintiff testified that he has no knowledge as to any other Toppers Pizza stores owned or operated by Defendants. Deposition of Jason Patzfahl ("Patzfahl Dep."), attached as Exhibit 1 to Declaration of Martin Kappenman ("Kappenman Decl."), 52:21–23. Plaintiff performed several job duties while employed at the Franklin, Wisconsin Toppers Pizza store, including delivering food, answering phones, folding boxes, taking

out garbage, cleaning dishes, and completing other various tasks which were "necessary for the operation of the restaurant." *Id.* ¶ 5. When Plaintiff worked as a pizza delivery driver for the Franklin, Wisconsin Toppers Pizza, FSM compensated him at a flat $5.00 rate, plus a $1.00 to $2.00 flat fee per delivery. Patzfahl Decl. ¶ 16–17. Plaintiff attests that other employees were paid higher per hour rates. *Id.* ¶ 9. Plaintiff also received tips from customers. Patzfahl Dep. 34:22-35:2. When tips were factored in, Plaintiff routinely took home well above the applicable federal and state minimum wage rate. *See* Plaintiff's Paystubs, attached to Burns Decl. as Exhibit 11.

Plaintiff was paid $7.50 per hour when Plaintiff performed tasks other than delivering pizzas. Patzfahl Decl. ¶ 6. Plaintiff alleges FSM and Burns required Plaintiff and other pizza delivery drivers to "provide [their] own cars to use while completing deliveries," the expenses of which Plaintiff alleges he and other delivery drivers paid for. *Id.* ¶ 10. Plaintiff did not provide receipts of his expenses for reimbursement. *Id.* ¶ 12. Plaintiff attests that he did not "see any other delivery driver provide records of the expenses they incurred while making deliveries." *Id.* ¶ 13. Plaintiff attests he was reimbursed "less than the IRS standard business mileage rate" while making deliveries, although Plaintiff has done no calculations with respect to what he is owed and has "no sense" of what he thinks he is owed. *Id.* ¶ 15; Patzfahl Dep. 103:19–20. Plaintiff did not report these alleged expense reimbursement deficiencies to Burns, and does not recall ever speaking with Burns. Patzfahl Dep. 36:10–11, 53:9–15, 59:6. Burns did not direct Plaintiff's employment or tell Plaintiff how to do his job. Patzfahl Dep. 53:9–11. Plaintiff did claim mileage driven while delivering pizzas for FSM as deductible work expenses on

his income taxes, yet has refused to produce these records. Patzfahl Dep. 41:12.

Plaintiff does not attest in his Declaration that Defendants' per-delivery expense reimbursement model caused Plaintiff's hourly wages—or any other driver's hourly wages—to fall below the federal and state minimum wage rate. Plaintiff does not attest that he was employed by Perfect Timing or performed work for Perfect Timing. Plaintiff does not attest that the policies and practices employed by the Toppers Pizza store located in Franklin, Wisconsin is similar to other Toppers Pizza stores owned by Defendants, or that Plaintiff has any knowledge regarding the policies of any other Toppers Pizza store. Plaintiff does not attest that the percentage of time he spent delivering pizzas versus performing "in-store" work is comparable to that of other delivery drivers in the proposed Class. Plaintiff does not attest that his delivery area or range at the Franklin, Wisconsin Toppers Pizza stores was similar to the delivery area or range applicable to delivery drivers employed at other Toppers Pizza stores. In fact, Plaintiff says the opposite, testifying that the delivery area for the Franklin, Wisconsin store had a "large" delivery area. Patzfahl Dep. 55:1–6. Despite having all of the information for him to do so, Plaintiff does not indicate how much he believes he is owed in damages.

C. DEFENDANTS.

1. FSM ZA, LLC.

FSM is a limited liability company registered in the State of Wisconsin. Declaration of Garett Burns ("Burns Decl.") ¶¶ 2, 10. FSM operates two Toppers Pizza stores—one in Franklin, Wisconsin (where Plaintiff was employed) and one located in South Milwaukee, Wisconsin. ECF No. 20-1. *Id.* ¶ 2. Burns acquired these stores on March 8, 2019. *Id.* ¶ 6.

Burns is FSM's sole owner. Burns *Id.* ¶ 3. FSM and Perfect Timing have separate workforces. *Id.* ¶ 5. FSM and Perfect Timing have separate EIN numbers. *Id.* ¶ 8. FSM and Perfect Timing have separate bank accounts. *Id.* ¶ 11. FSM and Perfect Timing have signed separate franchise agreements. *Id.* ¶ 9. FSM and Perfect Timing separately pay utilities for their respective stores. *Id.* ¶ 12.

2. Perfect Timing, LLC.

Perfect Timing is a limited liability company registered in the State of Wisconsin. *Id.* ¶¶ 3, 10. Perfect Timing owns two Toppers Pizza stores located in Waukesha, Wisconsin. *Id.* ¶ 3. Burns is Perfect Timing's sole owner. *Id.* ¶ 3. Burns took over management of the Waukesha, Wisconsin stores in September of 2018, but did not become owner of the stores until December 19, 2018. *Id.* ¶ 7. Perfect Timing never employed Plaintiff. *Id.* ¶ 13. Perfect Timing and FSM have separate workforces, EIN numbers, bank accounts, utility accounts, and franchise agreements. *Id.* ¶¶ 5, 8–12.

3. Garett Burns.

Burns is the sole owner of FSM and Perfect Timing. *Id.* ¶¶ 2–3. While Burns helped to set up the compensation system for the Toppers Pizza stores operated by FSM and Perfect Timing, Burns was not and is not involved in the day-to-day management or operations of any of the Toppers Pizza stores. *Id.* ¶ 15. Burns did not schedule, supervise, or direct the work performance of any delivery drivers for the Toppers Pizza stores operated by FSM and Perfect Timing. *Id.* ¶ 15. To Burns' knowledge the compensation system he helped create did not result in any delivery driver employees being paid less than minimum wage. *Id.* ¶ 16–17. Prior to this lawsuit, no employee had ever told Burns that they had

been paid less than minimum wage. *Id.* ¶ 16.

III. LEGAL ANALYSIS

A. LEGAL STANDARD

1. Certification Standard.

The Fair Labor Standards Act ("FLSA"), specifically, 29 U.S.C. § 216(b), allows an employee to bring an action on behalf of "similarly situated" employees against his employer for violations of the FLSA. *See* 29 U.S.C. § 216(b). The FLSA requires employees who wish to join a collective action to affirmatively opt-in to the litigation by consenting to join the action and filing the consent to join with the court. *Id.* It is due, in part, to this opt-in requirement that the Court has discretion to authorize—and facilitate—sending notice of a collective action to putative class members to allow the members to submit their consent to join. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989); *Austin v. CUNA Mut. Ins. Soc.*, 232 F.R.D. 601, 605 (W.D. Wis. 2006).

2. The Two-Stage Approach.

The FLSA does not define "similarly situated" or provide direction as to what courts should consider when evaluating whether a group of employees are "similarly situated." In absence of such guidance, courts have generally apply a two-stage approach to determine whether a collective action should be authorized and facilitated. *See, e.g.*, *Adair v. Wis. Bell, Inc.*, No. 08-C-280, 2008 WL 4224360, at *3 (E.D. Wis. Sept. 11, 2008); *Austin*, 232 F.R.D. at 605 (collecting cases applying the majority, "two-step," approach). In the first step, the court "conditionally certifies" the action for the purposes of sending notice. At this step, the court must determine whether the plaintiff has demonstrated a "reasonable

basis" for believing that he or she is similarly situated to potential class members by considering "affidavits, declarations, deposition testimony or other documents that 'demonstrate some factual nexus between the plaintiff and the proposed class or a common policy that affects all the collective members.'" *Tom v. Generac Power Sys., Inc*., No. 17-c-1413, 2018 WL 3696607, at *3 (E.D. Wis. Aug. 3, 2018). "Courts have held that plaintiffs can meet their burden by making 'a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Austin,* 232 F.R.D. at 605. A "modest factual showing" is required to allow courts to "guard against wasting the parties' time and resources," and to prevent cases from proceeding where certification is not appropriate. *Pecor v. North Point EDC Inc*., 2017 WL 3723600, at *3 (E.D. Wis. June 9, 2017).

For purposes of determining whether a plaintiff has met his burden, the court "need not accept the plaintiff's allegations as true." *Id.* at *4 (citing *Nehmelman v. Penn Nat. Gaming, Inc*., 822 F. Supp. 2d 745, 751 (N.D. Ill. Sept. 29, 2011)). Evidence which may be considered as part of a plaintiff's "modest factual showing" includes include "affidavits, declarations, deposition testimony, or other documents." *Generac Power Sys., Inc*., 2018 WL 3696607 at *3. After the action is certified as a collective action, and after plaintiff issues notice to the class, consent forms are filed with the court and the parties engaged in further discovery. After discovery concludes, the court proceeds (typically upon a plaintiff's motion for certification or a defendant's motion for decertification) to step two, at which point the court must determine whether plaintiffs who have opted in are, in fact, similarly situated by applying a higher evidentiary threshold. *See Hoffman-La Roche*

v. Sperling, 493 U.S. 165, 170 (1989); *Brabazon v. Aurora Health Care, Inc.*, No. 10-C-714, 2011 WL 1131097, at *2 (E.D. Wis. Mar. 28, 2011).

Some courts apply an intermediate level of scrutiny to motions for conditional certification where plaintiff has had the benefit of having engaged in some discovery prior to moving for conditional certification. *See Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 431 (S.D. Ind. 2012) (citing *Scott v. NOW Courier, Inc.*, No. 1:10-cv-971, 2012 WL 1072751, at *7–8 (S.D. Ind. Mar. 29, 2012)). A court deciding whether to apply an intermediate level of scrutiny when deciding a motion for conditional certification should consider factors that include the "length of discovery, amount and kind of documents exchanged, number of depositions taken, and the extent other factual material has been made part of the record," as well as whether the defendant has disclosed a list of employees who may qualify for the prospective class. *Miller v. ThedaCare Inc.*, No. 15-CV-506, 2016 WL 4532124, at *7 (E.D. Wis. Aug. 29, 2016); *see also Freeman v. Total Sec. Mgmt.–Wis., LLC*, No. 12-CV-461, 2013 WL 4049542, at *4 (W.D. Wis. Aug. 9, 2013) ("An intermediate standard may be appropriate when a court has expressly allowed 'discovery on the issue of whether the plaintiffs are similarly situated' and the plaintiffs have been given access to a 'list of other . . . potential members of the proposed class.'" (alteration in original) (quoting *Bunyan v. Spectrum Brands, Inc.*, No. 07-CV-0089, 2008 WL 2959932, at *4 (S.D. Ill. July 31, 2008))). Under this intermediate approach, conditional certification standard is more stringent, requiring the plaintiff present evidence that potential plaintiffs are similarly situated both in being subject to an unlawful compensation plan and in their job duties and circumstances. *Kurgan v. Chiro One Wellness Ctrs. LLC*, No. 10–cv–1899,

2014 WL 642092, at *3 (N.D. Ill. Feb. 19, 2014).

B. PERFECT TIMING DID NOT EMPLOY PLAINTIFF; THEREFORE PLAINTIFF CANNOT SEND NOTICE TO PERFECT TIMING'S EMPLOYEES.

Plaintiff's Motion for Conditional Certification must fail because Plaintiff requests the Court authorize sending Notice to employees of Perfect Timing, an entity not properly joined in this suit, which Plaintiff has never worked for, and for which Plaintiff has no personal knowledge. To highlight the baselessness of Plaintiff's allegations against Perfect Timing, Burns has submitted a Declaration attesting to FSM and Perfect Timing's actual corporate and managerial structure, which is entirely separate. Burns Decl. ¶¶ 2–3, 8–12. But, it is not Defendants' burden to disprove Plaintiff's employment; it is Plaintiff's burden to involve only those companies as to which Plaintiff, or other named or opt-in plaintiffs, have personal knowledge, and to affirmatively attest to the basis of his knowledge regarding the policies of the defendants to overcome his burden under 29 U.S.C. § 216(b).

Personal knowledge as to the policies and procedures of various locations is crucial to a plaintiff's motion for conditional certification. Courts routinely deny conditional certification where a common pay practice is alleged, but a plaintiff does not have personal knowledge as to pay violations occurring at similar locations owned or operated by the same company at which the plaintiff did not perform work. *See, e.g.*, *Viriri v. White Plains Hosp. Med. Ctr.*, 320 F.R.D. 344, 352 (S.D.N.Y. 2017) ("Indeed, courts have not hesitated to deny conditional certification where the plaintiff seeks to certify a class comprising employees working at other store locations of which the plaintiff has no personal knowledge and cannot therefore testify as to the employment practices."); *Sharma v.*

Burberry Ltd., 52 F. Supp. 3d 443, 458 (E.D.N.Y. 2014) ("Thus, the Court finds that Kozak's vague assertions in his declaration, coupled with his lack of knowledge of any pay violations at other New York stores, do not warrant a finding that SAs at all New York stores are similarly situated to Plaintiffs."); *Camper v. Home Quality Mgmt Inc.*, 200 F.R.D. 516, 520–21 (D. Md. 2000) ("While the plaintiffs have preliminarily established the existence of a company-wide policy regarding the use of time clocks, their factual showing of uncompensated work known to HQM supervisors is limited to the Bayside facility."); *Songer v. Dillon Res., Inc.*, 569 F. Supp. 2d 703, 707 (N.D. Tex. 2008) (denying conditional certification where plaintiffs' affidavits contained "nothing to establish that the plaintiffs have personal knowledge of those matters as they pertain to any other driver," included allegations which could "hardly be considered substantial," and consisted of "conclusory allegations unsupported by any factual assertions[.]"). Courts have denied sending notice to a pizza chain's various pizza store locations where the plaintiff-employee only had knowledge as to the single location he worked at. *Laroque v. Domino's Pizza, LLC*, 557 F. Supp. 2D 346, 355–56 (E.D.N.Y. 2008) ("Although plaintiffs, all of whom were employed at the Coney Island Store, have alleged enough facts to allow the court to certify a class of individuals who worked at the same location during the same period, those facts fail to demonstrate that plaintiffs are similarly situated to individuals who worked at a number of different locations, and under a number of different managers.").

Here, like the plaintiffs in the above cases, Plaintiff ***has not*** sufficiently pled that Perfect Timing employed him, ***has not*** attested to any personal knowledge regarding the working conditions at Perfect Timing, and ***has not*** presented evidence that FSM, Burns,

and Perfect Timing shared policies, and ***has not*** alleged that Defendants operated as a single enterprise or as his "joint employers." Comparatively, Defendant Burns ***has*** attested that Plaintiff was never employed by Perfect Timing, and ***has*** presented evidence and personally attested that FSM and Perfect Timing are distinct corporate entities. Burns Decl. ¶¶ 2–3, 8–12. Taken together, the evidence supports a finding that Perfect Timing did not employ Plaintiff, but at minimum, it indicates that Plaintiff has not possess the personal knowledge necessary for the Court to proceed to conditionally certify a class which includes Perfect Timing's employees or any employees beyond the location in which he worked.

C. PLAINTIFF FAILS TO MEET HIS BURDEN UNDER 29 U.S.C. § 216(b); CONDITIONAL CLASS CERTIFICATION MUST BE DENIED.

In his Motion for Conditional Certification Plaintiff seeks to conditionally certify a class of individuals (the "Class") defined as:

> All current and former delivery drivers employed at any Toppers Pizza location owned/operated by Defendants FSM ZA, LLC, Perfect Timing, LLC, and/or Garett Burns from August 6, 2017 to the date of the Court's Order approving notice.

Renewed Motion to Send Notice to Similarly Situated Employees, ECF No. 19 at 1. In support of his instant Motion for Conditional Certification, Plaintiff submits only Defendants' Reponses to Plaintiff's first set of Interrogatories (ECF No. 20-1), and cites a Declaration authored by Plaintiff which accompanied an earlier Motion for Conditional Certification, prior to Perfect Timing's inclusion in this suit (ECF No. 5-1). Neither of these documents, alone or together, assist Plaintiff in achieving a "modest factual showing" necessary for conditional certification, for the reasons set forth below.

1. Plaintiff Fails to make a "Modest Factual Showing" to Support a Finding that He and Putative Class Members Were Subjected to Common Policy or Plan that Violated the FLSA.

To achieve conditional certification under 29 U.S.C. § 216(b), a plaintiff must make a "modest factual showing" to the court which supports a finding "that the putative class members were together the victims of a single decision, policy, or plan" which violated the FLSA, *Weninger v. Gen. Mills. Ops. LLC*, 344 F.Supp.3d 1005, 1008 (E.D. Wis. 2018), and that the putative class members are sufficiently similar that a collective action will facilitate efficient resolution of common questions and common answers. *Ruis v. Servo, Inc.*, No. 10-cv-394, 2011 WL 7138732, *4–10 (W.D. Wis. June 9, 2011). A plaintiff seeking conditional certification must also show that "an identifiable factual nexus . . . binds the plaintiffs together as victims of a particular violation of the [FLSA]. *Molina v. First Line Solutions LLC*, 566 F. Supp. 2d 770, 787 (N.D. Ill. June 28, 2007). Simply claiming the FLSA has been violated is insufficient for conditional certification. *Id.*

Notably, nowhere in Plaintiff's Declaration does Plaintiff attest that his expenses caused him to make less than the federal minimum wage; nor does Plaintiff attest that other delivery drivers employed by Defendants ever made less than minimum wage. *See generally*, Patzfahl Decl. Plaintiff merely testifies that he believes he was not paid "the fair IRS [mileage] rate" while delivering pizzas. Patzfahl Dep. 105:10–11. Of course, not being paid the fair IRS mileage rate, and not being paid minimum wages, are two separate questions; a driver can be paid less than the IRS mileage rate and still be receive wages that are equal to, or more than, the federal minimum wage rate. Furthermore, Plaintiff's description of the pay practices at the Franklin, Wisconsin Toppers Store is consistent with

pay practices that do not violate the FLSA. For example, even though FSM's $1.00 or $2.00 per delivery flat reimbursement might have averaged out to less than Plaintiff's expenses incurred for long pizza delivery trips, shorter trips would have resulted in a reimbursement surplus, making up for any deficiency with longer trips. Higher wages paid to some employees, as explained by Plaintiff (*see* Patzfahl Decl. at ¶ 9), would have similarly offset any deficiencies. Importantly, despite the fact that Plaintiff had access to all documents necessary to prove a FLSA violation prior to filing this lawsuit,[1] and despite the fact that providing proof of such a violation is important—arguably, necessary—to the instant motion, Plaintiff has not yet shown that ***even one FLSA violation*** occurred.

Plaintiff also does not describe the circumstances at Defendants' other Toppers Pizza locations, nor does he attest that other delivery drivers at Defendants' other Toppers Pizza locations made less than the federal minimum wage rate. *See id.* Plaintiff provides no copy of Defendants' policies, provides no schedules, expenses, pay stubs—***nothing***—to aid the Court in its determination regarding conditional certification. Courts in this district have denied conditional certification under the same circumstances. *See Adair v. Wisconsin Bell, Inc.*, 2008 WL 4224360, at *5 (E.D. Wis. Sept.11, 2008) (denying conditional certification where plaintiffs could not provide the court with any facts

[1] Plaintiff himself maintained records of the GPS distance of trips he took while delivering pizzas, as well as his vehicle expenses. Patzfahl Dep. 39:7–18. Plaintiff also received pay stubs on a regular basis, but to the extent Plaintiff did not retain his pay stubs, FSM provided them again to Plaintiff at the beginning of discovery. *See* Plaintiff's Paystubs, attached to Burns Decl. as Exhibit 11. Despite this, Plaintiff has never shown—in his initial Complaint, First Amended Complaint, or his Motion for Conditional Certification—even one instance where he was paid less than minimum wage for any workweek during which he worked for the Franklin, Wisconsin Toppers Pizza.

supporting their allegations that a policy existed, common to all class members, which violated the FLSA); *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1046 (N.D. Ill. Oct. 30, 2003) ("It is the opinion of the Court that a demonstration of Lifeway's payment practice concerning two out of fifty employees . . . does not rise to the level of a common policy or plan by Lifeway that violated the FLSA."); *Rappaport v. Embarq Management Co.*, 2007 WL 4482581, at *4 (M.D. Fla. Dec.18, 2007) (finding that six affidavits submitted by named plaintiffs and opt-ins might support a finding that overtime was denied as to select individuals, but failed to offer a basis to find that violations occurred on a company-wide scale, and denying plaintiffs' motion for conditional certification).

Here, Plaintiff has entirely failed to show any of the Defendants violated the FLSA at all with respect to him or any other employee. This case is nothing more than a fishing expedition; Plaintiff has made no effort to provide the Court with the information necessary for it to make a determination in Plaintiff's favor. Courts in this district have denied certification under factually similar circumstances. This Court must do the same.

2. Plaintiff Fails to make a "Modest Factual Showing" to Support a Finding that Plaintiff is Similarly Situated to Proposed Class Members to Warrant Conditional Certification.

For conditional certification, a plaintiff must also make a "modest factual showing" to the court that the plaintiff is similarly situated to the class he seeks to represent. *Adair*, 2008 WL 4224360 at *3 (citing *Austin v. CUNA Mut. Ins. Soc.*, 232 F.R.D. 601, 605 (W.D. Wis. Jan. 26, 2006). "In determining whether individuals are similarly situated, the court 'need not accept the plaintiff's allegations as true.'" *Pecor v. North Point EDC, Inc.*, No. 16-c-1263, 2017 WL 3723600, at *4 (E.D. Wis. June 9, 2017) (citing *Nehmelman v. Penn*

Nat. Gaming, Inc., 822 F. Supp. 2d 745, 751 (N.D. Ill. Sept. 29, 2011); *see also Molina v. First Lien Solutions LLC*, 566 F. Supp. 2d 770, 786 ("Unless defendant admits in its answer or briefs that other similarly situated employees exist, plaintiffs cannot rely on their allegations along to make the required modest factual showing.")). The plaintiff must support his or her allegations with admissible evidence to demonstrate there is a reasonable basis for the court to find a factual nexus between plaintiff and the putative class members plaintiff seeks to represent. *Tom v. Generac Power Sys., Inc.*, No. 17-c-1413, 2018 WL 3696607, at *3 (E.D. Wis. Aug. 3, 2018). Such evidence may include "affidavits, declarations, deposition testimony, or other documents." *Id.* Although this District has noted that "there is no formula for the type or amount of evidence necessary to make the modest factual showing," in the Eastern District of Wisconsin, "plaintiffs generally put forth multiple declarations from putative class members and/or deposition testimony from the parties." *Malicki v. Leman U.S.A., Inc.*, No. 17-cv-1674, 2019 WL 699963, at *3 (E.D. Wis. Feb. 20, 2019).

Courts have denied conditional certification where a Plaintiff is unable to present evidence from fellow employees. For example, in *Malicki v. Leman U.S.A., Inc.*, the plaintiff, an office and warehouse employee, filed a proposed class and collective action against her employer, a logistical services, company, alleging violations of the FLSA stemming from the defendant's alleged rest break and time shaving policies. *Id.* at *1. Plaintiff moved to conditionally certify a class of similarly situated hourly workers. *Id.* at *1. In support of her motion for conditional certification, plaintiff submitted "fourteen timecards from seven employees, including herself . . . her own declaration . . . and an

hours summary document created by plaintiff's counsel." *Id.* at *3. This court denied plaintiff's motion for conditional certification on the grounds that the plaintiff had failed to (among other things) meet her burden to make a "modest factual showing" demonstrating that plaintiff was similarly situated to putative class members. *Id.* at *4–5 Specifically, this court noted that "[n]ot only does [Plaintiff] provide no affidavits, declarations, or depositions of fellow employees allegedly subjected to Leman's improper timekeeping policies, she herself testified that she had no knowledge of any other employee wronged by the policies." *Id.* at *5.

Plaintiff here has offered far less support for his Motion than the plaintiff in *Malicki*. Specifically, in support of his Motion, Plaintiff submitted only one affidavit—his own—and has not submitted any other employee affidavits such that the Court can determine that FLSA violations stemming from Defendants' pay practices affected other drivers, or such that the Court can evaluate Plaintiff's claim that he is similarly situated to other drivers. As Plaintiff attests in his Declaration, Plaintiff worked at the Toppers Pizza located in Franklin, Wisconsin from November 2019 to July 2020. Patzfahl Decl. at 1. Yet Plaintiff seeks to represent "[a]ll current and former delivery drivers employed at ***any*** Toppers Pizza location owned/operated by Defendants FSM ZA, LLC, Perfect Timing, LLC, and/or Garett Burns from ***August 6, 2017*** to the date of the Court's Order approving notice." Plaintiff's Brf. at 1. Plaintiff has ***not attested*** that he has personal knowledge that the pay practices of the Toppers Pizza store at which he worked resulted in a FLSA violation as to Plaintiff or any other employee of any other Toppers Pizza store. Plaintiff has ***not attested*** to having personal knowledge of Defendants' pay policies, practices, or the experiences of

other delivery drivers employed at any of the other Toppers Pizza stores owned or operated by the other Defendants. Plaintiff ***not even attested*** to being employed by one of the Defendants, Perfect Timing, named in Plaintiff's FAC. *See* Memorandum of Law In Support of Defendants' Joint Motion to Dismiss Plaintiff's First Amended Complaint, ECF No. 22. Plaintiff's affidavit entirely excludes statements attesting to essential elements which are necessary for this Court to find that Plaintiff has made a "modest factual showing" that he is similarly situated to the Class members he seeks to represent, and that FLSA violations occurred with respect to Plaintiff and putative Class members due to a common policy or plan.

Finally, Plaintiff cannot claim he took home less than minimum wage per hour because delivery tips given by customers to Plaintiff—which Plaintiff rightfully kept for himself—caused Plaintiff to take home well in excess of the federal and state minimum wage rate per hour. *See* Plaintiff's Paystubs, attached to Burns Decl. as Exhibit 11. Plaintiff has simply provided the Court with no facts on which it can find that Plaintiff is similarly situated to the putative Class members—or to even find that FLSA violations existed with respect to Plaintiff and putative Class members. The Court must deny Plaintiff's Motion.

a. Plaintiff Was Not Employed By Perfect Timing and Thus Cannot Represent a Class of Persons Defined as Being Employed by Perfect Timing.

Importantly, Plaintiff cannot be similarly situated to the Class members he seeks to represent because he was never employed by one of the Defendant-Employers included in the Class. As argued above in Part III(B), and by Defendants in their Joint Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss"), Plaintiff has not

sufficiently alleged Perfect Timing was ever his employer, and Perfect Timing did not, in fact, employ Plaintiff. Burns Decl. ¶¶ 13. Furthermore, Plaintiff has yet to serve Perfect Timing in accordance with the Federal Rules of Civil Procedure. *See* Memorandum of Law In Support of Defendants' Joint Motion to Dismiss, ECF No. 22. As lenient as the conditional certification standard may be, it does not authorize sending notice to a defendant's employees before the defendant has even had a full opportunity to properly respond to the complaint.

Furthermore, even if Perfect Timing had been appropriately served, Plaintiff's allegations against Perfect Timing are wholly conclusory and formulaic to the point where Perfect Timing must be dismissed from the action because Plaintiff has failed, as a matter of law, to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 8(a) and the federal pleading standard, as articulated by the United States Supreme Court. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Defendant's Motion to Dismiss Plaintiff's First Amended Complaint, ECF No. 21–22. Indeed, Plaintiff does not even attest in his declaration to being employed by Perfect Timing, and Plaintiff made no mention during his deposition to Perfect Timing or any of the Toppers Pizza stores operated by Perfect Timing. *See generally*, Patzfahl Decl. In fact, this case is a perfect example an effort to "solicit additional cases," which was cautioned against by the Fifth Circuit in *Swales v. KLLM Transport*. *Swales*, 985 F.3d at 436. Because Plaintiff has provided no substantive allegations against Perfect Timing is his complaint, offers no evidence that Perfect Timing employed Plaintiff in his Motion for Conditional Certification, and because the inclusion of Perfect Timing would serve only to allow

Plaintiff's counsel to solicit additional clients—Plaintiffs' Motion for Conditional Certification must be denied ***at minimum*** as to Perfect Timing.

3. Plaintiff Has Not Shown There Are Any Other Interested Parties.

The Eastern District of Wisconsin recognizes that, in order to guard against wasted time and resources resulting from the conditional certification of an ultimately unsuccessful collective action, "some courts require a showing not only that similarly situated potential plaintiffs actually exist, but that a substantial number likely have an interest in joining the litigation." *Pecor v. North Point EDC, Inc*., 2017 WL 3723600, at *3 (E.D. Wis. June 9, 2017). Indeed, many other district courts require at least one (but typically multiple) opt-in or additional named plaintiff to proceed with conditional certification of a FLSA collective action, and find that a Plaintiff's mere allegations that other employees exist is insufficient to justify sending notice. *See Collins v. Barney's Barn, Inc.*, No. 4:12CV00685, 2013 WL 1668984, * 2 (W.D. Ark. April 17, 2013) ("Additionally, this Court agrees with those courts that require evidence that other similarly-situated individuals desire to opt into the litigation."); *Dybach v. State of Fla. Dept. of Corrections*, 942 F.2d 1562, 1567–68 (11th Cir. 1991) (upon remand of this case, the district court should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and who are 'similarly situated'[.]"); *Rodgers v. CVS Pharmacy, Inc*., No. 8:05-cv770T-277MSS, 2006 WL 752831, at *3 (M.D. Fla. Mar. 23, 2006) ("A plaintiff's or counsel's belief in the existence of other employees who desire to opt in and 'unsupported expectations that additional plaintiffs will subsequently come forward are insufficient to justify' certification of a collective action and notice to a potential class."); *Alvarez v. Sun Commodities, Inc.*,

No. 12-60398-civ, 2012 WL 2344577, *2 (S.D. Fla. 2012) (same); *Salazar v. Agriprocessors, Inc.*, No. 07-cv-1006, 2008 WL 782803 (N.D. Iowa 2008) ("In light of the Rubashkin Affidavit and the lack of evidence from Plaintiffs, the court finds it cannot determine whether similarly situated potential plaintiffs exist."); *Saxton v. Title Max of Alabama, Inc.*, 431 F. Supp. 2d 1185, 1187 (N.D. Ala. 2006) ("Plaintiff's Motion for Conditional Class Certification and for Court Assisted Notice fails for want of any reasonable basis for the court to conclude that an interest to opt-in exists.").

Despite the fact that this litigation has been pending for over eight months, no additional Class members or named plaintiffs have joined the litigation, and no current or former employee of Defendants has even submitted as much as a declaration in support of the action. Plaintiff remains the only individual who alleges he was harmed by Defendants' alleged unfair pay practices. Here, there is absolutely no indication that any of Defendants' employees, other than Plaintiff, was adversely affected by Defendants' pay practices or has an interest in joining the litigation (and there is also no indication Plaintiff was adversely affected). This, coupled with Plaintiff's inability to satisfy his burden under 29 U.S.C. § 216(b) supports outright denial of Plaintiff's Motion for Conditional Certification.

4. Defendants' Oppositional Affidavits Weigh Against a Finding that Plaintiff and Putative Class Members are Similarly Situated.

When deciding whether to conditionally certify an action a court may revaluate "the entire record before it, 'including the defendant's oppositional affidavits, to determine whether the plaintiffs are similarly situated to other putative class members.'" *Pecor*, 2017 WL 3723600 at *4 (citing *Rottman v. Old Second Bancorp, Inc.*, 735 F. Supp. 2d 988, 998

(N.D. Ill. 2010)). Where plaintiffs have failed to make an adequate showing that they are similarly situated to putative class members, courts have looked to oppositional affidavits which counter a plaintiff's allegations in support of denying a plaintiff's motion for conditional certification. *See id.*

Here, Defendant Burns submitted his own Declaration, along with several corporate documents, showing that FSM and Perfect Timing are distinct companies who were responsible for operating different Toppers Pizza stores. Burns Decl. ¶¶ 2–3, 8–12. Burns attests that Perfect Timing never employed or paid Plaintiff. *Id.* ¶¶ 13–14. Burns attests that while he helped to set a compensation systems for FSM, to his knowledge the compensation system did not result in any delivery driver employees being paid less than federal and state minimum wage. *Id.* ¶¶ 15–17.

D. THE COURT SHOULD NOT CONDITIONALLY CERTIFY THE INSTANT ACTION BECAUSE RESOLUTION IS NOT POSSIBLE OR EFFICIENT ON A COLLECTIVE ACTION BASIS.

1. Resolution of this Action Is Not Possible On A Classwide Basis

While courts have applied various levels of scrutiny while motions for certification are filed at various stages of FLSA collective action cases, one federal appeals court—the Fifth Circuit—advises lower courts to conduct discovery into the merits of a case prior to issuing notice to ensure the notice device is not used as a tool to solicit additional plaintiffs. *See Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430 (5th Cir. 2021). Specifically, in *Swales*, the court recommended district courts proactively order pre-certification discovery in collective actions to help the court "identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of

'employees' is 'similarly situated[,]'" and then "authorize preliminary discovery accordingly." *Id.* at 441. Addressing certification issues early in the case would, according to the Fifth Circuit, help the district court determine if notice was necessary and "ensure[] that any notice sent is proper in scope—that is, sent only to potential plaintiffs." *Id.* Ultimately, the Fifth Circuit found that resolution of the plaintiffs' case in *Swales* necessarily involved individualized determinations regarding the status of each individual as an employee, as well as individualized contract issues, and vacated the district court's grant of conditional certification. Such direction is valuable here, where significant questions exist as to whether Perfect Timing employed Plaintiff.

Indeed, this court and courts within the Seventh Circuit have endorsed this approach. *See, e.g., Lee v. UL LLC*, 2019 WL 1915808, at *2 (E.D. Wis. Apr. 30, 2019) ("Indeed, 'courts routinely allow pre-certification discovery for the purposes of defining the class and identifying how many similarly situated employees exist."). This court has also noted that "[f]actors relevant to the FLSA certification question include any disparate factual and employment settings of the individual plaintiffs, the various individualized defenses available to the defendant, and fairness and procedural considerations." *Dekeyser v. Thyssenkrupp Waupaca, Inc.*, 314 F.R.D. 449, 456 (E.D. Wis. 2016). Here, it is apparent at the outset of the litigation that it is not ultimately appropriate for adjudication on a classwide basis for two reasons.

2. Resolution of this Action on Classwide Basis is not Judicially Efficient.

Furthermore, the same reasons why the case is not adjudicable on a classwide basis also make classwide resolution inefficient. At all times, the touchstone for conditional

certification is judicial efficiency. *See Hoffmann-La Roche*, 493 U.S. at 170–71. District Courts have wide discretion in determining whether to authorize notice,-and in exercising this discretion, the Court should consider that the opt-in mechanism established by the Portal-to-Portal Act was meant to *limit* employees' ability to proceed collectively. *Id.* at 173 (the 1947 FLSA amendments were enacted to "free[ ] employers of the burden of representative actions"). Thus, the fundamental inquiry is whether judicial economy would be promoted by certifying a class.

Here, the nature of Plaintiff's claims, and the facts and considerations necessary for Plaintiff and each putative class member to prove damages at trial, would render a collective action in this context likely impossible, but at minimum, judicially *in*efficient. *See Xavier v. Belfour USA Grp., Inc.*, 585 F. Supp. 2d 873, 877 (E.D. La. 2008) ("Courts require some identifiable facts or legal nexus that binds the claims so that hearing the cases together promotes judicial efficiency."). This Court would have to consider, for each driver, for each day on which they worked, how many delivery trips each driver took per workweek, the distance driven for pizza delivery purposes for each workweek, what expenses were incurred for each vehicle associated with each delivery per workweek, and what the average wages were for each class member per workweek, to allow credit to be given where drivers were paid wages for non-delivery or managerial work. *See* 29 U.S.C. § 207(a)(1)-(2); *see generally England v. New Century Fin. Corp.*, 370 F. Supp. 2d 504, 511 (M.D. La. 2005) (assessing damages would "require a case-by-case inquiry, thereby rendering it impossible to try this case as a collective class").

Second, individualized defenses exist. The defense of equitable estoppel, for

example—raised by Defendants FSM and Burns in their now-inoperable Answer to Plaintiff's initial Complaint (*see* ECF No. 9)—recognizes that, with respect to FLSA violations, employers are not liable for failure to pay wages, and, presumably, expenses, where the employee fails to bring the shortcoming to the employer's attention. *See Schremp v. Langlade County*, 2012 WL 3113177, at *3 (E.D. Wis. July 31, 2012) (noting that an employer is not liable to pay for work time that was not reported). With regards to the current action, questions will arise as to whether each employee properly reported his or her expenses. Courts have declined to certify collective actions where individualized defenses or defenses necessitating individualized inquiries exist. *See, e.g., Dekeyser v. Thyssenkrupp Waupaca, Inc.*, 314 F.R.D. 449, 456 (E.D. Wis. 2016)

Given the multitude of individualized factual inquiries for the calculation of damages and the individualized nature of defenses, this case is not one in which can be adjudicated on a classwide basis. Because "it would be a waste of the Court's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated," *Adair*, 2008 WL 4224360, at *4 (citations and quotations omitted), this Court should deny conditional certification at the outset.

E. THE COURT SHOULD EMPLOY INTERMEDIATE SCRUTINY BECAUSE DISCOVERY HAS OCCURRED.

"The level of scrutiny the Court uses to assess the certification issue varies depending on the stage of the litigation." *Bunyan v. Spectrum Brands, Inc.*, 2008 WL 2959932, at *2 (S.D. Ill. July 31, 2008). A court may apply an "intermediate level of

scrutiny" where the parties have engaged in "substantial discovery," and may choose to "collapse the two stages of the [conditional certification] analysis and deny certification outright" where "significant discovery" has occurred. *Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 439 (S.D. Ind. Sept. 25, 2012). A court may apply a heighted level of scrutiny after some discovery has occurred because "[a]t the initial stage, a court ordinarily possesses 'minimal evidence' and is thus instructed to apply a lenient standard in determining whether to conditionally certify . . . [but] where the parties have had the opportunity to conduct discovery on the issue of certification, the similarly situated inquiry is more stringent." *Bunyan v. Spectrum Brands, Inc.*, 2008 WL 2959932, at *4. Courts have found "substantial discovery" to have occurred when the parties have engaged in nearly ten months of discovery on the issue of whether the parties were similarly situated. *Id.* at *4.

Here the Parties (with the exception of Perfect Timing), have engaged in substantial discovery, as ordered by the Court, for the purposes of allowing the Parties to support (or refute) claims that Plaintiff is similarly-situated to members of the proposed Class. *See* ECF No. 13. The Parties have exchanged interrogatories and requests for the production of documents for the past eight months. Defendants FSM and Burns took the deposition of Plaintiff, and Plaintiff and Defendants FSM and Burns have all responded to document requests and interrogatories proffered by the opposing side. Plaintiff is in possession of the employee handbook applicable to Toppers Pizza franchise stores, his pay stubs, the service areas for the Toppers Pizza stores owned by Defendants, and presumably, receipts evidencing the expenses he incurred maintaining his vehicle. Plaintiff is in possession of all of the discovery he needs to show that Defendants maintained a common policy which

resulted in FLSA violations, and that he is similarly situated to other delivery drivers. And, to the extent he is not in possession of such discovery, that is due to Plaintiff's error as having more than enough opportunity to seek this discovery, necessary for the Court to judge whether conditional certification is necessary, since the Court's October 14, 2020 Order. *See* ECF No. 13. For these reasons, the Court may apply a heightened, intermediate level of scrutiny. When applying an intermediate scrutiny standard in the context of certification of a collective action, "courts generally consider three factors: '(1) the employment and factual settings of plaintiffs; (2) the various defenses available to defendants; and (3) considerations of fairness, procedure, and manageability." *Bunyan*, 2008 WL 2959932, at *8. Courts have found that where discovery shows a plaintiff and putative class members worked at different locations, worked on different shifts, and spent varying amounts of time performing different tasks—and where the plaintiff has failed to present evidence showing that similarities overcome these important differences—the plaintiff is not sufficiently similarly situated to the Class members, adjudication is appropriate on a classwide basis, and certification, considered under intermediate scrutiny, must be denied. *See id.* at *9–10.

Here, the discovery conducted thus far and the Declaration submitted by Plaintiff all show that Plaintiff is not similarly situated to the Class members he seeks to represent and adjudication is inappropriate on a classwide basis. Plaintiff admits to being employed only at the Franklin, Wisconsin Toppers Pizza Store operated by FSM and owned by Burns, but seeks to represent a class of drivers employed at Toppers Pizza Stores located in other cities and operated by a different company. Patzfahl Decl. ¶ 3. Plaintiff admits that delivery

drivers were paid varying wages based on whether they performed delivery, in-store, or managerial work. Patzfahl Decl. ¶ 9. Plaintiff provides no evidence indicating that the delivery drivers at the Franklin, Wisconsin Toppers Pizza Store (or at any of the other Toppers Pizza locations Plaintiff attempts to rope into the lawsuit) worked similar shifts, drove similar routes, or incurred similar expenses. *See generally*, Patzfahl Decl. Plaintiff has provided insufficient support for his Motion to even under a first-stage, lenient level of scrutiny. For all of the reasons provided above, Plaintiff's claim must fail under the more exacting intermediate level of scrutiny.

F. JUDICIAL NOTICE SHOULD BE LIMITED IN SCOPE AND CLARIFIED.

Alternatively, if the Court grants conditional certification, though Defendants strongly argue it is improper here, Defendants objects to Plaintiff's Proposed Notice and Plaintiff's Proposed Email Cover Letter (ECF Nos. 20-2 and 20-3), and asks that it be modified to make it timely, accurate and informative. *See Kelly v. Bluegreen Corp.*, 256 F.R.D. 626, 631–632 (W.D. Wis. 2009). Defendant respectfully requests the following modifications to Plaintiff's proposed notice.

1. The Court Must Remove Perfect Timing, LLC from Plaintiff's Proposed Notice.

As set forth in detail above, Perfect Timing did not employ Plaintiff, Plaintiff has failed to attest that Perfect Timing employed him, Plaintiff does not have personal knowledge of any FLSA violations that have occurred at Perfect Timing, and Perfect Timing has not been properly served pursuant to Fed. R. Civ. P. 4. Perfect Timing must thus, therefore, be stricken from the scope of Plaintiff's Proposed Notice and Plaintiff's

Proposed Class must be redefined to remove Perfect Timing.

2. The Court Should Deny Emailed Notice.

Likewise, should the Court allow notice to be sent to some or all of the Class, the Court should authorize notice be sent only via mail, and not via email. Courts within the Seventh Circuit have denied notice be sent via email due to concerns of distortion. Specifically, the Western District of Wisconsin, while recognizing that the court (and other district courts) had granted emailed notice in the past, denied a plaintiff's request for emailed notice "because of the potential for recipients to modify and re-distribute email messages," noting that "Plaintiffs have provided no reason why it is necessary in this case." *Espensheid v. DirecStat USA, LLC*, No. 09-cv-625-bbc, 2019 WL 2330309, at *14 (W.D. Wis. June 7, 2010). Here, as in *Espensheid*, Plaintiff has provided absolutely no indication of why he believes emailed notice is essential to reach Class Members. See generally Plaintiff's Memorandum in Support of His Renewed Motion to Send Notice to Similarly Situated Employees ("Plaintiff's Brief"), ECF No. 20. A threat that the message could be distorted electronically cannot be eliminated, no matter the form of the electronic message. The Court must deny emailed notice and deny Plaintiff's request for a list of email addresses for the Class.

3. The Notice Should be Printed on Plaintiff's Counsel's Letterhead.

In examining and approving any proposed notice, the Court must be careful to avoid the appearance of "judicial sponsorship" or a "judicial imprimatur." *Hoffmann-La Roche, 493 U.S.* at 174; *see also Woods v. N.Y. Life Ins. Co.*, 686 F.2d 578, 581 (7th Cir. 1982). Because of this, the Court should order that the case caption be removed from the notice

and that the notice instead be placed on Plaintiff's attorneys' letterhead. *See Alexander v. Caraustar Indus.*, No. 11-c-1007, 2011 WL 2550830, at *8 (N.D. Ill. June 27, 2011); and *Heuberger v. Smith*, No. 3:16-CV-386-JD-JEM, 2017 WL 3923271, at *7 (N.D. Ind. Sept. 7, 2017) (ordering same).

4. The Court Should Correct Incorrect and/or Misleading Portions of Plaintiff's Proposed Notice.

Finally, parts of Plaintiff's Proposed Notice are incorrect and/or misleading, and the Court should strike or modify such content. Specifically, Defendants object to the fee notice, found in the last paragraph of Plaintiff's Proposed Notice, which advises opt-ins that Plaintiff's attorneys will receive "a 1/3 contingency fee on any amount awarded, plus advanced costs." Plaintiff's Proposed Notice, ECF No. 20-2, at 5. As Plaintiff should be well aware, authorizing a 1/3 contingency fee recovery, on top of recovery of attorneys' fees and costs under 29 U.S.C. § 216(b), would result in a double fee recovery for Plaintiff's attorneys at the expense of their clients. Finally, Plaintiff's characterization of Biller & Kimble as "appointed" by the Court is unwarranted; authorization of notice does not serve as such appointment, and Plaintiff's counsel has not requested it.

IV. CONCLUSION

Based upon the foregoing, the Court should deny Plaintiff's Motion for Conditional Certification in its entirety.

Dated: April 20, 2020

s/ Martin D. Kappenman

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